THE DIGEST

OF

ENGLISH CASE LAW

CONTAINING THE

REPORTED DECISIONS

OF THE

SUPERIOR COURTS,

AND

A SELECTION FROM THOSE OF THE IRISH COURTS,

TO THE END OF

1897.

UNDER THE GENERAL EDITORSHIP OF

JOHN MEWS,

BARRISTER-AT-LAW.

VOL. XIV.

TELEGRAPH AND TELEPHONE—WATERMEN.

LONDON:

SWEET AND MAXWELL, LIMITED; 3, CHANCERY LANE.

STEVENS AND SONS, LIMITED; 119, 120, CHANCERY LANE.

1898.

BRADBURY, AGNEW, & CO. LD., PRINTERS,
LONDON AND TONBRIDGE.

TABLE OF ABBREVIATIONS

OF THE NAMES OF THE

PRINCIPAL REPORTS CITED.

[1891] A. C.	Law Reports, Appeal Cases (1891 onwards).
A. & E.	Adolphus and Ellis. Q. B.
Addams Ecc.	Addams. Ecclesiastical.
Aleyn	Aleyn. K. B.
Amb.	Ambler. Ch.
Anderson	Anderson. C. P.
Andrews	Andrews. K. B.
Anst.	Anstruther. Ex.
App. Cas.	Law Reports, Appeal Cases (1876—1890).
Arn.	Arnold. C. P.
Arn. & H.	Arnold and Hodges. Q. B.
Asp. M. C.	Aspinall. Maritime Cases.
Atk.	Atkyns. Ch.
B. & Ad.	Barnewall and Adolphus. K. B.
B. & Ald.	Barnewall and Alderson. K. B.
B. & C.	Barnewall and Cresswell. K. B.
B. & S.	Best and Smith. Q. B.
B. C. C.	Lowndes and Maxwell. Bail Court.
B. C. Rep.	Saunders and Cole. Bail Court.
Ball & B.	Ball and Beatty. Ch. (Ireland).
Bar. & Arn.	Barron and Arnold. Election.
Bar. & Au.	Barron and Austin. Election.
Barnard. Ch.	Barnardiston. Ch.
Barnard. K. B.	Barnardiston. K. B.
Batty	Batty. K. B. (Ireland).
Beat.	Beatty. Ch. (Ireland).
Beav.	Beavan. Rolls Court.
Bell, C. C.	Bell. Crown Cases.
Bing.	Bingham. C. P.
Bing (N.C.)	Bingham. New Cases. C. P.
Bligh	Bligh. H. L.
Bos. & P.	Bosanquet and Puller. C. P.
Bos. & P. (N.R.)	Bosanquet and Puller. New Reports. C. P.
Bott P. L.	Bott's Poor Laws.
Br. & B.	Broderip and Bingham. C. P.
Br. & Lush.	Browning and Lushington. Adm.
Bro. C. C.	Brown. Ch.
Bro. P. C.	Brown. Cases in Parliament.
Buck	Buck. Bky.
Bull. N. P.	Buller's Law of Nisi Prius.
Bulst.	Bulstrode. K. B.
Bunb.	Bunbury. Ex.
Burr.	Burrows. K. B.
Burr. S. C.	Burrows. Settlement Cases.

[1891] Ch.	Law Reports, Chancery (1891 onwards).
C. B.	Common Bench Reports.
C. L. R.	Common Law Reports (1853—1855).
C. P. D.	Law Reports, Common Pleas Division (1875—1880).
Cab. & E.	Cababé and Ellis. Nisi Prius.
Cald. S. C.	Caldecott. Settlement Cases.
Camp.	Campbell. Nisi Prius.
Car. & K.	Carrington and Kirwan. Nisi Prius.
Car. & M.	Carrington and Marshman. Nisi Prius.
Car. & P.	Carrington and Payne. Nisi Prius.
Carter	Carter. C. P.
Carth.	Carthew. K. B.
Cary	Cary. Ch.
Cas. t. Hardwicke	Cases temp. Hardwicke. K. B.
Cas. t. Talbot	Cases temp. Talbot. Ch.
Ch. Cas.	Cases in Chancery.
Ch. Cas. Ch.	Choice Cases in Chancery.
Ch. D.	Law Reports, Chancery (1876—1890).
Ch. Pre.	Precedents in Chancery.
Ch. Rep.	Reports in Chancery.
Chit.	Chitty. Bail Court.
Cl. & F.	Clark and Finnelly. H. L.
Co. Rep.	Coke. K. B.
Coll. C. C.	Collyer. Ch.
Colles	Colles' Cases in Parliament.
Colt.	Coltman. Registration.
Comb.	Comberbach. K. B.
Comyns	Comyns. K. B.
Coop. t. Brough.	Cooper. Cases temp. Brougham.
Coop. t. Cott.	Cooper. Cases in Chancery temp. Cottenham.
G. Cooper	Ch.
C. P. Cooper	C. P. Cooper. Ch.
C. & J.	Crompton and Jervis. Ex.
C. & M.	Crompton and Meeson. Ex.
C. M. & R.	Crompton, Meeson and Roscoe. Ex.
Con. & L.	Connor and Lawson. Ch. (Ireland).
Cooper	Cooper. Ch.
Ct. of Sess. Cas.	Court of Session Cases (Scotland).
Cowp.	Cowper. K. B.
Cox	Cox. Ch.
Cox, C. C.	Cox. Crown Cases.
Cr. & Ph.	Craig and Phillips. Ch.
Craw. & D.	Crawford and Dix (Ireland).
Curt.	Curteis. Eccl.
D. P. C.	Dowling. Practice Cases.
D. (N.S.)	Dowling. Practice Cases, New Series.
D. & L.	Dowling and Lowndes. Practice Cases.
D. & R.	Dowling and Ryland. K. B.
Daniell	Daniell. Ex. Eq.
Dans. & Ll.	Danson and Lloyd. Mercantile.
Dav. & M.	Davison and Merivale. Q. B.
Deac.	Deacon. Bky.
Deac. & C.	Deacon and Chitty. Bky.
Dears. & B.	Dearsley and Bell. Crown Cases.
Dears. C. C.	Dearsley. Crown Cases.
De G.	De Gex. Bky.
De G. F. & J.	De Gex, Fisher, and Jones. Ch. App.
De G. & J.	De Gex and Jones. Ch. App.
De G. J. & S.	De Gex, Jones, and Smith. Ch. App.
De G. M. & G.	De Gex, Macnaghten and Gordon. Ch. App.
De G. & Sm.	De Gex and Smale. Ch.

Den. C. C. ..... Denison. Crown Cases.
Dick. ..... Dickens. Ch.
Dod. ..... Dodson. Adm.
Dougl. ..... Douglas. K. B.
Dow ..... Dow. H. L.
Dow & Cl. ..... Dow and Clark. H. L.
Dr. & Sm. ..... Drewry and Smale. Ch.
Drew. ..... Drewry. Ch.
Dr. ..... Drury. Ch. (Ireland).
Dr. & Wal. ..... Drury and Walsh. Ch. (Ireland).
Dr. & War. ..... Drury and Warren. Ch. (Ireland).
Drink. ..... Drinkwater. C. P.
Dyer ..... Dyer. K. B.

East. ..... East. K. B.
East, P. C. ..... East's Pleas of the Crown.
Eden ..... Eden. Ch.
Edwards ..... Edwards. Adm.
El. & Bl. ..... Ellis and Blackburn. Q. B.
El. Bl. & El. ..... Ellis, Blackburn and Ellis. Q. B.
El. & El. ..... Ellis and Ellis. Q. B.
Eq. Ca. Abr. ..... Equity Cases Abridged.
Eq. R. ..... Equity Reports (1853—1855).
Esp. ..... Espinasse. Nisi Prius.
Ex. ..... Exchequer Reports (1848—1856).
Ex. D. ..... Law Reports, Exchequer Division (1875—1880).

F. & F. ..... Foster and Finlason. N. P.
Fl. & K. ..... Flanagan and Kelly. Rolls (Ireland).
Falc. & F. ..... Falconer and Fitzherbert. Election.
Fitzg. ..... Fitzgibbon. K. B.
Fonb. (N.R.) ..... Fonblanque. Bankruptcy.
Forrest ..... Forrest. Ex.
Fort. ..... Fortescue. K. B.
Foster ..... Foster. Crown Cases.
Fox ..... Fox. Registration.
Free. C. C. ..... Freeman. Ch.
Free. K. B. ..... Freeman. K. B.

G. & D. ..... Gale and Davison. Q. B.
Gale ..... Gale. Ex.
G. Coop. ..... G. Cooper. Ch.
Giff. ..... Giffard. Ch.
Gilb. Eq. ..... Gilbert. Ch.
Glyn & J. ..... Glyn and Jameson. Bky.
Godb. ..... Godbolt. K. B.
Gow. ..... Gow. Nisi Prius.

H. Bl. ..... H. Blackstone. C. P.
H. L. Cas. ..... House of Lords Cases.
H. & C. ..... Hurlstone and Coltman. Ex.
H. & H. ..... Horn and Hurlstone. Ex.
H. & M. ..... Hemming and Miller. Ch.
H. & N. ..... Hurlstone and Norman. Ex.
H. & R. ..... Harrison and Rutherford. C. P.
H. & W. ..... Harrison and Wollaston. Bail Court.
Hag. Adm. ..... Haggard. Adm.
Hag. Cons. ..... Haggard. Consistory.
Hag. Ecc. ..... Haggard. Eccl.
Hall & Tw. ..... Hall and Twells. Ch.
Hardr. ..... Hardres. Ex.

Hare .....Hare. Ch.
Hawk. P. C. .....Hawkins's Pleas of the Crown.
Hay. & J. .....Hayes and Jones. Ex. (Ireland).
Hayes .....Hayes. Ex. (Ireland).
Hob. .....Hobart. K. B.
Hodges .....Hodges. C. P.
Hog. .....Hogan. Rolls (Ireland).
Holt .....Holt. K B.
Holt, Eq. .....Holt. Eq.
Holt, N. P. .....Holt. Nisi Prius.
Hopw. & C. .....Hopwood and Coltman. Registration.
Hopw. & P. .....Hopwood and Philbrick. Registration.
Hurl. & W. .....Hurlstone and Walmsley. Ex.

Ir. C. L. R. .....Irish Com. Law (1850—1866).
Ir. Ch. R. .....Irish Chancery (1850—1866).
Ir. Eq. R. .....Irish Equity Reports.
[1894] Ir. R. .....Irish Law Reports (1894 onwards).
Ir. R. C. L. .....Irish Com. Law (1866—1878).
Ir. R. Eq. .....Irish Equity (1866—1878).

J. & H. .....Johnson and Hemming. Ch.
J. & W. .....Jacob and Walker. Ch.
J. Kelyng .....Sir J. Kelyng. Crown Cases.
J. P. .....The Justice of the Peace.
Jacob .....Jacob. Ch.
Jenk. .....Jenkins. Ex.
Jo. & Lat. .....Jones and Latouche. Ch. (Ireland).
Johns. .....Johnson. Ch.
Jones .....Jones. Ex. (Ireland).
Jones & C. .....Jones and Carey. Ex. (Ireland).
Jur. .....The Jurist.

K. & G. .....Keane and Grant. Registration.
K. & J. .....Kay and Johnson. Ch.
Kay .....Kay. Ch.
Keb. .....Keble. K. B.
Keen .....Keen. Rolls Court.
Keilw. .....Keilway. K. B.
Kel. .....Kelyng, Sir John. K. B.
Ken. .....Kenyon. K. B.
Knapp .....Knapp. P. C.
Knapp & O. .....Knapp and Ombler. Election.

L. & C. .....Leigh and Cave. Crown Cases.
L. & M. .....Lowndes and Maxwell. Bail Court.
L. M. & P. .....Lowndes, Maxwell, and Pollock. Bail Court.
L. T. .....Law Times, New Series.
L. J. (o.s.) Ch. K.B. etc. .....Law Journal Reports, 1822 to 1831.
L. J. Ch. .....Chancery.
,, Bk. .....Bankruptcy.
,, C. P. .....Common Pleas.
,, Ex. .....Exchequer.
,, M. C. .....Magistrates' Cases.
,, Q. B. .....Queen's Bench.
,, P. C. .....Privy Council.
,, P. & M. .....Probate and Matrimonial.
,, P. .....Probate, Divorce, and Admiralty.
,, Adm. .....Admiralty.
,, Ecc. .....Ecclesiastical.

From 1831 onwards.

L. R. H. L.	Law Reports, 1866 to 1875 inclusive.
L. R. P. C.	
L. R. Ch.	
L. R. Eq.	
L. R. Q. B.	
L. R. C. P.	
L. R. Ex.	
L. R. P. & M.	
L. R. A. & E.	
L. R. C. C.	
L. R. H. L. Sc.	
L. R. Ir.	Irish Law Reports (1879—1893).
Latch	Latch. K. B.
Leach, C. C.	Leach. Crown Cases.
Ld. Raym.	Lord Raymond. K. B.
Lev.	Levinz. K. B.
Lewin, C. C.	Lewin. Crown Cases.
Lit. Rep.	Littleton. C. P.
Ll. & G.	Lloyd and Goold. Ch. (Ireland).
Lofft	Lofft. K. B.
Longf. & T.	Longfield and Townsend. Ex. (Ireland).
Lush.	Lushington. Adm.
Lutw.	Lutwyche. C. P.
Lutw. Reg. Cas.	Lutwyche. Registration.
M. C. C.	Moody. Crown Cases.
M. & H.	Murphy and Hurlstone. Ex.
M. & M.	Moody and Malkin. Nisi Prius.
M. & P.	Moore and Payne. C. P.
M. & Rob.	Moody and Robinson. Nisi Prius.
M. & S.	Maule and Selwyn. K. B.
M. & Sc.	Moore and Scott. C. P.
M. & W.	Meeson and Welsby. Ex.
Macl. & R.	Maclean and Robinson. Scotch Appeals.
Mac. & G.	Macnaghten and Gordon. Ch.
M'Cle.	M'Cleland. Ex.
M'Cle. & Y.	M'Cleland and Young. Ex.
Macq. H. L.	Macqueen. H. L.
Madd.	Maddock. Ch.
Man. & G.	Manning and Granger. C. P.
Man. & Ry.	Manning and Ryland. K. B.
Manson	Manson. Bky. and Winding-up.
Marshall	Marshall. C. P.
Meg.	Megone. Company Cases.
Mer.	Merivale. Ch.
Mod.	Modern Reports.
Moll.	Molloy. Ch. (Ireland).
Mont.	Montagu. Bky.
Mont. & Ayr.	Montagu and Ayrton. Bky.
Mont. & B.	Montagu and Bligh. Bky.
Mont. & C.	Montagu and Chitty. Bky.
Mont & M'Ar.	Montagu and M'Arthur. Bky.
Mont. D. & D.	Montagu, Deacon, and De Gex. Bky.
Moore	Moore. C. P.
Moore Ind. App.	Moore. Indian Appeals.
Moore, P. C.	Moore. P. C.
Morrell	Morrell. Bky.
Moseley	Moseley. Ch.
Myl. & Cr.	Mylne and Craig. Ch.
Myl. & K.	Mylne and Keen. Ch.
N. & M.	Neville and Manning. K. B.
N. & P.	Neville and Perry. K. B.

N. R. .....New Reports (1862—1865).
Nelson .....Nelson. Ch.
New Sess. Cas. .....New Sessions Cases.

O'M. & H. .....O'Malley and Hardcastle. Election.

[1891] P. ..... Law Reports, Probate (1891 onwards).
P. D. .....Law Reports, Probate Division (1876—1890).
P. & D. .....Perry and Davison. K. B.
P. & K. ..... Perry and Knapp. Election.
Peake, Add. C. .....Peake. Additional Cases, Nisi Prius.
Peake, N. P. .....Peake. Nisi Prius.
P. Wms. .....Peere Williams. Ch.
Phillim. .....Phillimore. Eccl.
Ph. .....Phillips. Ch.
Pol. .....Pollexfen. K. B.
Pop. .....Popham. K. B.
Price .....Price. Ex.

Q. B. .....Queen's Bench Reports (1841—1852).
Q. B. D. .....Law Reports, Queen's Bench Division (1876—1890).
[1891] Q. B. .....Law Reports, Queen's Bench (1891 onwards).

R. .....The Reports, 1893—1895.
R. & R. .....Russell and Ryan. Crown Cases.
R. R. .....Revised Reports.
Railw. Cas. .....Railway and Canal Cases (1835—1854).
Raym. (Ld.) .....Lord Raymond. K. B.
Ridg. L. & S. .....Ridgway, Lapp and Schoales. K. B. (Ireland).
Ridgw. .....Ridgway. Parliamentary Cases.
Rep. Ch. .....Reports in Chancery.
C. Rob. .....Sir C. Robinson. Adm. (1798—1808).
W. Rob. .....W. Robinson. Adm. (1838—1847).
Rol. Abr. .....Rolle's Abridgment.
Rolle .....Rolle. K. B.
Rose .....Rose. Bky.
Russ. .....Russell. Ch.
Russ. & M. .....Russell and Mylne. Ch.
Ry. & Can. Traff. Cas. Rly. and Canal Cases (1874 onwards).
Ry. & M. .....Ryan and Moody. Nisi Prius.

Salk. .....Salkeld. K. B.
Sau. & Sc. .....Sausse and Scully. Rolls Ct. (Ireland).
Saund. .....Saunders. K. B.
Sayer .....Sayer. K. B.
Sch. & Lef. .....Schoales and Lefroy. Ch. (Ireland).
Scott .....Scott. C. P.
Scott (N.R.) .....Scott. New Reports, C. P.
Select Ca. Ch. .....Select Cases in Chancery.
Selw. N. P. .....Selwyn. Law of Nisi Prius.
Shower .....Shower. K. B.
Shower P. C. .....Shower. Parliamentary.
Sid. .....Siderfin. K. B.
Sim. .....Simons. Ch.
Sim. & S. .....Simons and Stuart. Ch.
Sm. & G. .....Smale and Giffard. Ch.
Smith .....Smith. K. B.
Smith .....Smith. Registration.

Spinks.....Adm.
St. Tri. .....State Trials.
Stark.....Starkie. Nisi Prius.
Str. .....Strange. K. B.
Styles .....Styles. K. B.
Swabey .....Swabey. Adm.
Sw. & Tr. .....Swabey and Tristram. Probate.
Swanst. .....Swanston. Ch.

T. Jones .....Sir T. Jones. K. B.
T. & M. .....Temple and Mew. Crown Cases.
T. Raym. ..... Sir T. Raymond. K. B.
Tam. .....Tamlyn. Rolls Court.
Taunt.....Taunton. C. P.
Term Rep. .....Durnford and East. K. B.
Tothill.....Tothill. Ch.
Turn. & R.....Turner and Russell. Ch.
Tyrw. .....Tyrwhitt. Ex.
Tyrw. & G. .....Tyrwhitt and Granger. Ex.

Vent. .....Ventris. K. B.
Vern. .....Vernon. Ch.
Vern. & S. .....Vernon and Scriven. K. B.
Ves. sen.....Vesey, sen. Ch.
Ves.....Vesey, jun. Ch.
V. & B. .....Vesey and Beames. Ch.

W. Bl. .....Sir Wm. Blackstone. K. B.
W. Jones .....Sir W. Jones. K. B.
W. Kelynge .....Sir W. Kelynge. Ch.
W. R. .....Weekly Reporter.
W. W. & D. .....Wilmore, Wollaston and Davison. K. B.
W. W. & H. .....Wilmore, Wollaston and Hodges. K. B.
West .....West. H. L.
Wightw.....Wightwick. Ex.
Willes .....Willes. C. P.
Wilmot .....Wilmot's Notes. K. B.
Wils. Ch. .....Wilson. Ch.
Wils. Ex. .....Wilson. Ex.
Wils. K. B. .....Wilson. K. B.
Wms. Saund. .....Williams' Saunders. K. B.

Y. & C. .....Younge and Collyer. Eq. Ex.
Y. & C. C. C. .....Younge and Collyer. Ch.
Y. & J. .....Younge and Jervis. Ex.
Yelv. .....Yelverton. K. B.
Younge .....Younge. Ex. Eq.

→ Central University

The Digest

OF

ENGLISH CASE LAW.

TELEGRAPH AND TELEPHONE.

A. TELEGRAPH.

1. *Generally*, 1.
2. *Compensation*, 4.
3. *Messages and their Effect*, 6.
4. *Injuring Property of Company*, 12.
5. *Liability of Company to pay Rates and Taxes.*—*See* RATES—REVENUE.
6. *Insurance of Property of Company.*—*See* INSURANCE.

B. TELEPHONE, 12.

A. TELEGRAPH.

1. GENERALLY.

Allowance of Commission for Collecting Messages—How far a Preference.]—A party collected messages for a telegraph company, and received a commission from the company on the messages collected:—Held, that the commission could not be considered as a violation of the provision in the charter of the company "for the sending and receiving of messages by all persons alike without favour or preference, and subject to such equitable charges and reasonable regulations as may from time to time be made by the company." *Reuter* v. *Electric Telegraph Co.*, 6 El. & Bl. 341; 26 L. J., Q. B. 46; 2 Jur. (N.S.) 1245; 4 W. R. 564.

Telegraph Wires—Mode of Placing.]—A local board, on being applied to by the postmaster-general under s. 3 of the Telegraph Act, 1878, for their consent to the placing of telegraphs and posts upon, along and over streets and roads in their district, refused their consent, except on condition that the wires across or along streets or roads should be underground. This difference, after having been referred to a metropolitan police magistrate, was, in accordance with s. 4 of the Telegraph Act, 1878, brought before the railway commissioners. The commissioners decided that overhead wires should be allowed, subject to the following conditions:—1. That all wires shall be of copper. 2. That all poles shall be of iron. 3. That no wires shall be placed over, along, or across any road or footway at a less height than thirty feet above such road or footway. 4. That where a wire crosses over any public road or street the distance between the points of support at either side of such road or street shall not in any case exceed 100 yards. *Wandsworth District Local Board* v. *Postmaster-General*, 4 Ry. & Can. Traff. Cas. 301.

By the Metropolitan Management Act, 1855, s. 96, "all streets, being highways, shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate." Defendants, a telephone company, fixed a telephone wire to a chimney, and stretched it across a street, which was vested in plaintiffs as the district board, at a height of about thirty feet from the ground. Plaintiffs brought an action for an injunction to restrain defendants from keeping up the wire:—Held, that what was vested in plaintiffs was the property in the surface of the ground, together with as much space, both above and below the surface, as amounted to the area of ordinary user; and that as the wire in question was above this area, and was not shown to be dangerous, so as to amount to a nuisance, plaintiffs were not entitled to an injunction:—Held, also, that defendants did not require plaintiffs' consent under 26 & 27 Vict. c. 112, s. 12, to entitle them to place the wire across the street. *Wandsworth Board of Works* v. *United Telephone Co.*, 53 L. J., Q. B. 449; 13 Q. B. D. 904; 51 L. T. 148; 32 W. R. 776; 48 J. P. 676—C. A.

A telegraph company had power by their act to place under any public road their wires and pipes, and to break up the pavement or soil of such roads, making compensation for all damage, provided that nothing in the provision should extend or apply to any railway, except that the company might carry their wires and pipes directly, but

not otherwise, across any railway, so as not to damage or be likely to damage the railway or any of the works connected therewith. A railway, pursuant to the provisions of the act incorporating the company, crossed a public road on the level:—Held, that the telegraph company had no right to place their wires and pipes under that part of the public road where it was crossed by the railway on the level, as that part was not a public road, but a railway within the telegraph company's act. *S. E. Ry.* v. *European and American Electric Telegraph Co.*, 9 Ex. 363; 2 C. L. R. 467; 23 L. J., Ex. 113.

A telegraph company, without any parliamentary powers, laid down their wires in tubes under a public highway. An information and bill were filed complaining of those acts as a nuisance to the public and as an invasion of the rights of the owner of the adjacent land in the soil of the road. The court refused to grant an injunction until the legal right had been established. *Att.-Gen.* v. *United Kingdom Electric Telegraph Co.*, 30 Beav. 287; 31 L. J., Ch. 329; 8 Jur. (N.S.) 583; 5 L. T. 338; 10 W. R. 167.

Where a company, for the purposes of profit to itself, placed telegraph posts upon a highway with the object and intention of keeping them there permanently, and did permanently keep them there, such posts being of such sizes and dimensions and solidity as to obstruct and prevent the passage of carriages and horses or foot passengers:—Held, that the company was liable to be found guilty upon an indictment for a nuisance. *Reg.* v. *United Kingdom Electric Telegraph Co.*, 2 B. & S. 647, n.; 31 L. J., M. C. 166; 8 Jur. (N.S.) 1153; 6 L. T. 378; 10 W. R. 538; 9 Cox, C. C. 174.

Held, also, that even if the posts were not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or although sufficient space was left for the public traffic, the company was still liable to a conviction. *Ib.*

Liability of Postmaster-General for Negligence.]—By the Telegraph Act, 1868, which incorporates the Telegraph Act, 1863, s. 2, the term "the company," in the Telegraph Act, 1863, shall, "in addition to the meaning assigned to it in that act, mean the postmaster-general." In an action against the postmaster-general, in his individual capacity, for, by his servants, negligently opening a flagway for the purpose of erecting telegraph posts:—Held, that the action did not lie. *Jones* v. *Monsell*, Ir. R. 6 C. L. 155.

Purchase of Premises by Postmaster-General—Rateable Value at Date of Purchase.]—The Telegraph Act, 1868, empowers the postmaster-general to purchase, for the purposes of the act, the undertaking (including land and property) of any telegraph company, and s. 22 provides that all land, property and undertakings so purchased shall be assessable and rateable to parochial rates at sums not exceeding the rateable value at which such land, property and undertakings were properly assessed at the time of such purchase. In 1870 the postmaster-general purchased the undertaking of a telegraph company, including a house held by the company under a lease for twenty-one years from September, 1867. At the time of the purchase a portion of the house was subject to an underlease granted by the company to H. for the remainder of the term less one day, and containing a covenant by the company to pay all parochial rates. The postmaster-general occupied and used, for telegraphic purposes only, the portion of the house not comprised in the underlease until the year 1878, when he demised that portion to others, and thenceforth no part of the house was occupied or used for telegraphic purposes. The rateable annual value at which the portion comprised in the underlease could properly have been assessed, as a separate tenement at the time of the purchase, was 108*l.* In 1880 the assessment committee of the district separately assessed that portion in respect of parochial rates at the rateable annual value of 334*l.*:—Held, that s. 22 applied notwithstanding that all use of the house for telegraphic purposes had ceased, and therefore that the occupier of the premises comprised in the underlease was not liable to be assessed in any sum exceeding the rateable value at which these premises could have been properly assessed at the time of the purchase. *St. Gabriel, Fenchurch* v. *Williams*, 55 L. J., M. C. 14; 16 Q. B. D. 649; 54 L. T. 270; 34 W. R. 256; 50 J. P. 533.

Telegraphic Address—Damnum absque Injuria.]—The short address "Street, London," was used for many years in sending telegrams from abroad to Street & Co., of Cornhill. A bank adopted by arrangement with the post-office the phrase "Street, London," as a cypher address for telegrams from abroad to themselves:—Held, that the court had no jurisdiction to grant an injunction restraining the bank from using such address, as there was no attempt to interfere with trade, no legal injury done, but simply a matter of inconvenience. *Street* v. *Union Bank of Spain and England*, 55 L. J., Ch. 31; 30 Ch. D. 156; 53 L. T. 262; 33 W. R. 901.

2. Compensation.

What is an Interest Entitling to—Compulsory Purchase by Government.]—By s. 7 of the Telegraph Act, 1868, any railway company possessed of a telegraph open to the use of the public on the 1st of January, 1868, for transmitting messages for money, or possessing any beneficial interest in such telegraph, might require the postmaster-general to purchase the right of such railway company to transmit such messages, or other beneficial interest. By s. 10 of the Telegraph Act, 1869, any telegraph company with which the postmaster-general may not come to an agreement with respect to the amount of compensation to be paid to them for their undertaking, may have such amount settled by arbitration in manner provided by the Lands Clauses Act, 1845. By an agreement with the telegraph company, under which the telegraph company erected and placed their telegraphic apparatus on the Cowes and Newport Railway Company's line, the railway company took the exclusive use of one wire during the continuance of the agreement, but was prohibited from using the wire for public use or for profit, or for any other purpose than the transmission of the railway company's own messages. The agreement was to be in force for twenty-one years, and at the end of that time the telegraph company was to remove its telegraphic apparatus:—Held, that the railway company had no interest in the telegraph such as to entitle them to require the postmaster-general to purchase it under the

Telegraph Acts, 1868 and 1869. *Cowes and Newport Ry.* v. *Board of Trade*, 43 L. J., Q. B. 242; 22 W. R. 807.

The Somerset and Dorset Railway Company, which connected two portions of the London and South-Western Railway, entered into an agreement in 1866, by which they undertook to complete all the works, including the telegraphs, and then to hand over, for the term of 1,000 years, their line to the South-Western, who undertook to pay them forty-five per cent. of the gross receipts from traffic conveyed by the railway. At the date of this agreement the Somerset and Dorset Railway had two telegraph wires along their line. In 1865 the South-Western had made an agreement with the Electric Telegraph Company, by which the latter was to have the exclusive right of transmitting messages along the lines which the South-Western then had or might afterwards acquire. After the passing of the Telegraph Acts, the postmaster-general acquired these telegraphs, and paid compensation in respect thereof to the South-Western. The Somerset and Dorset railway company then applied for compensation in respect to their telegraph, and afterwards requested the chief justice of the common pleas, pursuant to s. 9 of the Telegraph Act, 1868, to appoint an umpire, which he declined to do, on the ground that the Somerset and Dorset company had no beneficial interest in a telegraph within s. 7 of that act:—Held, that that railway had, under the agreement with the South-Western, parted with the beneficial interest in their telegraph, that messages sent by the telegraph formed no part of traffic conveyed by the railway, and that consequently they were not entitled to compensation under the Telegraph Acts. *Reg.* v. *Coleridge* (*Lord*), 45 L. J., Q. B. 649; 34 L. T. 752.

Award of Lump Sum—Further Claim—Arbitration Clauses.]—By the Telegraph Act, 1868, s. 9, sub-s. 6, the postmaster-general shall pay railway companies by way of compensation (clause D.) such sums as shall be settled by arbitration in respect of the loss by such railway company of the privilege of granting other way-leaves and making future arrangements with telegraph or other companies, and in respect of granting a monopoly to the postmaster-general for the conveyance of telegraphs over their railways. By clause H. of the same sub-section, on acquisition of the telegraphs, the postmaster-general shall have a perpetual right of way for his poles and wires over the whole of the railway company's system, and in consideration thereof he shall pay to the railway company such sum per mile per wire over the whole of the said system by way of yearly rent as shall be fixed by arbitration. The arbitrator in determining the amounts to be paid to the railway company under this act, shall have regard to the agreements which subsist between the railway company and any telegraph company, and also to a compulsory sale being required from the railway company; and in estimating the amount to be paid under any one part of this section shall have regard to the advantages to be obtained and the disadvantages to be sustained by the railway company under any other part of this section. By sub-s. 8 of the same section, power is reserved to the railway company to erect and work private telegraphs for annual rent or payment for way-leave from traders. An arbitrator had awarded a certain lump sum to the defendants as and by way of compensation in pursuance of the provisions of sub-s. 6 of s. 9 of this act, but had made no allusion in his award to any yearly rent under clause H. of that sub-section:—Held, that the defendants were precluded from any further compensation for extra poles or wires which the postmaster-general might in future require to be erected upon their railway system. *Reg.* v. *Metropolitan Ry.*, 50 L. T. 6—C. A.

To Officers.]—The Telegraph Act, 1868, s. 8, sub-s. 7, applies only to the three telegraph companies named at the beginning of s. 8; and, therefore, the telegraph superintendent of a railway company is not entitled to compensation for the loss of his office, when the telegraphic business of the company is acquired by the postmaster-general. *Reg.* v. *Postmaster-General*, 32 L. T. 559.

The superintendent of one of the three named telegraph companies was held entiled to compensation in respect of profits on allowance for expenses while travelling on the company's service. *Ib.*

By the Telegraph Act, 1868, s. 8, sub-s. 7, officers who have been for a fixed period in the employment of a telegraph company, whose undertaking has been purchased by the postmaster-general under the provisions of the act, and who have been in receipt of a yearly salary, or of remuneration not less than 50*l.* a year, are entitled, in the event of their receiving no offer of an appointment by the postmaster-general in the telegraphic department of equal value to that held under the company, to an annuity by way of compensation for the loss of their office, equal to a proportion of the annual emolument derived by them from their office. S. was an officer of a telegraphic company, whose undertaking had been purchased by the postmaster-general, and was entitled, so far as salary and term of office were concerned, to compensation under the Telegraph Act, 1868. It was part of his duty, when required, to travel on the company's business; when he so travelled his ordinary salary ran on, but his additional expenses were paid by the company, who agreed that he should receive certain fixed sums in lieu of making him bring in an account of his expenditure, and then repaying him:—Held, that the sums so paid to him for travelling expenses were to be taken into consideration in calculating the annual emolument derived by him from his office. *Reg.* v. *Postmaster-General*, 47 L. J., Q. B. 435; 3 Q. B. D. 428; 38 L. T. 89; 26 W. R. 322—C. A.

3. Messages and their Effect.

Liability for Misdelivery of Messages.]—A special act gave an electric telegraph company powers for laying down their line, and enacted that the use of their telegraph and apparatus for the purpose of receiving and conveying messages should, subject to the prior right of use for the service of the crown, and subject to such charges and reasonable regulations as might be made by the company, be open for the sending and receiving of messages by all persons alike. The company stipulated that they would not be responsible for mistakes or delays in the transmission of nor for the non-delivery of unrepeated messages from whatever cause arising, and that half the usual price for transmission would be charged in addition for repeated messages:—

Held, that the obligation of the company to use due care and skill in the transmission of a message arose entirely out of contract, and that the vendor of goods who received an offer by telegraph from the vendee could not maintain an action against the company for a mistake in the message. *Playford* v. *United Kingdom Electric Telegraph Co.*, 10 B. & S. 759 ; 38 L. J., Q. B. 249 ; L. R. 4 Q. B. 706 ; 21 L. T. 21 ; 17 W. R. 968.

An electric telegraph company's act provided that the public without preference, shall have the use of the company's telegraph, subject to reasonable regulations, to be made by the company. When a person wishes to transmit a message by the telegraph, a message paper is handed to him for his signature, on which is indorsed a notice that messages of consequence ought to be repeated from the station to which they are addressed, and that a higher rate is charged for repeated messages, and that the company will not be responsible for mistakes in the transmission of unrepeated messages :—Held, that the company was not liable for the consequences of such mistakes ; that the condition introduced into the notice was reasonable ; and if not a reasonable regulation under the act, it was such a limitation of liability as the company in the character of common carriers, was entitled to create by notice to their customers. *M'Andrew* v. *Electric Telegraph Co.*, 17 C. B. 3 ; 25 L. J., C. P. 26 ; 1 Jur. (N.S.) 1073 ; 4 W. R. 7.

—— **Warranty given in Error.**]—The respondent's ship was in a port in Australia under orders to proceed to R. The respondent entered into a contract with the appellants in the United Kingdom to purchase a cargo of coal, to be loaded in Australia. The appellants telegraphed to their agents in Australia as to the terms and conditions of the sale, and added instructions as to the destination of the ship. They had no authority from the respondent to give any orders as to the destination. By a mistake of a telegraph clerk, C. was given as the destination instead of R. The appellants' agents in Australia informed the master of the ship that they had instructions to direct him to proceed to C. The master hesitated to change his destination, and the appellants' agents then gave him a letter "to confirm our verbal instructions as to your destination "—naming C. as his destination — and continuing, "this letter will be a sufficient guarantee for your proceeding on your voyage " :—Held, that the letter amounted to a warranty upon which the respondent could sue for damages he had sustained through the ship proceeding to C. instead of to R. *Brown* v. *Law*, 72 L. T. 779 ; 8 Asp. M. C. 230—H. L. (E.)

Actions for Misdelivery.]—No action will lie against a telegraph company at the suit of the receiver for the misdelivery of a telegram, unless there is either a contract between him and the company, or (possibly) fraud on their part in the transmission of it. *Dixson* v. *Reuter's Telegraph Co.*, 47 L. J., C. P. 1 ; 3 C. P. D. 1 ; 37 L. T. 370 ; 26 W. R. 23—C. A.

The plaintiffs carried on business as merchants at Valparaiso, and were a branch house of a firm at Liverpool. A telegraph company, through the negligence of their agent misdelivered a telegraphic message to the plaintiffs. The message purported to be from the plaintiffs' Liverpool house, and to be a large order for barley ; but in fact it was not from the Liverpool house, nor intended for the plaintiffs. The plaintiffs executed the supposed order, and, having suffered a heavy loss in consequence, claimed damages against the telegraph company :—Held, that they were not entitled to maintain their action, as there was no contract between themselves and the company, nor any duty upon the company to transmit messages correctly. *Ib.*

The receiver of a telegram cannot maintain an action for a mistake which has caused him damage. The person who pays for the transmission of a message is the only person who has a right of action in case he is damnified by the negligence of the company or its servants. *Playford* v. *United Kingdom Electric Telegraph Co.*, 17 L. T. 243 ; 16 W. R. 219.

—— **For Non-delivery.**] — The defendant's business was to collect the telegraphic messages for transmission to America and other places. The plaintiff entrusted the defendant with a message in cypher, which was unintelligible to the defendant, for transmission to America. The defendant negligently omitted to send the message. The consequence was that the plaintiff lost a sum of money which he would have earned for commission upon an order to which the message related :—Held, that the plaintiff could not recover such sum of money from the defendant, but only nominal damages. *Sanders* v. *Stuart*, 45 L. J., C. P. 682 ; 1 C. P. D. 326 ; 35 L. T. 370 ; 24 W. R. 949.

Use of Cyphers.]—A telegram company in London made arrangements with the defendants, being two individuals in Australia, for the transmission of messages, in which certain words were used as short expressions of the names and addresses of the principal customers ; and the defendants were described as agents of the telegram company. In a little time the parties quarrelled, and one of the defendants came to England to carry on an independent telegram business with his partner in Australia, and sent circulars to the customers of the telegram company, mentioning that he had their cyphers. On motion to restrain him from using the cyphers :—Held, that there was nothing confidential in the cyphers, and that he was entitled to use them. *Reuter's Telegram Co.* v. *Byron*, 43 L. J., Ch. 661.

Equivalent to Letter.]—Semble, that a telegram, if properly identified, is equivalent to a letter. *Coupland* v. *Arrowsmith*, 18 L. T. 755.

Privileged Communications.]—When a communication, libellous in itself, but such that the occasion of it would have rendered it privileged if made by letter to the person alone to whom it was addressed, was in fact made by means of a telegram, it is not privileged, though made bonâ fide, because the mode of conveying the information necessarily involves publication to the post-office clerks :—Held, it was not less a publication because s. 20, of the Telegraph Act, 1868, makes the disclosure of the contents of a telegraphic message by any official in the post-office a misdemeanour. *Williamson* v. *Freer*, 43 L. J., C. P. 161 ; L. R. 9 C. P. 393 ; 30 L. T. 332 ; 22 W. R. 878.

Communications or messages transmitted through telegraph offices are not privileged, and the clerks transmitting the same must disclose their contents in a court of justice.

Waddell, In re, 8 Jur. (N.S.) 181, Part 2. S. P., *Ince, In re*, 20 L. T. 421.

Production of Telegrams by Post-office.]—On a subpœna from the court of bankruptcy to produce all telegrams sent by the bankrupt from a certain date, the secretary of the post-office was ordered to produce the documents sought for, the court intimating that such subpœnas should be prepared so as to meet the convenience of the officials. *Smith (Thomas), In re*, 7 L. R. Ir. 286.

The post-office authorities may be ordered to produce specified telegrams. *Tomline* v. *Tyler*, 44 L. T. 187.

Notice of Injunction by, how made.]—Sufficient notice of the granting of an injunction may be given by telegram. *Langley, Ex parte, Smith, Ex parte, Bishop, In re*, 49 L. J., Bk. 1; 13 Ch. D. 110; 43 L. T. 181; 28 W. R. 174.

Contracts by Telegram—Sufficiency within Statute of Frauds.]—When, in answer to an offer to buy land, written and signed instructions of acceptance are given in the usual way to a telegraph company to be telegraphed, and a telegram is sent in the usual way in accordance therewith, there is a sufficient contract in writing within the Statute of Frauds. *Godwin* v. *Francis*, 39 L. J., C. P. 121; L. R. 5 C. P. 121; 22 L. T. 338.

B. having entered into a contract with C., the brother of the defendant, for the sale of hay, brought an action against the defendant for not accepting. The judge at the trial admitted letters and telegrams signed by C. as evidence against the defendant, and the jury found for the plaintiff:—Held, that there was sufficient evidence of the authority, and that the two telegrams, of which one was signed in C.'s name, and in the other the name of the defendant was not mentioned as buyer, together constituted a sufficient memorandum of the contract to satisfy the statute of frauds, on the ground that the defendant might be treated as the undisclosed principal of C., who appeared on the telegrams to be liable as principal. *McBlain* v. *Cross*, 25 L. T. 804.

—— **Mistake in Telegram—Effect of.**]—The defendant wrote a message for transmission by telegraph to the plaintiff, ordering three rifles. By mistake the telegraph clerk telegraphed the word "the" for "three;" and the plaintiffs thereupon, acting upon a previous communication with the defendant to the effect that he might perhaps want as many as fifty rifles, sent that number to him. He declined to take more than three. In an action against him to recover the price of fifty rifles:—Held, that he was not responsible for the mistake of the telegraph clerk, and that therefore the plaintiffs were not entitled to recover the price of more than three rifles. *Henkel* v. *Pape*, 40 L. J., Ex. 15; L. R. 6 Ex. 7; 23 L. T. 419; 19 W. R. 106.

A firm of shipbrokers signed a charterparty in the form, "by telegraphic authority" of the charterer "as agent." Owing to a mistake made by the officials in its transmission, the rate of freight offered by the charterer had been misrepresented in the telegram which the shipbrokers had received from him:—Held, in an action brought by the owners of the ship against the shipbrokers for breach of warranty of authority, that evidence of persons engaged in the business was admissible to explain the effect of the form of signature, that such evidence showed that it was commonly adopted in order to negative the implication of any further warranty by the agent than that he had received a telegram, which, if correct, authorised such a charter as that which he was signing, and that the shipbrokers were therefore not liable. *Lilly* v. *Smales*, [1892] 1 Q. B. 456; 40 W. R. 544.

—— **Revocation of Offer.**]—The defendant, being possessed of warrants for iron, wrote from London to the plaintiffs at Middlesborough asking whether they could get him an offer for the warrants. Further correspondence ensued, and ultimately the defendant wrote to the plaintiffs fixing 40*s.* per ton, net cash, as the lowest price at which he could sell, and stating that he would hold the offer open till the following Monday. The plaintiffs on the Monday morning at 9.42 telegraphed to the defendant: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you could give." The defendant sent no answer to this telegram, and after its receipt on the same day he sold the warrants, and at 1.25 p.m. telegraphed to plaintiffs that he had done so. Before the arrival of his telegram to that effect, the plaintiffs having at 1 p.m. found a purchaser for the iron, sent a telegram at 1.34 p.m. to the defendant stating that they had secured his price. The defendant refused to deliver the iron, and thereupon the plaintiffs brought an action against him for non-delivery thereof. The jury found at the trial that the relation between the parties was that of buyer and seller, not of principal and agent. The state of the iron market was very unsettled at the time of the transaction, and it was impossible to foresee when the plaintiff's telegram was sent at 9.42 a.m. how prices would range during the day:—Held, by Lush, J., that under the circumstances the plaintiffs' telegram at 9.42 ought not to be construed as a rejection of the defendant's offer, but merely as an enquiry whether he would modify the terms of it, and that, although the defendant was at liberty to revoke his offer before the close of the day on Monday, such revocation was not effectual until it reached the plaintiffs; consequently the defendant's offer was still open when the plaintiffs accepted it, and the action was, therefore, maintainable. *Cooke* v. *Oxley*, (3 Term Rep. 653) discussed. *Stevenson* v. *McLean*, 49 L. J., Q. B. 701; 5 Q. B. D. 346; 42 L. T. 897; 28 W. R. 916.

—— **Where made.**]—The plaintiff telegraphed from Regent Street to the defendant at Ludgate Hill directing him to make bets, on his behalf, on certain horses. The defendant replied by telegram, "You are on." Upon the plaintiff suing the defendant, as his agent, in the mayor's court for 356*l.* received to his use, the defendant applied for a writ of prohibition:—Held, that the application must be refused, since the whole cause of action arose within the city—the telegraph office being merely the medium through which the parties were brought into communication—and they were accordingly in the same position as if they had met together in the city and made a contract. *Cowan* v. *O'Connor*, 57 L. J., Q. B. 401; 20 Q. B. D. 640; 58 L. T. 857; 36 W. R. 895.

Packed Messages.]—By an agreement with the plaintiffs the defendant was to receive a commission on the company's charge for messages sent by the defendant along their line: Held, that under this agreement the defendant was not at liberty to pack several messages into one, charging for them separately, and yet as between himself and the company only treating it as a single message. *International Telegraph Co.* v. *Reuter*, 4 W. R. 510.

Telegrams—Increased Charge—Authority of Clerk.]—Where a certain sum is charged for a telegram and the sender is afterwards called upon to pay an increased sum:—Held, that he is bound to pay the amount so claimed, as the postmaster-general is in no way estopped from suing, and is not bound by inaccurate representations made by a clerk in his employ. *Postmaster-General* v. *Green*, 51 J. P. 582.

Unpublished Information—Copying by Rival Firm—Injunction.]—It is competent for a news agency to collect information from a public source and transmit it to subscribers to whom it is new upon the terms that they shall not communicate it to third parties; and the court will interfere by injunction to restrain a subscriber from communicating such information to a third party in breach of his contract, and also to restrain a third party from inducing a subscriber to break his contract by supplying him with such information with a view to publication. *Exchange Telegraph Co.* v. *Central News*, 66 L. J., Ch. 672; [1897] 2 Ch. 48; 76 L. T. 591; 45 W. R. 595.

Licensee of Monopoly—Licence to Supply Stock Exchange Telegraphs Simultaneously—Injunction—Contract by Telegraph Company to Supply Tape-Recording Instruments—Personal Service.]—The defendants were a company incorporated under the Companies Act, 1862, and licensed by the postmaster-general under the Telegraph Act, 1869, s. 5, to establish telegraphs within the limits of their districts, which included the London Stock Exchange, for the purpose of simultaneously transmitting news to their subscribers. This news consisted, amongst other things, of current fluctuations of prices on the stock exchange, and was, by the permission of the stock exchange, collected there by the defendants' agents, and distributed from the defendants' offices to the offices of their subscribers by means of tape-recording instruments supplied by the defendants. The plaintiff was not a member of the stock exchange, and was in the habit of advertising for business. The defendants had entered into three separate contracts with the plaintiff by which they undertook to supply him with three of their instruments. By the rules of the stock exchange its members were not allowed to advertise, and the stock exchange having required the defendants to cease supplying outside brokers who advertised with the special information collected in the building, the defendants disconnected the three instruments from the supply of that class of news:—Held, that the licence of the defendants was neither a monopoly at common law nor part of the monopoly conferred on the postmaster-general by the Telegraph Act, 1869, and therefore that there was no duty imposed by the licence for the non-performance of which the plaintiff could sue the defendants. *Cochrane* v. *Exchange Telegraph Co.*, 65 L. J., Ch. 334.

Two of the three contracts were made without reference to the rules of the stock exchange; the third contract was made subject to the rules of the stock exchange:—Held, that, although under the circumstances of the case there had been breaches by the defendants of the two former contracts, the plaintiff was entitled to damages only and not to an injunction, the contracts being for personal service in reference to a chattel. *Ib.*

4. Injuring Property of Company.

Cables.]—A ship's anchor got entangled with an electric cable, and the cable was cut by order of the master:—Held, that, under the circumstances, the master was guilty of a want of nautical skill, and that the admiralty court had jurisdiction to entertain a suit against the ship, and the ship was condemned in damages and costs. *The Clara Killam*, 39 L. J., P. 50; L. R. 3 Adm. 161; 23 L. T. 27; 19 W. R. 25.

The plaintiffs were the owners of a telegraphic cable lying at the bottom of the sea between England and France. The defendants were aliens, and their ship, while sailing upon the high sea more than three miles from the English coast, lowered an anchor, and injured the cable:—Held, that the court would presume that the masters of ships were aware of the existence and situation of submarine cables, and that a duty was thereby cast upon all such masters of ships to manage their vessels so carefully and skilfully as to avoid (if possible, in the exercise of reasonable precaution) injuring these cables. *Submarine Telegraph Co.* v. *Dickson*, 15 C. B. (N.S.) 759; 33 L. J., C. P. 139; 10 Jur. (N.S.) 241; 10 L. T. 32; 12 W. R. 384.

B. TELEPHONE.

Infringement—Postmaster-General's Exclusive Privilege of Transmitting "Telegrams."]—Edison's telephone, for which patents were granted in 1877 and 1878, consists of a transmitter, a wire, and a receiver. When sounds are spoken into the transmitter, electric currents of varying intensity pass along the wire, so that corresponding or equivalent sounds are heard at the receiver, and two persons at a distance can thus converse with one another. A company leased these telephones to subscribers at yearly rents which produced a profit to the company, and arranged the wires so that subscribers could converse with one another when put into communication by a servant of the company:—Held, that Edison's telephone was a "telegraph" within the meaning of the Telegraph Acts, 1863 and 1869, although the telephone was not invented or contemplated in 1869. *Att.-Gen.* v. *Edison Telephone Co.*, 50 L. J., Q. B. 145; 6 Q. B. D. 244; 43 L. T. 697; 29 W. R. 428.

Held, also, that a conversation through the telephone was a "message," or at all events a "communication transmitted by a telegraph," and therefore a "telegram" within the meaning of those acts: and that since the company made a profit out of the rents, conversations held by subscribers through their telephones were infringements of the exclusive privilege of transmitting telegrams granted to the postmaster-general by the Act of 1869, and were not within the exceptions mentioned in s. 5. *Ib.*

Hiring of Wires—Notice to Determine Agreement—Waiver by Acceptance of Rent—Threats to cut off Wires—Injunction.]—An injunction granted to restrain the cutting off of communication, in breach of an agreement to "erect and maintain in working order" certain telephone wires and apparatus. *Keith, Prowse & Co.* v. *National Telephone Co.*, 63 L. J., Ch. 373; [1894] 2 Ch. 147; 8 R. 776; 70 L. T. 276; 42 W. R. 380; 58 J. P. 573.

The demand and acceptance of rent due subsequent to a notice to determine a tenancy of chattels is a waiver of the notice. *Ib.*

Semble, where a term in chattels has expired and rent has been subsequently accepted, a tenancy from year to year is created, and the tenant is entitled to six months' notice to determine the tenancy, whatever may have been the length of notice required during the continuance of the original tenancy. *Ib.*

J. M.

TENANT.

At Will or Sufferance.]—*See* LANDLORD AND TENANT.

For Life and pur autre vie.]—*See* ESTATE.

In Common or Joint.]—*See* ESTATE—WILL.

In Fee.]—*See* ESTATE—SHELLEY'S CASE—WILL.

In Tail.]—*See* ESTATE—FINES AND RECOVERIES.

By Curtsey.]—*See* HUSBAND AND WIFE.

In Dower.]—*See* HUSBAND AND WIFE.

For Years.]—*See* LANDLORD AND TENANT.

TENDER.

A. IN WHAT CASES, 14.

B. BY AND TO WHOM.
1. *Agents, Clerks, or Servants*, 15.
2. *Joint or Separate Demands*, 16.

C. MODE OF MAKING.
1. *What Money or Notes*, 16.
2. *Production of Money*, 17.
3. *Requiring Change*, 19.
4. *Waiver by Claiming Larger Sum*, 19.
5. *Demand of a Receipt*, 20.
6. *Must be Unconditional*, 20.
7. *Under Protest*, 22.
8. *Entire Demand*, 23.

D. DEMAND AFTER TENDER, 26.

E. EFFECT AND PROOF, 26.

F. TENDER OF AMENDS.
1. *In General*, 28.
2. *In Actions against Magistrates.* — *See* JUSTICE OF THE PEACE.

G. OF DEMAND AND OFFER TO SETTLE—EFFECT ON COSTS.—*See* COSTS.

H. OF GOODS.—*See* SALE OF GOODS.

I. FOR WORK AND LABOUR.—*See* WORK AND LABOUR.

J. OF COMPOSITION—*See* BANKRUPTCY, vol. II. col. 1396.

A. IN WHAT CASES.

Covenant.]—Upon a bare covenant for the payment of money, the defendant may plead a tender. *Johnson* v. *Clay*, 1 Moore, 200; 7 Taunt. 486.

So, in covenant on an insurance against fire, a tender may be pleaded, and money paid into court under 19 Geo. 2, c. 37, s. 7. *Solomon* v. *Bewicke*, 2 Taunt. 317.

Bill of Exchange.]—An acceptor of a bill of exchange cannot plead a tender after the day of payment. *Dobie* v. *Larkan*, 10 Ex. 776; 3 W. R. 247.

Action for Unliquidated Damages.] — A defence of tender of the sum paid into court cannot be pleaded to a claim for unliquidated damages. *Davys* v. *Richardson*, 57 L. J., Q. B. 409; 21 Q. B. D. 202; 59 L. T. 765; 36 W. R. 728—C. A.

A tender before action is not pleadable to an action for unliquidated damages. *Dearle* v. *Barrett*, 2 A. & E. 82; 4 N. & M. 200; 3 D. P. C. 13.

Mortgagor and Mortgagee.]—If the mortgagor tenders the money to the mortgagee and he refuses it, his interest shall cease from that time, and he ought not to keep the pledge. *Manning* v. *Burgess*, 1 Ch. Ca. 29.

As to a tender of mortgage-money, there ought to be reasonable notice of paying it in, and, if the tender be insisted on, to stop interest, the money must be kept dead from that time, because the party is to be always ready, six months' notice being given to pay in the mortgage-money at H.: though this be not the place mentioned in the proviso of the deed, yet where money was lent in town, and no objection made to the notice, no reason for a personal tender, or to make a man carry a great sum to a person in the country. *Gyles* v. *Hall*, 2 P. Wms. 378.

Interest on mortgage not stopped, but on a proper tender and notice. *Garforth* v. *Bradley*, 2 Ves. 678. See also *Robarts* v. *Jefferys*, 8 L. J. (o.s.) Ch. 137. *Harmer* v. *Priestley*, 16 Beav. 569; 22 L. J., Ch. 1041; 1 W. R. 343.

Tender of payment by mortgagor to agent of mortgagee, and refusal to accept, and twenty-four years thereafter suffered to elapse without demand from mortgagee of principal or interest; payment of principal or interest for whole decreed, under the circumstances. *Meade* v. *Bandon (Earl)*, 2 Dow, 268.

Where covenants are inserted in a deed of assignment on the part of a mortgagee, he may

refuse to take the principal and interest, though tendered, till he has advised with his attorney on the safety of executing the assignment, being entitled to reasonable time. *Wiltshire* v. *Smith*, 3 Atk. 89 ; 9 Mod. 441.

B. BY AND TO WHOM.

1. Agents, Clerks, or Servants.

To Authorised Agent, &c., is a Good Tender.]—A tender of money to an agent or a servant, authorised to receive payment, is a good tender to the creditor himself. *Goodland* v. *Blewith*, 1 Camp. 477 ; 10 R. R. 731. And see *Anon.*, 1 Esp. 349.

No Authority to Accept.]—A tender to a managing clerk is good, though he should have received orders not to accept it. *Moffatt* v. *Parsons*, 5 Taunt. 307 ; 1 Marsh. 55 ; 15 R. R. 506.

A creditor told his clerk, previously authorised to receive money, not to receive a sum if offered him by a certain debtor, for that he had put it into the hands of his attorney ; and the clerk, on tender made, refused to receive the money, and assigned the reason :—Held, that this was a good tender to the principal. *Ib.*

Money payable as a composition on a sum due to a solicitor for costs was tendered to a clerk in his office, who, saying that the solicitor was out, and that he, the clerk, had "no instructions," refused the money :—Held, per Lord Coleridge, C.J., that the clerk's statement did not amount to a disclaimer of his authority to receive the money ; as he was apparently conducting his master's business in the office, such authority might be implied ; and, therefore, the tender was good. Per Denman, J., that the statement was, in effect, a disclaimer of authority ; the case was, therefore, indistinguishable from *Bingham* v. *Allport* (1 N. & M. 398), and the tender was bad. *Finch* v. *Boning*, 4 C. P. D. 143 ; 40 L. T. 484 ; 27 W. R. 872.

Where a person demands the payment of money at his office, such demand amounts to a special authority for his clerk there to receive it ; therefore, in his absence, a tender to the clerk is a good tender, although he states that he is not authorised to receive the money. *Kirton* v. *Braithwaite*, 1 M. & W. 310 ; 5 D. P. C. 101 ; 2 Gale, 48 ; 1 Tyr. & G. 945 ; 5 L. J., Ex. 165.

A tender made to the managing clerk of the plaintiff's attorney, who at the time disclaims authority from his master to receive the debt, is insufficient. *Bingham* v. *Allport*, 1 N. & M. 398 ; 2 L. J., K. B. 86.

A., the plaintiff's attorney, wrote to the defendant, stating that a debt due from the defendant to the plaintiff "must be paid to me" on the next day. A tender was made on the next day to a writing-clerk of A., in A.'s office, who said that he could not take the money, as A. was out, and the person must wait till he came in :—Held, not a good tender, as not being made to a person authorised to receive money ; but, that if A.'s letter had asked payment "at my office," a tender to any person in the office who was carrying on the business there would have been sufficient. *Watson* v. *Hetherington*, 1 Car. & K. 36.

If an attorney sends a letter to demand payment, and the debtor makes a tender to him, that is a good tender, unless the attorney disclaims his authority at the time ; and if the attorney is absent, he is bound by the acts of those whom he allows to represent him at his office. Therefore, after such a letter sent, a tender to the clerk of the attorney at his office (the attorney being absent) is good. *Wilmot* v. *Smith*, 3 Car. & P. 453 ; M. & M. 238 ; 31 R. R. 732.

Authority of Principal to tender Smaller Sum.]—A tender by the agent of a debtor of the whole sum demanded by the creditor, by pulling out his pocket-book, and offering, if he would go into a neighbouring public-house, to pay it, which the creditor refused to take, is good, although the agent is only authorised by the debtor to tender a sum short of the whole sum demanded, and offered the rest at his own risk. *Read* v. *Goldring*, 2 M. & S. 86 ; 14 R. R. 594.

2. Joint or Separate Demands.

If A., B. and C. have a joint demand, and C. has a separate demand on D., and D. offers A. to pay him both the debts, which A. refuses, without objecting to the form of the tender, on account of his being entitled only to the joint demand, D. may plead this tender in bar of an action on the joint demand, and should state it as a tender to A., B. and C. *Douglas* v. *Patrick*, 3 Term Rep. 683 ; 1 R. R. 793.

If A. is indebted to several persons in different sums of money, and when they are all assembled together tenders them one gross sum sufficient to satisfy all their demands, which they refuse to receive, insisting on more being due, this is a good tender. *Black* v. *Smith*, Peake, 88 ; 3 R. R. 661.

Where a party has separate demands for unequal sums against several persons, an offer of one sum for the debts of all will not support a plea, stating that a certain portion of this sum was tendered for the debt of one. *Strong* v. *Harvey*, 3 Bing. 304 ; 11 Moore, 72 ; 4 L. J. (o.s.) C. P. 57.

The defendants (co-tenants) were let into possession of land under an agreement to give up possession at any time on payment of a fair equivalent for the crop :—Held, that a tender to one co-tenant only, of compensation for the crop, was a sufficient tender to the others, so as to entitle the landlord to maintain ejectment. *Loddiges* v. *Lister*, 1 L. T. 548.

B. MODE OF MAKING.

1. What Money or Notes.

Legal Coin.]—A tender to be strictly legal must be made in the coin of the realm, and the money should be produced ; but an offer in fact may be made equivalent in law, by waiver of the legal requisites of a strict undeniable tender, by putting it on a ground which works a dispensation. *Polglass* v. *Oliver*, 2 C. & J. 15 ; 2 Tyr. 89 ; 1 L. J., Ex. 5.

—— **Waiver of Objection.**]—To invalidate a tender, or to divest an offer to pay of the legal effect of a tender, if the objection is to the medium of the offer to satisfy, and not to the sum offered, the ground of the rejection must be stated, or it is a waiver of the objection of insufficiency in that particular respect, and it cannot afterwards be taken advantage of in court, on the score of not being an effective legal tender ; in other words, an objection on a point of

fact works a waiver of objections on points of law. Such waiver may be implied, though not expressed. *Ib.*

Bank Notes.]—Bank notes were not made a legal tender by 37 Geo. 3, c. 45. *Grigby* v. *Oakes*, 2 Bos. & P. 526.

Circumstances may make that amount to a tender in equity, which was not pleadable as such at law, e.g. a tender in bank notes, during the restriction as to the issue of cash, semble. *Biddulph* v. *St. John*, 2 Sch. & Lef. 534.

—— **Not Objected to.**]—Yet a tender of a Bank of England note was good, if not objected to at the time. *Brown* v. *Saul*, 4 Esp. 267. S. P., *Wright* v. *Read*, 3 Term Rep. 554.

So a tender of a country bank bill will be good if no objection is made to it on that account. *Lockyer* v. *Jones*, Peake, 180, n.; 3 R. R. 682, n. S. P., *Tiley* v. *Courtier*, 2 C. & J. 16, n.; *Polglass* v. *Oliver*, 2 C. & J. 15; 2 Tyr. 89; 1 L. J., Ex. 5.

Cheque—No Objection to.]—A tender made in the form of a cheque in a letter is a good tender, where no objection is made to the quality but only to the quantum of the tender; and though the letter contains a request that a receipt may be sent back, yet such request does not vitiate the tender, for it is not a condition. *Jones* v. *Arthur*, 8 D. P. C. 442; 4 Jur. 859.

2. Production of Money.

Is Necessary.]—To make a legal tender, there must either be an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or an equivalent act of the creditor. *Thomas* v. *Evans*, 10 East, 101; 10 R. R. 229.

A tender is not good where the money is not in sight, but the witness supposed it was in a desk and never saw it produced, so that it did not appear, that, if the party was willing to accept the money, it could be immediately paid; the money should be at hand and capable of immediate delivery. *Glasscott* v. *Day*, 5 Esp. 48; 8 R. R. 828. S. P., *Huxham* v. *Smith*, 2 Camp. 21; 11 R. R. 651.

If a party tells his creditor that he will pay him so much, and puts his hand into his pocket to take out the money, but before he can get it out the creditor leaves the room, and the money, consequently, is not produced till he is gone, this is no tender. *Leatherdale* v. *Sweepstone*, 3 Car. & P. 342.

A letter from a solicitor of B., to the solicitor of A., stating his willingness to pay the money due, and stating "Dr. B. now tenders," &c., but not actually tendering the amount, does not amount to a tender, although A.'s solicitor treated it as a tender, and wrote, in answer, "I decline your tender, and shall file a bill." *Powney* v. *Blomberg*, 14 Sim. 179; 13 L. J., Ch. 450; 8 Jur. 746.

What is Sufficient Production.]—Where the plaintiff disputes the quantum, to prove a tender some money must be proved to have been produced, though it is not necessary to prove the exact sum. *Dickinson* v. *Shee*, 4 Esp. 68.

Where a person offers a sum of money, by way of tender, and states the precise sum he so offers, which he holds in his hand, it is a sufficient tender, although it is twisted up in bank notes and not shown to the party. *Alexander* v. *Brown*, 1 Car. & P. 288.

Where the defendant ordered A. to pay the plaintiff 7*l.* 12*s.*, and the clerk of the plaintiff's attorney demanded 8*l.*, on which A. said, that he was only ordered to pay 7*l.* 12*s.*, which sum was in the hands of B., and B. put his hand to his pocket, with a view of pulling out his pocket-book to pay 7*l.* 12*s.*, but did not do so, by the desire of A.; but B. could not say whether he had that sum about him, but swore that he had it in his house, at the door of which he was standing at the time:—Held, that this was not a legal tender, as the money should have been produced to the attorney's clerk. *Kraus* v. *Arnold*, 7 Moore, 59.

Production Waived—By what Means.]—If at an interview between the plaintiff and the defendant, when the defendant is willing to pay 10*l.*, a third person present offers to go up stairs and fetch that sum, but is prevented by the plaintiff's saying "he cannot take it;" such offer is a good tender; and although the defendant did not at the time take notice of what was done, yet his pleading it afterwards is a sufficient ratification of the act. *Harding* v. *Davis*, 2 Car. & P. 77; 31 R. R. 654.

Where a vendor admits it would be fruitless, a tender is unnecessary. *Jackson* v. *Jacob*, 3 Bing. (N.C.) 869; 5 Scott, 79; 3 Hodges, 219; 6 L. J., C. P. 315.

In the case of a tender, if the party to whom it is to be made says, "You need not make a tender to me, as I will not accept it," it is considered as made. *Wallis* v. *Glynn*, 19 Ves. 380; G. Coop. 284.

Where the creditor insists on more being due, it is not necessary to produce the money tendered. *Black* v. *Smith*, Peake, 88; 3 R. R. 661.

On a plea of tender of 1*l.* 12*s.* 5*d.*, the jury found specially, that the defendant's attorney called on the plaintiff, and said, "I come to pay you 1*l.* 12*s.* 5*d.*, which the defendant owes you;" that the attorney put his hand into his pocket, but did not produce the money; the plaintiff said, "I cannot take it, the matter is now in the hands of my attorney":—Held, that such finding did not warrant a judgment for the defendant. *Finch* v. *Brook*, 1 Scott, 70; 2 Scott, 511; 1 Bing. (N.C.) 253; 2 Hodges, 97; 4 L. J., C. P. 1.

In an action for non-delivery of a cargo, it was proved that a larger sum was demanded for freight by the master than was due, and that the demand was so made as to amount to an announcement by the master, that it was useless to tender a smaller sum, as it would be refused:—Held, that these facts amounted to a dispensation of a tender. *The Norway*, Br. & Lush. 404; 3 Moore, P. C. (N.S.) 245; 11 Jur. (N.S.) 892; 13 L. T. 50; 13 W. R. 1085.

A trader who, under a trader debtor summons, served under 12 & 13 Vict. c. 106, s. 81, had signed an admission of a debt, went to his creditor with the amount of it in his pocket in money, and told the creditor that he had come for the purpose of paying that amount. The creditor said it was of no use, as it was too late, and that the debtor must see the creditor's attorney:—Held, that the production of the money was dispensed with, and that there was a good tender. *Danks, Ex parte*, 2 De G. M. & G. 936; 22 L. J., Bk. 73; 1 W. R. 57.

3. Requiring Change.

If Change required, no Tender.]—A plea of a tender of 20*l.* is supported by evidence of the tender of a larger sum, though such larger sum was tendered as the sum which the creditor was to receive, and not as the sum out of which he was to take the 20*l.* *Dean* v. *James*, 1 N. & M. 303; 4 B. & Ad. 547; 2 L. J., K. B. 94.

Where a defendant tendered seven sovereigns in payment of a demand of 6*l.* 17*s.* 6*d.*, and said to the plaintiff, "There, take your demand," and at the same time delivered a counter-claim upon the plaintiff of 1*l.* 5*s.*, who said, "You must go to my attorney":—Held, that this was not sufficient to support a plea of tender to an action for 6*l.* 17*s.* 6*d.* *Brady* v. *Jones*, 2 D. & R. 305. And see *Holland* v. *Phillips*, 6 Esp. 46.

A tender of a larger sum, requiring change, is not a good tender of a smaller sum. *Robinson* v. *Cook*, 6 Taunt. 336; 16 R. R. 624.

A plea of tender of a half-year's rent simply, is not supported by evidence of a tender of the half-year's rent, requiring the lessor to get change and pay back the property tax. *Ib.*

It is not a good tender of a fractional sum for the debtor to offer a creditor a bank note to a larger amount, and to desire him to take out of that the sum to be paid. *Betterbee* v. *Davis*, 3 Camp. 70; 13 R. R. 755.

4. Waiver by Claiming Larger Sum.

In what Cases.]—A tender of 2*l.* to pay 1*l.* 13*s.* is good, if the plaintiff objects to receive it only because he is entitled to a larger sum, and not on the ground that he has no change. *Cadman* v. *Lubbock*, 5 D. & R. 289; 3 L. J. (O.S.) K. B. 41.

Where the defendant, who owed the plaintiff 108*l.* for principal and interest on two promissory notes, in consequence of an application from the plaintiff's attorney for the amount, sent a person to the attorney, who told him he came to settle the amount due on the notes, and desired to be informed what was due, and laid down 150 sovereigns on a desk, out of which he desired the attorney to take the principal and interest, but the attorney refused to do so, unless a shop account, due from the plaintiff to the defendant, was fixed at a certain amount:—Held, that this was a good tender of the 108*l.* *Bevans* v. *Rees*, 5 M. & W. 306; 7 D. P. C. 510; 8 L. J., Ex. 263; 3 Jur. 608.

A tender of a bank note in payment of a fractional sum is good, if the creditor objects to receive it merely on the ground of the sum offered to be paid being less than the sum claimed, although the creditor is required to return the difference between the bank note and the fractional sum. *Saunders* v. *Graham*, Gow, 121.

A declaration stated an agreement by the defendants to repair the plaintiff's ship for a reasonable price to be charged by them to the plaintiff, and upon completion to redeliver the ship to the plaintiff upon payment of such price so to be charged. That the repairs were completed, and the plaintiff was ready and willing to pay the defendants such price as aforesaid, whereof they had notice. Breach, that they did not charge a reasonable price, but demanded an exorbitant sum as the price of the repairs, and gave notice to the plaintiff that they would not redeliver the ship until payment thereof, and detained the ship after she was completed until payment of the exorbitant sum. Plea, no tender of a reasonable price, or of any sum in respect thereof. Replication, waiver of the tender:—Held, that the replication was good and the plea bad. By the terms of the agreement the defendants were bound to deliver their bill of reasonable charges, and the plaintiff was relieved from the necessity of making a tender. *Watson* v. *Pearson*, 9 Jur. (N.S.) 501; 8 L. T. 395; 11 W. R. 702.

5. Demand of a Receipt.

Providing Stamp for—Condition.]—A tender must be unconditional, and of the precise sum due; therefore a plea of tender is not supported by evidence that the defendant took a sum of money out of his pocket, and said to the plaintiff, "If you will give me a stamped receipt, I will pay you the money;" as by 43 Geo. 3, c. 126, s. 4, the person from whom the money is due may require the person receiving to give him a receipt and pay the amount of the stamp duty, and, if he refuses to do so, he is liable to a penalty. *Laing* v. *Meader*, 1 Car. & P. 257.

Going with money in hand to make a tender, and demanding "whether the creditor has a receipt stamp," and receiving an answer in the negative, without an actual offer of the money, will not support a tender. *Ryder* v. *Townsend* (*Lord*), 7 D. & R. 119; 4 L. J. (O.S.) K. B. 27.

Where a creditor, on a tender being made, refused to receive the money, on account of more being due:—Held, that he could not afterwards object to the tender, on the ground that the party making it required a receipt. *Richardson* v. *Jackson*, 8 M. & W. 298; 9 D. P. C. 715; 10 L. J., Ex. 303. S. P., *Cole* v. *Blake*, Peake, 179; 3 R. R. 681.

Where a sufficient tender is made in a letter which requests that a receipt may be sent back, such request does not vitiate the tender, for it is not a condition. *Jones* v. *Arthur*, 8 D. P. C. 442; 4 Jur. 859.

Demand of Receipt in Full.]—Issue was joined upon a plea of tender of 7*l.* 16*s.* 8*d.* It was proved that the defendant's witness tendered that sum to the plaintiff, observing, "I offer you 7*l.* 16*s.* 8*d.*, as the balance of 35*l.*, and I demand a receipt in full." The plaintiff refused to receive it, alleging that the amount was insufficient:—Held, a conditional and therefore an invalid tender. *Foord* v. *Noll*, 2 D. (N.S.) 617; 12 L. J., C. P. 2.

A tender of a quarter's rent, coupled with a demand of a receipt to a particular day, the contest between the parties being whether one or two quarters' rent were due, is not a valid tender. *Finch* v. *Miller*, 5 C. B. 428.

If a person tenders money, but will not pay it unless the person to whom it is tendered will give him a receipt in full of all demands, such a tender is bad. *Griffith* v. *Hodges*, 1 Car. & P. 419. S. P., *Glascott* v. *Day*, 5 Esp. 48; 8 R. R. 828.

A tender is not good where the debtor at the time required the creditor to sign a receipt, which expressed that the sum tendered was the balance due. *Higham* v. *Baddely*, Gow, 213.

6. Must be Unconditional.

A tender to be good must not be clogged with a condition. *Jennings* v. *Major*, 8 Car. & P. 61.

The attorney of A. put down 18*l.*, and said to the other party, "I tender you 18*l.* for Mr. M." :—Held, that this was a good tender. *Ib.*

A tender to be good must be unconditional, so that if the creditor takes the money, and there is more due, he may still bring an action for the residue. *Mitchell* v. *King*, 6 Car. & P. 237. S. P., *Greenwood* v. *Sutcliffe*, 61 L. J., Ch. 59 ; [1892] 1 Ch. 1 ; 65 L. T. 797 ; 40 W. R. 214—C. A. *And see cases* supra.

Questions for Jury.]—A defendant made a tender in these terms : "I have called to tender 8*l.* in settlement of the account." The judge thought this a conditional tender, but the jury found for the defendant :—Held, that it was for the jury to determine the meaning of the language used, and that the construction was not a question of law. *Eckstein* v. *Reynolds*, 7 A. & E. 80 ; 2 N. & P. 256 ; 6 L. J., K. B. 198.

The question, as to whether a tender was made conditionally or not, is for the jury. *Marsden* v. *Goole*, 2 Car. & K. 133.

Tender in Full Discharge.]—If ten sovereigns are offered to a person, and he is told that he may "take those ten sovereigns in full of his demand," that is not a good tender. *Cheminant* v. *Thornton*, 2 Car. & P. 50.

An offer of a certain sum in full of a demand is not a legal tender. *Strong* v. *Harvey*, 3 Bing. 304 ; 11 Moore, 72 ; 4 L. J. (O.S.) C. P. 57.

In an action for taking the carriage horses which the plaintiff had hired of the defendant, to convey him from the defendant's inn ; he pleaded that the plaintiff refused to pay his bill for entertainment, and that the defendant did so to prevent the removal of the plaintiff's carriage. To this plea the plaintiff replied, he tendered the defendant 45*l.*, and the defendant rejoined, denying the tender. It was proved that the plaintiff put down the money, and offered it, if the defendant "would take it in full of the bill" :—Held, that this was not a valid tender, and that this evidence did not support the replication. *Gordon* v. *Cox*, 7 Car. & P. 172.

An offer to pay a sum of money to be accepted as the whole balance due, where a larger sum is claimed, does not amount to a legal tender. *Evans* v. *Judkins*, 4 Camp. 156.

Where a plaintiff offered to take a sum tendered in part of his demand, and the defendant would only allow him to take it "as a settlement" :—Held, not a good tender. *Mitchell* v. *King*, 6 Car. & P. 237.

If a person puts down a sum of money, and the creditor offers to take it in part, and the debtor will not allow him to do so, saying that no more is owing ; this is not a good tender, because a person tendering money should tender it without making any terms, and leaving it open for one party to say that more was due, and to the other, that the sum tendered was sufficient. *Peacock* v. *Dickerson*, 2 Car. & P. 51, n.

Creditor does not make Admission if Tender Valid.]—In support of a plea of tender, the evidence of the witness was, "I went to the plaintiff, and told him I came with the amount of Oliver's (the defendant's) bill. The plaintiff said he would not take it ; it was not his bill. I offered it to him as the amount of his bill" :—Held, that this tender was good, and that the plaintiff might have accepted the amount without thereby making any admission that no more was due. *Henwood* v. *Oliver*, 1 G. & D. 25 ; 1 Q. B. 409 ; 10 L. J., Q. B. 158.

A tender of a less sum than is due, accompanied with a statement, "that it is more than was due, but that the plaintiff might take it all," is a good tender of the amount offered. *Thorpe* v. *Burgess*, 8 D. P. C. 603.

The acceptance of such a tender does not preclude the party accepting it from proceeding for the remainder of his claim. *Ib.*

If a person offers a sum, "as all that is due," that is not a good tender. A party by accepting a sum properly tendered, does not thereby compromise his claim to a larger sum, which he would do if he took a sum offered "as all that was due." *Sutton* v. *Hawkins*, 8 Car. & P. 259.

A tender is not vitiated by the person making it saying, at the time of making it, that it was all the debtor considered to be due. *Robinson* v. *Ferreday*, 8 Car. & P. 752.

A good tender cannot be made in terms which, by taking the money, would cause the other party to make an admission. *Hastings* (*Marquis*) v. *Thorley*, 8 Car. & P. 573.

If a person in tendering a sum of money says, "I tender you 21*l.* in payment of the half-year's rent due at Lady-day last," this will make the tender bad, because, by accepting the money, the other party would admit that the sum was the amount of half a year's rent. *Ib.*

A tender is valid if it implies merely that the party offers a given sum as being all that he admits to be due, but if it implies also that if the other party takes the money he is required to admit that no more is due, the tender is conditional and insufficient. *Bowen* v. *Owen*, 11 Q. B. 130 ; 17 L. J., Q. B. 5 ; 11 Jur. 972.

A tenant sent to his landlord 26*l.* with a letter, in these words : "I have sent with the bearer 26*l.* to settle one year's rent of Nant-y-pair." The landlord refused to take it, saying that more was due :—Held, a good tender. *Ib.*

The plaintiff tendered rent to the defendants, his landlords, with the words. "Here is your quarter's rent" :—Held, that this did not require the landlord to make any admission as to the amount due, as a condition of its receipt, and was therefore a good tender. *Jones* v. *Bridgman*, 39 L. T. 500.

A tender of a certain sum as being "all that is due," is bad. *Field* v. *Newport &c. Ry.*, infra.

Waiver by saying that Money not Enough.]—Where it was proved that an agent of the defendant had gone to the plaintiff and had offered him 4*l.* "in full discharge of his account," and the question of the meaning of these words was not left to the jury, but a verdict was directed to be entered for the plaintiff :—Held, that the tender was sufficient, the plaintiff having offered no objection at the time it was made, either to its form, or that he was called upon to accept the sum tendered in full discharge, but rejecting it simply on the ground that the money was not enough. *Bull* v. *Parker*, 2 D. (N.S.) 345 ; 12 L. J., Q. B. 93 ; 7 Jur. 282.

7. Under Protest.

Validity.]—A. demanded 20*l.* as rent due from B., and B. having claimed deductions which A. would not allow, B. then put down twenty sovereigns, and said, "I tender you 20*l.* under protest" :—Held, a good tender, as this was not a conditional tender, the words "under protest"

merely importing that B. did not acquiesce in the demand of A., and did not mean to preclude himself from recovering the money back again if he could. *Manning* v. *Lunn*, 2 Car. & K. 13.

An offer to pay under protest the sum claimed is a good tender. *Scott* v. *Uxbridge and Rickmansworth Ry.*, 35 L. J., C. P. 293; L. R. 1 C. P. 596; 12 Jur. (N.S.) 602; 13 L. T. 596; 14 W. R. 893.

A tender accompanied by a protest is valid. *Sweney* v. *Smith*, 38 L. J., Ch. 446; L. R. 7 Eq. 324.

A shareholder in a company formed for working certain patents owed 40*l.* to the company in respect of calls on his shares. He sent a cheque for that amount to the secretary, along with a letter, which began thus:—"Herewith I forward a cheque for 40*l.*, being the amount of the call made upon me for twenty shares which I hold in the company." Then followed a protest against the payment, on the ground that certain patents which had been sold to the company were invalid; and the letter concluded in these terms:—"I request that you will enter this my protest in the records of the company, and further, that this money be held in trust by the directors (each of whom I shall hold responsible for repayment of the same) until the question of the vendor's patent rights has been settled":—Held, that this was a good tender of payment, and that the concluding words of the letter imposed no obligation or liability on the directors. *Ib.*

Though a conditional tender is not good, a tender under a protest, reserving the right of the debtor to dispute the amount due, is a good tender if it does not impose any conditions on the creditor. *Greenwood* v. *Sutcliffe*, 61 L. J., Ch. 59; [1892] 1 Ch. 1; 65 L. T. 797; 40 W. R. 214—C. A.

A mortgagor tendered to a mortgagee in possession the balance appearing to be due for principal, interest, and costs, according to an account made out by the mortgagor from documents furnished by the mortgagee, such balance being less than what the mortgagee claimed to be due. The mortgagor stated at the time that he did not admit the correctness of the mortgagee's accounts, and that he intended to take steps to dispute them, and to have the costs taxed. The mortgagee refused to accept the sum tendered. The mortgagor then brought an action to redeem:—Held, that the tender, as it did not impose any conditions on the mortgagee, was a good tender, and that the mortgagor was entitled to accounts, for the purpose of showing whether it was sufficient in amount, reserving further consideration and costs in case it proved to have been sufficient; the ordinary decree to stand in case the tender was shown to have been insufficient. *Ib.*

8. Entire Demand.

Tender of Part.]—A demand of a certain sum, made up of two sums, claimed on two distinct grounds, is not a demand of either. *Field* v. *Newport, &c. Ry.*, 3 H. & N. 409; 27 L. J., Ex. 396.

Therefore, where a railway company, entitled to distrain for tolls, demanded a sum in gross, made up of two sums, the one due for tolls, the other not so due, and the party tendered the amount due for tolls as being all that was due:—Held, that the company was not entitled to distrain, but was not precluded by the tender from recovering the toll. *Ib.*

A tender of part of an entire demand is inoperative. *Dixon* v. *Clarke*, 5 C. B. 365; 5 D. & L. 155; 16 L. J., C. P. 237.

And a tender of part of a debt is not made valid by the debtor having a set-off for the balance. *Searles* v. *Sadgrove*, 5 El. & Bl. 639; 25 L. J., Q. B. 15; 2 Jur. (N.S.) 21; 4 W. R. 53.

If A. demands from B. 1*l.* 7*s.* for several matters, including 10*s.* for a particular service performed by A., and B. tenders 19*s.* 6*d.*, this will not support a plea of tender of 10*s.* on account of such service. *Hardingham* v. *Allen*, 5 C. B. 793; 17 L. J., C. P. 198; 12 Jur. 584.

—— **Pleading.**]—Action by payee against the maker of a promissory note for 15*l.* 9*s.* 4*d.*, payable on demand, averring a demand on a particular day. Plea, as to 3*l.*, parcel, &c., a set-off, due at the time when the note was demanded, and ever since; and as to 12*l.* 9*s.* 4*d.*, residue, &c., that at the time of the demand the defendant tendered the plaintiff 12*l.* 9*s.* 4*d.*, and has always from the time of making his promise, as to 12*l.* 9*s.* 4*d.*, been ready and willing to pay that sum, and now brings the same into court; replication to the first plea, a traverse that any set-off was due at the commencement of the suit; to the second, that, before making the alleged tender, and before and at the time of making the demand and refusal hereinafter mentioned, a larger sum than 12*l.* 9*s.* 4*d.*, to wit, 15*l.* 9*s.* 4*d.*, including the 12*l.* 9*s.* 4*d.*, was due upon the note; and that before the tender, the plaintiff demanded payment of the 15*l.* 9*s.* 4*d.*, which so included the 12*l.* 9*s.* 4*d.*, but the defendant refused to pay the 15*l.* 9*s.* 4*d.*; and that, at the time of such demand and refusal, no set-off or other just cause for non-payment thereof existed:—Held, that the replication was good *Cotton* v. *Godwin*, 7 M. & W. 147; 9 D. P. C. 763; 10 L. J., Ex. 243.

A replication, alleging that the sum pleaded to, and brought into court, was not sufficient to satisfy the plaintiff's claims in respect thereof, is bad. *Smith* v. *Manners*, 5 C. B. (N.S.) 632; 28 L. J., C. P. 220; 5 Jur. (N.S.) 549.

Action for work and labour, money paid, and on an account stated. Plea, as to 4*l.* 16*s.*, parcel, &c., that, after the making of the promises, the defendant tendered to the plaintiff 4*l.* 16*s.*, and as to that sum, he has always been ready to pay the 4*l.* 16*s.* to the plaintiff, and now brings the same into court. Replication, that before making the tender, and before and at the time of the demand and refusal hereinafter mentioned, a larger sum than 4*l.* 16*s.*, to wit, 7*l.* 12*s.*, that sum including the 4*l.* 16*s.*, was due from the defendant to the plaintiff on account of divers of the causes of action in the declaration; and that, before making the tender, the plaintiff demanded of the defendant payment of the 7*l.* 12*s.*, which so included the 4*l.* 16*s.*; yet the defendant did not pay the 7*l.* 12*s.*, but refused to pay the same, and that no set-off or other just cause then existed for the non-payment:—Held, that the replication was good. *Tyler* v. *Bland*, 9 M. & W. 338; 1 D. (N.S.) 608; 11 L. J., Ex. 257.

To a declaration for breaking into and entering the plaintiff's house and converting his goods, the defendant pleaded that the plaintiff's house was situate in a township in which a poor-rate had been made, that the plaintiff omitted to pay it, and that the churchwardens and overseers

applied to two justices, who issued a warrant directing them to levy the amount and costs incurred by them. The plea then justified the trespasses under the warrant, as a servant of the overseers. Replication, a tender before distress of the amount of the rate (omitting the costs): —Held, that the replication was bad, as pleading a tender of part only of what was due. *Walsh* v. *Southwell*, 2 L. M. & P. 91; 6 Ex. 150; 20 L. J., M. C. 165.

A replication that, before and at the time of the tender, a larger sum was owing and was demanded, and not paid, is no answer to a plea of tender as to a smaller sum. *Brandon* v. *Newington*, 3 G. & D. 194; 3 Q. B. 915; 12 L. J., Q. B. 20; 7 Jur. 60.

A declaration on simple contract, containing two counts, in each of which 26*l.* was demanded. The defendant pleaded as to 5*l.*, parcel, &c., a tender. The plaintiff replied, that before and at the time of the tender, and of the request and refusal after mentioned, and until and at the commencement of the action, a larger sum than 5*l.*, to wit, 13*l.* 15*s.*, part of the money in the declaration demanded, was due from the defendant to the plaintiff as one entire sum, and on one entire contract and liability, and inclusive of and not separate or divisible from the sum of 5*l.*, and the same being a contract and liability by which the defendant was liable to pay to the plaintiff the whole of the larger sum in one entire sum, upon request; and that after the last-mentioned and larger sum had become so due, and while the same remained unpaid, the plaintiff requested of the defendant payment of the last-mentioned and larger sum, of which the 5*l.* in the plea mentioned was such indivisible parcel as aforesaid, yet that the defendant refused to pay the larger sum, wherefore the plaintiff refused the 5*l.*:—Held, that the replication was a good answer to the plea; and that if there was any set-off or other just cause for not paying the larger sum, it should come by way of rejoinder. *Dixon* v. *Clarke*, 5 C. B. 365; 5 D. & L. 155; 16 L. J., C. P. 237.

Action for money received. Pleas, except as to 7*l.*, never indebted. Except as to the 7*l.* set-off. And as to 7*l.* a tender and payment into court. Replication to the last plea, that, at the time of tender, a larger sum was due as one entire sum on one entire contract. The judge, at the trial, having ruled that the tender was good, and that, if the payment into court and set-off made up the amount, the verdict should be for the defendant, and a verdict having been found accordingly, the court granted a rule absolute for a new trial. *Phillpotts* v. *Clifton*, 10 W. R. 135.

Solicitor Retained.]—It is no answer to a plea of tender before the commencement of the suit, that the plaintiff had, before such tender, retained an attorney and instructed him to sue out a writ against the defendant, and that the attorney had accordingly applied for such writ before the tender, which was afterwards sued out. *Briggs* v. *Calverly*, 8 Term Rep. 629.

Tender without Solicitor's Charge.]—The plaintiff's attorney, before bringing the action, wrote to the defendant to say, that, unless the debt, together with his (the attorney's) charge for that letter, was paid at his office on the Wednesday following, at twelve o'clock, proceedings would be commenced. On the Wednesday, at ten o'clock, an agent of the defendant went to the attorney's office, and there saw a boy, to whom he tendered the amount of the debt only. The boy, after referring to the letter-book, refused to accept it, unless the charge was also paid. The writ was issued at eleven o'clock on that day:—Held, that this was a good tender. *Kirton* v. *Braithwaite*, 1 M. & W. 310; 5 D. P. C. 101; 2 Gale, 48; 5 L. J., Ex. 165.

D. DEMAND AFTER TENDER.

Demand must be of Exact Sum.]—If the plaintiff in his reply alleges a subsequent demand and refusal, it is incumbent on him to prove, that, after the tender admitted in the pleadings, he demanded of the defendant the exact sum specified as having been before tendered and refused. *Spybey* v. *Hide*, 1 Camp. 181.

Where, to a declaration on a bill of exchange for 10*l.* 4*s.* the defendant pleaded non assumpsit as to all except 4*l.* 7*s.* 6*d.*, and as to that a tender, with an averment that the defendant was always ready and willing to pay the same; and the plaintiff replied, that the defendant was not always ready and willing to pay the said sum, and a demand thereof after the cause of action accrued, and before the tender, and issue was taken thereon; and on its being proved that the defendant had paid 7*l.* on account of the bill, and had tendered 3*l.* 4*s.*, a verdict was found for him:—Held, that the replication was not supported by proof of a demand of the whole debt due, but could only be supported by proof of the demand of the precise sum tendered. *Rivers* v. *Griffiths*, 1 D. & R. 215; 5 B. & Ald. 630; 22 R. R. 505.

By whom Demand Made.]—Where the issue is on a subsequent demand and refusal to a plea of tender, the demand of the debt, to do away the effect of the tender, must be by some one authorised to receive it, and to give the debtor a discharge. *Coles* v. *Bell*, 1 Camp. 478, n; 10 R. R. 731, n. S. P., *Coore* v. *Callaway*, 1 Esp. 115.

This principle applies even in replevin. *Pimm* v. *Grevill*, 6 Esp. 95.

To whom Demand Made.]—After a tender of what is due from two persons on a joint contract, a subsequent application to one of them is sufficient to support a replication, that the plaintiff subsequently demanded payment from both. *Peirse* v. *Bowles*, 1 Stark. 323; 18 R. R. 775.

Evidence of Demand.]—A letter demanding payment of a debt sent to the defendant's house, and to which an answer is returned that the demand should be settled, is sufficient evidence of a demand, on the issue of a subsequent demand and refusal to a plea of tender. *Hayward* v. *Hague*, 4 Esp. 93.

E. EFFECT AND PROOF.

Effect of, as an Admission.]—A tender admits the contract and facts stated in the declaration. *Cox* v. *Brain*, 3 Taunt. 95.

A plea of tender merely admits the defendant's liability on the contract to the amount tendered. *Willis* v. *Langridge*, 2 H. & W. 250. S. P., *Seaton* v. *Espinasse*, 5 Bing. 187; 2 M. & P. 301; 6 L. J. (o.s.) C. P. 208.

When a declaration shows substantially a contract, and a tender in compliance with it, the

plaintiff is not estopped from contending for the true interpretation of the contract by the fact that he has also set out in his declaration an alternative case of a tender which would not have been a compliance. *M'Connel* v. *Murphy*, L. R. 5 P. C. 203 ; 28 L. T. 713 ; 21 W. R. 609.

A lessee, after certain supposed breaches of covenant, tendered money as rent. The lessor refused to receive it as rent, but finally did accept it, though protesting that he took it not as rent under the lease, but as compensation for the occupation of the premises merely, and that he did not mean to waive, but expressly reserved, the right of re-entry :—Quære, whether if there had been any forfeiture by breaches of covenant, this acceptance of the money was a waiver of them. *Croft* v. *Lumley*, 6 H. L. Cas. 672 ; 27 L. J., Q. B. 321 ; 4 Jur. (N.S.) 903 ; 6 W. R. 523.

Effect of Plea.]—A promise to pay the debt of another need not be proved to be in writing, when the defendant pleads a tender to the count on such promise. *Middleton* v. *Brewer*, Peake, 15 ; 3 R. R. 643.

After a plea of tender the plaintiff cannot be nonsuited. *Harding* v. *Spicer*, 1 Camp. 327.

A plea of tender is good in the usual form, alleging the defendant to have always been ready and willing to pay, and before the commencement of the action to have tendered the money. *Smith* v. *Manners*, 5 C. B. (N.S.) 632 ; 28 L. J., C. P. 220 ; 5 Jur. (N.S.) 549.

The meaning of a plea of tender is, that the defendant has always been ready to perform his contract. *Poole* v. *Crompton*, 5 D. P. C. 468. *S. C.*, nom. *Poole* v. *Thumbridge*, 2 M. & W. 223 ; 6 L. J., Ex. 74. S. P., *Hume* v. *Peploe*, 8 East, 168 ; 9 R. R. 399.

Payment into Court.]—If a defendant brings money into court on a plea of tender, the plaintiff may take it out, though he replies that the tender was not made before action. *Le Grew* v. *Cooke*, 1 Bos. & P. 332.

If money is paid into court with a defence of tender, the plaintiff only recovers in the action, the excess. *James* v. *Vane*, 2 El. & El. 883 ; 29 L. J., Q. B. 169 ; 6 Jur. (N.S.) 731 ; 2 L. T. 281 ; 8 W. R. 446.

A defendant pleaded the general issue as to part, and as to the other part a tender, but omitted to pay the money into court ; judgment having been on that acount signed as for want of a plea, the court set aside the judgment for irregularity. *Chapman* v. *Hicks*, 2 D. P. C. 641 ; 2 C. & M. 633 ; 3 L. J., Ex. 219.

If a defendant pleads a tender without paying the money into court, the plaintiff may sign judgment. *Anon.*, 1 Tidd's Prac. 612.

Proof.]—Proof of a tender of 20*l.* 9*s.* 6*d.* in bank-notes and silver is sufficient to support a plea of tender of 20*l.* *Dean* v. *James*, 4 B. & Ad. 547 ; 1 N. & M. 393 ; 2 L. J., K. B. 94.

A plea to an avowry of a tender of 16*l.* will not be supported by proof of a tender of 15*l.* 16*s.*, although no more rent was due than the sum proved to have been tendered. *John* v. *Jenkins*, 1 C. & M. 227 ; 3 Tyr. 170 ; 2 L. J., Ex. 83.

An entry of a tender and a refusal, made by the deceased clerk of the plaintiff's attorney, in a day-book kept for the purpose of minuting his daily transactions, is admissible in evidence to prove the tender. *Marks* v. *Lahee*, 3 Bing. (N.C.) 408 ; 4 Scott, 137 ; 6 L. J., C. P. 69.

In an action on an agreement to let the plaintiff a messuage for a year from the 25th March, the plaintiff to take the fixtures at a valuation and to pay the same on entry :—Held, that it was open to the plaintiff to show a tender on the 10th April. *Edman* v. *Allen*, 6 Bing. (N.C.) 19 ; 8 Scott, 261 ; 9 L. J., C. P. 49.

Action for use and occupation, work and labour, money lent and money paid, and for money due on an account stated. Several pleas, as to all but 7*l.*, parcel of the moneys in the declaration ; and a single plea, as to 7*l.*, parcel of the moneys in the declaration, of tender and payment of the sum into court. The pleas did not distinguish the counts. The plaintiff traversed the tender :—Held, that proof of a single tender of 7*l.*, in respect of the use and occupation, satisfied the plea of tender. *Robinson* v. *Ward*, 8 Q. B. 920 ; 15 L. J., Q. B. 271 ; 10 Jur. 409.

F. TENDER OF AMENDS.

1. In General.

Replication to Plea of.]—Where a defendant in trespass pleads that he tendered to the plaintiff a certain sum, being a sufficient amends, the plaintiff should reply that the defendant did not tender the sum named, or that that sum was insufficient, and not that he did not tender sufficient amends. *Williams* v. *Price*, 3 B. & Ad. 695 ; 1 L. J., K. B. 258.

Local Act where no Plea.]—By a local act commissioners were empowered to cause any present or future sewers, ditches, drains, &c., to be opened, enlarged, altered or cleansed ; and in case any action should be brought against any person for anything done in pursuance of the act, or in relation to the matters therein contained, the plaintiff should not recover in any such action, if tender of amends should have been made to him, or his attorney, by or on behalf of the defendant before such action brought ; and in case no such tender should be made, that it should be lawful for the defendant, by leave of the court, to pay money into court ; and if the matter should appear to have been done in pursuance and under the authority of the act, and after sufficient satisfaction made or tendered, then that the jury should find for the defendant. The commissioners, of whom the defendant was one, appointed a committee to inspect a ditch, with a view to widening the same, and to report thereon. The committee having reported thereon in favour of widening the ditch, the commissioners appointed a second committee, of whom the defendant was one, to confer with a surveyor respecting the work, with power to two of them to act. The defendant being afterwards told by the clerk to the commissioners that he might proceed without further instructions from the commissioners, took the plaintiff's land for the purpose of widening the drain, without having given him notice or obtained his consent. The land was taken for the bonâ fide purpose of widening the drain. The defendant, before action, tendered 10*l.* as amends, which the plaintiff refused to accept ; but no tender was pleaded, nor was the amount paid into court. The jury found the trespass, and that the damage amounted to 5*l.* :—Held, first, that although neither the defendant was, nor the commissioners were, authorised to take the land without the plaintiff's consent in writing, yet the defendant

was entitled to the protection of the act. *Jones* v. *Gooday*, 9 M. & W. 736 ; 1 D. (N.S.) 914 ; 11 L. J., Ex. 297.

Held, secondly, that the defendant was not bound to plead the tender, or pay the amount tendered into court. *Ib.*

J. M.

TERMS.

See MERGER—SETTLEMENT.

THAMES.

Conservancy.]—*See* WATER.

Collision on.]—*See* SHIPPING.

THEATRE.

1. *Licence*, 29.
2. *Privileges of Admission*, 33.
3. *Contracts relating to*, 36.
4. *Torts relating to*, 42.
5. *Rights of Spectators*, 43.
6. *Dramatic Copyright.*—*See* COPYRIGHT.
7. *Music and Dancing Licence.*—*See* DISORDERLY HOUSE.

1. LICENCE.

Necessity for.]—The 10 Geo. 2, c. 28, s. 2, prohibited acting plays for gain, without patent from the king, or licence from the lord chamberlain. Section 5 provided, that no person shall be authorised by patent or licence to act except within the city and liberties of Westminster, or where the king shall be resident:—Held, that the prohibition in s. 2 was not merely co-extensive with the exempting power as limited by s. 5, but prevailed throughout the kingdom. *Rex* v. *Neville*, 1 B. & Ad. 489.

Neither letters patent from the crown, nor a licence from the lord chamberlain, could be granted for any dramatic performances within 10 Geo. 2, c. 28, except in Westminster or some place where her majesty was residing. Dramatic performances, therefore, within twenty miles of London or Westminster, and not in Westminster, or in the place of her majesty's residence, could not be rendered legal by any authority whatever; for 25 Geo. 2, c. 36, extends only to music and dancing. *Levy* v. *Yates*, 3 N. & P. 249 ; 1 W., W. & H. 219 ; 8 A. & E. 129 ; 7 L. J., Q. B. 138.

Discretion of Justices — Condition — Excise Licence.]—Upon an application for a stage licence a licensing committee are entitled in the exercise of their discretion to take into consideration the fact that the holder of a stage licence can thereby obtain an excise licence for the sale of intoxicating liquors from the excise authorities under s. 7 of 5 & 6 Will. 4, c. 39, and the refusal of such an application, unless the applicant undertakes not to apply for an excise licence, is no ground for interfering with the exercise of the committee's discretion. *Reg.* v. *Yorkshire* (*West Riding*) *County Council*, 65 L. J., M. C. 136 ; [1896] 2 Q. B. 386 ; 75 L. T. 252 ; 44 W. R. 650 ; 60 J. P. 550.

Unlicensed Theatre—Contracts Relating to.]—Where the plaintiff was participant in the concern, he could not recover money which he had paid at the request of the defendant in the conduct of an unlicensed theatre. *De Begnis* v. *Armistead*, 10 Bing. 107 ; 3 M. & Scott, 511 ; 2 L. J., C. P. 214.

No action will lie for the breach of an agreement to hire a theatre for the performance of plays, if it appears that no licence can be granted by the lord chamberlain for that theatre, on the ground of its not coming within the provisions of 10 Geo. 2, c. 28. *Levy* v. *Yates*, 3 N. & P. 249 ; 1 W., W. & H. 219 ; 8 A. & E. 129 ; 7 L. J., Q. B. 138.

No play can lawfully be acted for hire, gain, or reward, within twenty miles of London, without the authority of letters patent from the king, or of a licence from the lord chamberlain ; and no such letters patent, or licence, can be granted so as to authorise the performance of plays at any place except within the city or liberties of Westminster, or where the king may happen to reside. An agreement, therefore, for a partnership in acting plays at a theatre situate within twenty miles of London, but not within the city or liberties of Westminster, or in the place of the king's residence, is one to which the court will not give effect. *Ewing* v. *Osbaldiston*, 2 Myl. & C. 53 ; 6 L. J., Ch. 161 ; 1 Jur. 50.

Having regard to the provisions of 10 Geo. 2, c. 28, s. 2, and 25 Geo. 2, c. 36, ss. 2, 3, no action can be maintained for the breach of an agreement "to dance at the king's theatre in the Haymarket, or at such other place as the plaintiff should appoint," if it appear that no licence for that theatre was granted by the lord chamberlain, as required by the 10 Geo. 2, c. 28 ; and that the plaintiff did not request the defendant to dance at any other place which was licensed. *Gallini* v. *Laborie*, 5 Term Rep. 242 ; 2 R. R. 581.

Letters Patent.]—The court refused to seal a patent for representing Italian operas, because the provisions for carrying it on were by agreement with the lord chamberlain, his executors and administrators, and the right to the patent was not sufficiently connected with the property in the house. Not sufficient for the party applying merely to answer objections, but he must lay a proper case. Upon such application the court will take care that the king is not deceived, or his object disappointed, and will represent the whole to the king, but will not decide upon the merits of the various claimants. Essential to the complaint of an old market against a new one set up near it, that the old is competent in the accommodation of the public ; so here the old proprietors must be able to keep it up properly, the accommodation of the public being the principal thing. *O'Reilly, Ex parte*, 1 Ves. J. 112 ; 1 R. R. 89.

By the 26 Geo. 3, c. 57, s. 1, the crown was authorised to grant letters patent for establishing and keeping a theatre in Dublin ; and, by s. 2, it was enacted that no person should, for hire, act any play in any theatre in Dublin, except in such theatre as should be so established by letters patent, under the penalty of forfeiting 300*l.* for every such offence, to be sued for by the common

informer. Under this statute, the crown granted letters patent to H., authorising him, during a certain time, to keep a theatre in Dublin, and his majesty prohibited and forbid all persons whatsoever during the term that they presume to keep open, in any manner, any theatre in Dublin, and therein to act any play, unless they should be thereunto authorised by his majesty:—Held, that the patentee could not maintain a bill for an injunction to restrain unauthorised persons acting plays in a theatre in Dublin, for the keeping of which no patent had been granted. Such a bill can only be maintained upon the ground of interest in the plaintiff; and unless he can sustain an action in the case, the injunction cannot be supported. *Calcraft* v. *West*, 2 Jo. & Lat. 123; 8 Ir. Eq. R. 74.

Evidence as to.]—In an action against a performer for not performing at a licensed theatre, pursuant to his contract, evidence that the performances have gone on without interruption is sufficient primâ facie evidence that the theatre is duly licensed. *Rodwell* v. *Redge*, 1 Car. & P. 220.

Proof that a party was the acting manager of a theatre, and that he paid the salary of and dismissed one of the performers, is sufficient proof that he caused the performances; and if he caused the performances, it is not material whether he did so as the agent of others or not. *Parsons* v. *Chapman*, 5 Car. & P. 33.

When Required—House or Place.]—A booth theatre, which is taken to pieces and carried from place to place for theatrical performances, is not a "house or other place of public resort for the public performance of stage plays," within 6 & 7 Vict. c. 68, s. 2. *Davys* v. *Douglas*, 4 H. & N. 180; 28 L. J., M. C. 193; 7 W. R. 327.

The appellant was the owner and occupier of a building which he gratuitously allowed to be used on a few occasions for the performance of stage plays, to which the public were admitted on payment, for the benefit of a charity. The appellant had no licence for the performance of stage plays in such building:—Held, that he was rightly convicted, of having or keeping a house for the public performance of stage plays without a licence, under 6 & 7 Vict. c. 68, s. 2. *Shelley* v. *Bethell*, 53 L. J., M. C. 16; 12 Q. B. D. 11; 49 L. T. 779; 32 W. R. 276; 48 J. P. 244.

But a booth theatre, which is taken to pieces and carried from place to place for theatrical representations, is a place within 6 & 7 Vict. c. 68, s. 11, and a person causing a stage play to be acted therein for hire, is liable to the penalty imposed by that section, if it be not licensed, and not a patent theatre. *Fredericks* v. *Payne*, 1 H. & C. 584; 32 L. J., M. C. 14; 8 Jur. (N.S.) 1109; 7 L. T. 329; 11 W. R. 36.

A person hired a room for six nights, paying 7*l.* for the hire, and then issued playbills announcing theatrical representations, and also collected at the door the money paid for admission by those attending the same. The place was not licensed for stage plays:—Held, that he could not be convicted, under 6 & 7 Vict. c. 68, s. 2, of having and keeping a house or place for performance of stage plays; but he might be convicted, under s. 11, of causing stage plays to be represented. *Reg.* v. *Rosenthal* or *Strugnell*, 7 B. & S. 124; 35 L. J., M. C. 78; L. R. 1 Q. B. 93; 12 Jur. (N.S.) 269; 13 L. T. 433; 14 W. R. 193.

A person who, without licence, acts stage plays for hire in a temporary booth, brings himself within the penalty imposed by 6 & 7 Vict. c. 68, s. 11, on a person peforming stage plays "in any place not being a patent theatre, or duly licensed as a theatre." *Tarling* v. *Fredericks*, 28 L. T. 814; 21 W. R. 785.

Stage Play, what is.]—A dramatic performance (a duologue) by two persons is a stage play, within the 6 & 7 Vict. c. 68, s. 23. *Thorne* v. *Colson*, 3 L. T. 697.

A house, licensed for music and dancing, was used to represent an entertainment in which there was a dialogue between parties bodily on the stage (with all its accessories), and also dramatic action, and a regular plot performed by other parties, not upon the stage, but whose images were reflected upon it:—Held, a stage play. *Day* v. *Simpson*, 18 C. B. (N.S.) 680; 34 L. J., M. C. 149; 11 Jur. (N.S.) 487; 12 L. T. 386; 13 W. R. 748.

S. occupied a house of public resort, licensed for music and dancing. There were a pit and private boxes, a band, a stage, and curtain. Upon this stage was performed a ballet divertissement by dancers dressed as ballet dancers, who danced, and in so doing described, by certain gestures and motions, the ideas of war, peace, and reconciliation:—Held, first, that the question whether a performance is a stage play within 6 & 7 Vict. c. 68, s. 23, is a question of fact. *Wigan* v. *Strange*, 35 L. J., M. C. 31; L. R. 1 C. P. 175; 12 Jur. (N.S.) 9; 13 L. T. 371; 14 W. R. 103.

Held, secondly, that the performance was a stage play, within the meaning of the act. *Ib.*

Tumbling is not an entertainment of the stage within 10 Geo. 2, c. 28. *Rex* v. *Handy*, 6 Term Rep. 286.

Power of Police to enter Unlicensed Places.]—A portable theatre or booth, consisting of two caravans or waggons, drawn from place to place by horses, and when joined together forming a temporary structure for the performance thereon of stage plays, is not a tenement within 2 & 3 Vict. c. 47, s. 46. *Fredericks* v. *Howie*, 1 H. & C. 381; 31 L. J., M. C. 249; 8 Jur. (N.S.) 750; 6 L. T. 544; 10 W. R. 796.

Convictions.]—The plaintiff was convicted under 6 & 7 Vict. c. 68, s. 2, and fined 5*l.*; he was then ordered to be detained in custody, and a warrant of distress, reciting that he had been adjudged to pay a penalty of 5*l.* and 12*s.* costs, was issued to levy the amount. Under this warrant the plaintiff's goods were seized on the same day, and he was discharged out of custody on the following morning; and within a few days his goods were sold to satisfy the penalty and costs. The conviction was quashed on appeal:—Held, by Coleridge and Wightman, JJ., that, assuming they had power, under 5 Geo. 4, c. 18, s. 1, to detain the plaintiff until it was ascertained whether he had goods to satisfy the distress, the order for the detention of the plaintiff was made without jurisdiction, being indefinite as to time and object. *Leary* v. *Patrick*, 15 Q. B. 266; 4 New Sess. Cas. 258; 19 L. J., M. C. 211; 14 Jur. 932.

Held, by the court, that, assuming that costs could be awarded in addition to the penalty, the warrant of distress was issued without jurisdiction, notwithstanding s. 19 of the 6 & 7 Vict.

c. 68, because the conviction was silent as to costs. *Ib.*

Held, by Lord Campbell, C. J., and Patteson, J., that the warrant of distress being illegal, the imprisonment which was founded upon it was without jurisdiction. *Ib.*

Held, by the court, that the justices having exceeded their jurisdiction, and the conviction having been quashed, the case was within 11 & 12 Vict. c. 44, s. 2, and therefore trespass was the proper form of action. *Ib.*

2. PRIVILEGES OF ADMISSION.

Rights of Renters of Stalls or Boxes.]—Trustees acting for the shareholders or rentallers of a theatre, called the Queen's Theatre and Opera House, who had obtained a feu right to the site, granted in 1858 a disposition of the ground and buildings to one J. B., a subject, inter alia, to the real burden of a perpetual annuity of 2*l.* per share to each rentaller of the said Queen's Theatre and Opera House, and to the successors or assignees of them; and it was further declared that each of the said rentallers, or the assignees or successors of such, should at all times be entitled, inter alia, to free admission to the auditorium of the said Queen's Theatre and Opera House; also declaring that J. B. should not convert the said theatre to any other use; and that he should keep it open for performance six months in each year. There was no stipulation as to insurance of the theatre or as to the re-building of it in case of destruction by fire or otherwise. In 1865 the theatre was entirely destroyed by fire, and was re-built by J. B.'s trustee and called by another name. In 1875 it was again entirely burnt down, and again re-built. From 1865 to 1879 the theatre, under the new name, was twice sold, but in each case the conveyance was granted subject to the "real burdens, conditions, provisions, declarations, and others," specified in the original disposition of 1858, and especially under the burden of payment of the annuities to the rentallers, and of allowing these parties the privileges to which they were entitled. The privilege of free admission was enjoyed by the rentallers for fourteen years after the destruction of the first theatre. But in 1879 disputes arose as to the validity of the rentallers' right to, inter alia, the privilege of free admission. The trustees maintained that the rentallers were entitled under the disposition of 1858 and the succeeding conveyances to the same privileges in the new theatre which they had in the first:—Held, that the privileges conferred on the rentallers by the original dispositions—other than the payment of the annuities which was constituted a real burden—rested only on the personal obligation of the original disponee, and were confined to the theatre then in existence, and that the subsequent deeds, to which the rentallers were not parties, were not intended to, and did not, confer on them any new right. *Scott* v. *Howard*, 6 App. Cas. 285—H. L. (Sc.)

A new renter of Drury Lane Theatre, under 1 Geo. 4, c. 60, is entitled to free admission to any disengaged stall, the stalls being a portion of the "usual audience part of the theatre" within the meaning of s. 3. *Dauney* v. *Chatterton*, 45 L. J., C. P. 293; 33 L. T. 628—C. A.

When once the new renter has given up his ticket, and been shown to a seat in that portion of the usual audience part to which he first seeks admission, he is entitled, during the remainder of the performance, to no greater privilege than an ordinary member of the public who has been admitted by payment to that portion of the usual audience part of the theatre. *Ib.*

W., in 1816, became, under an order of the court, purchaser of the opera house, and was in possession as equitable owner until possession was delivered to C. in 1821. No assignment of the terms of years for which the premises were held was made to W., but the same were vested in T., who, in 1821, on behalf of and by the direction of W., assigned the terms to C. (who was mortgagee of the premises), but "subject to the right of possession of W., his executors, &c., to the box numbered 124, usually occupied by him, or his or their nominees, not exceeding in number six persons nightly, during the remainder of the several terms granted by the indenture, and of the terms covenanted by the indenture to be granted." In 1823 W. assigned his leasehold or other interest in the opera house and other property to H. W., in trust for the benefit of his creditors, and he, as such trustee, or his solicitor, received the rents and profits of the opera box numbered 124, to 1838, and his solicitor continued to receive the rents to 1850. In 1823 C. filed a bill for specific performance of the contract of 1821, and in 1829 a decree was made to that effect, and it declared that he was entitled to the leasehold premises of the opera house, to the rents, and to a renewal at the cost of W. C., from 1821 to 1845, paid the rents of the box to, or permitted the same to be received by, H. W. or his solicitor, by virtue of the reservation in the assignment of 1821. In 1845 the assignees of C. sold the opera house to L. for the residue of the terms subsisting by virtue of the covenants for renewal in the indenture of 1821. In the contract for sale the indenture of 1821 was noticed, and it was provided that it should be subject to such rights to boxes as the premises were then subject to. A renewed lease was granted in 1845. L., from 1845 to 1850, paid the rents of the box to the solicitor of H. W., or persons claiming under him; but since 1850 he had refused to pay any rent for such box. In 1855 the plaintiff was appointed a new trustee under the deed of assignment by E. W. of 1823. By the renewed lease of 1845 L. was restrained from disposing of boxes for more than one year, except forty-one boxes, to be selected within five years, which he was at liberty to dispose of at pleasure, but after that period provision was made for his acquiring, with the assent of the lessors, the right of disposing of other boxes. In May, 1856, L. assigned the lease of 1845 to the defendant, who, as alleged, had notice of the plaintiff's claim to the box. On a bill filed by the plaintiff for a declaration that he was entitled to the box, or to an equivalent in money for the residue of the renewed term of 1845:—Held, that the defendant refusing to make compensation in money or otherwise, the plaintiff was entitled to the relief sought. *Helling* v. *Lumley*, 28 L. J., Ch. 249; 5 Jur. (N.S.) 301; 7 W. R. 152—L.JJ.

Trespass to Sub-Lessee's Boxes and Stalls.]—The lessee of a theatre held it under a lease in which he covenanted not to convert it to any other use than for acting or performing operas or theatrical entertainments. He demised certain boxes and stalls to a sub-lessee, reserving power of access for the purpose of repairing; the

sub-lessee covenanted only to use the same for the purpose of viewing and hearing the operas and other entertainments. The under-leases contained covenants for quiet enjoyment. The lessee demised the theatre for a term of three months for the purpose of holding religious meetings. To enable these meetings to be held, the stalls were covered with a flooring, the division between the boxes removed, and other temporary structural alterations made:—Held, that a trespass had been committed by the lessee and persons claiming under him in thus entering upon the sub-lessee's boxes and stalls without his licence, and that the conversion of the theatre for other than theatrical purposes was a derogation from the grant and a breach of the covenant for quiet enjoyment. *Leader* v. *Moody*, 44 L. J., Ch. 711; L. R. 20 Eq. 145; 32 L. T. 422; 23 W. R. 606.

Covenant in Lease Granting—Validity of.]—A., in 1792, granted a lease of a theatre to B., B. covenanting not to grant rights of admission, except 250 free admissions, without the consent of A.; and in case of any of the covenants being broken, the lease to be void. B. then assigned his interest to trustees, to receive the profits and pay the debts, who left B. in the management and direction of the concern: in the course of which, in 1799, B. granted a ticket of admission to C. for twenty-one years. In 1800, the trustees took possession of the theatre, but suffered C. to exercise his privilege of admission till 1814, when the ticket was stopped on the ground that B. had no right to make such a grant:—Held, first, that the covenant by B. with A., not to grant rights of admission, supposing it to have been broken, did not avoid the grant to C.; secondly, that as the trustees had left B. in the management of the theatre, they must be taken to have authorised the grant, and could not afterwards disavow it; thirdly, that this was not an interest in land, but a licence to C. to enjoy the privilege of admission: and, therefore, that it was not necessary that it should pass by deed, or that B. should have been authorised by the trustees, in writing, to make such a grant. *Tayler* v. *Waters*, 2 Marsh. 551; 7 Taunt. 374; 18 R. R. 499.

An agreement that the plaintiff should be paid 360*l.* on the 31st December, 1834, for 313*l.* lent by him on the 26th April, 1834, if four persons named should be alive on the 31st December, and that the plaintiff should have the use of two boxes at the V. theatre, in the intermediate time, gratuitously: but if either of the four persons should die, the plaintiff should pay a reasonable sum for the use of the boxes; is not an agreement running with the land, and is therefore not binding, as to the use of the boxes, on an assignee of the theatre. *Flight* v. *Glossop*, 2 Scott, 220; 2 Bing. (N.C.) 125; 1 Hodges, 263; 4 L. J., C. P. 268.

—— **Specific Performance of.**]—An owner of a theatre, in 1839, for valuable consideration, covenanted to confirm to certain debenture holders the privilege of free admission to the theatre. A. was entitled as a debenture holder to the benefits of the deed, but subsequently lost his debenture. Afterwards B. became lessee of the theatre, with notice of the deed:—Held, that A. was not entitled specifically to enforce against B. the privilege of free admission created by the deed. *Malone* v. *Harris*, 11 Ir. Ch. R. 33.

—— **Determination of.**]—By lease not under seal, two trustees on behalf of themselves and the other proprietors of a theatre demised it to S. for three years, reserving to themselves and the other proprietors free liberty of admission to the theatre. S., by lease not under seal, let the theatre to the plaintiff for two nights subject to the terms on which he held the theatre:—Held, that the licence was determined, and that trespass might be maintained by the plaintiff against the defendant, a proprietor, who entered the theatre during his tenancy. *Coleman* v. *Foster*, 1 H. & N. 37; 4 W. R. 489.

Covenant in Lease not to Grant.]—A lease contained a covenant not to grant away, assign, dispose of, &c., the stalls or boxes "for any longer period than one year or season." On the 21st December, 1851, the lessee leased certain boxes for one year, to commence from March, 1852. On the 1st of August, 1852, he made another lease of the same boxes to a different person, with his habendum, "from the 1st of February now next ensuing, or from such subsequent day during the year upon which the theatre shall be opened, and thenceforth for the full term of one year to be computed from that day:—Held, that this was not a breach of the covenant. *Croft* v. *Lumley*, 6 H. L. Cas. 672; 27 L. J., Q. B. 321; 4 Jur. (N.S.) 903; 6 W. R. 523.

Ratability of Lessee of Box.]—The lessee of a private box at a theatre is ratable to the poor rates in respect of it, under a local act by which the rate was to be laid on every person who shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, wharf, warehouse, or any other building, tenement, or hereditament; although the proprietors of the theatre were also rated for the theatre. *Reg.* v. *St. Martin's-in-the-Fields Overseers*, 3 Q. B. 204; 11 L. J., M. C. 112.

3. Contracts relating to.

Commencement of Season.]—On the 16th August, 1871, F. agreed with M. to act for him "for the season of not less than nine months; to commence on the 2nd of October, 1871." F. subsequently, on the 2nd of March, agreed to a renewal of his engagement on the same terms for the next season:—Held, that such second season commenced on the 2nd October, 1872, and terminated in July, 1873. *Montague* v. *Flockton*, 42 L. J., Ch. 677; L. R. 16 Eq. 189; 28 L. T. 580; 21 W. R. 668.

Refusal of Actor to Perform.]—Where a father signed a letter, in which he agreed that his daughter should perform at a theatre during the remainder of a season, and consented that she should enter into articles for three following seasons; an action may be maintained on the first part of the agreement for the refusal of the daughter to perform, but the latter part is a mere consent, and not an agreement. *Morris* v. *Paton*, 1 Car. & P. 189.

A declaration stated, that the defendant agreed that he and his wife should for three months perform as equestrians on the stage and in the ring in all entertainments which might be produced at A. or elsewhere under the direction of the plaintiff, in such parts as the plaintiff should require, and should attend all calls and rehearsals; that although the plaintiff had an establishment at P. under his direction for equestrian entertainments, and although the

plaintiff required the defendant and his wife to join the plaintiff's establishment at P. for the purpose of performing in entertainments to be produced there, and although a reasonable time for joining elapsed before action, yet the defendant and his wife did not join or perform in the entertainments to be produced at P. :—Held, good, inasmuch as it sufficiently appeared that the requisition by the plaintiff was to appear and perform as equestrians on the stage or in the ring. *Batty* v. *Melillo*, 10 C. B. 282 ; 1 L. M. & P. 571 ; 19 L. J., C. P. 362.

Held, also, that the breach was good, showing substantially an entire refusal to perform the contract. *Ib.*

Right of Actor to Notice — Condition Precedent.]—A performer who is called on to resume, in consequence of the illness of another, a part in which by previous performances she had acquired celebrity, is entitled to reasonable notice previously to the time of the performance ; such notice to be proportioned to the reputation at stake. *Graddon* v. *Price*, 2 Car. & P. 610 ; 31 R. R. 704.

Agreement "not to Perform elsewhere"—Injunction.]—Where W. agreed with L. that she would sing at his theatre during a certain period of time, and would not sing elsewhere without his written authority :—Held, on a bill filed to restrain her from singing for a third party, and granting an injunction for that purpose, that the positive and negative stipulations of the agreement formed but one contract, and that the court would interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract. *Lumley* v. *Wagner*, 1 De G. M. & G. 604 ; 21 L. J., Ch. 898 ; 16 Jur. 871. Overruling *Kemble* v. *Kean*, 6 Sim. 333.

—— **Implied Term.**]—D., an actor, contracted with the manager of a theatre to play at his theatre for twelve consecutive nights, commencing on a certain day, stipulating that he should be at liberty during those nights to perform (among other characters) three which were named ; but there was no express condition that he should not act elsewhere during the twelve nights. On the approach of the day appointed for commencing the engagement, D. declared that he would only act in a piece which could not be produced at the theatre ; and when told that was impossible, declared that he would not act at all, and advertised himself to act at another theatre on the night appointed for the commencement of his engagement :—Held, that an injunction might be granted to prevent D. acting during the twelve nights at any other theatre during the ordinary hours at which the theatre was open for public performance. *Webster* v. *Dillon*, 3 Jur. (N.S.) 432 ; 5 W. R. 867.

A manager of a London theatre engaged a provincial actor, desirous of appearing on the London stage, for two years. Though there was nothing expressed on the subject the court inferred an engagement on the part of the manager to employ the actor for a reasonable time, and on his part not to perform elsewhere. The manager having (under these circumstances) delayed the actor's appearance for five months, he broke his engagement and went to another theatre :—Held, that he had a right so to do, and that the manager was not entitled to an interlocutory injunction to prevent his performing there. *Fechter* v. *Montgomery*, 33 Beav. 22.

When an actor enters into a contract to perform at a particular theatre during a particular period, a negative stipulation to the effect that he will not perform elsewhere during that period, though not expressed, will be implied. *Montague* v. *Flockton*, 42 L. J., Ch. 677 ; L. R. 16 Eq. 189 ; 28 L. T. 580 ; 21 W. R. 668.

On the 16th August, 1871, F. agreed with M. to act for him :—Held that a negative clause was not necessary, but that M. could obtain an injunction to restrain F. from acting at any other theatre, although such acting might not prevent his acting for M. *Ib.*

—— **Music-hall Artiste.**]—The plaintiff K., a music-hall artiste, entered into contracts with each of the three defendant companies by which she agreed to perform for ten weeks certain, commencing at a certain date, every evening at the time notified by the management, in "her usual entertainment as mimic" in two of the contracts, "as singer and mimic" in the other, at a salary of 8*l.* per week in respect of each hall, subject to the following conditions (inter alia)—namely, "that the said artiste shall not perform before nor during this engagement at any theatre, music-hall, club, concert or place of entertainment within one mile of the said music-halls respectively." At the end of the contract was this clause : "In the event of the above-named artiste not observing these conditions in every respect, the company shall have the option of cancelling this agreement." During the fulfilment of the engagement she went to a smoking concert at a certain club one Sunday evening within a mile of these music-halls by invitation. Nobody except members and their guests were admitted to this club, and no admission money was paid. At this concert she sang a song and danced for a few minutes. The following night she performed at the halls, but at one of them the manager asked if she had sung at the club, and she replied she had done so. He told her it was against the rules, and that she must not do it again. The following night a letter was handed her cancelling the three engagements, and signed by the manager of the halls. These actions were then brought by the plaintiff to recover damages for wrongful dismissal, and for breach of contract :—Held, that the word "engagement" did not include Sundays, that day in such contracts being a dies non. That the performance was not within the meaning of the word "perform" as contemplated by the parties, for the plaintiff did not use her powers of mimicry. That, although singing was included in one contract, singing before a private audience such as the present case was not a performance. *Kelly* v. *London Pavilion*, 77 L. T. 215.

—— **After End of Season.**]—An opera singer, by an agreement dated only as to the year, 1870, agreed to sing at a theatre for the whole London season, and nowhere else in the kingdom of Great Britain pendant l'annee 1871, without the written consent of the employer. The salary did not extend beyond the season, which ended on the 5th August. On motion for an injunction to restrain him from singing elsewhere after the season was over but during 1871 :—

Held, that the court would not under the circumstances grant an injunction on an interlocutory application. *Mapleson* v. *Bentham*, 20 W. R. 176. Affirmed, *Ib.* 177, n.—L.JJ.

Agreement as to Rehearsals — Conditions precedent.]— A declaration alleged that the plaintiff, a singer, agreed with the defendant, director of the Italian Opera in London, that he would undertake the part of first tenor in the theatres, halls, and drawing-rooms in the United Kingdom during his engagement, to begin on the 30th of March, 1875, and terminate on the 13th of July, 1875, at a salary of 150*l.* per month. That the plaintiff should sing in concerts as well as operas, but should not sing anywhere out of the theatre in the United Kingdom from the 1st of January to the 1st of December, 1875, without the written permission of the defendant, except at more than fifty miles from London, and out of the season of the theatre. The defendant agreed to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals. Averment, that the plaintiff did not sing anywhere in the United Kingdom from the 1st of January, 1875, to the date of the commencement of the action; that the plaintiff was prevented by temporary illness from being in London before the 28th of March, 1875, on which day he arrived in London; and that, save as aforesaid, he was and is ready to perform his part of the contract. Breach, that the defendant refused to receive the plaintiff into his service. Plea, that the plaintiff was not in London six days before the commencement of the engagement ready for rehearsals, as was necessary for him to be, wherefore the defendant refused to receive him into his service:—Held, that the stipulation as to rehearsals was not a condition precedent; for that it did not go to the root of the matter, as the plaintiff was to sing in concerts at halls and drawing-rooms as well as at the theatre, and was also to abstain from singing within fifty miles of London from the 1st of January previously to the commencement of the engagement on the 30th of March, and that the plea was therefore bad. *Bettini* v. *Gye*, 45 L. J., Q. B. 209; 1 Q. B. D. 183; 34 L. T. 246; 24 W. R. 551.

Right of Proprietor to Rescind Contract—Inability to Perform.]—The plaintiff agreed in writing with the defendant to sing and play in the chief female part in a new opera about to be brought out at the defendant's theatre, at a weekly salary of 11*l.* for three months, provided the opera ran for that time, commencing on or about the 14th November. The first performance was announced for Saturday, the 28th of November, and no objection was raised by the plaintiff as to this delay. She attended several rehearsals, such attendance, though not expressed in the written engagement, being an implied part of it. Owing to delays of the composer, the music of the latter part of the opera was not in the hands of the defendant till a few days before the 28th of November, and the final rehearsals did not take place till the beginning of the last week. The plaintiff was taken ill, and was unable to attend any of the rehearsals in that week; and, it being uncertain how long her illness might continue, the defendant's manager made a provisional engagement with another artiste, Miss L., to study the part and be ready to take it if the plaintiff was unable. If she was not wanted, Miss L. was to receive a douceur; if she was called on to perform, she was to receive 15*l.* a week till the 25th of December, if the piece ran so long. The plaintiff continued too ill to attend the rehearsals or the first performance on Saturday, the 28th of November, or on the first three days of the next week; Miss L. accordingly performed on those days. On Thursday, the 4th of December, the plaintiff was well enough to perform and tendered her services, which the defendant refused to accept; on which she brought an action for wrongful dismissal. The jury found that the employment of Miss L. by the defendant under the circumstances was reasonable:—Held, that the plaintiff's inability to perform on the opening and early performances went to the root of the matter, and justified the defendant in rescinding the contract. *Poussard* v. *Spiers*, 45 L. J., Q. B. 621; 1 Q. B. D. 410; 34 L. T. 572; 24 W. R. 819.

Action for Salary — Agreement by Member on behalf of Orchestra.]—The plaintiff, acting on behalf of the members of an orchestra to which he himself belonged, signed a proposal "on behalf of the members of the orchestra" to continue their services, provided the defendant would guarantee a certain salary then due to them. The defendant accepted this proposition, but failed to pay the salary due. The plaintiff alone brought an action for the whole money due to himself and the rest, and stated the contract to be with himself and the rest. The jury found that he acted on behalf of himself as well as of the rest:—Held, that the contract was joint, and that he could not recover. *Lucas* v. *Beale*, 10 C. B. 739; 20 L. J., C. P. 134.

—— **Proof of Theatrical Usage.**]—An actress having been engaged by a manager of a theatre, for three years, at a salary of 5*l.*, 6*l.*, and 7*l.* per week, in those years respectively:—Held, that this contract being ambiguous, parol evidence was admissible to show, that, under such a contract, it was the theatrical usage to pay a proportion of salary for those nights only during which the theatre was open for performance. *Grant* v. *Maddox*, 15 M. & W. 737; 16 L. J., Ex. 227.

—— **Arrears are not Work and Labour.**]—A performer at a theatre, who is to be paid for nights of performance on which he does not perform, as well as for those on which he does perform, should not declare for work and labour, but for arrears of salary as a hired performer. *Frazer* v. *Bunn*, 8 Car. & P. 704.

Acting Manager—Privileges of.]—An acting manager cannot, under the words "usual privileges of his situation," claim, as matter of right, the use of a private box, and the power of giving orders of admission, though both are usually allowed as matter of courtesy. *Lacy* v. *Osbaldiston*, 8 Car. & P. 80.

—— **Right of Proprietor to Dismiss.**]—If the acting manager of a theatre conducts himself in such an improper manner as to make it injurious to the interests of the theatre to keep him, the lessee or proprietor may lawfully dismiss him. *Lacy* v. *Osbaldiston*, 8 Car. & P. 80.

Evidence as against Proprietor.]—What a

stage manager says at the close of a season, in his farewell address from the stage, as to the success of the theatre, is evidence against the lessee or proprietor upon that subject. *Lacy* v. *Osbaldiston*, 8 Car. & P. 80.

Lease of Opera House—Covenants therein—When broken.]—A lease of the opera house contained covenants on the part of the lessee, first, not to use the house for any but purposes of a theatrical kind, and to use his best endeavours to improve the house for that purpose. The house was closed at the end of the season of 1852, and was not opened at all during the following year:—Held, that this was not a breach of the covenant. *Croft* v. *Lumley*, 6 H. L. Cas. 672; 27 L. J., Q. B. 321; 4 Jur. (N.S.) 903; 6 W. R. 523.

And a second covenant was, not to charge nor incumber the theatre, or the income thereof, or the terms hereby granted, by mortgaging the same, or granting any rent-charges, or any other incumbrance whatever." The lessee was greatly in debt. In respect of his debts, he granted warrants of attorney, one of which was to secure payment of bills not due, and another provided that it was a concurrent security, with an indenture therein recited, that judgment was to be entered up when the grantee thought fit, and to be registered; and judgments were signed against him on those warrants of attorney, and upon judges' orders and registered:—Held, that no breach of this covenant had been committed. *Ib.*

Relating to Unlicensed Theatres.]—*See cases*, ante, col. 30.

Contract with Dramatic Author.]—Contract with the proprietors of a theatre not to write dramatic pieces for any other, legal; as similar restraint of a performer would be; not resembling a covenant restraining trade generally. *Morris* v. *Coleman*, 18 Ves. 437; 11 R. R. 230.

Partnership.]—The court will entertain a bill to compel partners to act according to the provisions of instruments into which they have entered; and where it will interfere for that purpose, will take care that the decree shall not be defeated by anything done in the meantime. Thus, where, in 1812, the then proprietors of Covent Garden Theatre executed a deed, by which they covenanted and agreed that the profits of the theatre should be exclusively appropriated to particular purposes, and that the treasurer for the time being should be irrevocably directed so to apply the profits; and in 1822, parties then entitled under the former proprietors, to seven-eighths of the theatre, entered into an agreement, which provided, in some respects, for a different application of the profits, and otherwise affected the rights of a party interested in the remaining eighth, who was not consulted on the subject; the court, upon a bill filed by that party, for the specific performance of the covenants and agreements contained in the deed of 1812, appointed a receiver. *Const* v. *Harris*, Turn. & R. 496; 24 R. R. 108.

Partnership in the opera house dissolved by the conduct of the parties making it impossible to carry it on upon the terms stipulated. Decree accordingly for sale of the whole concern; restraining the managing partner from acting with liberty to either party, and to lay proposals before the master for management until sale. *Waters* v. *Taylor*, 2 Ves. & B. 299; 13 R. R. 91.

4. TORTS RELATING TO.

Enticing Actress away from Theatre.]—A count stated a contract between the plaintiff and W. that she would perform at the plaintiff's theatres, in operas, for three months, on certain terms, and that she would not during that time sing or use her talents elsewhere than in his theatre. Averment, that the defendant maliciously intending to injure the plaintiff, and to prevent W. from performing according to her contract, whilst the agreement was in force, and before the commencement of the period for which W. was engaged, wrongfully and maliciously enticed and procured W. to refuse to sing or perform at the theatre, and to depart from and abandon her contract with the plaintiff, and all service thereunder; by means of which enticement and procurement W. unlawfully and wrongfully refused to perform her contract. Another count stated that W. was hired and engaged by the plaintiff to sing and perform at his theatre for a certain time as his dramatic artiste, for reward, and had become and was such dramatic artiste, and that the defendant, maliciously intending to injure him, enticed and procured her to depart from his employment:—Held, that the action was maintainable. *Lumley* v. *Gye*, 2 El. & Bl. 216; 22 L. J., Q. B. 463; 17 Jur. 827; 1 W. R. 432.

Libel on Performer—Action by Manager.]—The proprietor of a theatre cannot maintain an action against a man for a libel on one of his performers, by reason whereof she was deterred from appearing on the stage. *Ashley* v. *Harrison*, Peake, 194; 1 Esp. 48; 3 R. R. 686.

Assaulting Performer—Action by Manager for Loss of Service.]—An action with a per quod servitium amisit will not lie by the manager of a place of public entertainment against a person for beating one of the performers, who is thereby prevented from performing. *Taylor* v. *Neri*, 1 Esp. 386.

Trespass to Sub-Lessee's Boxes and Stalls.]—The lessee of a theatre held it under a lease in which he covenanted not to convert it to any other use than for acting or performing operas or theatrical entertainments. He demised certain boxes and stalls to a sub-lessee, reserving power of access for the purpose of repairing; the sub-lessee covenanted only to use the same for the purpose of viewing and hearing the operas and other entertainments. The underleases contained covenants for quiet enjoyment. The lessee demised the theatre for a term of three months for the purpose of holding religious meetings. To enable these meetings to be held, the stalls were covered with a flooring, the division between the boxes removed, and other temporary structural alterations made:—Held, that a trespass had been committed by the lessee and persons claiming under him in thus entering upon the sub-lessee's boxes and stalls without his license, and the conversion of the theatre for other than theatrical purposes was a derogation from the grant and a breach of the covenant for quiet enjoyment. *Leader* v. *Moody*, 44 L. J., Ch. 711; L. R. 20 Eq. 145; 32 L. T. 422; 23 W. R. 606.

5. Rights of Spectators.

To Hiss or Applaud.]—It is no riot of the spectators in a theatre to express their feelings spontaneously by applauding or hissing the piece or the actors. *Clifford* v. *Brandon*, 2 Camp. 358; 11 R. R. 731.

Conspiracy to Drive Actor from the Stage.]—The public, who go to a theatre, have a right to express their free and unbiassed opinions of the merits of the performers who appear upon the stage; but parties have no right to go to a theatre by a preconcerted plan, to make such a noise that an actor, without any judgment being formed of his performance, should be driven from the stage; and, if two persons are shown to have laid a preconcerted plan to deprive a person who comes out as an actor of the benefits which he expected to result from his appearance on the stage, they are liable for a conspiracy. *Gregory* v. *Brunswick* (*Duke*), 1 Car. & K. 24. See *S. C.*, 6 Man. & G. 205; 1 D. & L. 518; 6 Scott (N.R.) 809.

In an action for conspiracy to hiss an actor, the defendant cannot, under the general issue, give in evidence libels published by the plaintiff, with a view of showing that the plaintiff was hissed on account of those libels, and not by reason of any conspiracy of the defendants. *Ib.*

Payment for Seats—No Room—Assault.]—If three persons are told on entering a theatre that there is room, when in fact there is not, their proper course is to leave the theatre, and demand the return of their money; and such persons are not justified in getting into a private box in the theatre, and if they do, the proprietor may remove them, using no more force than is necessary; and if in going out of the theatre one of them strikes a servant of the proprietor's in the presence of a constable, such constable will be justified in taking all the three persons into custody, if the jury is satisfied that they were acting with a common purpose. *Lewis* v. *Arnold*, 4 Car. & P. 354.

J. M.

THIRD PARTY PROCEDURE.

See PRACTICE.

THREATS AND THREATENING LETTERS.

See CRIMINAL LAW—PATENT.

TIMBER.

See WASTE AND TIMBER.

TIME.

1. *Computation of.*
   a. Generally, 44.
   b. Days, 44.
   c. Week, 51.
   d. Months, 51.
   e. Terms and Years, 55.
   f. Particular Words as to, 56.
   g. Reasonable Time, 59.
2. *Extension of.*—*See* PRACTICE—APPEAL.
3. *For Appeal.*—*See* APPEAL.
4. *When Essence of Contract.*—*See* SPECIFIC TITLES.
5. *Sunday.*—*See* SUNDAY.

1. Computation of.

a. Generally.

Relation Back—Issuing of Writ.]—To issue a writ of summons is not a judicial act, and the court may inquire at what period of the day it was issued. It appeared from the statement of claim that the writ of summons in the action was issued on the 2nd of July, and that the cause of action arose on the same day, but before the issue of the writ. The statement of claim was demurred to on the ground that the issuing of the writ was a judicial act, and must, therefore, be presumed to have taken place at the earliest moment of the day, before the cause of action accrued:—Held, that the court could inquire whether or not the writ was in fact issued after the cause of action accrued. *Clarke* v. *Bradlaugh*, 51 L. J., Q. B. 1; 8 Q. B. D. 63; 46 L. T. 49; 30 W. R. 53; 46 J. P. 278—C. A.

—— **Signing Judgment.**]—Judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done. *Wright* v. *Mills*, 4 H. & N. 488; 28 L. J., Ex. 223; 5 Jur. (N.S.) 771; 7 W. R. 498.

Therefore where judgment was signed at the opening of the office at its usual hour, eleven a.m., the defendant having died at half-past nine a.m. on the same morning:—Held, regular. *Ib.*

Time for Sitting of Court—Greenwich Time.]—The time appointed for the sitting of the court must be understood as the meantime at the place where the court sits, and not Greenwich time, unless it is so expressed. *Curtis* v. *Marsh*, 3 H. & N. 866; 28 L. J., Ex. 36; 4 Jur. (N.S.) 1112.

b. Days.

Hours.]—A policy upon a ship contained a printed clause covering her "until she had moored at anchor twenty-four hours in good safety," and also a written stipulation extending the period of the risk "during thirty days' stay in her last port of discharge":—Held, that the thirty days were not substituted for the twenty-four hours, and that they did not begin to run until the twenty-four hours had elapsed. *Mercantile Marine Insurance Co.* v. *Titherington*, 5 B. & S. 765; 34 L. J., Q. B. 11; 11 Jur. (N.S.) 62; 11 L. T. 340; 13 W. R. 141.

Clear Days.]—Where there was a right of forfeiture of shares, on giving ten clear days' notice:—Held, that a notice to forfeit "on Monday the

9th" was insufficient, the 9th being on a Friday. *Watson* v. *Eales*, 23 Beav. 294.

Days Inclusive, or Exclusive.]—There is no general rule, in computing time from an act or event, that the day is to be inclusive or exclusive; it depends on the reason of the thing according to the circumstances. *Lester* v. *Garland*, 15 Ves. 248; 10 R. R. 68.

The twenty-one days for which the sheriff must have held the debtor's goods under an execution in order to constitute the act of bankruptcy created by s. 1 of the Bankruptcy Act, 1890, are exclusive of the day upon which the seizure takes place. *North, In re, Hasluck, Ex parte*, 64 L. J., Q. B. 694; [1895] 2 Q. B. 264; 14 R. 436; 72 L. T. 854; 59 J. P. 724; 2 Manson, 326—C. A.

Where an arbitrator enlarges the time for making an award till a given day, the time is to be computed as including that day. *Kerr* v. *Jeston*, 1 D. (N.S.) 538.

Where a certain number of days' notice of an intention to do an act is required, the day of the service of the notice is excluded from the computation, and that on which the act is to be done is included,—unless there are some special provisions requiring a different mode of computation. *Rex* v. *Cumberland JJ.*, 4 N. & M. 378; 1 H. & W. 16; 4 L. J., M. C. 72.

"Within" certain Number of Days after.]—Where a statute empowers justices, on information laid at special sessions, to make orders on specified parties for the payment of money, notice of the intended information being first given to such parties, and empowers them to appeal, giving notice of such appeal within six days after such order shall be made or given, the time for notice of appeal runs from the making of the order, not from the service. *Reg.* v. *Derbyshire JJ.*, 7 Q. B. 193.

A conviction having taken place under the Turnpike Act, on Monday, the 2nd of May, and notice of appeal served on the following Monday, the 9th of May:—Held, that it was too late, for that it was not "within six days after the cause of complaint," within 4 Geo. 4, c. 95, s. 87. *Reg.* v. *Middlesex JJ.*, 2 D. (N.S.) 716; 12 L. J., M. C. 59; 7 Jur. 396.

In construing the 2 Will. & M. stat. 1, c. 5, s. 2, which authorises the sale of goods distrained within five days next after the taking, the days must be so calculated as the rule now is in other cases, inclusively of the last, and exclusively of the day of taking. *Robinson* v. *Waddington*, 13 Q. B. 753; 18 L. J., Q. B. 250; 13 Jur. 537.

Under 3 Geo. 4, c. 39, which makes void, as against the assignees of a bankrupt, any warrant of attorney executed by him unless filed "within twenty-one days after execution," the days are to be reckoned exclusively of the day of execution; and a warrant therefore executed on the 9th is duly filed on the 30th of the month. *Williams* v. *Burgess*, 4 P. & D. 348; 12 A. & E. 635; 9 D. P. C. 544; 10 L. J., Q. B. 10.

D. and L., being both domiciled in England, left London for Scotland on the evening of the 30th June, 1870, for the purpose of contracting a clandestine marriage. They arrived at Edinburgh between five and six on the following morning, July 1st, and lived in Scotland until the 21st July, when they contracted an irregular marriage before the registrar at Edinburgh about 11.30 on the morning of that day. By 19 & 20 Vict. c. 96, s. 1, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage:—Held, that, according to the mode of computing time by Scotch law, the parties had not lived the prescribed time in Scotland, and that therefore the marriage was invalid. *Lawford* (otherwise *Davies*) v. *Davies*, 47 L. J., P. 38; 4 P. D. 61; 39 L. T. 111; 26 W. R. 424.

"Until" a certain Day.]—A trader having petitioned the court of bankruptcy for arrangement under 12 & 13 Vict. c. 106, s. 211, praying that "his person and property might be protected from all process until further order," the commissioner made an order, which, after reciting the petition, proceeded thus, "I hereby grant such protection, and order that the person and property of the trader be protected from process until the 29th July next"; and the court appointed a meeting for twelve o'clock on that day, for the creditors to assent to or dissent from the arrangement proposed by the trader:—Held, that the word "until" in the order must be understood inclusive of the 29th July, the day until which the protection was given. *Backhouse* v. *Mellor*, 4 H. & N. 116; 28 L. J., Ex. 141; 5 Jur. (N.S.) 175.

A party insured his goods against fire with an insurance company by a policy for six months, whereby it was provided that, from the 14th of February, 1868, until the 14th of August, 1868, and for so long after as the assured should pay the sum of 225 dollars, and the company, at the time above mentioned, accept the same, the funds should be liable to make good losses by fire to the goods. The assured intended to keep up this policy, and the company knew his intention, but the renewal premium was not demanded or paid on the 14th of August, 1868. On that day a fire took place which destroyed the goods. The course of business between the assured and the company was, that the company should come to the assured and demand the renewal premium:—Held, that under the terms of the policy the whole of the 14th of August was protected; and that the company was therefore liable for loss caused by a fire happening on that day. *Isaacs* v. *Royal Insurance Co.*, 39 L. J., Ex. 189; L. R. 5 Ex. 296; 22 L. T. 681; 18 W. R. 982.

"Not less than" Fourteen Days.]—An interval of not less than fourteen days which is to elapse between two acts done in an interval of fourteen clear days exclusive of the days on which such acts were to be done. *Railway Sleepers Supply Co., In re*, 54 L. J., Ch. 720; 29 Ch. D. 204; 52 L. T. 731; 33 W. R. 595.

So many Days "at the least" before.]—Where an act is required by a statute to be done so many days at least before a given event, the time must be reckoned excluding both the day of the act and that of the event. *Reg.* v. *Shropshire JJ.*, 8 A. & E. 173.

Where an act directed that seven days' notice at least should be given of an appeal:—Held, that the meaning was, that so many clear days should be given; and, therefore, the day on which the notice was given should be excluded from the computation. *Reg.* v. *Middlesex JJ.*,

2 New Sess. Cas. 73 ; 3 D. & L. 169 ; 14 L. J., M. C. 139 ; 9 Jur. 758.

The 4 & 5 Will. 4, c. 51, requires that a summons to appear before justices, and answer a summons, shall be served ten days, at least, before the hearing. A party was summoned on the 20th day of the month to appear on the 30th, and was convicted for default of appearance :—Held, that the justices had no jurisdiction, as the ten days must be reckoned exclusively of the day of serving the summons and that of convicting. *Mitchell* v. *Foster*, 4 P. & D. 150 ; 12 A. & E. 472 ; 9 D. P. C. 527 ; 9 L. J., M. C. 95.

By a local act it was enacted, that no meeting of the commissioners should be held for putting in execution any of its powers, unless previous notice should be given in some local newspaper, published and circulated in the county, at least sixteen days before such meeting. Notice of a meeting of the commissioners to be held on the 12th February was inserted in a county newspaper, dated the 27th January, on which day the notice itself was also dated, but the newspaper was printed and partially circulated on the 26th January :—Held, that the notice was not given until the 27th of January, and therefore was not given "at least sixteen days before such meeting," in pursuance of the act, the sixteen days being reckoned exclusively of the day of notice and the day of meeting. *Reg.* v. *Aberdare Canal Co.*, 14 Q. B. 854 ; 19 L. J., Q. B. 251 ; 14 Jur. 735.

A notice to be given "three days at the least before the commencement of the term," must be given exclusive of the day on which the notice is given, and of the first day of the term to which it relates. *Prangley, In re*, 4 A. & E. 781 ; 6 N. & M. 421 ; 2 H. & W. 65 ; 6 L. J., K. B. 259.

Fractions of a Day.]—A pauper entered upon the occupation of premises at twelve o'clock on the 30th September, 1850, and on the same evening signed a memorandum, which stated that the tenancy was for one year, commencing on the 30th September instant. He continued in possession until the 29th September, 1851, about four o'clock in the afternoon of which day he gave up possession to an incoming tenant :—Held, that the fractions of the days on which the pauper entered and gave up possession were not to be regarded, and therefore he had occupied the premises "for one whole year at the least," within 1 Will. 4, c. 18, s. 1. *Reg.* v. *St. Mary, Warwick*, 1 El. & Bl. 816 ; 1 C. L. R. 192 ; 22 L. J., M. C. 109 ; 17 Jur. 551 ; 1 W. R. 307.

Where an adjudication in bankruptcy and appointment of an official assignee take place at an earlier period of the same day on which a writ of extent is issued against the bankrupt for a crown debt, a fraction of a day cannot be taken in account where the conflict is between the right of the crown and the right of the subject, and the title of the crown must prevail against the right of the subject. *Edwards* v. *Reg.*, 9 Ex. 628 ; 2 C. L. R. 590 ; 23 L. J. Ex. 165 ; 18 Jur. 384 ; 2 W. R. 333—Ex. Ch.

Where it is necessary to show which of two events first took place, the court may enter into the question of the fraction of a day ; therefore, the court will regard the particular hour at which a defendant dies, so as to see whether execution issued previously to his demise. *Clinch* v. *Smith*, 8 D. P. C. 337.

By 20 Vict. c. 5, s. 8, if any person shall keep a dog without having in force a licence granted under this act, he shall forfeit 5*l*. Sect. 5 provides that every licence shall commence on the day on which the same shall be granted :—Held, that "on the day on which" must be taken to mean "at and from the time when," and that it is no answer to a charge of having kept a dog without a licence on a particular day to produce a licence taken out on that day, if it is proved that the licence was applied for later in the day than the detection of the offence charged. *Campbell* v. *Strangeways*, 47 L. J., M. C. 6 ; 3 C. P. D. 105 ; 37 L. T. 672. *See also Cases ante*, col. 44.

In an arbitration under the Building Societies Act, 1874, one of the parties to the arbitration obtained at chambers an order nisi calling upon the arbitrators to show cause why they should not be required to state a case for the opinion of the court. Later on the same day but without having had notice of the order nisi the arbitrators made and signed their award :—Held, that the jurisdiction of the court was not ousted and that the order nisi was rightly made absolute. *Tabernacle Permanent Building Society* v. *Knight*, 62 L. J., Q. B. 50 ; [1892] A. C. 298 ; 67 L. T. 483 ; 41 W. R. 207 ; 56 J. P. 709—H. L. (E.)

Fraction of a day to support a commission of bankruptcy, by evidence that it was committed before the commission sealed on the same day. *Dufrene, Ex parte*, 1 Ves. & B. 54.

Fraction of a day allowed, in support of a commission of bankruptcy, by admitting evidence, that the act of bankruptcy, though on the same day, was previously to the issuing, i.e. the awarding and sealing the commission. *Wydown's Case*, 14 Ves. 80.

Under 6 Geo. 4, c. 16, s. 81, where the computation of time is to be from an act done, the day when such act is done is to be included. For some purposes the court notices the fraction of a day. *Farquhar, Ex parte*, Mont. & M'Ar. 7.

Fraction of a day in notices to prevent reputed ownership. *Bignold, Ex parte, Newton, In re*, 3 Mont. & Ayr. 13.

Sundays—When Reckoned.]—The general rule of law is, that "days" mean "consecutive days," except Sunday is the first or the last day ; but in commercial cases it is sometimes otherwise, because mercantile contracts are to be construed with reference to mercantile usage. *Brown* v. *Johnson*, Car. & M. 440 ; 10 M. & W. 331 ; 11 L. J., Ex. 373.

A charterparty by which it was agreed that a ship should receive on board a cargo of coals, and proceed with them to Constantinople (and, or) Odessa, contained these words : "The vessel to be loaded in Liverpool in fourteen days, and to be discharged, weather permitting, at not less than twenty-five tons per working day (holidays excepted), the days to commence on the ship's being in turn and ready to deliver ; all days above the said days to be paid demurrage at the rate of 5*l*. sterling per day" :—Held, that the words "holidays excepted" did not apply to the fourteen days, within which the vessel was to be loaded ; and therefore, that, although two Sundays occurred within the fourteen days, still that was the period of fourteen days only within which she was to be loaded. *Niemann* v. *Moss*, 29 L. J., Q. B. 206 ; 6 Jur. (N.S.) 775.

In reckoning the twenty-one days within which an appeal must be entered, the computation must be made exclusive of Sundays. *Hicks, Ex parte, Ball, In re*, 44 L. J., Bk. 106 ; L. R. 20 Eq. 143 ; 32 L. T. 432 ; 23 W. R. 852.

And in reckoning the twenty-one days allowed by r. 143 of the Bankruptcy Rules of 1870 for appealing, Sundays are, by virtue of the rule in bankruptcy of 26th of May, 1873, not to be taken into account. *Hall, Ex parte, Alven, In re*, 50 L. J., Ch. 400; 16 Ch. D. 501; 44 L. T. 8; 29 W. R. 298—C. A.

Since the Judicature Acts the time for appealing to the court of appeal from orders made by the chief judge in bankruptcy is regulated by the Rules of Court, 1875. *Viney, Ex parte, Gilbert, In re*, 46 L. J., Bk. 80; 4 Ch. D. 794; 36 L. T. 43; 25 W. R. 364—C. A.

Therefore, in calculating the twenty-one days allowed for appealing, Sundays are not to be excluded, and the material date is, not that of entering the appeal with the registrar, but that of service of notice of the appeal on the respondent. *Ib.*

The two days' notice of countermand is two business days, and therefore, notice on Saturday for Monday is insufficient. *Rose* v. *Macgregor*, 12 M. & W. 517; 1 D. & L. 583; 13 L. J., Ex. 110; 8 Jur. 86.

Sunday is to be included in the three days within which the appellant is to transmit a case to the court. *Pennell* v. *Uxbridge Overseers*, 31 L. J., M. C. 92; 8 Jur. (N.S.) 99; 5 L. T. 685; 10 W. R. 319.

Appearance on the 26th April; order on the 8th May, staying proceedings until security for costs should be given; security given on the 4th December; cause set down pro confesso on the 24th January, the 23rd being Sunday:—Held, irregular, the defendant having the whole of the 24th to answer. *White* v. *White*, 12 Ir. Eq. R. 425.

In the number of days for notice of the time and place of examining a witness, an intermediate Sunday is to be reckoned. *M'Intosh* v. *G. W. Ry.*, 1 Hare, 328; 11 L. J. Ch. 283; 6 Jur. 454.

A bill of sale through inadvertence not being registered within the time limited by the Bills of Sale Act, 1879, leave was given on the ex parte application of the grantee to register within three days, and the bill of sale was registered on the fourth day from the order, reckoning an intervening Sunday:—Held, that Sunday was not to be counted in the three days limited by the order for registration, and that therefore the registration had been effected within the time prescribed by that order. *Parke, In re*, 13 L. R., Ir. 85.

Sunday will reckon as one day. *Bumps, Ex parte*, 5 D. P. C. 713; W. W. & D. 350.

The 15th April, which, by 11 Geo. 4 & 1 Will. 4, c. 70, s. 6, is constituted the first day of Easter Term, falling on Easter Sunday, a delivery three days before the 18th April, of the notices for the admission of an attorney, was sufficient. *Bayley, Ex parte*, 6 D. P. C. 516; 1 W. W. & H. 175; 2 Jur. 326.

—— **When Last Day for doing an Act.**]—Sunday is to be computed in the three days allowed for an application to justices to state a case for the opinion of one of the superior courts, under 20 & 21 Vict. c. 43, s. 2, although it is the last day. *Peacock* v. *Reg.*, 4 C. B. (N.S.) 264; 27 L. J., C. P. 224; 6 W. R. 517. S. P., *Wynne* v. *Ronaldson*, 12 L. T. 711; 13 W. R. 899.

So in computing the two days allowed by the Nuisances Removal Act (18 & 19 Vict. c. 121), s. 40, to an appellant for entering into recognisance after giving notice of appeal, Sunday is to be reckoned as one, though it falls on the last day. *Simkin, Ex parte*, 2 El. & El. 392; 29 L. J., M. C. 23; 6 Jur. (N.S.) 144.

But under 18 & 19 Vict. c. 67 (the Bills of Exchange Act), Sunday was not included in the days for appearance, if it was the last day, as r. 174, H. T. 16 Vict. applied. *Lewis* v. *Calor*, 1 F. & F. 906.

In the computation of time, where the last day falls on a Sunday or a holiday, and the act is to be done by the court, and not by the party, ex. gr. the sealing of a writ, it may be done on the next practicable day. *Hughes* v. *Griffith*, 13 C. B. (N.S.) 324; 32 L. J., C. P. 47.

A warrant under 14 & 15 Vict. c. 52, was issued by a county court judge, upon an affidavit that the defendant was about to go abroad. The seven days limited for issuing a capias expired on Good Friday:—Held, that a capias issued on the following Wednesday was in time, that being the earliest day on which it was practicable to issue the writ. *Ib.*

In calculating the time within which to serve notice of motion by way of appeal from an order of a judge at chambers, Sundays cannot be excluded; so that when the last day on which notice of motion could be served was a Sunday, and notice of motion was not given until the Monday, it was held that the notice was out of time. *Chambon* v. *Heighwey*, 54 J. P. 520.

When the last of the eight days, limited by Ord. LIV. r. 6, for appealing from a decision at chambers expires on a Sunday, the appellant has the following Monday for appealing. *Taylor* v. *Jones*, 45 L. J., C. P. 110; 34 L. T. 131.

If the eighth day after service of an order nisi for confirming a report is a Sunday, that day is not to be reckoned. *Milburn* v. *Lister*, 5 Sim. 565.

By a judge's order, debt and costs were to be paid by instalments of 2*l.* on the 25th of each month. The 25th happened to be on a Sunday; the instalment was offered on Monday and refused, and judgment was signed on the following day. The court set aside the judgment, holding that the defendant had the whole of Monday to pay the money. *Morris* v. *Barrett*, 7 C. B. (N.S.) 139; 29 L. J., C. P. 102; 6 Jur. (N.S.) 609; 1 L. T. 38; 8 W. R. 45.

In computing the eight days allowed by 15 & 16 Vict. c. 76, s. 27, to a defendant who is proceeded against by a writ of summons specially indorsed, Sunday must be reckoned as one, whether it falls on the last day or not. *Rowberry* v. *Morgan*, 2 C. L. R. 1026; 9 Ex. 730; 23 L. J., Ex. 191; 18 Jur. 452; 2 W. R. 431.

—— **Promissory Note due on.**]—The plaintiff in the action sued on a promissory note at three months, dated the 11th March, 1874; the note was therefore primâ facie due on the 14th June of the same year. The 14th of June was a Sunday. The writ in the action bore date the 14th June, 1880, which was a Monday. It was contended that the right of action was barred by the statute of limitations:—Held, that the action was barred, and that, as the mercantile usage in the matter of days of grace had the effect of law, it had the like effect on the custom of bills and notes falling due on a Sunday becoming payable on the previous Saturday, and that Ord. LVII. r. 3 of the Judicature Act of 1875 did not apply to such a case as the present one, as it was not intended to extend the time

fixed by the statute of limitations. *Morris* v. *Richards*, 45 L. T. 210; 46 J. P. 37.

—— **Under Rules of Supreme Court, 1883.**]—*See* Ord. LXIV. rr. 2 and 3.

—— **Other Matters relating to.**]—*See* SUNDAY.

c. Week.

What is.]—A week's order to examine means exclusive of that day sennight. Otherwise in Irish courts. *Donovan* v. *Keatinge*, 2 Moll. 327.

The answer became sufficient on the 2nd August, and the four weeks allowed from that time to amend the bill, extra the vacation, expired on the 18th November. The defendant served notice of motion to dismiss at half-past seven o'clock on the evening of the 18th November:—Held, that the four weeks did not expire till twelve o'clock at night, and consequently that the notice of motion was given before the plaintiff was in default. Motion dismissed with costs. *Preston* v. *Collett*, 20 L. J. Ch. 228.

d. Months.

In Statutes.]—Before 13 & 14 Vict. c. 21, when the word "month" was used in a statute, without the addition of "calendar," or any other words to show that the legislature intended "calendar," it was understood to mean a lunar month. *Lacon* v. *Hooper*, 6 Term Rep. 224; 1 Esp. 246.

The six months given to tenants to redeem under the statutes of ejectment for non-payment of rent, are calendar months, and the day on which the habere is executed is not to be included in the calculation. Where a right would be devested or a forfeiture incurred by including the day of the act done, the computation will be made exclusive of it. *Dowling* v. *Foxall*, 1 Ball & B. 193, 196.

The six months for redemption given to the tenant, after the execution of the habere, by 4 Geo. 1, c. 5, are calendar and not lunar months. *Devereux* v. *Bradstreet*, Wall. Lyn. 338.

The nine months allowed by the stat. 8 Geo. 1, c. 2, s. 4, to a mortgagee of an evicted lease to redeem, are calendar months. *Biddulph* v. *St. John*, 2 Sch. & Lef. 521.

Under the act against stock-jobbing, the six months in the first section means lunar months, and no discovery lies where the cause of action arose prior to the expiration of six lunar months. *Windale* v. *Fall*, 3 Bro. C. C. 11.

Section 23 of 28 Geo. 3, c. 37 provided that any action brought against any person for anything done by him in pursuance of the act should be commenced within three months next after the matter or thing done:—Held, that the three months were to be computed as lunar and not as calendar months. *Crook* v. *McTavish*, 1 Bing. 307; 8 Moore, 265; 1 L. J. (o.s.) C. P. 107.

Months ought to be considered in equity as calendar months; but in acts of parliament it means lunar months, except in the case of tempus semestre, with regard to the lapse of livings, and other instances of six months, allowed to prohibition. *Franco* v. *Alvares*, 3 Atk. 346.

In Legal Proceedings.]—In most orders of the courts of law and equity "month" means a lunar month; and it so means in an order for payment of money. *Att.-Gen.* v. *Newbury Corporation*, C. P. Cooper, 383.

Three months' time to plead meant three lunar months. *Soper* v. *Curtis*, 2 D. P. C. 237; 3 L. J., Ex. 61.

Under an order permitting a plaintiff to amend within a month, the amendment must be made within a lunar month. *Creswell* v. *Harris*, 2 Sim. & S. 476; 4 L. J. (o.s.) Ch. 94.

In legal matters, a month means a lunar month; but in commercial matters, a month always means a calendar month. *Hart* v. *Middleton*, 2 Car. & K. 9.

Condition in Will.]—Limitation in a will that the tenant for life, who should be of full age, should reside at the house for six months in every year, to be computed from January to January, or in default forfeit 1,000*l.*:—Held, to mean a personal presence at the house for the period of six lunar months. *Walcot* v. *Botfield*, 2 Eq. R. 758; 1 Kay, 534; 18 Jur. 570; 2 W. R. 393.

In Contracts.]—The word "month" may mean lunar or calendar month, according to the intention of the contracting parties; therefore, where, upon a sale of land on the 24th of January, it was agreed by the conditions of sale that an abstract of the title should be delivered to the purchaser within a fortnight from the date thereof, to be returned by him at the end of two months from the said date, and that a draft of the conveyance should be delivered within three months from the said date, to be redelivered within four months from said date, and the purchase to be completed on the 24th of June, making a period of precisely five calendar months from the date of the sale and conditions; the word "months" was held to mean calendar and not lunar months, by reference to the whole period fixed for the completion of the contract. *Lang* v. *Gale*, 1 M. & S. 111.

The word "month" in all contracts, except there is some evidence to show that calendar month is meant, means lunar month, except in mercantile transactions in the city of London, where month means calendar month. *Turner* v. *Barlow*, 3 F. & F. 946.

Therefore, where an artist agreed to engrave a copy of a picture in twenty-one months from the date of its receipt by him, having it in his possession at intervals as might be agreed upon for fourteen months for that purpose:—Held, that the word "months" in this contract meant lunar months in the absence of evidence to the contrary, and that such a work was not a mercantile transaction to bring it within the custom in the city of London, to construe the word "month" to mean calendar month in mercantile transactions. *Ib.*

Where parties contract that the purchase of lands shall be completed within so many months, calendar, and not lunar, months are intended. *Hipwell* v. *Knight*, 1 Y. & Coll. 401; 4 L. J., Ex. Eq. 52.

If a clerk and foreman is engaged at a weekly salary, and to have two suits of clothes per annum, it is a yearly hiring within s. 48 of 6 Geo. 4, c. 16. The words "six months" in s. 48 mean "six lunar months." *Humphreys, Ex parte*, Mont. & Bli. 413; 3 Deac. & C. 114; 2 L. J., Bk. 71.

An auctioneer was employed to sell land, under a written contract that he should be paid one per cent. commission; but if the estate was not sold

within two months after the day of the auction, only one-half per cent.:—Held, that this by itself meant two lunar months, unless there was evidence that the parties meant calendar months. *Simpson* v. *Margitson*, 11 Q. B. 23; 17 L. J., Q. B. 81; 12 Jur. 155.

The plaintiff hired chattels of the defendant by a hiring agreement, by which he agreed to pay him a certain sum once a week, the hiring to be for twenty-six months from the date of the first payment. The plaintiff afterwards gave the defendant a bill of sale of the same and other chattels to secure money owed by him to the defendant. An account was ordered of the dealings between the plaintiff and defendant, the bill of sale to be a security for what should be found due on such account. The defendant claimed that in taking the account the twenty-six months should be taken to be calendar, and not lunar months:—Held, that the months must be taken to be lunar. *Hulton* v. *Brown*, 45 L. T. 343; 29 W. R. 928.

A house and land were taken by lease "for the term of six months from the 1st day of January next" (1830), "and so on, for six months to six months, until one of the parties shall give to the other of them six calendar months' notice in writing to determine the tenancy, at and under the rent of 13*l.* for every six months, the first payment to be made on the 1st day of July, 1830":—Held, that the months here spoken of were shown by the context to be calendar months, and that this was a taking for a year at least. *Reg.* v. *Chawton*, 1 Q. B. 247; 4 P. & D. 525; 10 L. J., M. C. 55.

A custom of letting on a particular estate cannot be imported into an agreement so as to give to the word "month" the meaning of "calendar month," unless, perhaps, in the case of an estate so large that all persons living in the district may be presumed to know of the custom. *Rogers* v. *Hull Dock Co.*, 4 N. R. 494; 10 Jur. (N.S.) 1245; 11 L. T. 42, 463; 12 W. R. 1101; 13 W. R. 217.

How Calculated.]—In calculating a calendar month, if the computation commences during the course of a month, the right method is to proceed from a given day in one month to the day with the corresponding number in the ensuing month. *Freeman* v. *Read*, 4 B. & S. 174; 32 L. J., M. C. 226; 10 Jur. (N.S.) 149; 8 L. T. 458; 11 W. R. 802.

Where one calendar month's notice of action at least was necessary, a notice was given on the 28th of April, and an action was commenced on the 29th of May:—Held, that the action was rightly commenced. *Ib.*

In the computation of a calendar month's notice of action to a justice, required by 24 Geo. 2, c. 44, s. 1, the day of giving the notice and the day of suing out the writ were both to be excluded. *Young* v. *Higgon*, 6 M. & W. 49; 8 D. P. C. 212; 9 L. J., M. C. 29.

In computing the six months for bringing an action against a magistrate for false imprisonment, the day of discharge from imprisonment is to be reckoned exclusively. *Hardy* v. *Ryle*, 7 L. J. (O.S.) M. C. 118.

In computing the one calendar month within which complaint must be made under s. 14 of 12 & 13 Vict. c. 92, the day on which the offence was committed is not to be included. *Radcliffe* v. *Bartholomew*, 61 L. J. M. C. 63; [1892] 1 Q. B. 161; 65 L. T. 677; 40 W. R. 63; 56 J. P. 262.

The plaintiffs, a tramway company, effected with the defendants an insurance against accidents for twelve calendar months from November 24, 1887. An accident happened on November 24, 1888:—Held, that the effect of "from" in the expression "for twelve calendar months from November 24, 1887," was to exclude November 24, 1887, and to include November 24, 1888, in the period of the insurance, and that the defendants were therefore liable. *South Staffordshire Tramways* v. *Sickness and Accident Assurance Association*, 60 L. J., Q. B. 47; [1891] 1 Q. B. 402; 63 L. T. 807; 55 J. P. 168.

Bequest of residue in trust in case A. shall, within six calendar months after the testator's decease, give security not to marry B., then and not otherwise to pay to the children of A.; with a proviso to go over if she shall refuse or neglect to give such security; a condition precedent: the six months are exclusive of the day of the testator's death; therefore, as he died on the 12th January, between eight and nine in the evening, a security given on the 12th July about nine in the evening was held sufficient. *Lester* v. *Garland*, 15 Ves. 248; 10 R. R. 68.

A patent dated 10th May contained a proviso that a specification should be inrolled within one calendar month next and immediately after the date thereof. The specification was inrolled on the 10th of June following:—Held, that the month did not begin to run till the day after the date of the patent, and that the specification was in time. *Watson* v. *Pears*, 2 Camp. 294; 11 R. R. 712.

The 13 Geo. 2, c. 18, s. 5, directs, that no order of justices shall be removed, unless the certiorari is applied for within six months after the order is made. Where an act directs justices to make an order, and that it should be subsequently confirmed by an order of sessions the period of six months is to be calculated from the date of the latter order. *Rex* v. *Middlesex JJ.*, 1 N. & P. 92; 2 H. & W. 407; 5 A. & E. 626; 6 L. J., M. C. 10.

If a party purchases goods, to be paid for in two calendar months, the credit does not expire till the end of the corresponding day of the second month. *Webb* v. *Fairmaner*, 3 M. & W. 473; 6 D. P. C. 493; 7 L. J., Ex. 140.

A., in London, consigned goods to B. at Bristol, to be disposed of for him by B., and, after they were shipped off, wrote to B., inclosing the bill of lading, and requesting leave to draw on B. in about three months; to which B. replied, "that the moment the goods arrived A. might depend on hearing from him, when he might draw upon him; or that B. would send him a banker's draft." The goods arrived, and a bill at two months' sight was presented to B., which he, being a creditor of A., refused to accept:—Held, that the three months were to be reckoned from the date of the letter, and not from the arrival of the goods. *Smith* v. *Brown*, 2 Marsh. 41; 6 Taunt. 340.

By s. 6, sub-s. 1 (c), Bankruptcy Act, 1883, "a creditor shall not be entitled to present a bankruptcy petition against a debtor unless the act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition." A debtor committed an act of bankruptcy on the 13th August, and a petition was presented on the 13th November:—Held, that the petition was presented in time. *Foster, Ex parte, Hanson, In re*, 56 L. T. 573; 35 W. R. 456; 4 Morrell, 98.

By s. 4, sub-s. (g) of the Bankruptcy Act, 1883, a debtor commits an act of bankruptcy if a creditor has served on him a bankruptcy notice, and he does not "within seven days after the service of the notice" comply with its requirements. By s. 141, where any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceeding, then, in the computation of that limited time, the same shall be taken as exclusive of the day of that date, or of the happening of that event, and as commencing at the beginning of the next following day. On the 4th December a petition was presented by T. against a debtor, the act of bankruptcy relied on being non-compliance with a bankruptcy notice served on the 20th November. On the 2nd January the debtor paid T. 100*l.*, and the petition was dismissed. On the 28th February a second petition was presented by W., based on another act of bankruptcy, on which a receiving order was made:—Held, that the first act of bankruptcy was complete under s. 4 on the 27th November, and was not within three months of the petition subsequently presented on the 28th February; that the payment to T. was therefore valid, and could not be set aside by the trustee in bankruptcy. *Townend, Ex parte, Maud, In re*, 64 L. T. 743; 40 W. R. 47; 8 Morrell, 144.

Computation of Time of Imprisonment.]—Where a term of one calendar month's imprisonment begins in one month and ends in another, the month must be calculated from the day on which the imprisonment commences to the day before the (numerically) corresponding day in the following month. If there be no such numerically corresponding day, the term will end on the last day of the following month. *Migotti* v. *Colvrille*, 48 L. J., C. P. 695; 4 C. P. D. 233; 40 L. T. 747; 27 W. R. 744; 14 Cox, C. C. 305—C. A.

e. Terms and Years.

Terms.]—The terms into which the legal year was formerly divided are kept alive by s. 26 of the Judicature Act, 1873, in cases where they are used as a measure for determining the time within which any act is required to be done. *Christ's Hospital* (*Brecknock*) v. *Martin*, 46 L. J., Q. B. 591; 3 Q. B. D. 16; 36 L. T. 537; 25 W. R. 637.

Therefore when, after the Judicature Acts, an award was made before Easter term, and an application was made during Easter sittings, but after the 8th of May (the last day of Easter term), to set it aside, under 9 & 10 Will. 3, c. 15, s. 2:—Held, that the application was too late. *Ib.*

When all the days included between the Thursday before and the Wednesday after Easter day (both inclusive), fall within Easter term, that term must be prolonged by five business days, and Trinity term commence five days later accordingly. *Downes* v. *Bostock*, 5 Jur. 103.

Years—How Reckoned.]—By 1 & 2 Vict. c. 106, s. 58, if a living continues "for the space of one whole year" under sequestration for non-residence, such living shall be deemed void, and the patron may appoint thereto:—Held, that this meant one whole year on which the sequestration issued, and not a year commencing on the 1st January, and ending on the 31st December, both inclusive, as defined in s. 120. *Bartlett* v. *Kirwood*, 2 El. & Bl. 771; 2 C. L. R. 253; 23 L. J., Q. B. 9; 18 Jur. 173; 2 W. R. 17.

B., by an indenture, dated and made 19th July, 1851, demised to A. premises, habendum to A. from 25th December, 1849, for and during and until the full end and term of fourteen years thence next ensuing, determinable as therein mentioned: proviso that it should be lawful for either B. or A. to determine the demise at the expiration of the first seven years thereof, by six months' notice; and thereupon that demise, and every covenant therein contained, should cease and determine accordingly:—Held, that the seven years were to be reckoned from 25th December, 1849, and that the lease might be determined on the 25th December, 1856. *Bird* v. *Baker*, 1 El. & El. 12; 28 L. J., Q. B. 7; 4 Jur. (N.S.) 1148; 7 W. R. 8.

Original letters patent, for a term of fourteen years, were dated on the 26th of February, 1825; and renewed letters patent were dated on the 26th day of February, 1839:—Held, that the day of the date must be reckoned inclusively, and that the former term expired on the 25th of February, 1839, and, consequently, the renewed letters patent were granted after the original letters patent had expired. *Russell* v. *Ledsam*, 14 M. & W. 574; 14 L. J., Ex. 353; 9 Jur. 557.

In computing time, under 15 & 16 Vict. c. 5, s. 2, avoiding letters patent, on failure in payment of stamp duties:—Held, that the day of the date is excluded, and that the three years do not expire until twelve o'clock at night of the anniversary of the day on which the letters patent were granted. *Williams* v. *Nash*, 28 Beav. 93; 28 L. J., Ch. 886; 5 Jur. (N.S.) 696.

In a letter of licence from creditors to a debtor, "for and during the term of one year from the date hereof," the day of the date should be excluded from the computation of the year. *Ammerman* v. *Digges*, 12 Ir. C. L. R. App. i.

Neglect to Perform Condition.]—Under the limitations of a will, each devisee, becoming entitled to the actual possession of the devised lands, was directed to take the name and bear the arms of the testator, subject to forfeiture on neglect to do so for the space of one year next after becoming entitled to the possession of the estates. A tenant for life of the devised estates died on the 9th April, 1888, and on the 9th April, 1889, the next remainderman did what, if in time, was admittedly a compliance with the condition:—Held, that in the computation of time for this purpose the day of the death of the tenant for life was not to be counted, and that, therefore, the condition was duly complied with. *Riggs-Miller* v. *Wheatley*, 28 L. R., Ir. 144.

Attaining Majority.]—Devise to A. as soon as he shall accomplish his full age of twenty-one years. A. was born on the 16th August, 1725, and died on the 15th August, 1746:—Held, that he lived to attain his full age of twenty-one. *Toder* v. *Sansam*, 1 Bro. P. C. 469.

f. Particular Words as to.

Directly.]—A contract to be performed "directly" means to be performed not "within

a reasonable time," but "speedily," or at least "as soon as practicable." *Duncan* v. *Topham*, 8 C. B. 255 ; 18 L. J., C. P. 310.

On the 18th of February A. wrote to B., offering to supply him with linseed cake at 10*l.* 15*s.* per ton. On the 19th B. replied, "I can take five tons at 10*l.* 10*s.*, but it must be put on board directly," and on the 22nd A. again wrote, "I shall ship you five tons best cakes to-morrow" : —Held, that this correspondence did not prove a contract on the part of B. to accept cake, "to be delivered within a reasonable time." *Ib.*

As soon as Possible.]—A contract by a manufacturer to furnish certain specified goods "as soon as possible," means within a reasonable time, regard being had to the manufacturer's ability to produce them, and the orders he may already have in hand. *Attwood* v. *Emery*, 1 C. B. (N.S.) 110 ; 26 L. J., C. P. 73 ; 5 W. R. 19.

"Forthwith."]—When an act is required by a statute or a rule of court to be done "forthwith," the word "forthwith" must be construed with regard to the object of the provision and the circumstances of the case. The London agents of the country solicitors of an appellant from an order made by a county court in bankruptcy entered the appeal with the registrar of appeals in London, on Friday, the 5th August, the last possible day, but did not post a copy of the appeal notice to the country solicitors until the following day, and it was not received by them until Monday, the 8th August, and on that day they sent a copy of the notice to the registrar of the county court :—Held, that the copy of the notice had not been sent to the registrar of the county court "forthwith" on entering the appeal as required by r. 144, and that consequently the appeal was out of time. *Lamb, Ex parte, Southam, In re*, 51 L. J., Ch. 207 ; 19 Ch. D. 169 ; 45 L. T. 639 ; 30 W. R. 126—C. A.

Where the registrar of the county court from which an appeal is brought did not in fact receive notice of an appeal until three days after the time for appealing had elapsed :—Held, that the notice not having been sent "forthwith," the appeal was out of time and could not be heard. *Lyon, Ex parte, Lyon, In re*, 45 L. T. 768.

An order of a county court was made on the 17th December. Notice of appeal was entered in London on the 22nd December. On the five following days the county court office was closed, and in consequence the county court registrar did not receive a copy of the appeal notice till the 28th. The respondents' country solicitors, however, received notice of the appeal on the 23rd December :—Held, that the copy notice had been sent to the county court registrar "forthwith" within the meaning of r. 144 of the Bankruptcy Rules, 1870. *Williams, Ex parte, Jones, In re*, 46 L. T. 242—C. A. Reversing 30 W. R. 416.

Rule 144 of the Bankruptcy Rules, 1870, requires that upon entering an appeal a copy of the appeal notice shall be sent forthwith to the registrar of the court appealed from :—Held, that "forthwith" must be read with reference to the period of twenty-one days within which, by r. 143, a notice of appeal must be entered with the registrar of appeals, and that it means within twenty-one days from the date of the order appealed from, or as soon as possible afterwards. *Sillence, In re, Sillence, Ex parte*, 47 L. J., Bk. 87 ; 7 Ch. D. 238 ; 37 L. T. 676 ; 26 W. R. 129.

Where an order for the discharge of a patient has been given under 8 & 9 Vict. c. 100, s. 72, by the person who signed the order for the reception of such patient, the proprietor of the asylum is bound to discharge the patient forthwith, that is, as soon as practically possible under the circumstances. *Lowe* v. *Fox*, 54 L. J., Q. B. 561 : 15 Q. B. D. 667 ; 53 L. T. 886 ; 34 W. R. 144 ; 50 J. P. 244—C. A. See *Hill, Ex parte*, 53 L. J., Ch. 247.

The word "forthwith" in a notice to a party charged criminally, and out on bail to appear, on pain of forfeiting his recognisance, means, within a reasonable time from the service, and not from the date of the notice. *Reg.* v. *Price*, 8 Moore, P. C. 203.

"Forthwith" in a contract held not to mean immediately, but without delay or loss of time. *Roberts* v. *Brett*, 11 H. L. Cas. 337 ; 34 L. J., C. P. 241 ; 11 Jur. (N.S.) 377 ; 12 L. T. 286 ; 13 W. R. 587.

Immediately.]—A., being indebted to B., executed in his favour, by way of security, a bill of sale of his furniture, thereby covenanting that he would, "immediately upon demand in writing," pay the principal and interest ; and in case he did not immediately upon such demand pay the money, B. was empowered to seize and sell. A demand in writing, signed by B.'s attorney, of the immediate payment of the principal and interest, was served upon A. by a bailiff, who had authority to receive the money, but did not communicate the fact to A. ; and who, in default of payment, seized the goods, which were afterwards sold :—Held, that there was a sufficient demand of payment, but no default, inasmuch as no reasonable time was afforded to A. for compliance with it, and that the action, therefore, was maintainable. *Toms* v. *Wilson*, 4 B. & S. 442 ; 32 L. J., Q. B. 382 ; 10 Jur. (N.S.) 201 ; 8 L. T. 799 ; 11 W. R. 952—Ex. Ch. S. P., *Moore* v. *Shelley*, 52 L. J., P. C. 35 ; 8 App. Cas. 285 ; 48 L. T. 918 ; *Trevor, Ex parte, Burghart, In re*, 45 L. J., Bk. 27 ; 1 Ch. D. 297 ; 33 L. T. 756 ; 24 W. R. 301 ; *Brighty* v. *Norton*, 3 B. & S. 305 ; 32 L. J., Q. B. 38 ; 9 Jur. (N.S.) 495 ; 7 L. T. 422 ; 11 W. R. 167.

Next following.]—By an award, dated the 13th of October, 1840, it was ordered that a sum of money be paid on the 28th day of October next : —Held, that the money was payable on the 28th day of that present month of October. *Brown* v. *Smith*, 8 D. P. C. 867.

A proviso for payment "on the —— of February next ensuing," properly means of next February ; but "on the 29th of February next ensuing," means the 29th of February in next leapyear, in order to give effect to the words. *Chapman* v. *Beecham*, 3 G. & D. 71 ; 3 Q. B. 723 ; 12 L. J., Q. B. 42.

On.]—Whatever meaning may be given to the word "on" in an act of parliament, it is very difficult to extend it to above a year. It is not necessary to express an opinion as to what time should be allowed, but it is not to be conceived that a period of more than a year can be included in the word "on." "On," if not confined to the time of making the decree, must mean shortly after. *Robertson* v. *Robertson*, 8 P. D. 96 ; 48 L. T. 591 ; 31 W. R. 652.

g. Reasonable Time.

What is.]—The overseers of a township agreed with the plaintiff and several other persons, who had given notices of appeal against a poor-rate, that all matters in difference between the overseers and the plaintiff, and the other appellants, should be referred; and that the costs of the plaintiff and the other appellants, incurred in relation to the appeals, up to the time of the agreement, should be taxed and payed by the overseers. A declaration against the overseers for nonpayment of such costs, alleged that they were taxed in a reasonable time after the making of the agreement, and they were requested to pay the amount, but they had not paid it. They pleaded, that the costs were not taxed in a reasonable time after the making of the agreement, on which issue was joined and found for the overseers: —Held, that the question whether such a reasonable time had elapsed was a question for the decision of the jury and not of the judge. *Burton* v. *Griffiths*, 11 M. & W. 817.

What is reasonable time, in compliance with request of landlord, to pay a fine on renewal of leases in Ireland. In considering what reasonable time is after demand, the previous transactions are to be taken into the account. *Jackson* v. *Saunders*, 2 Dow, 444.

Reasonable time in mercantile transactions not applicable to cases of contracts respecting real property. *Jessop* v. *King*, 2 Ball & B. 95.

—— **To elapse between Summons and Hearing.**]—The 11 & 12 Vict. c. 43, s. 2, authorises justices to proceed ex parte, where it is proved on oath that the summons has been served upon the defendant a reasonable time before the time appointed for the hearing. A summons to answer a charge of assault was served upon the defendant's wife, at his house, at nine o'clock in the morning, to appear the next day at eleven o'clock, at a place eight miles distant. The defendant, who was a collier, had gone to his work at the time, and did not return till eleven at night. The next morning, having left some work unfinished, he went to the mine. The justices proceeded to hear in his absence, and adjudged him guilty of an assault, and sentenced him to pay a fine or be imprisoned:—Held, that it was for the justices to decide whether the time was reasonable under the circumstances; and that, having so decided, the court would not review their decision. *Williams, Ex parte*, 2 L. M. & P. 580; 21 L. J., M. C. 46.

—— **For Notice.**]—By deed made on the 30th January, 1860, in consideration of 410*l.* lent to A. by B., A. assigned household furniture, farming stock, and goods and chattels and future personal estate and effects to A., subject to a proviso for redemption if A. should pay to B. 410*l.* "on the 30th January, 1870, or at such earlier day or time as B., or his attorney or agent, should appoint for payment, by notice in writing, sent by post, or delivered to or left at the house or last known place of abode" of A.; with a power of immediate entry and sale on default of payment contrary to the proviso and the true intent and meaning of the deed; and there was a proviso, that until default A. should hold possession, and use the goods, chattels, and effects, without any hindrance or disturbance by B. B. at noon of the 20th February, 1860, gave A. notice to pay the money to him at half-past twelve of the same day, and at that time, he not paying the money, seized the goods, and afterwards sold them:—Held, that the notice under the proviso must be reasonable, and that the notice given was not given in a reasonable time. *Brighty* v. *Norton*, 3 B. & S. 305; 32 L. J., Q. B. 38; 9 Jur. (N.S.) 495; 7 L. T. 422; 11 W. R. 167.

—— **For Rescission of Contract for Sale of Land.**]—When, after a contract for the sale of land has been entered into, a notice is given to make time of the essence of the contract, the question whether the notice is reasonable or not must be judged of as at the date when it is given. The plaintiff held a lease from the defendant which gave him an option of purchasing the demised property at any time during the term, on giving the lessor three months' previous notice in writing. On the 24th of March, 1877, the plaintiff gave the defendant notice of his intention to exercise the option. There were some difficulties in completing the defendant's title to the property, and an abstract of title was not delivered to the plaintiff's solicitor till the 17th of June, 1878. The plaintiff's solicitor not having acknowledged the receipt of the abstract, and having neglected to answer several letters from the defendant's solicitors, they, on the 16th of September, wrote to the plaintiff himself, asking whether he intended to complete the purchase. The plaintiff replied the next day that he would write at once to his solicitor. On the 24th of September, 1878, no further communication having been received from the plaintiff or his solicitor, the defendant gave the plaintiff a notice in writing, requiring him to complete the purchase, and stating that, unless he completed it on or before the 31st of October, 1878, the defendant would treat the contract as rescinded, and that in that respect time should be deemed of the essence of the contract. On the 26th of September, 1878, the plaintiff acknowledged the receipt of the notice, and said that he had seen his solicitor, who had promised to proceed as soon as possible. On the 1st of November, 1878, no further communications having been received from the plaintiff or his solicitor, the defendant's solicitors wrote to the plaintiff that the defendant, in pursuance of his notice, declared the contract at an end; and they requested the return of the abstract, and demanded payment of rent for the property. The plaintiff had been in possession of the property ever since his notice to purchase, but had refused to pay any rent after the 24th of June, 1877. On the 21st of November, 1878, the plaintiff commenced his action for the specific performance of the contract to purchase:—Held, that the notice of the 24th of September fixed an unreasonably short time for the completion of the purchase, and was therefore invalid. Specific performance was decreed, and the defendant was ordered to pay the costs of the action up to and including the trial. *Crawford* v. *Toogood*, 49 L. J., Ch. 108; 13 Ch. D. 153; 41 L. T. 549; 28 W. R. 248.

When time is not originally made of the essence of a contract for the sale of land, one of the parties is not entitled afterwards by notice to make it of the essence, unless there has been some default or unreasonable delay by the other party. After a delay of two years on the part of a vendor, he gave notice to the purchaser to complete his contract within three

weeks, and that, if he did not do so, the vendor would treat the contract as at an end:—Held, that the time limited for completion was, under the circumstances, unreasonably short, and the notice thereof of no effect. *Green* v. *Sevin*, 49 L. J., Ch. 166; 13 Ch. D. 589; 41 L. T. 724; 44 J. P. 282.

J. M.

TIPPLING ACT.

See INTOXICATING LIQUORS.

TITHES.

See ECCLESIASTICAL LAW.

TITLE.

See VENDOR AND PURCHASER.

TITLE-DEEDS.

See DEED AND BOND—VENDOR AND PURCHASER.

TOBAGO.

See COLONY.

TOLLS.

1. *Generally.*
   a. Validity of, and Right to, 61.
   b. Rate of Charge, 65.
   c. Levy, 67.
2. *Canal.—See* WATER.
3. *Market.—See* MARKETS AND FAIRS.
4. *Port, Harbour, and Lighthouse.—See* SHIPPING.
5. *Turnpike.—See* WAY.
6. *Ratability.—See* RATES AND RATING.
7. *On Carriage of Goods.—See* CARRIERS.

1. GENERALLY.

a. Validity of, and Right to.

Bad Custom.]—A custom that a meter of a borough should have a toll on all goods imported within the borough, whether meted or not, is bad in law, unless it can be connected with some obligation to do something beneficial to the person to be charged with the toll. *Jenkins* v. *Harvey*, 1 Gale, 454; 5 Tyr. 871. See *Laybourn* v. *Crisp*, 4 M. & W. 320; 8 L. J., Ex. 118; 8 Car. & P. 397.

Rankness.]—No objection can be made on the ground of rankness to a toll, the right to levy which depends upon a correspondent obligation to do something beneficially to the payers of the toll. *Ib.*

Account—Custom.]—Though validity of custom of toll has been established in a former suit, yet this court has jurisdiction to decree an account of toll. *Norfolk* (*Duke*) v. *Myers*, 4 Madd. 83.

Plaintiffs having first established their title to tolls at law, equity will decree account of such as are subtracted. *Reading Corporation* v. *Winkworth*, 5 Price, 473.

Tolls Traverse and Thorough.]—A toll traverse, i.e. a toll for the mere use of a public way, is bad. *Lawrence* v. *Hitch*, 9 B. & S. 467; 37 L. J., Q. B. 209; L. R. 3 Q. B. 521; 18 L. T. 483; 16 W. R. 813—Ex. Ch.

The repair of some streets in a town is not sufficient consideration to support a claim of toll thorough in all parts of the town. *Brett* v. *Beales*, 10 B. & C. 508; M. & M. 416; 31 R. R. 744.

Right to.]—Under charters granting to a dean and chapter, "that they and all their men shall be quit of toll, passage, cheminage, &c., in city and borough, fair and market, in the passage of bridges, and all parts of the sea, in all places throughout England," their lay tenant of lands included in the charters is exempt from market toll and toll traverse, not only for articles going to or coming from the lands for the necessary manurance and enjoyment of them, but also for the goods sent out or coming in for the purpose of merchandise. *Middleton* (*Lord*) v. *Lambert*, 1 A. & E. 401; 3 N. & M. 841.

If a person, claiming a toll for passing over a highway, can show an immemorial usage, and that the soil and toll were, before the time of legal memory, in the same hands, though severed since, it will be presumed that the soil was originally granted to the public in consideration of the toll. *Pelham* (*Lord*) v. *Pickersgill*, 1 Term Rep. 660; 1 R. R. 348.

When an act authorises the exaction of a toll, the accommodation for which the toll is authorised must be provided. *Aiton* v. *Stephen*, 1 App. Cas. 456—H. L. (Sc.)

—— **"Coach"—Tramcar.**]—An act of parliament, passed in 1766, empowered the owners of a ferry across a creek to build a bridge over the creek and to demand certain tolls for the passage of the bridge, including, amongst others, the following: "For every coach, chariot, berlin, chaise, chair, or calash drawn by more than two horses, the sum of sixpence," and "for every waggon, wain, dray, car, cart, or sledge, or other carriage drawn by three or four horses or oxen, the sum of fourpence":—Held, that the toll payable in respect of a tramcar drawn by three horses was that payable in respect of a "coach." *Plymouth, Stonehouse, and Devonport Tramways Co.* v. *General Tolls Co.*, 75 L. T. 467—C. A. Affirmed in H. L.

—— **Evidence of.**]—Where the crown granted to S. the castle and honour of H., and "all that toll and all those tolls called 'traverse,' to be taken in manner accustomed, i.e. of all saleable things passing through the town of H. and also through the towns of Ware, B., T., and elsewhere, in divers places in the same county;" and it appeared that a toll had always been taken at

Ware Bridge, and that in various ancient documents it had been described as "the traverse," and "the toll traverse" of the bridge of W., and that S. and his ancestors for twenty years past had repaired the bridge :—Held, that the burden was cast on S. to show that the toll was a toll-thorough and not traverse, although the bridge was a public highway ; and that the sessions, in the absence of any such evidence, were warranted in inferring that it was a toll traverse. *Reg.* v. *Salisbury (Marquis)*, 3 N. & P. 476 ; 8 A. & E. 716 ; 1 W. W. & H. 444 ; 7 L. J., M. C. 110.

—— **Right of Corporation to.**]—In an action for tolls upon live stock driven through a borough and upon waggons and carriages with four wheels, passing to, through and from a borough and manor, a market company claimed—as representing by virtue of a statute a municipal corporation which was the lord of the manor in which the borough was, and holder of land within the borough, and entitled by prescription or grant to drift tolls and dues payable within the borough on horned cattle, sheep, and swine driven through the borough, and waggons and carriages with four wheels passing to, through and from the borough—to be entitled to such tolls from a railway company, incorporated by acts passed in 1862 and 1863, who had made a portion of their line of railway and station on lands within the borough, acquired by them for the purposes of their railway, and used their line and station for the conveyance of goods and live stock and passengers in carriages and trucks, in, to, and through the borough :—Held, that such tolls could only be claimed as tolls traverse, but that inasmuch as the enjoyment of the railway company was a proprietary one of their own land acquired by them without any reservation of any rights by their vendors, enabling them to earn such a toll (if such rights could legally exist), neither the corporation, as a grantee of any such toll, nor the market company, as their representative, could have a right to take such tolls. *Brecon Markets Co.* v. *Neath and Brecon Ry.*, 41 L. J., C. P. 257 ; L. R. 7 C. P. 555 ; 27 L. T. 316. Affirmed, 42 L. J., C. P. 63 ; L. R. 8 C. P. 157—Ex. Ch.

A passenger from Paris to England, by registering his luggage, places it under "the special care and charge of the master of the vessel," in which it is conveyed to Dover, so as to exempt it from the porterage regulations of the town of Dover, under 11 Geo. 4, c. cxvii. s. 60. *Richardson* v. *Dover Corporation*, 6 W. R. 15.

Import Duties—"Grain brought into Port for Sale."]—Grain brought into the port of London for the purpose of being dealt with, and which is actually dealt with, in such a manner as to change its character and name in a commercial sense, and which after being so changed is then sold, is not "grain brought into the port of London for sale" within the meaning of s. 4 of the Metage on Grain (Port of London) Act, 1872, and is not liable to the duty thereby imposed. *Cotton* v. *Vogan*, 65 L. J., Q. B. 486 ; [1896] A. C. 457 ; 74 L. T. 598 ; 61 J. P. 36—H. L. (E.) Affirming, 14 R. 763 ; 44 W. R. 55—C. A.

The importation of an article for the purpose of its manufacture or conversion into a form other than that in which it is imported, is not an importation of such article for sale, notwithstanding that it may at the time of importation be intended for sale when manufactured or converted. Where, therefore, a local act rendered grain brought into a port for sale liable to duty, such duty was held not to be leviable upon grain imported by a miller for the purposes of his business. *Scott* v. *Taylor*, 48 J. P. 424.

—— **Parts beyond the Seas.**]—By a dock act, 48 Geo. 3, c. xi. s. 38, certain duties were imposed "on goods, wares, and merchandises, imported from parts beyond the seas, and not brought by inland navigation into the port of Bristol" :—Held, that goods imported from Ireland were brought from parts beyond the seas. *Battersby* v. *Kirk*, 2 Bing. (N.C.) 584 ; 3 Scott, 11 ; 1 Hodges, 451 ; 5 L. J., C. P. 166.

—— **Coastwise.**]—By another branch of the statute, other duties were imposed "on goods, wares, and merchandises brought coastwise into the said port, of foreign growth or importation, but not of British growth or manufacture" :—Held, that Irish linens imported to Bristol from Dublin, were not brought coastwise. *Ib.*

Railway Trucks or Carriages.]—Where, by an act for paving, lighting, and cleansing a town, tolls were imposed on all stage-coaches and other such public carriages carrying passengers for hire, and coming to or going from or out of the town and the precincts, and also on all wains, waggons, carts, or other such carriages carrying goods for hire, and coming to or going from or out of the town and the precincts :—Held, that railway carriages carrying passengers for hire, and coming into the town by a railway, and railway trucks carrying goods for hire, and coming into the town by a railway, were not liable to the tolls. *Newmarket Ry.* v. *Foster*, 2 C. L. R. 1617 ; 3 El. & Bl. 94 ; 18 Jur. 572 ; 2 W. R. 532.

Coals brought by Railway into Town.]—A private act of parliament imposed a duty of 2*s.* per chaldron upon all coal "imported and landed at the town of H., or otherwise brought or delivered within the limits of the town." The act gave a remedy against the shipowner by distraining the ship and tackle as well as the coals in default of payment. At the time that the act was passed no coals were brought into H. except by sea :—Held, that coals brought into the town by railway were liable to the duty, and not only sea-borne coals ; and that the railway company, as the persons who brought the coals into the town, were primarily liable to pay the duty. *G. E. Ry.* v. *Harwich Corporation*, 41 L. T. 533 ; 44 J. P. 104—H. L. (E.)

—— **"Dealing with"—Tonnage Rate.**]—The plaintiffs conveyed coal for use on their line from various collieries within the borough of K., where it was wanted for their own consumption :—Held, that this was a "dealing" with coal so as to compel them to show a pit note and pay a tonnage rate under the Kingston-upon-Hull Improvement Act, 1854. *N. E. Ry.* v. *Kingston-upon-Hull*, 55 J. P. 518—C. A. S. P., *Wilson* v. *Kingston-upon-Hull Local Board*, 12 Jur. (N.S.) 706 ; 14 W. R. 638.

See also sub-tit. COALS.

Letting of.]—Tolls traverse of a bridge cannot be let by parol, the demise must be by deed. *Reg.* v. *Salisbury (Marquis)*, 3 N. & P. 476 ; 8 A. & E. 716 ; 1 W. W. & H. 444 ; 7 L. J., M. C. 110.

Action on a deed made between five commis-

sioners of an inland navigation, under the authority of several acts of parliament, and the defendant, whereby the commissioners, in consideration of rent, demised the tolls of the navigation to the defendant for a year, from the 1st January, 1850, at the rent of 3,470*l.*, together with other payments, and the defendant covenanted with them, and also with the whole body of commissioners, in a separate covenant, for the payment of the rent. The declaration alleged an entry by virtue of the demise, and the occupying and receiving of the tolls during the entire year. Breach, non-payment of the rent. Plea, that the commissioners never executed the lease, and that the entry and occupation were at the will of the commissioners only, and not under the demise. Replication, that the defendant entered and received and enjoyed the tolls, by the permission of the commissioners, under the terms of the deed:—Held, that as the lessors had not executed the lease, the lessee had never received the consideration for which he had stipulated, namely, a permanent estate during the demise and under its terms, and therefore that he was not liable to be sued upon his covenant in the lease. *Swatman* v. *Ambler*, 8 Ex. 72; 22 L. J., Ex. 81.

A dock company was liable, under an act of parliament, to pay a harbour and pier board deficiencies of their income. The board had power to compound for tolls:—Held, that, as against the company they could not let the whole annual tolls. *Southampton Dock Co.* v. *Southampton Harbour and Pier Board*, 41 L. J., Ch. 832; 14 L. R., Eq. 595.

Reduction of.]—The board had power to reduce or alter their tolls:—Held, that, as against the company, they had no power to remit tolls on particular classes of goods. *Ib.*

Liability of Persons receiving.]—A private person or a company having a right to levy tolls in respect of the performance of a particular work, will be liable for injuries occasioned by performing it improperly. *Mersey Docks* v. *Gibbs*, 11 H. L. Cas. 686; 35 L. J., Ex. 225; L. R. 1 H. L. 93; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.

A corporate body authorised to perform such a work, and receiving tolls in respect of it, though obtaining no profit for itself from such tolls, but collecting them for the maintenance of the work and the possible future benefit of the public, is equally responsible for injuries arising from the improper performance of such work, and the funds thus obtained must discharge that liability. *Ib.*

b. Rate of Charge.

Rights to Tolls for Fractional Parts of Mile Traversed.]—By a local act of 1739, s. 23, the plaintiffs are empowered to take from every person conveying goods upon the river between Maidstone and Forest-row, or any part thereof (which all person and persons should and might lawfully do), such rates and duties for lockage and riverage as the plaintiffs should think fit, not exceeding 4*d.* per mile for every ton weight of goods from Maidstone up the river to Branbridge, and not exceeding 6*d.* per mile for every ton weight of goods from Branbridge up the river to Forest Row, and so in proportion for a greater or less quantity. By s. 28, the plaintiffs are from time to time to publicly fix up the duties for lockage and riverage charged by them. By s. 31, nothing in the act is to be construed to extend the plaintiff's authority to the execution of any works below Mrs. Edmonds' wharf in Maidstone. By s. 38, any action, suit or information for anything done in pursuance of this act, or in relation to the premises, shall be commenced within three months after the facts committed. Maidstone extends along the river upwards about three furlongs from Mrs. Edmonds' wharf to the College Lock, constructed by the plaintiffs, Maidstone bridge being between the two. The plaintiffs, besides other works on the river, had scoured a shoal between the bridge and Mrs. Edmonds' wharf, and on their annual survey they always disembarked at that wharf. In 1874, the plaintiffs amended their toll list, so as to charge, for the first time, tolls proportioned to a fractional part of a mile traversed. An owner of oil mills situate on the Medway, less than a mile above the College Lock, but more than a mile above Mrs. Edmonds' wharf, refused to pay to the plaintiffs any toll upon barges coming up the river to his mills:—Held, that they were entitled to charge tolls proportioned to a fractional part of a mile traversed since the amendment of their list, without reference to the three months' limitation provided by s. 38. *Medway Navigation* v. *Brook*, 33 L. T. 843.

A clause in a private act granted tolls for "a fraction of a mile beyond four miles," &c.; the company claimed such tolls when the whole distance traversed was less than four miles. The Lord Chancellor (Earl Cairns) and Lord Selborne were of opinion that the charge was, on the whole, warranted by the words of the act, and that the judgment of the court below must on this point also be affirmed. Lord Penzance and Lord O'Hagan, applying the principle that no charge could be imposed on the public but by the clearly expressed intention of the legislature, held that in this case the legislature had not clearly expressed an intention, nor had intended to authorise such a charge. *Pryce* v. *Monmouthshire Canal & Ry.*, 49 L. J., Ex. 130; 4 App. Cas. 197; 40 L. T. 630; 27 W. R. 666—H. L. (E.)

Publication of Tolls.]—A company obtained an act (8 & 9 Vict. c. clxix.) authorising it to construct a railway and to demand tolls for the conveyance of passengers and goods thereon. The charge for the conveyance of goods was generally thus expressed, "per ton per mile not exceeding," &c. One clause provided that "for articles or persons conveyed on the railway for a less distance than four miles" there might be, "in addition to the prescribed tolls for conveyance, a reasonable charge for the expense of stopping, loading, and unloading." No publication of this charge in the form of a "toll" had been made upon the toll board:—Held, that this "charge" for stopping was not properly a "toll," and that the non-publication of it on the toll-board in the form required by the Railways Clauses Consolidation Act, 1845, ss. 93 and 95, did not prevent the company from demanding it. *Ib.*

A pier company was authorised by act of parliament to charge, for goods laden or unladen on the pier, the rates specified in a schedule to the act; but they could only demand them so long as "the rates for the time being authorised to be taken as thereinbefore mentioned" were painted on a board affixed to the premises. By a subsequent section power was given to lower the tolls or to raise them to such sums as the company should think proper, not exceeding the sums

authorised by the act. The company lowered some of the rates, but put up a board showing the tolls contained in the schedule to the act:—Held, that the act required the actual tolls in force for the time being, and not the maximum tolls authorised by the act, to be painted on the board. *Gregson* v. *Potter*, 48 L. J., M. C. 86; 4 Ex. D. 142; 27 W. R. 840.

Alteration and Variation.]—A toll reasonable in amount, but varying from time to time according to the value of money, is valid in point of law. *Lawrence* v. *Hitch*, 9 B. & S. 467; 37 L. J., Q. B. 209; L. R. 3 Q. B. 521; 18 L. T. 483; 16 W. R. 813—Ex. Ch.

If the lessee of tolls under a corporation varies, by temporary agreement, the amount of toll claimed of individuals, it will not affect the right to the tolls, if it appears to have been a variation, not for the purpose of claiming more at one time than another, but for the convenience of both parties. *Lancum* v. *Lovell*, 6 Car. & P. 463.

Trustees empowered, by one section of a local act, to take such tolls as they might at any meeting direct, up to a certain maximum, are not entitled, under that power, to remit a half toll on return loads, imposed by another section. Any alteration of tolls must affect the different classes mentioned in the act equally. *Barton* v. *Bennett*, 12 W. R. 709.

But one who had taken a lease of the tolls, subject to an order purporting to remit the half tolls:—Held, not entitled to exact them. *Ib.*

A trading company empowered by statute to take tolls for certain matters, is not bound, unless there is an enactment to that effect, to exact one uniform toll from all persons alike, but may charge a smaller toll to a particular class than to another. *Hungerford Market Co.* v. *City Steamboat Co.*, 3 El. & El. 365; 30 L. J., Q. B. 25; 7 Jur. (N.S.) 67; 3 L. T. 732.

c. Levy.

Conviction for Wrongful Levy.]—A mere claim of a right to take tolls, without showing clearly that it is a bonâ fide claim, is not sufficient to oust justices of the jurisdiction, to convict for taking them improperly. *Rex* v. *Hampshire JJ.*, 3 D. P. C. 47.

By Action.]—Indebitatus assumpsit lies for fish claimed as toll for the use of a capstan and windlass in drawing fishing boats up on the beach out of the sea. *Falmouth (Earl)* v. *Penrose*, 9 D. & R. 452; 8 B. & C. 452.

A power of distress implies an antecedent right of action. *G. E. Ry.* v. *Harwich (Corporation)*, 41 L. T. 533; 44 J. P. 44—H. L. (E.)

TONTINE.

Annuity — Deed.]—In 1792, 32,000*l.* were raised by way of tontine, viz. by subscribers, who were to receive during the lives of cestuis que vient nominated by them annuities proportioned to the amounts subscribed, which were secured by conveying to trustees freehold lands, upon trust to raise an annuity of 880*l.*, and divide it among the subscribers during the lives of their cestuis que vient. Each subscriber had a debenture handed to him, in which the amount of his subscription and of his annuity at that date, and the name and age of the cestui que vie were set forth; and it was expressly provided in the deed, that any person holding the debenture might give a receipt for the annuity due on the debenture, and that no payment could be made to any subscriber without his producing the debenture at the time of payment:—Held, that the annuity to which a subscriber was thus entitled was an interest in lands which could not pass by delivery of the debenture, but required a deed, and in the case of a married woman required a fine (before 1833). *O'Hara's Tontine, In re*, 3 Jur. (N.S.) 1145; 6 W. R. 45.

The provision, that any person holding the debenture should have power to give a receipt, only operates so as to discharge the trustees, and does not enable the right itself to pass by delivery. *Ib.*

Succession Duty.]—A tontine is a contract for value, and therefore within the exceptions of s. 17 of the Succession Duty Act, 1853. *Oldfield* v. *Preston*, 3 De G. F. & J. 398; 31 L. J., Ch. 256; 8 Jur. (N.S.) 107; 5 L. T. 650; 10 W. R. 257.

An interest accruing immediately under a tontine does not create the relation of predecessor and successor, so as to make succession duty payable in respect of the accrued interest. *Ib.*

Where a father subscribed to a tontine in the names of three of his children, two of whom died before the time appointed for the commencement of the act, but the third survived it:—Held, in the absence of evidence to the contrary, that such surviving child took, not by succession, but in its own right, by way of advancement, and that no duty was payable in respect thereof. *Ib.*

Insurance Company—Winding-up.]—The circumstance that policies of a life insurance company are still in force, and that the liabilities of the company upon them cannot be settled for many years, is not sufficient to render it inexpedient to make an order for winding-up such a company under the provisions of the winding-up acts. *Dee, Ex parte, Universal Tontine Life Insurance Co., In re*, 3 De G. & Sm. 112.

TOLZEY COURT.

See COURT.

TORT.

1. *Generally*, 68.
2. *In Particular Cases.*
   a. Arising out of Detinue. *See* DETINUE.
   b. Arising out of Malicious Procedure. *See* MALICIOUS PROCEDURE.
   c. Arising out of Negligence. *See* NEGLIGENCE.
   d. Arising out of Trespass. *See* TRESPASS.
   e. Arising out of Trover. *See* TROVER.
3. *Joint Tortfeasors*, 70.

1. GENERALLY.

No Legal Wrong without a Remedy.]—Where a person has an exclusive right which is infringed upon, if an action of trespass will not lie, he may have an action on the case; for the law will not permit a man who has a right to be without a remedy. *Whitchurch* v. *Hide*, 2 Atk. 392.

Non Injuria—Malice.]—An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent. *Stevenson* v. *Newnham*, 13 C. B. 285; 22 L. J., C. P. 110—Ex. Ch. S. P., *Bradford Corporation* v. *Pickles*, 64 L. J., Ch. 759; [1895] A. C. 587; 11 R. 286; 73 L. T. 353; 44 W. R. 190; 60 J. P. 3—H. L. (E.)

The plaintiffs alleged in their statement of claim that their house had been called "Ashford Lodge" for sixty years, and the adjoining house belonging to the defendant had been called "Ashford Villa" for forty years, and that the defendant had recently altered the name of his house to that of the plaintiffs' house. The plaintiffs alleged that this act of the defendant had caused them great inconvenience and annoyance, and had materially diminished the value of their property, and they claimed an injunction to restrain the defendant from continuing to use the name of their house:—Held, that the alleged act of the defendant in calling his house by the name of the plaintiffs' house was not a violation of any legal right of the plaintiffs, and there being no allegation of malicious intention, a demurrer to the statement of claim was allowed. *Day* v. *Brownrigg*, 48 L. J., Ch. 173; 10 Ch. D. 294; 39 L. T. 553; 27 W. R. 217—C. A.

In the case of damage occasioned by a wrongful act, though such as the law esteems an injury, malice is not a necessary ingredient to the maintenance of an action. *Rogers* v. *Rajendro Dutt*, 13 Moore, P. C. 209; 3 L. T. 160; 9 W. R. 149.

It is essential to an action of tort that the act complained of should be legally wrongful as regards the party complaining, i.e. it must prejudicially affect him in some legal right. The fact that it will, however directly, do him harm in his interests is not enough. *Ib.*

A summons and plaint complaining that the plaintiff, a corn merchant, was possessed of stores adjacent to a public thoroughfare and market-place, and the defendant, contriving and unjustly intending to injure the plaintiff in his business of a corn merchant, and to prevent his customers from coming to the premises and stores to sell and dispose of their corn to the plaintiff, wrongfully and injuriously prevented certain parties named, under colour of requiring from them the payment of some alleged or pretended tolls or other duties not legally demandable or payable from sellers, from disposing of their corn to the plaintiff, and stopped and detained the carts and animals laden with corn while proceeding to the premises and stores of he plaintiff, and thereby obstructed and hindered the plaintiff from carrying on his business, is bad. *Higgins* v. *O'Donnell*, Ir. R. 4 C. L. 91; 18 W. R. 378.

Physical Harm caused by Words.]—A false statement made wilfully, the direct and natural effect of which is to cause a mental shock resulting in the illness of the person to whom it is made, is an infringement of the right to personal safety, and actionable. It is wilful injuria, although no malicious purpose to cause the harm nor motive of spite be imputed, and its effect—illness from mental shock—may be, and in this case was, not too remote to be in law regarded as a consequence for which the speaker is answerable in damages. *Wilkinson* v. *Downton*, 66 L. J., Q. B. 493; [1897] 2 Q. B. 57; 76 L. T. 493; 45 W. R. 525.

Failure to prove Special Damage.]—The principle ordinarily applicable to actions of tort is that a plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action. *Mudun Mohun Doss* v. *Gokul Doss*, 14 L. T. 646; 14 W. R. 590—P. C.

Committed Abroad.]—Where, by the law of a foreign country, compensation or damages may be recovered in such country for an assault there committed, an action is maintainable in England by a British subject for such assault, although proceedings taken at his instance are pending in the foreign court in respect of the same assault. *Scott* v. *Seymour* (*Lord*), 1 H. & C. 219; 32 L. J., Ex. 61; 9 Jur. (N.S.) 522; 8 L. T. 511; 11 W. R. 169.

If by the law of a foreign country a person is justified or is excused, or has been justified or excused, in respect of a particular act, he is not answerable in this country in respect of such act as being a tort. *The M. Moxham*, 46 L. J., P. 17; 1 P. D. 107; 34 L. T. 559; 24 W. R. 650.

The rule as to property and civil contracts, that an act, unless intended to take effect elsewhere, shall, as regards its effects and incidents, if a conflict of law arises between the lex loci and the lex fori, be governed by the former, applies also to the case of an act causing a personal injury. If such an act is either enjoined or rendered lawful by the law of the country where it is done, an action cannot be maintained here in respect of it. *Phillips* v. *Eyre*, 10 B. & S. 1004; 40 L. J., Q. B. 28; L. R. 6 Q. B. 1; 22 L. T. 869—Ex. Ch. Affirming 17 W. R. 375.

Where a wrongful act inflicting personal injury is committed in a colony, an act of the colonial legislature rendering legal the wrongful act done, subsequently passed before an action has been brought in this country, takes away the right of action, not only in the courts of the colony, but also in those of this country. *Ib.*

Where the tort has been committed by the governor of the colony, it is no objection to the validity of the act of the colonial legislature, legalising the wrongs committed, that the assent of the governor was necessary to the passing of the act. *Ib.*

In order that an action may lie between parties in this country in respect of an act committed in a foreign country, the act must be one which if committed in this country would be actionable, and one which is not innocent according to the law of the country where it was committed; but it is not necessary that it should be the subject of civil proceedings in that country. The rule laid down in *Phillips* v. *Eyre* (supra) and *The M. Moxham* (supra) applied. *Machado* v. *Fontes*, 66 L. J., Q. B. 542; [1897] 2 Q. B. 231; 76 L. T. 588; 45 W. R. 565—C. A.

3. Joint Tortfeasors.

Contribution Between.]—If A. recover in tort against two defendants, and levy the whole damages on one, that one cannot recover a moiety against the other for his contribution; aliter in assumpsit. *Merryweather* v. *Nixan*, 8 Term Rep. 186. S. P., *Lingard* v. *Bromley*. infra.

Where a liability arises from the wrongful act of several parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party

Att.-Gen. v. *Wilson*, Cr. & Ph. 1 ; 10 L. J., Ch. 53 ; 4 Jur. 1174. And see *S. C.* on demurrer, 9 Sim. 30 ; 7 L. J., Ch. 76 ; 1 Jur. 890.

The rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act. *Adamson* v. *Jarvis*, 4 Bing. 66 ; 5 L. J. (o.s.) C. P. 68. S. P., *Pearson* v. *Skelton*, 1 M. & W. 504 ; 1 Tyr. & G. 848.

Or the act is of an obviously illegal character. *Betts* v. *Gibbins*, 2 A. & E. 57 ; 4 N. & M. 64 ; 4 L. J., K. B. 1.

Nor does the rule extend to a case in which there is any bonâ fide doubt whether in point of law the act was authorised. *Ib.*

So also the rule that a tortfeasor cannot recover upon a promise to indemnify made by the person at whose request the tortious act is committed, must be similarly confined. *Ib.*

The principle that no rights of indemnity and contribution exist as between wrongdoers is confined to cases where the transaction is actually illegal or void, or where the fraud is so great that on moral grounds the court will not entertain a suit for the relief of the malfeasors. The principle is further limited to cases where the fraudulent or illegal transaction is itself the basis of the claim, and does not apply where the transaction, though leading to that which is the basis of the claim, is separable from it. *Power* v. *Hoey*, 19 W. R. 916.

Where the joint author of a quasi-delict whose acts or omissions are not tainted with fraud or other moral delinquency whereby they partake of the nature of a delict, has paid the entire judgment debt for which he is jointly and severally liable, he has by the law of Scotland a right of recourse against his co-delinquents. Semble, the rule in *Merryweather* v. *Nixan* (8 Term Rep. 186) was correctly qualified in *Adamson* v. *Jarvis* (4 Bing. 66 ; 5 L. J. (o.s.) C. P. 68), per Lord Herschell, L.C., dub. Lord Halsbury. *Palmer* v. *Wick Steam Shipping Co.*, [1894] A. C. 318 ; 6 R. 245 ; 71 L. T. 163—H. L. (Sc.)

Where the injured party's claim of damages is liquidated by a joint and several decree against all the delinquents, the sum decreed is a civil debt, and while each debtor is liable under the decree in solidum to the pursuer, inter se each is liable only pro ratâ. *Ib.*

Contribution enforced among assignees in bankruptcy, to reimburse a payment by one under an order for a loss occasioned by their joint act ; and the objection that the defendants acted only for conformity upon the representation and advice of the plaintiff did not prevail. *Lingard* v. *Bromley*, 1 Ves. & B. 114 ; 12 R. R. 195.

—— **Proportion of Liability of Joint Tort Feasors.**]—Where two persons are jointly sued for false imprisonment, one of whom has acted from improper motives, the damages ought not to be assessed with reference to the act and motives of the most guilty or the most innocent party, but the true criterion of damage is the whole injury the party has sustained from the joint act of trespass. *Clark* v. *Newsam*, 1 Ex. 131 ; 16 L. J., Ex. 296.

Damages cannot be severed where the count is for a joint trespass, and the jury finds the defendants guilty accordingly. *Hill* v. *Goodchild*, 5 Burr. 2790.

—— **Agency.**]—There is no agency as between wrongdoers ; each of them is personally liable. *Heugh* v. *Abergavenny (Earl)*, 23 W. R. 40.

—— **Form of Decree.**]—In a collision action in rem where a tug and tow are both pronounced to blame for a collision with another vessel, the owner of the latter vessel may enforce the judgment for the whole of his damages against either or both the defendants, and the defendants are not entitled to have the decree so drawn up that half only of the total damages is recoverable from each defendant. *The Thomas Joliffe* or *The Avon*, [1891] P. 7 ; 63 L. T. 712 ; 39 W. R. 176 ; 6 Asp. M. C. 605.

Effect of Discharge of one of two joint Tortfeasors.]—A covenant not to sue one of two joint tortfeasors does not operate as a release so as to discharge the other. An agreement to accept a sum of money from one of two joint tortfeasors in full discharge of his liability, without prejudice to the right to claim against the other, ought to be construed, not as a release, but as a covenant not to sue. *Duck* v. *Mayeu*, 62 L. J., Q. B. 69 ; [1892] 2 Q. B. 511 ; 4 R. 38 ; 67 L. T. 547 ; 41 W. R. 56 ; 57 J. P. 23—C. A.

J. S. H.

TOTAL LOSS.

See SHIPPING (INSURANCE).

TOWAGE.

See SHIPPING.

TOWING PATH.

See WATER (CANAL COMPANY).

TOWN.

What is.]—On the trial of an issue whether a railway was passing through a town, within the meaning of the Railways Clauses Act (8 & 9 Vict. c. 20), s. 11, the judge merely told the jury that the word "town" was to be understood in the ordinary and popular sense :—Held, a misdirection, inasmuch as the judge ought to have given such a definition of the word "town" as would have enabled the jury to decide the issue. *Elliott* v. *South Devon Ry.*, 2 Ex. 725 ; 5 Railw. Cas. 500 ; 17 L. J., Ex. 262.

"Town," in that act, means a collection of inhabited houses, so near to each other that they may reasonably be said to be continuous ; and the term will include a space of open ground, surrounded by continuous houses. *Ib.*

A local act created trustees of turnpike roads, which were described by definite points, some in the town of T. The act was to be in operation for thirty-one years. It enacted, that it should not be lawful for the trustees to continue or erect any turnpike or toll gate across the roads, in the towns of T. and W., or in any other town

through or into which the roads might pass or be made:—Held, on an indictment for erecting and continuing a turnpike gate within the town of T., that the jury was rightly directed that the word "town" was to be understood in a popular sense, as a congregation of houses, and they were to consider whether the spot where the gate stood was surrounded by houses so reasonably near that the inhabitants might fairly be said to dwell together. *Reg.* v. *Cottle*, 16 Q. B. 412; 20 L. J., M. C. 162; 15 Jur. 721.

The 1 & 2 Vict. c. ii., for better paving, &c., the town of M., by s. 23 required the commissioners to repair, &c., all or any of the streets then paved or thereafter to be paved, cleansed and lighted under the provisions of the act: and s. 35 empowered the commissioners to light streets "within the town," although they were not public. The limits of the act were not defined. In pursuance of 25 & 26 Vict. c. 61, s. 7, the county was divided into highway districts, one of which included that part of the parish of M. "not within the town of M." Since 1862 certain highways in the parish of M. had been lighted by the commissioners: before they were so lighted they were not within the town. Upon complaint before justices against the highway district board for not repairing them:—Held, first, that the word "town" in the local act meant the town of M., not as it existed at the time of the passing of the act, but as it extended from time to time. *Milton next-Sittingbourne Commissioners* v. *Faversham Highway Board*, 10 B. & S. 548.

Held, secondly, that a highway was within the town if there was a continuous series of houses in it so contiguous as to form a congregation of human habitations. *Ib.*

Held, thirdly, that the fact of lighting the highways was not conclusive as to their being in the town. *Ib.*

By a local act passed in 1822 it was enacted that no person should sell any fish within the town of Rochdale except in the market-places, and that any person offending against this provision should forfeit a sum of money. In 1876, W. sold fish in Molesworth-street, which then was a main thoroughfare of the town of Rochdale; but in 1822 its site was green fields; Molesworth Street was not within the market-places of Rochdale:—Held, that the word "town," as used in the local act, meant the collection of buildings from time to time called the town of Rochdale, and that W. had been guilty of an offence against that act. *Collier* v. *Worth*, 1 Ex. D. 464; 35 L. T. 345.

—— Within the Lands Clauses Act.]—Quære, whether Teddington, in Middlesex, is a town within the Lands Clauses Act (8 & 9 Vict. c. 18), s. 128. The lands near it situated close to the railway station, and not continuously built upon, are not lands within a town, nor lands used for building purposes, within the meaning of that section. *L. & S. W. Ry.* v. *Blackmore*, 39 L. J., Ch. 713; L. R. 4 H. L. 610; 23 L. T. 504; 19 W. R. 805.

When premises are within the municipal boundaries of a town, but not surrounded by houses:—Held, that they were not in a town within the meaning of s. 93 of the Lands Clauses Consolidation Act, 1845. *Falkner* v. *Somerset and Dorset Ry.*, 42 L. J., Ch. 851; L. R. 16 Eq. 458.

The words "lands situate within a town" in s. 128 of the Lands Clauses Consolidation Act, 1845, mean lands surrounded by buildings which constitute the town; and therefore lands outside the buildings, although within the borough boundary, are not within the exception of the section. *Carington* v. *Wycombe Ry.*, 37 L. J., Ch. 213; L. R. 3 Ch. 377; 18 L. T. 96; 16 W. R. 494.

Improvement and Government.]—*See* LOCAL GOVERNMENT.

—— Of London.]—*See* METROPOLIS.

Town Council.]—*See* CORPORATION.

TRADE AND TRADE MARK.

[BY H. J. NEWBOLT.]

A. TRADE.
1. *Trade Name.*
   a. In General, 75.
   b. Colourable User by Defendant of his own Name, 82.
   c. Right to on Dissolution of Partnership, 84.
   d. Right to of Patentee when Patent Expired, 86.
2. *Imitation of Goods*, 87.
3. *Trade Libels—Slander of Title*, 90.
4. *Injury to Trade*, 94.
5. *Trade Custom*, 96.
6. *Trade Secret*, 100.
7. *Contract in Restraint of, see* CONTRACT.

B. TRADE MARK.
1. *What is, and Infringement.*
   a. What is a Trade Mark, 103.
   b. What is Infringement, 106.
2. *Action to Restrain Infringement.*
   a. Principles.
      i. In General, 118.
      ii. Delay and Acquiescence, 127.
      iii. Misrepresentation by Plaintiff, 128.
   b. Practice.
      i. Generally, 131.
      ii. Parties, 135.
      iii. Evidence and Discovery, 135.
      iv. Account of Profits, 136.
      v. Costs, 138.
3. *Assignment, and User by Firms and Representatives*, 140.
4. *Registration.*
   a. Who may Register, 144.
   b. What may be Registered.
      i. Generally, 146.
      ii. Fancy Words: Words not in Common Use, 153.
      iii. Distinctive Device, Word, Mark, 158.
      iv. Similarity: Calculated to Deceive, 165.
      v. Old Marks and Three Mark Rule, 171.
      vi. Words Publici Juris, 175.

c. Practice.
i. Generally, 177.
ii. Rectification of Register, 181.
iii. Opposition to Registration, 190.
iv. Committee of Experts, 193.
v. Party Aggrieved, 193.
vi. Common Elements: Disclaimer, 197.
vii. Costs, 200.

C. MERCHANDISE MARKS, 202.

D. DESIGNS, 204.

E. TRADE UNIONS, 207.

A. TRADE.

1. TRADE NAME.

a. In General.

Name and Mark—Distinction between.]—There is a distinction between trade names and trade marks—the latter being always assumed and invented by a trader for the purpose of his goods; and there is no necessity for him to adopt a trade mark like that of another trader, except for the purpose of passing off his goods as those of that trader. *Turton* v. *Turton*, 58 L. J., Ch. 677; 42 Ch. D. 128; 61 L. T. 571; 38 W. R. 22—C. A.

Name.]—The name of the first maker of an article may in time become a mere sign of the quality of the article, and cease to be a representation that the article is the manufacture of any particular person. *Hall* v. *Barrows*, 4 De G., J. & S. 150; 3 N. R. 259; 33 L. J., Ch. 204; 10 Jur. (N.S.) 55; 9 L. T. 561; 12 W. R. 322.

A name may become a trade denomination, and as such the property of a particular person who first gives it to a particular article of manufacture. The employment of the name by another person for the purpose of describing an imitation of that article is an invasion of the right of the original manufacturer, who is entitled to protection by injunction. *Wotherspoon* v. *Currie*, 42 L. J., Ch. 130; L. R. 5 H. L. 508; 27 L. T. 393.

A company cannot acquire the right to the exclusive user of a name which is merely descriptive of the class of business carried on by it. *Colonial Life Insurance Co.* v. *Home and Colonial Insurance Co.*, 33 Beav. 548; 33 L. J., Ch. 741; 10 Jur. (N.S.) 967; 10 L. T. 448; 12 W. R. 783.

The plaintiff in cases relating to trade names has not any property in the particular title, but he has a right to prevent others from personating his business by using such a description as would lead customers to suppose they were trading with the plaintiff. *Boulnois* v. *Peake*, 13 Ch. D. 513, n.

Before the court will interfere to prevent one trader from making fraudulent use of the name of another, it requires to be satisfied not only that the course taken by the defendant is calculated to deceive the public, but that representation had been made to him by the plaintiff that it will have that effect. *Williams* v. *Osborne*, 13 L. T. 498.

—— **Similarity—Injunction.**]—A trader who bonâ fide adopts as his trade or business name what is an accurate statement of an existing state of facts—e.g. his own name, if trading alone, or his own in combination with those of his partners, or with a comprehensive description of them, if in partnership—as A. and B. and C., or A. & Sons—cannot, in the absence of fraud, be restrained from so doing, because the name so adopted may by its similarity with that of another trader in the same place—or in the same class of goods—whose name may have acquired a reputation in the market, make it possible, or even probable, that inconvenience may arise, and the goods of the one trader be bought by mistake for those of the other. *Turton* v. *Turton*, supra.

To justify the court in granting an injunction, there must be a passing off by the trader sought to be restrained of his goods as those of the other trader. *Ib.*

A tradesman must not advertise his goods as being those of another tradesman, and will be restrained from doing so, though it is not proved that anyone has been deceived. *Jay* v. *Ladler*, 40 Ch. D. 649; 60 L. T. 27; 37 W. R. 505. See *Thompson* v. *Montgomery*, post, col. 173, and *Bodega Co.* v. *Owens*, post, col. 161.

To obtain an injunction on an interlocutory application to restrain a company from trading under a name very similar to that of a previously established company, it is not enough to show the similarity of the names, but also that there is a reasonable probability of damage in consequence to the business of the plaintiff company. *General Reversionary Investment Co.* v. *General Reversionary Co.*, 1 Meg. 65.

A man is not entitled to call his goods by a name which is an accurate and true description of such goods when the name is one by which the goods of another manufacturer have already been described and are known to the trade, and the effect of his doing so will be to mislead purchasers into the belief that they are buying the goods of that other. Injunction granted in the form approved in *Johnston* v. *Orr-Ewing* (post, col. 110). *Burgess* v. *Burgess* (post, col. 83) considered. *Reddaway* v. *Banham*, 65 L. J., Q. B. 381; [1896] A. C. 199; 74 L. T. 289; 44 W. R. 638—H. L. (E.)

Injunction granted at the instance of a foreign company trading in England to restrain an English rival from adopting a name so similar to its own act as to be calculated to deceive customers. *National Folding Box and Paper Co.* v. *National Folding Box Co.*, 13 R. 60; 13 W. R. 156.

The plaintiff company having for many years carried on an insurance business under its name as stated below, the defendant company obtained registration, and began to issue prospectuses and advertisements under the name stated below. The offices of both companies were situated in the city of London. On motion of the plaintiff company, an injunction was granted to restrain the defendant company, until the hearing or further order, from using its name as stated below, or any other name calculated to cause the defendant company to be mistaken for the plaintiff company. *Accident Insurance Co.* v. *Accident, Disease, and General Insurance Corporation*, 54 L. J., Ch. 104; 51 L. T. 597.

—— **Misleading Statements on Plaintiff's Label.**]—A plaintiff is entitled to an injunction

restraining a rival trader from the use of a name which is a substantial part of his trade mark, notwithstanding a misrepresentation of fact on the labels constituting the trade mark. Such a misrepresentation, in the absence of any design to mislead, does not disentitle the plaintiff to relief. *Cochrane* v. *McNish*, 65 L. J., P. C. 20; [1896] A. C. 225; 74 L. T. 109—P. C.

The appellant, plaintiff in the action, was the owner of a trade mark registered in England and in Jamaica, of which the words "Club Soda" were part. On the mark were the words "manufactured in Ireland by H.M.'s Royal Letters Patent." There was no patent for the manufacture. The respondents, whose labels were easily distinguishable from those of the appellant, used the words "Club Soda" on their labels to describe their own goods:—Held, that the appellant was entitled to an injunction restraining the respondents from the use of those words. *Ib.*

—— **Company Incorporated in Canada—Use of Similar Trade Name in England—Injunction.**]—In June, 1893, the Sun Life Assurance Company of Canada, which was duly incorporated in Canada, and had there carried on business for some years under that name, opened an office in the city of London. The Sun Life Assurance Company, which was established in 1810 in this country, its head office being in the city, thereupon commenced proceedings against the Canadian company, and moved for an injunction to restrain the defendant company from carrying on in the united kingdom the business of a life assurance company under the name of the Sun Life Assurance Company of Canada:—Held, that, inasmuch as the mere user by the defendant company of its full name involved no misstatement of fact and was not a fraudulent user, the defendant company was entitled to use in this country its full corporate name, but that the right did not extend to the use of the name of "The Sun" or "The Sun Life" without the addition of the words "of Canada." *Saunders* v. *Sun Life Assurance Co. of Canada*, 63 L. J., Ch. 247; [1894] 1 Ch. 537; 8 R. 125; 69 L. T. 755; 42 W. R. 315.

—— **"Post Office Directory"—"The Post Office Bradford Directory."**]—The plaintiff was the proprietor of a directory entitled the "Post Office Directory of the West Riding of Yorkshire," and he had for several years published post office directories of other counties. The defendants published a directory for the town of Bradford, which is within the West Riding, entitled "The Post Office Bradford Directory," but it was not similar to the plaintiff's directory in price or appearance. There being no evidence to satisfy the court that the words "Post office," in connection with directories, had become necessarily connected in the minds of the public with the name of Kelly:—Held, that the plaintiff had no right to the exclusive use of the words "Post Office Directory." *Kelly* v. *Byles*, 49 L. J., Ch. 181; 13 Ch. D. 682; 42 L. T. 338; 28 W. R. 485—C. A.

—— **"Radstock Collieries"—"The Radstock Colliery Proprietors and Factors."**]—B. was the owner of and worked all the collieries in the parish of Radstock in Somersetshire, and owned all the coal in that parish, with a small exception. She carried on the business of working the collieries and selling the coal in her own name, adding to it on her waggons and billheads the words "Radstock Collieries." The defendants, from 1868, carried on at Radstock the business of coal merchants as the "Radstock Coal Company," having depôts at various railway stations in the south and west of England, at which they sold different kinds of coal. They became in 1876 the lessees of and worked a colliery outside the parish of Radstock, but in a district or basin in which coal was raised similar to that raised within the parish; coal raised in the district, but outside the parish, being known in the market as Radstock coal. In 1873 the defendants began to sell coals at G. in Surrey, by means of a local agent, and in 1875 they bought the goodwill of a retail coal dealer named C. at G., who had become bankrupt. They then advertised themselves in the Surrey newspapers, and otherwise in the neighbourhood, as "The Radstock Colliery Proprietors and Factors, Coal and Coke Merchants (late C. & Co.)," and offered to supply coal of every description direct from the collieries:—Held, that the defendants were not entitled to use the name "The Radstock Colliery Proprietors," unless and until they should acquire a colliery within the parish of Radstock, or to use any style implying that their coal came from the parish of Radstock, unless and until they should become authorised to sell coals raised from a colliery within that parish. *Braham* v. *Beachim*, 47 L. J., Ch. 348; 7 Ch. D. 848; 38 L. T. 640; 26 W. R. 654.

Newspaper—User and Reputation.]—The plaintiffs, on the 3rd February, 1888, published the first number of a newspaper, and registered it at Stationers' Hall on the next day. No advertisement had been issued that a newspaper under that name was about to be published. On the 5th February the defendant published the first number of a newspaper with the same name. Very few copies of the plaintiffs' paper had then been sold:—Held, that the plaintiffs could not restrain the defendants from publishing their newspaper under that name, for that the registration at Stationers' Hall gave the plaintiffs no exclusive right to the name, and that a title to it by user and reputation could not be acquired by a publication for three days with a very small sale. *Licensed Victuallers' Newspaper Co.* v. *Bingham*, 58 L. J., Ch. 36; 38 Ch. D. 139; 59 L. T. 187; 36 W. R. 433—C. A.

The use for many years of two words of common use, "Newcastle Chronicle," as the name of a newspaper, does not give the owner of the newspaper an exclusive right to the use of one of the words, "Chronicle," so as to entitle him to restrain the defendant from publishing in the same town a newspaper having for its name the word "Chronicle," in conjunction with another, that is to say, "Sporting Chronicle"; the appearance and contents of two papers being dissimilar, there being no evidence of anyone having been deceived, and no apparent intention to deceive on the part of the defendant. *Cowen* v. *Hulton*, 46 L. T. 897—C. A.

The right of the proprietor of a newspaper to prevent another person from adopting the same or similar name for a similar publication is not founded on the right of property in the proprietor, but rests upon the equitable doctrine that the user of such name is reasonably calculated to induce the public to believe that the new

paper is that of the original proprietor, and to pass off his paper for that of the original proprietor. *Walter* v. *Emmott*, infra.

Where the owner of a publication claims an injunction to restrain the issue of another publication with a similar name he must show not only that the assumption of the name by the defendant is calculated to deceive the public, but also that there is a probability of the plaintiff being injured by such deception. *Borthwick* v. *Evening Post*, 57 L. J., Ch. 406; 37 Ch. D. 449; 58 L. T. 252; 36 W. R. 434—C. A.

The plaintiff had long been the proprietor of a daily morning newspaper, called the "Morning Post." The defendants commenced a daily evening newspaper called the "Evening Post." There was no evidence of any actual injury having been done to the plaintiff by the conduct of the defendants:—Held, that although the conduct of the defendants in taking the name "Evening Post" might be calculated to deceive the public in supposing that there were was a connection between the two papers, there was no probability that the plaintiff would be injured by such supposition; and an injunction was therefore refused. *Ib.*

The plaintiff was the proprietor of a newspaper called "The Grocer," published in London, to which there had been originally attached a monthly supplement entitled "The Oil Trade Review," both of which were registered at Stationers' Hall. In 1886 the two were amalgamated under the name of "The Grocer and Oil Trade Review." In 1888, the defendants commenced, in Dublin, the publication of a bimonthly paper called "The Grocer and Wine Merchant and Irish Brewer and Distiller," intended by the defendants to represent and to advocate the interests of a different branch of the trade from the plaintiff's paper:—Held, that the plaintiff was entitled to an injunction to restrain the defendants from using the term "Grocer" as the first or principal part of the title of their paper. *Reed* v. *O'Meara*, 21 L. R., Ir. 216.

——**Misrepresentation—Interlocutory Injunction.**]—The proprietor of an old-established paper called "The Mail," published three days a week at 11 a.m. at the price of 2*d.* in London, but whose principal circulation was in the provinces and abroad, was held not entitled, upon interlocutory application, to an injunction restraining the defendant from using on a daily morning paper which he had just started, and which was published in London at 3 a.m. at the price of ½*d.*, the title of "The Morning Mail." *Walter* v. *Emmott*, 54 L. J., Ch. 1059; 53 L. T. 437—C. A.

Person assuming Name.]—In England the assumption of a name, the patronymic of a family, by a stranger, who has never before been called by that name, is not the subject of a civil action, as by the English law there is no right of property in a person to the use of a particular name, to the extent of enabling him to prevent the assumption of his name by another. *Du Boulay* v. *Du Boulay*, 6 Moore, P. C. (N.S.) 31; 38 L. J., P. C. 35; L. R. 2 P. C. 430; 17 W. R. 594.

Aliter, as to the exclusive use of a name in connection with a trade or a business, which right is recognised, and a party's assuming it, colourably or otherwise, being an invasion of another's rights, is a fraud, for which a remedy lies either at law or equity. *Ib.*

—— **Telegraphic Address.**]—The short address "Street, London," was used for many years in sending telegrams from abroad to Street & Co., of Cornhill. A bank adopted by arrangement with the post-office the phrase "Street, London," as a cypher address for telegrams from abroad to themselves:—Held, that the court had no jurisdiction to restrain the bank from using such cypher address. *Street* v. *Union Bank of Spain and England*, 55 L. J., Ch. 31; 30 Ch. D. 156; 53 L. T. 262; 33 W. R. 901.

"Castle Album" of Photographs.]—An album for holding photographs containing a printed list of various castles, painted illustrations of which, with short descriptions, appeared on the pages of the album, is not a book within the Copyright Act, 1842. Even if the album were a book, there was no infringement of copyright in taking as a title the words "Castle Album," which had not on the evidence been proved to have acquired a secondary sense in the market designating the plaintiff's album exclusively so as to fall within the principle of *Wotherspoon* v. *Currie* (supra, col. 75). *Schove* v. *Schmincke*, 55 L. J., Ch. 892; 33 Ch. D. 546; 55 L. T. 212; 34 W. R. 700.

Label on Champagne Bottles—Misrepresentation—Long User.]—In July, 1885, M., of Dizy, in France commenced the consignment to the plaintiff in London, of champagne under the label "Le Court et Cie., Reims," which had then recently been registered in France as his trade-mark, and to which in December, 1886, his right was established in proceedings against X. before the French tribunal. Further consignments were made to the plaintiff down to July, 1886, and advertised and sold by him as Le Court et Cie.'s champagne. In March, 1886, the defendant, trading under the name of Short & Co., began to sell (chiefly at a wine bar across the counter) champagne which was sent to him from France by X. as Le Court et Cie.'s champagne; and it appeared that in 1882 he had proposed to register in France a label with the name Le Court et Cie. as corresponding to his own trade-name of Short & Co., but from difficulties in obtaining registration abandoned the idea. Upon motion by the plaintiff to restrain the use of the name and brand by the defendant:—Held, that the plaintiff was not entitled to an injunction against the defendant: because the evidence failed to show that either by long user or reputation had the wine sold under the name and brand "Le Court et Cie." become so associated with the wine of the plaintiff as to enable him to assert his common law right of restraining another person from passing off his goods as those of the plaintiff. *Goodfellow* v. *Prince*, 56 L. J., Ch. 545; 35 Ch. D. 9; 56 L. T. 617; 35 W. R. 488—C. A.

Exclusive Use of another Person's Name.]—F. sought to restrain C. and V. from using the name "Richter Concerts," or from representing themselves as owners of the undertaking known by that name, or from representing that they were carrying on the "Richter Concerts" in succession to F.'s series; and also to restrain V. from acting in the matter as agent for C. F

alleged that he engaged Dr. Richter to conduct concerts, and in 1879 had originated the "Richter Concerts"; and that no concerts had ever been given under that name excepting by him. It appeared that C. had announced a series of "Richter Concerts," and that V., notwithstanding a written agreement to act as F.'s agent, had held himself out as the agent of C. It was contended by F. that he had acquired the right to the exclusive use of the term "Richter Concerts," as a "trade-name," by having originally introduced the name and obtained a list of subscribers, and by the introduction of original features as to price and music. Dr. Richter had declined to act any longer as the conductor of F.'s concerts, and had made arrangements with C.:—Held, that it required a strong case to be made out to sustain a claim to the exclusive use of another person's name as a trade-name; that no such case had been established in the present instance, and that there was no ground for saying that the term "Richter Concerts" had become dissociated from Dr. Richter himself, who was at liberty to carry his services to any market he chose. *Franke* v. *Chappell*, 57 L. T. 141.

Servant setting up Independent Business.]—Representations contained on the blinds and brasses of a shop front, calculated to induce the public to believe that the owner is connected in business with a firm of established reputation, will be considered upon the same principles as govern rights in trade-marks. Therefore, where a tradesman, in addition to his own name upon his shop front, placed upon his sun blind and upon his brass plate the words "From T. and G." (in whose employment he had been), the court, being of opinion that this was done in such a way as to be likely to mislead, and there being evidence that persons had been actually misled, granted an injunction to restrain such a use of the name of the firm "T. and G." *Glenny* v. *Smith*, 2 Dr. & Sm. 476; 6 N. R. 363; 11 Jur. (N.S.) 964; 13 L. T. 11; 13 W. R. 1032.

A trader, who has been a manager or a partner in a firm of established reputation, has a right, on setting up an independent business, to make known to the public that he has been with that firm, but he must take care not to do so in a way calculated to lead the public to believe that he is carrying on the business of the old firm, or is in any way connected with it. An old-established tailor took his foreman into partnership, and the business was carried on under the name of H. and P. The partnership was afterwards dissolved by a decree of the court, in which it was provided that the business of the partnership should belong to the master. The master accordingly kept up the shop under the name of H. & Co. Subsequently the foreman set up a shop only a few doors from the master's shop, and painted over the door the words "P., from H. and P.":—Held, that, having regard to the manner in which the names were painted up, the foreman had done that which was calculated to lead the public to suppose that he was still connected with the old firm, and that the master was entitled to an injunction. *Hookham* v. *Pottage*, L. R. 8 Ch. 91; 27 L. T. 595; 21 W. R. 47. S. P., *Hart* v. *Colley*, 59 L. J., Ch. 355.

Vendor after Sale of Business.]—Although the fact that a man has sold the goodwill of a business does not prevent him from setting up again immediately in the same trade, the court will nevertheless restrain him from sending special solicitations to the customers of the old house asking them to deal with him at his new place of business, and it will not justify his conduct that he is not in any way holding himself out as continuing to carry on the old business. *Labouchere* v. *Dawson*, 41 L. J., Ch. 427; L. R. 13 Eq. 322; 25 L. T. 894; 20 W. R. 309.

L. M. Pinet (trading as Maison Pinet), who carried on a small and recently established business in boots and shoes made for a special purpose, sold that business to the defendant company. One of the objects of the company was, by its memorandum of association, stated to be "to carry on business in England and elsewhere as bootmakers and shoemakers." The plaintiffs had for over forty years carried on business in the manufacture and sale of boots and shoes, their goods being commonly known as "Pinet's." They accordingly applied for an interlocutory injunction to restrain the defendant company from carrying on business as manufacturers or vendors of boots or shoes under the name of "Maison Pinet, Limited," or under any other name or description of which the name "Pinet" formed part, and which was so arranged or contrived as, by colourable imitation of the plaintiffs' trading style or otherwise, to be calculated to represent or lead to the belief that the defendant company were carrying on the plaintiffs' business, and from in any other manner representing or acting so as to lead to such belief as aforesaid:—Held, that, although the business of L. M. Pinet was not the same as the plaintiffs, yet the company formed to acquire it had no intention of restricting their operations in any way, and would probably develop that business as far as possible, and develop it at the expense of the plaintiffs; that, therefore, a case had been made out justifying the interference of the court at the present stage of the proceedings; but that the interlocutory injunction claimed went beyond what the plaintiffs required for their protection; and that it must be limited as in the form in *Montgomery* v. *Thompson* (post, col. 109). *Pinet* v. *Maison Pinet*, 77 L. T. 322—C. A. But see *S. C.* at trial, 67 L. J., Ch. 41.

Right of Purchaser to use Vendor's Name.]—The plaintiff sold to the defendant his business premises, and the goodwill of the business carried on by him there. The deed by which the sale was carried out contained no express assignment of the right to use the plaintiff's name:—Held, that the defendant had, by virtue of the assignment of the goodwill, the right to use the plaintiff's name in the business, so as to show that the business was the one formerly carried on by him, but not so as to expose him to any liability by holding him out as the owner of the business, or as one of the persons with whom contracts were to be made. *Levy* v. *Walker* (post, col. 86) distinguished. *Thynne* v. *Shove*, 59 L. J., Ch. 509; 45 Ch. D. 577; 62 L. T. 803; 38 W. R. 667.

Mortgagee—User of Name.]—The mortgagee of stock-in-trade and goodwill, and of the right to use a name, never having used the name and not intending to use the name, cannot obtain an injunction to restrain persons claiming under the mortgagor from using the name. *Beazley* v. *Soares*, 52 L. J., Ch. 201; 22 Ch. D. 660; 31 W. R. 887.

b. Colourable User by Defendant of his own Name.

Defendant carrying on Business in his own Name—Intention to Deceive.]—Semble, when a defendant carries on business in his own name with the object of securing to himself a portion of the plaintiff's business by suggesting to the public that his business is the plaintiff's, the court will grant an injunction restraining him from so doing. *Valentine* v. *Valentine*, 31 L. R., Ir. 488.

The plaintiff, Thomas Holloway, sold a medicine as Holloway's pills. The defendant, Henry Holloway, commenced selling pills as H. Holloway's pills, but in boxes, &c., similar to the plaintiff's, and with a view of passing off his pills as the plaintiff's. He was restrained by injunction. *Holloway* v. *Holloway*, 13 Beav. 209.

A blacking manufactory had long been carried on under the firm of Day & Martin, at 97, High Holborn. The executors of the survivor continued the business under the same name. A person of the name of Day having obtained the authority of one Martin to use his name, set up the same trade at 90½, Holborn Hill, and sold blacking as of the manufacture of Day & Martin, 90½, Holborn Hill, in bottles and with labels having a general resemblance to those of the original firm. He was restrained by injunction. Principles on which the court interferes with the use of trade marks. *Croft* v. *Day*, 7 Beav. 84.

—— **No Intention to Deceive.**]—Where the manufacturer of an article of trade sells it under his own name, and the article attains great celebrity in the market under that name, the manufacturer does not thereby acquire such an exclusive right in the use of the name or title under which the article has been sold as to prevent the use of it, without fraud, by another person having the same name, in the sale of a similar article manufactured by himself. *Burgess* v. *Burgess*, 3 De G. M. & G. 896; 22 L. J., Ch. 675; 17 Jur. 292.

Therefore, where a father had for many years exclusively sold a sauce under the title of "Burgess's" sauce, the court would not restrain his son from selling a similar article under that name, no fraud being proved. *Ib.*

Delay from October to March in appealing from the refusal of a motion for an injunction held fatal to the appeal. *Ib.*

Any person who by fair means has gained the knowledge of a trade secret, may, after the death of the original inventor, make and sell the article under the name of the original inventor, provided such person does nothing to induce the public to believe that the article sold by him is made by the successor of the original inventor. *James* v. *James*, 41 L. J., Ch. 353; L. R. 13 Eq. 421; 26 L. T. 568; 20 W. R. 434.

A member of the family of R. J., the original inventor of a secret preparation, having by fair means become possessed of the original receipt, made and sold the article by the name given to it by the original inventor, under the signature of R. J., his own name being R. J. J.:—Held, that he was not entitled, as against the successor of the original inventor, to sell the article under the signature of R. J. singly, or to represent that his was the only genuine preparation. *Ib.*

—— **Joint-Stock Company—Defendant registering Company in his own Name—Name calculated to Deceive.**]—William Edgcumbe Rendle, the patentee of an invention for glass-roofing, carried on business under the name of "W. Edgcumbe Rendle & Co." His son, John Edgcumbe Rendle, having failed in his business of a bookseller, was taken into his father's glass-roofing business, and entered into an agreement not to carry on any opposition business. The father died, having by his will given his son an interest in the glass-roofing business. The son then started business on his own account under the name of "J. Edgcumbe Rendle & Co." He got into financial difficulties, and made an assignment for the benefit of his creditors of his business and of all his property. A company, of which he was the promoter and manager, was subsequently registered under the name of "J. Edgcumbe Rendle & Co., Limited," to carry on the business of glass-roofing in opposition to W. Edgcumbe Rendle & Co. The trustees of the will of the father thereupon applied to the court for an injunction to restrain the company and their manager from carrying on the business of glass-roofing under the name of "J. Edgcumbe Rendle & Co., Limited," or any other name calculated to mislead the public into the belief that such company was carrying on or had succeeded to the business of W. Edgcumbe Rendle & Co.:—Held, that an injunction must be granted, as the son, who was not at the time carrying on the business of glass-roofing, he having assigned all his interest to his creditors, had no right to lend his name to a company, which name, from its being so like one already attached to an established business, would be calculated to deceive. *Rendle* v. *Rendle*, 63 L. T. 94.

The plaintiffs were a registered company carrying on the business of a wax-work exhibition in London under the name of "Madame Tussaud & Sons, Limited." Their exhibition was a very old-established one. The defendant, Louis Tussaud, was a wax-modeller, who had formerly been employed by the plaintiff company, but had never carried on any business on his own account. He promoted a company, of which he was to be manager, to carry on an exhibition similar to that of the plaintiffs, but in another part of London. It was proposed to register the new company under the name of "Louis Tussaud, Limited." The plaintiffs moved for an injunction to restrain the defendant from proceeding with the registration of the new company under the proposed name or any other name so nearly resembling that of the plaintiff company as to be calculated to deceive:—Held, that an injunction ought to be granted in similar terms to the order in *Hendriks* v. *Montagu* (post, col. 146). *Tussaud* v. *Tussaud*, 59 L. J., Ch. 631; 44 Ch. D. 678; 62 L. T. 633; 38 W. R. 503; 2 Meg. 120.

Semble, that if the defendant had previously carried on an exhibition in his own name, and had sold it with the goodwill to third parties, who had transferred it to the company, registration under the proposed name might have been allowed. *Ib.*

c. Right to on Dissolution of Partnership.

In General.]—A trader who has been a partner in a firm of established reputation is entitled on setting up a separate business to tell the world that he has been with that firm, but he must not do so in a way calculated to lead the public to believe that he is carrying on the business of the old firm. *Hookham* v. *Pottage*, L. R. 8 Ch. 91; 27 L. T. 595; 21 W. R. 47.

Upon the dissolution of a partnership, which had been carried on for a considerable time by J. D. and others, as stuff merchants, under the style or firm of "J. D. & Co.," J. D. assigned all his shares, rights, and interests in the business, and the goodwill thereof, to his late partners and another, who thereupon proceeded to carry on business under a new style or firm, consisting of their own names with the addition of the words "late J. D. & Co." Upon a bill filed by them, J. D. was restrained by injunction from resuming or carrying on the business of a stuff merchant at or in the immediate neighbourhood, either alone or in partnership with any other persons whatsoever, under the style or firm of "J. D. & Co.," or in any other manner holding out that he was carrying on the business of a stuff merchant, in continuation of or in succession to the business carried on by the late firm of J. D. & Co. *Churton* v. *Douglas*, 1 Johns. 174; 28 L. J., Ch. 841; 7 W. R. 365.

Under Agreement.]—E. and H. were partners under articles. One of the terms was, that on the decease of either partner his personal representative should have the power, within three months, of electing to continue the share of the deceased partner; and if he declined, then the business, stock in trade, &c., were to be valued, and the surviving partner was to take the whole, giving security for the moiety late belonging to the deceased partner. E. died:—Held, that during the three months, or until E.'s personal representative should elect, the survivor H. was to be prevented by injunction from carrying on the business in any other form than what had been used in the life of E. *Evans* v. *Hughes*, 18 Jur. 691.

R. Scott & W. Scott carried on business at N. and G., in partnership, under the firm of R. & W. Scott. By an agreement for dissolution, it was agreed that one of the partners should remain at N., but there was no stipulation by which either party bound himself not to continue the business, but only that they would not carry it on together. There was no disposition of the goodwill to the partner who remained at N. Neither party was to use the name of the firm except so far as might be necessary in winding up the partnership affairs. Shortly after the date of the agreement W. Scott retired from the business and set up business for himself at T., near N. The inscription used by the firm over the door of their place of business at G. had been "R. & W. Scott, of N." R. Scott made over his business at N. and G. to the defendants, who, at their premises at G., made use of the inscription, "Scott & Nixon, late R. & W. Scott, of N." On the application of W. Scott, the court granted an injunction restraining them from using such an inscription, inasmuch as it amounted to a representation that they had succeeded to the business of the late firm. *Scott* v. *Scott*, 16 L. T. 143.

Where no Agreement.]—A partnership was carried on for fourteen years between B. and G. under the style of "B. & Co." On the dissolution, the assets were divided, but no arrangement was come to as to the style:—Held, that the name or style of "B. & Co." formed an undivided asset of the partnership which belonged to the partners in common after the dissolution, and that B. was not entitled to prevent G. using the style of "B. & Co." in his business. *Banks* v. *Gibson*, 6 N. R. 373; 34 Beav. 566; 34 L. J., Ch. 591; 11 Jur. (N.S.) 680; 13 W. R. 101.

Executor carrying on Business.]—A. and B. carried on the business of a pencil maker, under the firm of A. & L. A. died, and B. carried on the business, under the firm of B. & Co., successors to A. & L. A.'s executor having commenced the same business, under the firm of A. & L., an injunction was granted to restrain him from using that firm until the right should have been tried at law. *Lewis* v. *Langdon*, 7 Sim. 421.

Purchase by one Partner—Goodwill included.]—Two ladies, V. C. and M. W., carried on business in London in partnership under the firm of C. & W. V. C. married L. After this a decree for dissolution was made, and it was ordered that "the said partnership business, and the leasehold premises, trade fixtures, stock-in-trade, goodwill, and business," should be sold as a going concern to M. W. or to L. and wife, whichever should be the highest bidder. M. W. became the purchaser of all the property directed to be sold. L. and wife, who carried on business in Paris under the firm of C. et Cie., commenced an action to restrain M. W. from carrying on business under the style or firm of C. & W.:—Held, that L. and wife had no right to restrain M. W. from using the name of the old firm. *Levy* v. *Walker*, 48 L. J., Ch. 273; 10 Ch. D. 436; 39 L. T. 654; 27 W. R. 370.

—— **Goodwill not included.**]—On a dissolution of partnership the whole of the stock-in-trade was purchased at a valuation by one of the partners, but no assignment was made of the goodwill of the business:—Held, that the outgoing partner was entitled to an injunction to restrain the use of his name in the style of the firm. *Scott* v. *Rowland*, 26 L. T. 391; 20 W. R. 508. See also *Gray* v. *Smith*, 59 L. J., Ch. 145; 43 Ch. D. 208; 62 L. T. 335; 38 W. R. 310—C. A.

d. Right to of Patentee when Patent expired.

No Exclusive Right.]—The court will restrain the use by a third party of an arbitrary name, which a plaintiff has invented and applied to a particular class of goods as sold by him, and which has thus become identified with the plaintiff's goods, where the sale of that class of goods is open to the world. *Young* v. *Macrae*, 9 Jur. (N.S.) 322.

But where the class of goods is a patented article, no such protection will be afforded; for the name becomes identified with the goods, not because they are the plaintiff's but because he alone, as patentee, can make and sell them; and if the goods are the same, but made or manufactured in a totally different way and from a totally different natural source, so that there is no infringement of the patent, a third party may use the name fixed upon by the patentee. *Ib.*

Where the inventor of a new substance has given to it a name, and, having taken out a patent for his invention, has, during the continuance of the patent, alone made and sold the substance by that name, he is nevertheless not entitled to the exclusive use of that name after the expiration of the patent. *Linoleum Manufacturing Co.* v. *Nairn*, 47 L. J., Ch. 430; 7 Ch. D. 834; 38 L. T. 448; 26 W. R. 463.

A company, under patents, made floor cloth of a new substance marked with the word "linoleum" :—Held, that "linoleum" being the only name of the new substance, the company, at the expiration of the patents, was not entitled to the exclusive use of that word. *Ib.*

When articles of a particular kind have become generally known in commerce by the name of an original manufacturer (or patentee as the case may be), any person has a right, after the expiration of the patent, to manufacture such articles and sell them under that name ; but he may not by inscribing the name as a proper name, on his shop-front, or otherwise, lead the public to believe that he is selling as the agent for the original manufacturer. *Wheeler & Wilson Manufacturing Co.* v. *Shakespear*, 39 L. J., Ch. 36.

Continued use of word "Patent."]—A trade mark describing the articles on which it is impressed as "patented," is a proper one, if the statement was true at the time the mark was adopted, though the patent has been allowed to drop before its expiration. *Leather Cloth Co.* v. *Hirschfeld*, 1 N. R. 551 ; 1 H. & M. 295 ; 11 W. R. 933.

T. took out letters patent, which expired in 1844, for the manufacture of solid-headed pins, and carried on the business, under the firm of "T. & Co.," till 1838. In such business T. used parti-coloured labels, in pink and green, in which the pins were described as "patent pins," "exclusively manufactured by T. & Co." ; and had engraved plates and blocks for striking off such labels. In 1838 T. assigned the letters patent, together with his business and goodwill, and the right to use the plates, labels, &c., and the name of "T. & Co." to S. In 1839 S. became bankrupt. His assignees carried on the trade till 1841, when they agreed to assign the business, patent, plates, labels, &c., and the right to use the name of "T. & Co." to E., the plaintiff, who ever since carried on the business accordingly, and used the said labels. In 1853 E. discovered that V., the defendant, was using labels in palpable imitation of the plaintiff's :—Held, first, that E. was entitled to restrain such palpable imitation by V. Secondly, that E. was not disentitled to sue by reason that the representations on his labels were no longer accurate, although the pins were not now protected by patent, nor manufactured strictly according to the patent, nor exclusively or at all by T., who had long since retired. Thirdly, that V. was not to be precluded altogether from representing that his pins were manufactured according to T.'s patent (now expired), but he was not to do so in a manner liable to mislead. *Edleston* v. *Vick*, 11 Hare, 78 ; 1 Eq. R. 413 ; 18 Jur. 7.

Where there is a strong resemblance in matter, colour, and arrangement, the court will presume that it is not fortuitous, but that it was intentional, with a view to mislead purchasers. *Ib.*

2. Imitation of Goods.

Passing off Goods.]—Where a trader has long been the sole maker of a particular kind of article, and has called it by a non-descriptive trade name by which alone the article has become known in the market, a rival trader is not at liberty to make and sell a similar kind of article under the same name, unless he can so distinguish his goods as to prevent them from being mistaken for the goods of the original maker. The plaintiff having for thirty-five years been the sole maker under a secret recipe of a sauce which he called "Yorkshire Relish," and sold in round glass bottles with labels attached to them containing the name "Yorkshire Relish," and also his own name, the defendants made a similar, but not identical sauce, under the same name, and sold it at a less price, in similar glass bottles, with labels upon them also containing the name "Yorkshire Relish" in conjunction with their own name. The labels were not otherwise similar. The plaintiff's and defendant's sauces were sold by the retail tradesman at the same price, and there was proof that the ultimate purchaser had been in several instances misled into buying the defendant's sauce for the plaintiff's :—Held, that the defendants were not entitled to use the name "Yorkshire Relish" in connection with any sauce other than the plaintiff's without clearly distinguishing such sauce from the plaintiff's. *Birmingham Vinegar Brewery Co.* v. *Powell*, 66 L. J., Ch. 763 ; [1897] A. C. 710 ; 76 L. T. 792—H. L. (E.) Affirming 44 W. R. 188. And see *Powell* v. *Birmingham Vinegar Brewery Co.*, 13 R. 153 ; 71 L. T. 393. Affirmed, [1894] 3 Ch. 449 ; 13 R. 164, n.—C. A.

The general proposition that nobody has a right to represent his goods as the goods of somebody else is without limit as regards name, origin, honesty of manufacture, or otherwise, and applies to a case where the plaintiff's goods largely acquired their value through the exertions of the defendants as the sole importers of those goods. If the plaintiff is entitled to an injunction in such a case, he is also entitled to an account of profits. *Lever* v. *Goodwin* (36 Ch. D. 1) followed. *Saxlehner* v. *Apollinaris Co.*, 66 L. J., Ch. 533 ; [1897] 1 Ch. 893 ; 76 L. T. 617.

If the defendants' goods on the face of them, and having regard to surrounding circumstances, are calculated to deceive, evidence to prove the intent to deceive is unnecessary, since a man must be taken to have intended the reasonable and natural consequences of his own acts. If, on the other hand, a mere comparison of the goods, having regard to the surrounding circumstances, is not sufficient, then it is allowable to prove from other sources that what is or may be apparent innocence was really intended to deceive. *Ib.*

Public not Retail Dealers deceived—Right to Injunction — Form of Account.]—The defendants, who were soap manufacturers, brought out their soap in packets so closely resembling those in which the plaintiffs, who were also soap manufacturers, had been in the habit of bringing out their soap, as to be calculated to deceive purchasers :—Held, that although the retail dealers who bought soap from the defendants would not be deceived, the defendants, by their imitation of the plaintiffs' packets, put into the hands of the retail dealers an instrument of fraud, and ought to be restrained by injunction. An injunction was accordingly granted, and an account was directed of the profits made by the defendants in selling soap in the form in which it was held that they were not entitled to sell it ; and on an appeal the court held that the injunction had been rightly granted, and that the account was in the proper form, and ought not to be limited by excluding from it

soap which the retail dealers sold to persons who bought it as the defendants' soap. *Lever* v. *Goodwin*, 36 Ch. D. 1; 57 L. T. 583; 36 W. R. 177—C. A.

"Guaranteed Corset"—Exclusive User.]—A firm of corset manufacturers had for upwards of four years been the exclusive makers and sellers of a corset which they called the "Guaranteed Corset," the wear of which they guaranteed for twelve months by undertaking to supply any purchaser with a new corset in case of complaint within that period. The corset was sold in a box bearing a printed label with the words "Guaranteed Corset" in large and conspicuous type, and in smaller type the words, "This corset is guaranteed to wear twelve months." The defendants, a rival firm of corset manufacturers, subsequently introduced a cheaper and inferior corset, the wear of which they also professed to guarantee for twelve months, and which they sold in a box bearing a printed label with the words "Guaranteed Corset" in large type, and words in smaller type similar to the plaintiffs': —Held, in an action by the plaintiffs for an injunction, that the word "guaranteed" was not so distinctively and exclusively applicable to the plaintiffs' corset as that the court would restrain the defendants from using the same word in connection with their corset. *Symington* v. *Footman*, 56 L. T. 696. See *Goodfellow* v. *Prince*, ante, col. 80.

Colourable Imitation.]—W. registered the word "Reversi" as a trade-mark for "a game somewhat analogous to draughts." The word was the name of a game of cards popular in France in the 16th century. In the rules of W.'s game the word "reverse" frequently occurred, and the game depended on each player reversing or turning over his adversary's counters. A. brought out a similar game under the name "Annex," and on the labels of the boxes in which he sold it, he added to the name "a game of reverses." W. brought an action to restrain A. from using the word "reverses":—Held, that the use of the words "a game of reverses," which were a fair description of the nature of the game, did not show any design on the part of A. to pass off his game as that of W., and that an injunction ought not to be granted. *Waterman* v. *Ayres*, *Waterman's Trade-mark*, *In re*, 57 L. J., Ch. 893; 39 Ch. D. 29; 59 L. T. 17; 37 W. R. 110—C. A.

Exclusive Right to Use apart from Legislation.]—In the absence of any legislation for the registration of trade-marks, as soon as a trade-mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the exclusive property of that firm, and no one else has a right to copy it, or even to appropriate any part of it, if by such appropriation purchasers may be induced to believe that they are getting goods which were made by the firm to which the trade-mark belongs. But the acquisition of such exclusive right to a mark or name in connection with a particular article of commerce cannot entitle the owner of that right to prohibit the use by others of such mark or name in connection with goods of a totally different character. *Somerville* v. *Schembri*, 56 L. J., P. C. 61; 12 App. Cas. 453; 56 L. T. 454—P. C.

3. TRADE LIBELS—SLANDER OF TITLE.

Jurisdiction—Injunction.]—The court has now jurisdiction to restrain by injunction the publication of a libel injurious to trade. *Thomas* v. *Williams*, 49 L. J., Ch. 605; 14 Ch. D. 864; 43 L. T. 91; 28 W. R. 983.

In order to obtain an injunction in such a case it is sufficient for the plaintiff to show that the libel is calculated to injure his trade; it is not necessary that he should prove actual damage. *Ib.*

The court has jurisdiction to restrain by injunction a person from making oral statements as well as written statements calculated to injure another person in his business; but with regard to oral statements such jurisdiction will be exercised with great caution. *Hermann Loog* v. *Bean*, 53 L. J., Ch. 1128; 26 Ch. D. 306; 51 L. T. 442; 32 W. R. 994.

What must be Proved.]—In order to entitle a plaintiff to maintain an action for damages for, or to obtain an injunction against, statements disparaging his goods, it must be shown that such statements were in disparagement of the goods of the plaintiff in particular; that they were untrue; and that they occasioned special damage. Damages and injunction are two different forms of remedy against the same wrong; and the facts which must be proved to entitle a plaintiff to the first of these remedies must equally be proved to entitle him to the second:—Quære, whether any action is maintainable for the disparagement by a trader, in the course of his trade, of the goods of a rival trader, where the disparagement consists merely of the allegation that the goods of the former are better than those of the latter. *White* v. *Mellin*, 64 L. J., Ch. 308; [1895] A. C. 154; 11 R. 141; 72 L. T. 334; 43 W. R. 353; 59 J. P. 628—H. L. (E.)

To obtain an interlocutory injunction restraining the defendant from issuing circulars, &c., stating the wrongful user by the plaintiff upon his manufactured articles of labels claimed by the defendant, and from threatening the plaintiff's customers with legal proceedings for selling his articles bearing the labels in question, the plaintiff must satisfy the court that the statements in the circulars, &c., complained of are in fact untrue. The fact that the defendant, having commenced actions against the plaintiff and his customers for injunctions restraining the wrongful user of the labels in question, had not thought fit to move for interlocutory injunctions:—Held, to be no ground by itself for granting the plaintiff the injunction sought for. *Anderson* v. *Liebig's Extract of Meat Co.*, 45 L. T. 757.

Wrapper—Descriptive Title.]—It had been established by litigation between the L. company and A. that (1) the words "Liebig's Extract of Meat" is a merely descriptive title open to all the public; (2) that it is equally open to the public to sell the article as "Baron Liebig's Extract of Meat"; or (3) to use a photograph of Baron Justus Von Liebig, the inventor of the receipt. A. then proceeded to use in connection with the extract of meat sold by him a wrapper with a photograph of Baron Liebig, and a statement "this is the only genuine brand," with a reference to the "favourable decision" of the house of lords and the judgments of the various judges who had given judgment in the litigation which had been carried to the house of lords.

The L. company moved to restrain A. from using the wrapper in question:—Held, that the company, who were not carrying on a fraudulent trade, were entitled to an injunction, notwithstanding that they might in their own advertisements have to some extent gone beyond what they were entitled to say. *Liebig's Extract of Meat Co.* v. *Anderson*, 55 L. T. 206.

Circular tending to Mislead.]—The plaintiffs and defendants carried on business of a similar description. On the expiration of the term in a lease of certain works to the plaintiffs, where they had carried on their business, the defendants, fifteen months afterwards, had procured a lease of the same works, with the exception of certain mines of clay. The defendants issued a circular and card tending to lead the public to suppose that the defendants had succeeded to the business of the plaintiffs, and were working the same material as the plaintiffs had formerly used:—Held, that, although the words of the circular and card might be literally true, yet, if they tended to mislead the public, the court would restrain them from further circulating or issuing such or any similar circular or card. *Harper* v. *Pearson*, 3 L. T. 547.

A circular was issued by parties recently in the employ of a firm of manufacturing engineers, which informed the trade and the public that they had commenced business on their own account, and made precisely the same goods as their former employers, with great improvements in the same, and could sell them at a much reduced price as being satisfied with smaller profits. It appeared that several customers of the former firm had been deceived by this circular, and removed their custom to the new firm:—Held, that the facts contained in the circular not being such as there stated, the same was a deceit upon the trade and the public, and, as such, an injunction granted to restrain the further issuing of the circular, sale, &c. *Stevens* v. *Paine*, 18 L. T. 600.

Joseph Thorley died in 1876, having for years carried on the manufacture of a condiment well known as "Thorley's Food for Cattle." His executors continued his business. In 1877 a company was formed for manufacturing the same article, and employed a brother of Joseph Thorley who was acquainted with the secret of the manufacture. The executors published in the newspapers an advertisement warning the public that any food purporting to be Thorley's food for cattle, and not signed "Joseph Thorley," was not the manufacture of the establishment carrying on business as Joseph Thorley, the proprietors of which were alone possessed of the secret for compounding the food. The executors also issued a circular to their customers warning them against the course pursued by the company "in seeking to foist upon the public an article which they pretend is the same as that manufactured by the late Joseph Thorley." The court came to the conclusion that there was no substantial difference between the food sold by the executors and that sold by the company:—Held, that the advertisement and circular contained untrue representations calculated to injure the company in their trade, and that the issuing of them ought to be restrained by injunction. *Thorley's Cattle Food Co.* v. *Massam*, 14 Ch. D. 763; 42 L. T. 851; 28 W. R. 966—C. A.

—— **Damages.**]—The plaintiff, who traded as R. H. & Co., and the defendants, who traded as R. H. & Sons, were rival manufacturers of sail-cloth. The plaintiff had formerly been a partner in the defendant's firm. In 1855 the defendants brought an action against the plaintiff, claiming (inter alia) an injunction to restrain him from representing his firm to be the original firm of R. H. & Sons. At the trial of the action, North, J., dismissed it, without costs as to that issue, and with costs as to the other issues. North, J., was satisfied by the evidence that the then defendant had never made any such representation, but that on two or three occasions one of his agents, without his knowledge or concurrence, had represented that the then defendant's firm was the original firm. The then defendant repudiated this as soon as he knew it, and at the trial he offered by his counsel to give an undertaking that he would never make such a representation. North, J., desired that this undertaking should be inserted in the judgment; the defendant assented, and it was accordingly inserted in the judgment drawn up by the registrar. In 1886 the present defendants distributed a printed circular, which stated that they were the original firm, and after giving the title of the former action, headed by the word "Caution," proceeded: "By the judgment the defendant was ordered to undertake not to represent that his firm is, or that the plaintiffs' firm is not the original firm of R. H. & Sons. Messrs. R. H. & Sons, finding that serious misrepresentations were in circulation to their prejudice, felt themselves compelled to bring the above action":—Held, that the circular contained an untrue statement of the effect of the judgment in the former action; that it was a libel injurious to the plaintiff's trade; that it was not privileged; that the defendants had published it maliciously; and that the plaintiff was entitled to an injunction, with the costs of the action. But there being no evidence of damage to the plaintiff, except his own affidavit that the publication of the circular was calculated to injure him, and had injured him, in his business, which he said had greatly fallen off since the issue of it; and the plaintiff not having brought the action until three months after he knew of the publication of the circular, only 5*l.* damages were awarded to him. *Hayward & Co.* v. *Hayward & Sons*, 56 L. J., Ch. 287; 34 Ch. D. 198; 55 L. T. 729; 35 W. R. 392.

Descriptive Use of Name—Circular not calculated to Deceive.]—In an action to restrain the use by the defendant of the plaintiffs' trade name the issues were whether the name was a designation of machines of the plaintiffs' manufacture, or of machines of a particular kind of construction; whether the defendant had used the name for the purpose of appropriating the reputation acquired by machines manufactured by the plaintiff company or not; and whether the defendant had by using the name induced purchasers to believe they were buying machines manufactured by the plaintiff company. Defendant, who sold (as wholesale agent in London of a company in Berlin) to persons in the trade only, described his machines in his circulars and price list as machines manufactured on the "Singer" system, or the "Singer improved system," and by his statement of defence alleged that, as the plaintiff's patent had long since elapsed, they were not entitled to any monopoly of the right of advertising or selling machines manufactured on what was known in the trade

as the "Singer system":—Held, that the plaintiff company had no exclusive right to use the word "Singer" as applied to sewing machines, and that there was nothing in the defendant's circular, price lists, and invoices calculated to deceive and induce purchasers to believe they were buying machines manufactured by the plaintiffs. Injunction overruled. *Singer Manufacturing Co.* v. *Loog*, 52 L. J., Ch. 481; 8 App. Cas. 15; 48 L. T. 3; 31 W. R. 325—H. L. (E.) And see *Singer Manufacturing Co.* v. *Wilson*, 47 L. J., Ch. 481; 3 App. Cas. 376; 38 L. T. 303; 26 W. R. 664—H. L. (E.)

Circular Warning against Infringement of Patent—Balance of Convenience.]—The defendants, who were the owners of patents in Belgium and England for an invention for making glass lamp globes, by a deed executed in Belgium, granted a licence to the plaintiffs to manufacture articles under their invention in Belgium, but not elsewhere. The deed contained a clause for submitting disputes to arbitration. The plaintiffs under this licence manufactured articles in Belgium and sold them in England. The defendants issued a circular warning persons engaged in the trade that the importation and sale of articles made in foreign countries under their invention, except by themselves, would be a violation of their patent. The plaintiffs brought an action to restrain the issue of this circular until the matters in dispute had been determined by arbitration:—Held, that where a trade circular is issued bonâ fide, an interim injunction will not be granted to restrain it unless it is in violation of some contract between the plaintiff and defendant, however much the balance of convenience may be in favour of granting it. *Société Anonyme des Manufactures des Glaces* v. *Tilghman's Patent Sand Blast Co.*, 53 L. J., Ch. 1; 25 Ch. D. 1; 49 L. T. 451; 32 W. R. 71; 48 J. P. 68—C. A.

The plaintiffs were the makers of "rainbow water raisers or elevators," and they commenced an action for an injunction to restrain the defendants from issuing a circular cautioning the public against the use of such elevators as being direct infringements of certain patents of the defendants. The plaintiffs subsequently gave notice of a motion to restrain the issue of this circular until the trial of the action. The defendants then commenced a cross action, claiming an injunction to restrain the plaintiffs from infringing their patents:—Held, that as there was no evidence of mala fides on the part of the defendants, they ought not to be restrained from issuing the circular until their action had been disposed of; but that they must undertake to prosecute their action without delay. *Household* v. *Fairburn*, 51 L. T. 498.

The defendants issued a circular to their customers stating that they were unable to supply a particular electric bell (for which the plaintiff had obtained protection) as it had "been proved to be an infringement" of another patented bell. Up to date of issue of the circular no action or proceeding had been commenced by anyone against the plaintiff in respect of his bell. An action was afterwards commenced, and then abandoned:—Held, that as the alleged infringement had not been proved by any proper proceeding before the court, there was no reasonable and probable cause for the statement in the circular, and the plaintiff was entitled to damages. *Crampton* v. *Swete*, 58 L. T. 516.

Actions not abating by Death of Party.]—An action for defamation, either of private character or of a person in relation to his trade, comes to end on the death of the plaintiff, but an action for the publication of a false and malicious statement, causing damage to the plaintiff's personal estate, survives:—Held, therefore, that a claim for falsely and maliciously publishing a statement calculated to injure the plaintiff's right of property in a trade-mark was put an end to by the death of the plaintiff after the commencement of the action only so far as it was a claim for libel, but that so far as the claim was in the nature of slander of title the action survived, and could be continued by his personal representative, who would be entitled to recover on proof of special damage. *Hatchard* v. *Mège*, 56 L. J., Q. B. 397; 18 Q. B. D. 771; 56 L. T. 662; 35 W. R. 576; 51 J. P. 277.

Injunction to restrain.]—*See* SLANDER OF TITLE.

4. INJURY TO TRADE.

By Interception of Customers.]—A declaration stated that the plaintiff was possessed of stores where he carried on the business of a corn merchant in a town; that the defendant, unjustly intending to injure him in his business, prevented certain persons from selling their corn to him by requiring from them the payment of tolls not legally demandable, and stopped and detained the carts and animals of the persons proceeding with corn to his stores, whereby he lost great gains and profits:—Held, as no contract was alleged between the plaintiff and the persons obstructed, and as no right of property or franchise of the plaintiff was shown to have been injured by the obstruction, that such obstruction did not give a cause of action for the loss sustained by the plaintiff. *Higgins* v. *O'Donnell*, Ir. R. 4 C. L. 91; 18 W. R. 378.

Loss of Trade by Non-Access to Shop.]—A corporation being authorised by act of parliament to stop up or level a street for the purpose of its act, in the course of operations wrongfully cut into the cellars of a house, which were under the street, leaving them open and exposed; the corporation also, in the course of the works, partially stopped the traffic along the streets; an injunction having been obtained restraining the corporation from cutting into the cellars, with an inquiry as to damages:—Held, that although the owner was entitled to damages for the structural injury to his cellars, he was not entitled to damages for depression caused to his trade by reason of the difficulty of access to his shop, it not being shown that the depression arose from the wrongful, as distinguished from the authorised, act of the corporation. *Bigg* v. *London Corporation*, L. R. 15 Eq. 376; 28 L. T. 336.

The erection of a building will not be restrained because it injures the plaintiff by obstructing the view of his place of business. *Butt* v. *Imperial Gas Co.*, L. R. 2 Ch. 158; 16 L. T. 820; 15 W. R. 92.

Highway—Unreasonable User of, causing particular Injury to Individual.]—When the private right of the owner of a house adjoining a highway to access from his house to the high-

way is interfered with by an unreasonable user of the highway, he is entitled to recover damages from the wrongdoer in respect of loss of custom in the business which he carries on in his house. He is entitled also to recover damages on the ground that he has suffered a particular injury from a public nuisance. *Fritz* v. *Hobson*, 49 L. J., Ch. 321 ; 14 Ch. D. 542 ; 42 L. T. 225 ; 28 W. R. 459.

Passing off Goods as Another's.]—To justify the court in granting an injunction, there must be a passing off by the trader sought to be restrained, of his goods as those of the other trader. *Turton* v. *Turton*, 58 L. J., Ch. 677 ; 42 Ch. D. 128 ; 61 L. T. 571 ; 38 W. R. 22 ; 54 J. P. 151—C. A.

Conspiracy—Combination to keep up Freights—Contract in Restraint of Trade—Exclusion of Rival Traders from Combination.]—Owners of ships, in order to secure a carrying trade exclusively for themselves and at profitable rates, formed an association and agreed that the number of ships to be sent by members of the association to the loading port, the division of cargoes and the freights to be demanded, should be the subject of regulation ; that a rebate of 5 per cent. on the freights should be allowed to all shippers who shipped only with members ; and that agents of members should be prohibited on pain of dismissal from acting in the interest of competing shipowners ; any member to be at liberty to withdraw on giving certain notices. The plaintiffs, who were shipowners excluded from the association, sent ships to the loading port to endeavour to obtain cargoes. The associated owners thereupon sent more ships to the port, underbid the plaintiffs, and reduced freights so low that the plaintiffs were obliged to carry at unremunerative rates. They also threatened to dismiss certain agents if they loaded the plaintiffs' ships, and circulated a notice that the rebate of 5 per cent. would not be allowed to any person who shipped cargoes on the plaintiffs' vessels. The plaintiffs having brought an action for damages against the associated owners alleging a conspiracy to injure the plaintiffs :—Held, that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits, and since they had not employed any unlawful means, the plaintiffs had no cause of action. *Mogul Steamship Co.* v. *McGregor*, 61 L. J., Q. B. 295 ; [1892] A. C. 25 ; 66 L. T. 1 ; 40 W. R. 337 ; 7 Asp. M. C. 120 ; 56 J. P. 101—H. L. (E.)

—— **Interlocutory Injunction.**]—A confederation or conspiracy by an associated body of shipowners which is calculated to have, and has, the effect of driving the ships of other merchants or owners, and those of the plaintiffs in particular, out of a certain line of trade, even though the immediate and avowed object be not to injure the plaintiffs, but to secure to the conspirators themselves a monopoly of the carrying trade between certain foreign ports and this country, is, or may be, an indictable offence, and therefore actionable, if private and particular damage can be shown. To warrant the court, however, in granting an interim or interlocutory injunction to restrain the parties from continuing to pursue the objectionable course, those who complain must at least show that they have sustained or will sustain "irreparable damage,"—that is, damage for which they cannot obtain adequate compensation without the special interference of the court. *S. C.*, 54 L. J., Q. B. 540 ; 15 Q. B. D. 476 ; 53 L. T. 268 ; 5 Asp. M. C. 467 ; 15 Cox, C. C. 740 ; 49 J. P. 646.

Receiver and Manager of Business—Injunction.]—A business was carried on under the order of the court for ten years by a receiver and manager not previously engaged in business. On proposals for a purchase of the business under the order of the court, the court refused to restrain the receiver and manager from soliciting orders from or doing business with the present customers. *Irish, In re, Irish* v. *Irish*, 58 L. J., Ch. 279 ; 40 Ch. D. 49 ; 60 L. T. 224 ; 37 W. R. 231.

Bond — Condition — Injunction — Penalty — Liquidated Damages.] — The defendant on entering the service of the plaintiffs, a banking company, executed a bond in the penal sum of 1,000*l.*, the condition of which was that it should be void if he should perform his duties in the manner therein mentioned, and also if he should pay to the plaintiffs 1,000*l.* as liquidated damages, in case he should at any time within two years after his leaving the service of the plaintiffs accept any employment in any other bank within two miles of the plaintiffs' bank. The defendant resigned his employment in the plaintiffs' bank and immediately entered the service of a rival bank in the same town. The plaintiffs brought an action claiming an injunction to restrain the defendant from holding employment in any rival bank. The defendant was willing and offered to pay the penal sum of 1,000*l.* :—Held, that the defendant could not satisfy his obligation by paying the penal sum ; but that there was an agreement between the parties, to be implied from the bond, that the defendant should not enter into the service of a rival bank, which could be enforced in a court of equity, and that the plaintiffs were entitled to an injunction. *National Provincial Bank* v. *Marshall*, 58 L. J., Ch. 229 ; 40 Ch. D. 112 ; 60 L. T. 341 ; 37 W. R. 183—C. A.

5. Trade Custom.

Lien—Custom, how Established.]—A right of general lien can only be established either by contract express, or necessarily implied, or by custom ; and such a custom in a particular trade is not established by mere evidence of the popular opinion of the members of that trade that a right of general lien was or ought to be a privilege of their trade. *Provincial Bank, Ex parte, Spotten, In re*, Ir. R. 11 Eq. 412.

Local Custom—London—Lien of Agent.]—By the custom of the London dry goods market a broker who purchases for a principal as broker, but without disclosing the name of the principal, is liable for the price of the goods in case the purchaser does not pay. On the 3rd March, 1876, C. sold to D., a broker, for undisclosed principals, eighteen casks of gum sandrac lying at the docks, and signed a delivery order in favour of D. The delivery order was indorsed by D. to B. & Co., his undisclosed principals, who deposited the same with the Imperial Bank as a

security for advances. On the 18th March the bank lodged the order at the office of the docks company in Leadenhall Street, with a request for warrants, and notice of the order having been lodged was sent to the long room at the dock house. On the same day D., having heard that B. & Co. had stopped payment, paid C. for the goods, and sent his clerk to the long room, who arrived there before notice of the delivery order having been lodged by the bank had been received, and he, in the name of C., applied for a warrant for the goods, which was made out and delivered to him. C. subsequently indorsed the warrant to L., and gave him a second delivery order. On an action by the bank for a declaration that they were entitled to the goods:—Held, that under the circumstances C.'s lien as an unpaid vendor passed to D., and that the warrant in favour of C. having been obtained before the delivery order had been entered at the warrant office at the docks, D. was entitled to the goods. *Imperial Bank* v. *London and St. Katharine Dock Co.*, 46 L. J., Ch. 335; 36 L. T. 233.

—— **Manchester.**]—An arrangement was made between W., R., and G., that W., a manufacturer, should consign cotton cloths to G. in Rangoon, paying him an inclusive commission. The goods were to be exported through R., who acted as shipping agent, and was to see to the goods being finished and packed, for which services he received a commission from G. A particular mark was by arrangement between the three parties adopted for the goods, of which some portions and the general arrangement were new, and other portions consisted of R.'s name and arms, and of a symbol which had formerly been used by G. After goods had been regularly exported for some years under this arrangement, W. ceased to send goods through R., and commenced exporting them to Rangoon through the agency of F., continuing to use the old mark, except that the name and arms of F. were substituted for those of R. At the same time R. commenced exporting other goods under the old mark. Cross actions were commenced for injunctions, in which R. set up an alleged custom in Manchester, giving the right to the trade marks to the shipping agent:—Held, upon the evidence, that no such custom existed. *Robinson* v. *Finlay*, 9 Ch. D. 487; 39 L. T. 398; 27 W. R. 294.

Held, also, that neither R. nor W. had any exclusive right to the use of the mark, and that both actions must be dismissed. *Ib.*

A firm of merchants, formerly carrying on business at Calcutta, sued a firm at Manchester, who had acted as their agents on commission for the purchase and shipping to India of Manchester goods, to have the settled accounts between the parties, extending back for a period of nearly twenty years, opened; and to obtain repayment of certain alleged overcharges made by the defendants in their accounts with the plaintiffs. The defendants were charged with having bought goods at one price and invoiced them to the plaintiffs at an increased price; that having been instructed to buy white goods, they purchased grey goods and got them bleached, charging the plaintiffs more than the price of the grey goods plus the cost of bleaching; that they had not credited the plaintiffs with the discounts allowed to themselves; that they had charged for insurances that they had never effected; that they had sold their own goods to the plaintiffs at a profit; and that they had overcharged the plaintiffs in other ways. The main defences raised were, that the plaintiffs knew of the charges, and that they were in accordance with the custom of the Manchester trade, and that as regarded the insurances which had been charged for but not effected, the defendants had themselves insured:—Held, that the plaintiffs did not know of the overcharges, and that there was no custom of the Manchester trade to make such overcharges. *Williamson* v. *Barbour*, 50 L. J., Ch. 147; 9 Ch. D. 529; 37 L. T. 698.

—— **Ignorance of—Liverpool.**]—Evidence was admitted of a custom in Liverpool, that a lien on goods for a sum agreed to be paid there as freight continued:—Held, also, that where assignees of the bill of lading were resident in Sydney, in New South Wales, and there was no evidence that they were acquainted with the local usage in Liverpool, such evidence of custom was not admissible for the purpose of explaining the effect of the memorandum in the bill of lading, or of showing the terms on which the goods were shipped, in the construction of such bill of lading. *Miedbrodt* v. *Fitzsimon, The Energie*, 44 L. J., Adm. 25; L. R. 6 P. C. 306; 32 L. T. 579; 23 W. R. 932.

Although a person who as principal employs a broker to transact business for him in a particular market is bound by the usage of that market, though unknown to him, provided the usage is one that merely regulates the mode of performing the contract, and does not change the intrinsic character of the contract, yet where the usage is one which gives the broker an interest at variance with his duty, as by converting him into a principal instead of a mere agent to establish privity of contract between two principals, such a usage is not binding on a principal who, being ignorant of the usage, employs a broker to whom the usage is known to perform the ordinary and accustomed duties belonging to the office or employment of a broker. The principal is not bound to inquire what the usage may be, or whether there is any particular usage affecting the market in which he proposes to deal. *Robinson* v. *Mollett*, 44 L. J., C. P. 362; L. R. 7 H. L. 802.

A Liverpool merchant employed brokers of London to buy tallow for him in the London tallow market. They having other orders, bought in their own name a quantity sufficient to cover all their orders, and by letter they informed the merchant that they had bought on his account so many tons; but they did not mention the name of the seller. A few days after they sent him notice that they were ready to deliver to him so many casks of tallow in fulfilment or part fulfilment of his order, but they did not allude to any third party as the seller. He acknowledged the receipt of these notices without observation. There is a custom on the London tallow market for brokers when they receive orders to contract in their own names, and if their principals refuse to accept or deliver, to buy or sell against them, and charge them with the loss. The merchant was ignorant of this custom. On becoming aware of it, and of the mode in which his orders had been executed, tallow having in the meantime fallen, he refused to take the tallow:—Held, that as the brokers were employed to act as brokers only, the custom which converted them into principals was inconsistent with the employment, and as the

merchant was ignorant of it when he gave his orders, he was not bound by the custom. *Ib.*

Hire Purchase System.]—The custom of letting a piano out on hire under an agreement by which upon the payment of the price fixed for the purchase by monthly instalments extending over a period of three years the hirer becomes the owner of the piano, and which is known as "the three years' hire system," is a well-established and good custom, and will, therefore, prevail to take a piano, hired under such an agreement, out of the order and disposition of the hirer on his becoming bankrupt. *Hattersley, Ex parte, Blanchard, In re*, 47 L. J., Bk. 113; 8 Ch. D. 601; 38 L. T. 619; 26 W. R. 636.

In Particular Trades—Hop Trade.]—A custom, that purchasers of hops shall leave them upon rent in the hop-merchant's warehouse for re-sale, undistinguished from his stock, will not prevent them from becoming the property of the hop-merchant's assignees upon his bankruptcy, as being in his possession, &c. *Thackthwaite* v. *Cock*, 2 Rose, 105; 3 Taunt. 487; 12 R. R. 689.

—— **Iron Trade.**]—By the usage of the iron trade warrants for goods deliverable (f. o. b.) to A. B., or their assigns, by indorsement hereon, are considered to pass to the holders for value free from vendor's lien. *Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.*, 46 L. J., Ch. 418; 5 Ch. D. 205; 36 L. T. 395; 25 W. R. 457.

—— **Navy Agents—Custom of Merchants.**]—By the statute 59 Geo. 3, c. 111, navy agents are entitled to make the usual charge for passing accounts before that act, and to charge commission on the full amount of pay without being limited to the money passing through their hands. The defendants having received a sum as returned premiums, without bringing it to account for many years and alleging that they awaited the final adjustment of average; it was referred to the master to inquire whether they were entitled to retain it, according to the custom of merchants. *Drury* v. *Atkins*, Tam. 75.

—— **Tea Trade.**]—Teas are sold, to be paid for at appointed days, the sales being made according to the custom of the trade, whereby the goods, when sold, are left as pledge for full payment with the vendor, who in case of non-payment is at liberty to re-sell, and charge the loss to the original purchaser. The purchase money is not paid at the appointed time; the purchaser becomes bankrupt, and the vendor, having sold part of the teas before the fiat and the rest afterwards, gives the estate credit for the clear proceeds of the sales:—Held, that although there was no delivery of the goods, the original sale was a binding contract within the statute of frauds, and that the vendors were entitled to prove for the residue of the purchase money unsatisfied by the sale. *Moffatt, Ex parte, Tate, In re*, 2 Mont. D. & D. 170. *And see* 1 Mont. D. & D. 282; 4 Jur. 659.

A quantity of tea is sold at a price, which is to be paid at a future day. After the day has elapsed the purchaser pays a sum on account, and writes to the vendors, who have retained the warrants in their possession, requesting them to await the arrival of the overland mail, and on its receipt to dispose of the tea. He afterwards became bankrupt:—Held, first, that the vendors have a lien on the tea for the unpaid purchase money; secondly, that an application to the court for an order for sale is not improper or unnecessary; and thirdly, that the letter is a sufficient memorandum to entitle the vendors to costs. *Twining, Ex parte, Coles, In re*, 1 Mont. D. & D. 691; 10 L. J., Bk. 60; 5 Jur. 536.

—— **Wharfinger's Certificates.**]—Wharfinger's certificates were not documents of title, and their delivery passes no right to the goods; and no custom of trade can give them the effect of warrants or documents of title as against vendors. *Gunn* v. *Bolckow, Vaughan & Co.*, 44 L. J., Ch. 732; L. R. 10 Ch. 491; 32 L. T. 781; 23 W. R. 739.

Interest allowed to Creditors in Bankruptcy—Contract Necessary.]—There being a surplus of a bankrupt's estate, interest allowed to creditors, whereby the course of actual trading between the parties and settled accounts, interest was allowed for a certain credit. Accounts made up and delivered from time to time, upon that footing, held good evidence of a contract for the purpose. No allegation of proof of any general custom of trade, could, however, have had that effect; nor anything short of actual evidence of contract between the parties. *Champion, Ex parte*, 3 Bro. C. C. 436.

6. Trade Secret.

—— **Exception to Rule against Restraint of Trade.**]—Not against public policy that trader sells secret in trade, and restrains himself generally from use of it. *Bryson* v. *Whitehead*, 1 Sim. & S. 74; 1 L. J. (o.s.) Ch. 42.

A covenant in restraint of trade, although it is unrestricted in respect of space, is reasonable, and therefore good in law, if it relates to the use of a trade secret. *Hagg* v. *Darley*, 47 L. J., Ch. 567; 38 L. T. 312.

—— **Communication of—When Restrained.**]—Injunction to restrain a defendant from communicating certain recipes for medicines, and vending them, granted, on the ground that he had obtained a knowledge of the mode of preparing them by a breach of trust. *Yovatt* v. *Winyard*, 1 J. & W. 394; 21 R. R. 194.

Quære, whether a court of equity, in the exercise of its jurisdiction to decree the specific performance of an agreement, can interfere by injunction to restrain a party from divulging a secret in medicine which is unprotected by patent. In this case an injunction, which had been granted for that and other purposes, was dissolved, upon the affidavit of the defendant (an infant) denying the facts of the case as represented by the plaintiff's affidavit in support of the injunction, and upon the ground that there was no secret in the alleged invention. *Williams* v. *Williams*, 3 Mer. 157; 17 R. R. 49.

The court does not recognise property in unpatented articles, and will not interfere to restrain the sale of spurious articles, though described to be the same as those manufactured by another, unless such articles are held out by the imitator to be the manufacture of that other person. Where B. invented and sold a secret medicine called chlorodyne, and F. advertised

a spurious imitation of it as "the original chlorodyne," and the evidence showed that F.'s article was not mistaken for B.'s, but only that F. was taken to be the first inventor:—Held, that B. was not entitled to an injunction to restrain F. from issuing such advertisements. *Browne* v. *Freeman*, 4 N. R. 476; 12 W. R. 305.

An injunction granted to restrain the use of a secret in the compounding of a medicine not being the subject of a patent, and to restrain the sale of such medicine, by a defendant who acquired a knowledge of the secret in violation of the contract of the party by whom it was communicated, and in breach of trust and confidence. *Morison* v. *Moat*, 9 Hare, 241. Affirmed, 21 L. J., Ch. 248; 16 Jur. 321.

A plaintiff not having the privileges of a patentee may have no title to be protected in the exclusive manufacture and sale of a medicine against the world, but he may, notwithstanding, have a good title to protection against the particular defendant. *Ib.*

The case of a secret acquired by a breach of faith or confidence, but communicated to a purchaser for value, without notice of any obligation affecting it, distinguished from that of a party whose claim of right to use the secret is that of a volunteer. *Ib.*

The court, in interfering in such cases, upon the grounds of faith or confidence, fastens upon the conscience of the party and enforces the obligation against him as it enforces, against a party to whom a benefit is given, an obligation to perform a promise upon the faith of which the benefit has been conferred, semble. *Ib.*

In June, 1823, Morison, the sole inventor and proprietor of a medicine not protected by patent, upon the occasion of entering into partnership with Moat as manufacturers and vendors of the medicine, for the purposes of the partnership communicated to the latter the secret of compounding the medicine. By the partnership deed either partner was empowered to introduce another partner, by deed, to be attested by the other; and by mutual bonds of even date, Morison bound himself not to communicate the secret of compounding the medicine to any person, except a partner so introduced; whilst Moat bound himself not to communicate such secret to any person whomsoever. Morison afterwards introduced his sons, the plaintiffs, into the partnership; and Moat, shortly before his death, in breach of his bond, communicated the secret to the defendant, his son; and then by deed, duly attested by Morison, appointed the defendant his successor in the partnership. Shortly after the death of Moat, the defendant joined Morison and the plaintiffs, who were ignorant that he had obtained a knowledge of the secret, in executing a partnership deed, containing a clause declaring the defendant a sleeping partner, and another clause, by which the partners covenanted not to divulge the secret of compounding the medicines to any person whomsoever. The defendant also afterwards executed deeds reciting that the sole property in the secret was in Morison. Morison afterwards died, having by will bequeathed his property in the secret to the plaintiffs. After the determination of the partnership the defendant made use of his knowledge of the secret communicated to him by his father, in manufacturing medicine, which he sold as the medicine originally manufactured by Morison. Upon the application of the plaintiffs the court granted an injunction restraining the defendant from selling, under the title or designation of "Morison's medicine," any medicine manufactured by the defendant; and also from compounding any medicines according to the secret mentioned in the plaintiff's bill, and from in any way making use of such secret. *Ib.*

Secret obtained by Fair Means—Misrepresentation as to Article Sold.]—Any person who by fair means has gained the knowledge of a trade secret may after the death of the original inventor, make and sell the article under the name of the original inventor, provided such person does nothing to induce the pubilc to believe that the article sold by him is made by the successor of the original inventor. But he must uot assert that his is the only genuine article, or suggest that the article manufactured by the successors of the original discoverer is spurious. *James* v. *James*, 41 L. J., Ch. 353; L. R. 13 Eq. 421; 26 L. T. 568; 20 W. R. 434.

A member of the family of R. J., the original inventor of a secret preparation, having by fair means become possessed of the original receipt, made and sold the article by the name given to it by the original inventor, under the signature of R. J., his own name being R. R. J.:—Held, that he was not entitled, as against the successor of the original inventor, to sell the article under the signature of R. J. singly or to represent that his was the only genuine preparation. *Ib.*

Joseph Thorley for many years manufactured and sold extensively an article called "Thorley's Food for Cattle," made according to a recipe communicated to him and not known to the public, and down to his death he was the only person who made it. His executors continued the business. Shortly after his death a company was formed by other persons, under the name of J. W. Thorley's Cattle Food Company, in which J. W. Thorley, a brother of Joseph Thorley, took a 1*s.* share. J. W. Thorley had been employed by Joseph Thorley, and knew the secret of the manufacture, and was employed by the company to conduct it. The company sold the same article under the name of "Thorley's Food for Cattle":—Held, that the company were not at liberty to use the name "Thorley's Food for Cattle" unless they took such precautions as would prevent purchasers from supposing that the article sold by them was manufactured at the original establishment of Joseph Thorley. *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748; 41 L. T. 543; 42 L. T. 851; 28 W. R. 966. And see *S. C.*, 46 L. J., Ch. 707; 6 Ch. D. 574; 36 L. T. 848.

Articles falsely Represented to be Made according to Secret Recipe of Plaintiff.]—An article, the secret making of which was known only to one maker, had acquired a trade name. An injunction was granted, restraining the application of that name to a different article of the same class, so as to induce the belief that it was the plaintiff's article. *Siegert* v. *Findlater*, 47 L. J., Ch. 233; 7 Ch. D. 801; 38 L. T. 349; 26 W. R. 459.

The plaintiff manufactured a fluid which he sold under the name of "Aromatic Bitters," and it was described by this name upon the wrappers of the bottles in which it was sold. It became, however, generally known in the market by the name of "Angostura Bitters," it having been originally manufactured at the

town of Angostura, in Venezuela. The name of this town was afterwards, by a decree of the state, changed to Ciudad Bolivar. After this change had taken place, the defendant began to manufacture in the same town a different fluid, which he at first sold under the name of "Aromatic Bitters," but, having been restrained in an English colony from using that name, he adopted the name, "Angostura Bitters," and placed it upon the wrappers of his bottles, also registering his wrapper at Stationers' Hall. His wrappers were very similar to those of the plaintiff, but they contained a statement that the fluid was prepared by the defendant. After this the plaintiff adopted the name "Angostura Bitters," and placed it upon his wrappers, and he brought an action against the defendant, claiming an injunction to restrain him from imitating the plaintiff's wrappers, and from using the name "Angostura Bitters." At the time when the action was brought the plaintiff had ceased to carry on his manufacture at Ciudad Bolivar:—Held, that the defendant had been guilty of an attempt to deceive, and that, though he could not be restrained from using the name "Angostura Bitters," in case he should ever discover the plaintiff's secret, and manufacture the same fluid, yet he must be restrained from using the name so as to deceive the public into the belief that his fluid was the plaintiff's. *Ib.*

It was alleged by the defendant that the plaintiff was disentitled to relief, because at the time of the trial, he was using wrappers which contained a misrepresentation. The plaintiff did not begin to use those wrappers until after the action had been brought:—Held, that there was in fact no misrepresentation in the wrappers in question, but that, even if there had been, a misrepresentation not made till after the commencement of the action would not have affected the plaintiff's title to relief. *Ib.*

Injunction to prevent a chemist from selling a quack medicine, under a false and colourable representation that it was a medicine of the plaintiff, an eminent physician, refused. *Clark* v. *Freeman*, 11 Beav. 112; 17 L. J., Ch. 142; 12 Jur. 119.

Right to Exclusive Use of Name.]—When a man has learnt a trade secret from his employer, and practised it after the employer's death, selling the article under the old name, he will not acquire such a right to the exclusive use of the name as a trade mark as will be protected in a court of equity. *Hovenden* v. *Lloyd*, 18 W. R. 1132.

7. TRADE, CONTRACT IN RESTRAINT OF, *see* CONTRACT.

B. TRADE MARK.

1. WHAT IS, AND INFRINGEMENT.

a. What is a Trade Mark.

Name of Person or Place.]—When a name, whether of a place or of a person, has, by user by a particular maker of a particular article of manufacture, acquired a secondary signification in connection with that manufacture, and has obtained currency and value in the market as the trade denomination of that particular maker's goods, it becomes in connection with that manufacture the property of that maker as his trade mark or as part of his trade mark. *Wotherspoon* v. *Currie*, 42 L. J., Ch. 130; L. R. 5 H. L. 508; 27 L. T. 393. Reversing 18 W. R. 942.

The name of a manufacturer, or a system of numbers adopted and used by him in order to designate goods of his make, may be the subject of the same protection in equity as an ordinary trade mark. *Ainsworth* v. *Walmsley*, 35 L. J., Ch. 352; L. R. 1 Eq. 518; 12 Jur. (N.S.) 205; 14 L. T. 220; 14 W. R. 363.

—— **Right of Outgoing Partner to use Trade Name.**]—B., an outgoing partner, claimed that by the terms of the deed of dissolution between himself and L., he was entitled to manufacture a particular article from an original recipe, the property of the late partnership, and to sell it as "L.'s soap" prepared by B.:—Held, that he was entitled to use the old trade name of the article as his trade mark, and to have it registered, although identical with that of the successors of the old firm. *Benbow* v. *Low*, 44 L. T. 875; 29 W. R. 837.

See also PARTNERSHIP.

Name of Place of Origin.]—The name of the place of origin of an article may become a trade mark. *Radde* v. *Norman*, 41 L. J., Ch. 525; L. R. 14 Eq. 348; 26 L. T. 788; 20 W. R. 766.

Although where a word is chosen as a trade mark which is in fact a geographical designation of a whole tract of country, where the raw material is grown whence a manufactured article is produced, there cannot be property in the word for all purposes, yet property in the word, as applied by way of stamp upon a particular vendible article, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation, whereby the stamp gets currency as an indication of superior quality or of some other circumstance which renders the article so stamped acceptable to the public. M. & Co. were manufacturers of liquorice, and having made in this country a new description of goods from a mixture of juice extracted from roots obtained from Anatolia and Spain, they stamped upon the manufactured article the mark "Anatolia," and sold it to the public, and acquired a reputation for it in the market. This was the first use of the word in this way, though juice had previously been imported from Anatolia. The mark was immediately afterwards imitated by B., at the request of a customer, and attached to their liquorice made from Spanish roots:—Held (affirming 10 Jur. (N.S.) 492; 10 L. T. 65), that the word "Anatolia" so used was a trade mark, and that there had been a sufficient user and adoption of it by M. & Co. to give them a property in it as such. *M'Andrew* v. *Bassett*, 4 De G. J. & S. 380; 4 N. R. 12, 123; 33 L. J., Ch. 561; 10 Jur. (N.S.) 550; 10 L. T. 442; 12 W. R. 777.

Letters used with Name.]—A firm having adopted the letters "L. L." to designate a peculiar quality of whiskey sold by them, acquire an exclusive right to the use of those letters as a trade mark, though they were always preceded by the name of the firm upon the labels issued by them. *Kinahan* v. *Bolton*, 15 Ir. Ch. R. 75.

Crest.]—Long user of a trade mark gives such a property in it to the owner that another person cannot adopt the same device, even though it is his "family crest." *Standish* v. *Whitwell*, 14 W. R. 512.

A trader may establish a trade mark by the use of a "crest," and anything which amounts to an imitation of the crest as a trade mark would be restrained by the court. But the use of a different crest by another trader, if not accompanied by other indicia to make it a colourable imitation of the trade mark of the plaintiff, will not be restrained. *Beard* v. *Turner*, 13 L. T. 746.

Title of Book.]—There may be a trade mark in a title of a book, and an action for fraud will lie against a person using the title of a book already published for the purpose of passing off such book as that of a former author. *Dicks* v. *Yates*, 50 L. J., Ch. 809 ; 18 Ch. D. 76 ; 44 L. T. 660—C. A.

Mere Description — "Nourishing London Stout."]—An adjective, merely describing the quality of a manufactured article, will not be protected by the court as a trade mark. *Raggett* v. *Findlater*, 43 L. J., Ch. 64 ; L. R. 17 Eq. 29 ; 29 L. T. 448 ; 22 W. R. 53.

Therefore, when the plaintiff, who dealt in malt liquors in London, sold stout, which was subjected by him to a particular treatment, under the name of Nourishing London Stout :—Held, that he was not entitled to an injunction restraining the defendant from selling stout under the name of Nourishing Stout. *Ib.*

—— **Filter.**]—C., a patentee of a filter, after the expiration of his patent, sold filters marked "C.'s patent filter." W., a rival manufacturer, sold filters made according to the expired patent, marked "C.'s patent filter, manufactured by W." :—Held, to be no infringement of C.'s trade mark. Held, also, that the label was not a trade mark, but only a description of the article sold. *Cheavin* v. *Walker*, 46 L. J., Ch. 686 ; 5 Ch. D. 850 ; 37 L. T. 300—C. A. *S. C.*, 36 L. T. 938.

—— **"Liebig's Extract of Meat."**]—In 1847 Baron von Liebig discovered and published a process for making an extract of meat. The extract was made extensively at the Royal Pharmacy, Munich, and sold there, with the permission of the baron, as Liebig's extract of meat from 1861 to 1864. It became generally known in Germany and other countries, and the term Liebig's extract of meat became used as a term of art in scientific treatises. In 1864 Baron Liebig gave the Fray Bentos company the right of using his name in connection with the extract of meat manufactured by them. In 1864 a company bought the business and property of the Fray Bentos Company, and by a deed-poll, dated the 12th April, 1866, the baron granted to the plaintiff company the exclusive right and privilege to use his name in connection with the extract manufactured by them. The defendants, who had previously sold extract manufactured by the Fray Bentos Company, in 1866, began to sell as "Liebig's extract of meat" an extract manufactured by Mr. Tooth, in Australia, after Liebig's process. On a suit being instituted by the plaintiff company to restrain the defendants from so using the name Liebig's extract of meat :—Held, that the term having been used as a term of art to designate a well-known process long before 1861, the defendants were fully justified in using it, and the bill was dismissed with costs. *Liebig's Extract of Meat Co.* v. *Hanbury*, 17 L. T. 298.

—— **Patent Plumbago Crucibles.**]—The plaintiffs purchased from a firm established in the United States knowledge of a secret mode of making crucibles, which had acquired a reputation in America as "Patent Plumbago Crucibles," although the process never had been patented :—Held, that they could not maintain a bill to restrain others from pirating this designation. *Morgan* v. *M'Adam*, 36 L. J., Ch. 228.

Words "Prize Medal."]—The persons to whom prize medals have been awarded by the Commissioners of the International Exhibition have not ipso facto any special property in the nature of a trade mark in the words "prize medal." Therefore, where a person who had not obtained such a medal issued his goods with labels affixed to them bearing the words "prize medal, 1862," the court refused to interfere at the instance of a person who had obtained such a medal. *Batty* v. *Hill*, 1 H. & M. 264 ; 2 N. R. 265 ; 8 L. T. 791 ; 11 W. R. 745.

Affixed to Article or Cover.]—A trade mark need not be actually affixed to the article. It is sufficient if the trade mark is on the cover or wrapper in which the article is sold. *Jay* v. *Ladler*, 40 Ch. D. 649 ; 60 L. T. 27 ; 37 W. R. 505.

Property in Trade Mark.]—Property in a trade mark is the right to the exclusive use of some mark, name or symbol in connection with a particular manufacture or vendible commodity. *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. Cas. 523 ; 35 L. J., Ch. 53 ; 11 Jur. (N.S.) 513 ; 12 L. T. 742 ; 13 W. R. 873 ; 6 N. R. 209.

An element in the right to property in a trade mark is the fact of the article to which the stamp or mark is affixed being in the market as a vendible article, with a stamp or mark, at the time when it is imitated. *M'Andrew* v. *Bassett*, 4 De G. J. & S. 380 ; 4 N. R. 123 ; 33 L. J., Ch. 561 ; 10 Jur. (N.S.) 550 ; 10 L. T. 442 ; 12 W. R. 777.

There is no property in a trade mark, but a person who has been in the habit of using a particular mark may prevent other persons from fraudulently taking advantage of the reputation which his goods have acquired, by using his mark in order to pass off their goods as his, to his injury. *Collins Co.* v. *Brown*, 3 K. & J. 423 ; 3 Jur. (N.S.) 929 ; 5 W. R. 676. S. P., *Boulnois* v. *Peake*, ante, col. 75.

Charles I. having granted a charter to the cardmaker's company to use the mogul stamp on cards, plaintiff, suggesting a sole right, as having appropriated it to himself conformably to the charter, moved for an injunction to restrain defendant ; but lord chancellor refused it. The objection of the defendant taking away the plaintiff's customers by using the same mark (the mogul stamp on his cards) is of no more weight than if one innkeeper should set up the same sign as another. But a cloth-worker may maintain an action against another of the same trade for using his mark, where it is done with a fraudulent design to put off bad cloths, or to draw away customers. The court however, will never establish a right claimed under a charter only from the crown, unless the right has been first tried at law. *Blanchard* v. *Hill*, 2 Atk. 484.

There is no exclusive right in a subject not protected by patent, to prevent sale by another

person under the same title, not assuming the name and character of the plaintiff. *Canham* v. *Jones*, 2 V. & B. 218 ; 13 R. R. 70.

b. What is Infringement.

Colour cannot be Considered.] — In deciding the question of piracy of a trade-mark, the colour of the marks cannot be taken into account, and the only test is a comparison of the uncoloured diagrams. *Nuthall* v. *Vining*, 28 W. R. 330—C. A.

Where Difference Reasonably Evident.]—Where, in a stamp used by the defendant as a trade-mark, the form of the printed words, the words themselves, and the pictured symbol introduced among them, so much differed from that of the plaintiffs, that any person with reasonable care and observation must see the difference, and could not be misled into taking the one for the other :—Held, that there had been no infringement. *Leather Cloth Co.* v. *American Leather Cloth Co.*, 6 N. R. 209 ; 11 H. L. Cas. 253 ; 35 L. J., Ch. 53 ; 11 Jur. (N.S.) 513 ; 12 L. T. 742 ; 13 W. R. 873. And see *S. C.*, 4 De G. J. & S. 137 ; 2 N. R. 481 ; 3 N. R. 264 ; 33 L. J., Ch. 199 ; 10 Jur. (N.S.) 81 ; 9 L. T. 558 ; 12 W. R. 289.

Where Acts Likely to Mislead.]—The test of the infringement of a trade-name or trade-mark is whether the acts alleged as an infringement are likely to mislead the public into dealing with the alleged infringer under the belief that they are dealing with the person who first used the name or mark. *Lee* v. *Haley*, 39 L. J., Ch. 284 ; L. R. 5 Ch. 155 ; 22 L. T. 251 ; 18 W. R. 242.

The doctrine of the court on this point will not be restricted by any technical rules as to the name or mark in which the tradesman has property. *Ib.*

When a name denotes a special article to persons in a particular trade, but is used vaguely by persons not in the trade, it is not a misdescription to sell by that name, to persons not in the trade, articles popularly included under the name, but not strictly within the meaning of the word as used in the trade. *Ib.*

Where no Proof that Public Deceived.]—In 1884 the defendants, who were brewers, and who had no knowledge of the plaintiffs' trade-mark registered in 1879, designed as a trade-mark for their beer a label consisting of a picture of "John Bull" similar to the plaintiffs' picture, and containing the words "John Bull, registered." The defendants' label was registered at Stationers' Hall under the Copyright Acts. In 1885 the defendants applied to have their label registered as a trade-mark. The plaintiffs opposed, and the defendants' application was refused. The defendants, nevertheless, still continued to sell their beer bearing the above-described label :—Held, that the defendants' label, taken as a whole, was an infringement of the plaintiffs' registered trade-mark, and that the plaintiffs were entitled to an injunction, although there was no proof that any of the public had been deceived. *Paine & Co.* v. *Daniells & Sons' Breweries, Paine & Co.'s Trade Marks, In re*, post, cols. 157–8.

The plaintiffs made and sold soda water in their own bottles, marked in the glass with their own name, followed by the words "Genuine Superior Aerated Waters," and pasted over the corks with reddish labels, bearing a royal crown and their own name. They charged the bottles and contents in one price per dozen to their customers, and allowed 3*s.* per dozen for the empty bottles. The bottles only cost them 1*s.* 6*d.* per dozen. The defendant, who had been a customer of theirs to some extent, being asked for a dozen of soda water by the plaintiffs' agent sent for that purpose, supplied twelve bottles, seven of which were not stamped in the glass with the plaintiffs' name, and about which no deceit or mistake could arise. The remaining five bottles so supplied bore the plaintiffs' name on the glass, and had been originally made and supplied by the plaintiffs, but to whom in particular did not appear. The labels on all the bottles so sold were similar in colour to the plaintiffs' labels, and had a royal crown, but had not the plaintiffs' name on them. The water was not the plaintiffs' water. They, on such purchase, without asking for any explanation, filed a bill for an injunction to restrain the use, or vending, by the defendant of the plaintiffs' bottles generally, and obtained an ex parte injunction :—Held, that the ex parte injunction must be dissolved with costs, the court being of opinion, upon the evidence, that the defendant was not shown to have used the bottles either with an intention, or so as, in fact, to mislead the public. *Welch* v. *Knott*, 4 K. & J. 747 ; 4 Jur. (N.S.) 330.

But the use of such bottles, so as in fact to mislead the public, although unintentionally, would be restrained. *Ib.*

It is a serious error to allege, in a bill to restrain the improper use of a trade-mark, that the trade-mark complained of is "similar," when it is in fact the same, or vice versâ. *Ib.*

Sale of Goods calculated to deceive.]—If a person sells his goods with the intention of deceiving purchasers and of inducing them to believe his goods are the goods of another, this is actionable, and entitles the latter to recover nominal damages, even though no special damage is proved. If an article has acquired a distinctive meaning in the trade, connecting it with a particular person's manufacture, and another so advertises or describes, or makes up his goods as to lead purchasers to believe, or to create a probability of their believing, that they are buying the goods of the former, when in fact they are buying the goods of the latter (and this though there is no intention to deceive and no special damage proved), a court of equity will grant relief by way of injunction. The fraudulent intention is essential in the first case ; it is unnecessary in the second. *Reddaway* v. *Bentham Hemp Spinning Co.*, [1892] 2 Q. B. 639 ; 67 L. T. 301—C. A.

Name calculated to Deceive.]—The plaintiffs registered the word "Sanitas" as a trade mark, under the Patents, Designs and Trade Marks Act, 1883, for goods manufactured and sold by them. The defendant advertised and sold under the name of "Condi-Sanitas" articles of a similar nature to those manufactured by the plaintiffs :—Held, that the word adopted by the defendant so resembled the plaintiffs' trade-mark as to be calculated to deceive and mislead ; and that, therefore, an interlocutory injunction must be granted to restrain the defendant from using the word "Sanitas" in conjunction with "Condi," or in any other way which would infringe the

plaintiffs' trade-mark. *Sanitas Co.* v. *Condy*, 56 L. T. 621.

A manufacturer who has produced an article of merchandise, e.g. a new pattern of cloth, and applied to it a particular fancy name, and sold it with a particular mark, under which name and mark it has obtained currency in the market, acquires an exclusive right to the use of such name and mark, and is entitled to restrain all other persons from using such name and mark to denote articles similar in kind and appearance, although he may have no exclusive right of manufacturing the article. *Hirst* v. *Denham*, 41 L. J., Ch. 752; L. R. 14 Eq. 542; 27 L. T. 56.

If the use of such name and mark, by any other person than the first inventor, has been adopted for the purpose of selling goods of an inferior quality, though of similar external appearance, so that purchasers may be misled into the belief that they are buying the goods of the first inventor, the injury to the first inventor is one for which he is entitled to compensation in damages, and relief by injunction. *Ib.*

The respondents were long-established brewers at the town of Stone, in Staffordshire, and their ales had long been known in the trade as "Stone Ales." The appellant had recently established a brewery at Stone, and the courts below came to the conclusion that he intended to use the name "Stone" in connection with his own ales in such a way as to lead to the belief that his ales were those of the respondents. Injunction granted restraining the appellant from "carrying on the business of a brewer at Stone under the title 'Stone Brewery' or 'Montgomery's Stone Brewery,' or under any other title so as to represent that the defendant's brewery is the brewery of the plaintiffs, and from selling or causing to be sold, any ale or beer not of the plaintiffs' manufacture under the terms 'Stone Ales' or 'Stone Ale,' or in any way so as to induce the belief that such ale or beer is of the plaintiffs' manufacture, and from infringing the plaintiffs' registered trade marks or any of them." *Montgomery* v. *Thompson*, 60 L. J., Ch. 757; [1891] A. C. 217; 64 L. T. 748; 55 J. P. 756—H. L. (E.)

Device on Label.]—The plaintiffs and the defendants were bottlers of beer for export. The plaintiffs' label consisted of a bulldog's head on a black ground surrounded by a circular band on which were the words "Read Brothers, London. The Bull Dog Bottling." The defendants' label represented a rough terrier's head on a black ground surrounded by a red circular band on which were the words "Celebrated Terrier Bottling, E. Richardson." The plaintiffs' beer was well known in the colonies as the "Dog's Head" beer, and they alleged that the defendants, by exporting to certain colonies beer with the terrier's head label, led to their beer being substituted and taken for the plaintiffs' beer:—Held, that the plaintiffs were entitled to an interim injunction restraining the continuance of the terrier's head in the label on the bottles of beer exported to such colonies by the defendants. *Read* v. *Richardson*, 45 L. T. 54—C. A.

Though there is no copyright in a trade-mark, a manufacturer who has adopted a trade-mark, in order to designate some particular article as made by him, has a right to the assistance of a court of equity to prevent anyone from so using the same, or any similar mark, as to induce purchasers to believe, contrary to the fact, that they are buying that particular article to which the mark was originally applied. *Farina* v. *Silverlock*, 6 De G. M. & G. 214; 26 L. J., Ch. 11; 2 Jur. (N.S.) 1008.

B. & Co. for many years affixed a label or a trade-mark to the bottles in which their ale was sold. D. & Co. adopted a label bearing a general resemblance to that of B. & Co., but differing from it in several particulars. Bill by B. & Co. to restrain D. & Co. from using such label dismissed with costs. *Bass* v. *Dawber*, 19 L. T. 626.

Where the plaintiff attached to wire manufactured by him tallies marked with an anchor, and the defendant attached to his manufacture similar tallies marked with the device of a crown and anchor:—Held, that the plaintiff was entitled to an injunction. *Edelston* v. *Edelston*, 1 De G. J. & S. 185; 9 Jur. (N.S.) 479; 7 L. T. 768; 11 W. R. 328.

A defendant sold tobacco-pipes packed in boxes or cases, upon which were labels or descriptions of a similar character to those of the plaintiff, using the plaintiff's name as being the real manufacturer, the defendant having a person in his employ of that name:—Held, that such colourable imitation and use of the labels and descriptions could be restrained by injunction. *Southorn* v. *Reynolds*, 12 L. T. 575.

A defendant was restrained from selling or exposing for sale, fireworks, not manufactured or sold by the plaintiff, in boxes bearing the plaintiff's labels. *Barnett* v. *Leuchars*, 13 L. T. 495; 14 W. R. 166.

Introduction of New Article under known Name—Right to Name.]—Where A. introduces into the market an article which, though previously known to exist, is new as an article of commerce, and has acquired a reputation therefrom in the market by a name not merely descriptive of the article, B. will not be permitted to sell a similar article under the same name; and this, although the peculiarity of the name has long been in common use as applied to goods of a different kind. *Braham* v. *Bustard*, 1 Hem. & M. 447; 9 L. T. 199; 11 W. R. 1061.

If the goods of a trader have acquired in the market a name derived from a part of the trade-mark which he affixes to them, a rival trader is not entitled to use a ticket which is likely to lead to the application of the same name to his goods, even though that name is not the only name by which the goods of the first trader have been known, or though it has been always used in conjunction with some other words. *Johnston* v. *Orr-Ewing*, 51 L. J., Ch. 797; 7 App. Cas. 219; 46 L. T. 216; 30 W. R. 417—H. L. (E.)

—— **Secret or Patent Process.**]—An article, the secret making of which was known only to one maker, had acquired a trade name. An injunction was granted, restraining the application of that name to a different article of the same class, so as to induce the belief that it was the plaintiff's article. *Siegert* v. *Findlater*, 47 L. J., Ch. 233; 7 Ch. D. 801; 38 L. T. 349; 26 W. R. 459.

The maker of a secret preparation or of a patented article may while the secret remains undiscovered or the patent is unexpired obtain an injunction to restrain the sale of goods of a different kind passed off under the name by

which the preparation or article is known. *Powell* v. *Birmingham Vinegar Brewery Co.*, [1894] 3 Ch. 449; 13 R. 153; 71 L. T. 393. Affirmed in C. A., 13 R. 164, n.

From 1860 to 1893 the plaintiff alone had sold a sauce called "Yorkshire Relish." At the latter date the defendants put upon the market a sauce which was altogether different from the plaintiff's sauce and sold it under the name of their "Yorkshire Relish:"—Held, that though the general appearance of defendant's labels and wrappers was different from those of plaintiff, they had not taken sufficient precautions to prevent customers being misled, and that an interim injunction must be granted. *Ib.*

The inventor of a sauce gave it the name of the Licensed Victuallers' Relish, and designed a trade-mark for labels on the bottles containing it, and employed his son to sell it. He permitted his son to describe himself in his circulars and invoices as the sole proprietor of the sauce. The son became bankrupt and his trustee sold his interest in the sauce and its trade-mark to the plaintiff, who sought to restrain the inventor from infringing the trade-mark. The plaintiff did not know the defendant's receipt, but made a sauce which the witnesses deposed to be undistinguishable from the defendant's:—Held, that a trade-mark could not exist in gross, and that as the plaintiff did not know the receipt for the original article, he could not have a right to affix the trade-mark to a sham article for the purpose of imposing on the public. *Cotton* v. *Gillard*, 44 L. J., Ch. 90.

Joseph Thorley for many years manufactured and sold extensively an article called "Thorley's Food for Cattle," made according to a recipe communicated to him and not known to the public, and down to his death he was the only person who made it. His executors continued the business. Shortly after his death a company was formed by other persons under the name of J. W. Thorley's Cattle Food Company, in which J. W. Thorley, a brother of Joseph Thorley, took a 1*s.* share. J. W. Thorley had been employed by Joseph Thorley, and knew the secret of the manufacture, and was employed by the company to conduct it. The company sold the same article under the name of "Thorley's Food for Cattle":—Held, that the company were not at liberty to use the name "Thorley's Food for Cattle" unless they took such precautions as would prevent purchasers from supposing that the article sold by them was manufactured at the original establishment of Joseph Thorley. *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748; 42 L. T. 851; 28 W. R. 966—C. A.

Using Patented Lockplates to Inferior Rifles.]—The plaintiff was a gunmaker, who manufactured rifles, purchasing some of the different parts from various makers, and putting them together to form a complete rifle, which after having been viewed and approved by him, was stamped with his name and trade-mark on the lock plate as a guarantee that it had been examined and approved by him. He also fitted to the rifles levers manufactured by himself, for which he had taken out a patent, and these levers were also marked with his name. The plaintiff's rifles so marked with his name had a great reputation. He supplied rifles so marked and guaranteed by him to the government, and when they became unsuitable for government purposes, they were taken to pieces and some of the parts mutilated and sold as old stores. The defendant bought some of these old stores, including levers and lockplates with the plaintiff's name and trade-mark upon them, and fitted them to old rifle barrels, which had been cut down to the size of carbine barrels, and were not suited to the action which formed part of the rifles as passed and guaranteed by the plaintiff. At this time his patent for the levers had expired:—Held, that the defendant might be restrained from making and selling such firearms. *Richards* v. *Williamson*, 30 L. T. 746; 22 W. R. 765.

Particular Cases—Medicine.]—The plaintiff invented and sold a medicine under his own name. The defendant also made and sold a similar medicine, and on his labels he used the plaintiff's name and certain certificates given of the efficacy of the plaintiff's medicine in such an ingenious manner as primâ facie, though not in fact, to appropriate and apply them to his own medicine:—Held, that although there were other differences in the mode of selling, the proceeding was wrongful, and the defendant was restrained by injunction. *Franks* v. *Weaver*, 10 Beav. 291.

—— **Omnibus.**]—Injunction granted to restrain the defendant from running an omnibus having upon it such names, words and devices as to form a colourable imitation of the words, names, and devices on the omnibuses of the plaintiffs. *Knott* v. *Morgan*, 2 Keen, 213.

—— **Watches—Foreign Characters.**]—Injunction to restrain a party from making and sending to Turkey watches having the plaintiff's name or the word "warranted," engraved thereon in Turkish characters, in imitation of plaintiff's watches. *Gout* v. *Aleploglu*, 6 Beav. 69, n.

A man cannot acquire a property merely in a name or mark. *Ib.*

—— **"Ethiopian" Stockings.**]—A. and B. filed their bill, alleging a right to a trade mark in the word "Ethiopian" upon black cotton stockings, acquired by A. and a former partner, deceased, praying an injunction and account of profits. Defendants denied plaintiffs' right to the mark as a trade mark, stating that other parties used the word prior to A. and his partner, but admitted that they (defendants) had copied the mark from plaintiffs' stockings, and denied any fraudulent intent in so doing. The evidence as to plaintiffs' right to the mark as a trade mark was very unsatisfactory:—Held, refusing a motion to dissolve an injunction, that defendants having made so complete a copy of plaintiffs' mark, the difference being only nominal, must be taken to have done so with an intent to gain an advantage to which they were not entitled:—Held, also, that, although the personal representative of A.'s deceased partner might have a right to participate in the property (if any) of the mark, A. had such an interest as to entitle him to file this bill. *Hine* v. *Lart*, 10 Jur. 106.

—— **"Stephens' Blue Black Ink."**]—A trader produced and sold an ink which he designated "Stephens' Blue Black," and it was shown to the public in a label in white capital letters of large type. The defendant sold an ink in bottles similar in size, designated as "Steelpens Blue Black," also in white capital letters of large type:—Held, that this was a colourable imitation of the trade mark, and the defendant was restrained

by injunction from the further use of it. *Stephens* v. *Peel*, 16 L. T. 145.

—— "**Schweitzer's Cocoatina.**"]—Schweitzer sold a preparation of cocoa labelled "Schweitzer's cocoatina." Atkins, who had been in his employ, set up business in partnership with a man also named Schweitzer, and sold a similar preparation of cocoa, labelled "Schweitzer, Atkins & Co.'s cocoatina":—Held, that this was a fraudulent and colourable imitation, and an injunction was granted accordingly. *Schweitzer* v. *Atkins*, 37 L. J., Ch. 847; 19 L. T. 6; 16 W. R. 1080.

"**Angostura Bitters.**"]—The plaintiff manufactured a fluid which he sold under the name of "Aromatic Bitters," and it was described by this name upon the wrappers of the bottles in which it was sold. It became, however, generally known in the market by the name of "Angostura Bitters," it having been originally manufactured at the town of Angostura in Venezuela. The name of this town was afterwards, by a decree of the state, changed to Ciudad Bolivar. After this change had taken place, the defendant began to manufacture in the same town a different fluid, which he at first sold under the name of "Aromatic Bitters," but, having been restrained in an English colony from using that name, he adopted the name "Angostura Bitters," and placed it upon the wrappers of his bottles, also registering his wrapper at Stationer's Hall. His wrappers were very similar to those of the plaintiff, but they contained a statement that the fluid was prepared by the defendant. After this the plaintiff adopted the name "Angostura Bitters," and placed it upon his wrappers, and he brought an action against the defendant, claiming an injunction to restrain him from imitating the plaintiff's wrappers, and from using the name "Angostura Bitters." At the time when the action was brought the plaintiff had ceased to carry on his manufacture at Ciudad Bolivar:—Held, that the defendant had been guilty of an attempt to deceive, and that, though he could not be restrained from using the name "Angostura Bitters," in case he should ever discover the plaintiff's secret, and manufacture the same fluid, yet he must be restrained from using the name so as to deceive the public into the belief that his fluid was the plaintiff's. *Siegert* v. *Findlater*, ante, col. 102.

"**Singer's Sewing Machines.**"]—A manufacturer using, to describe articles made by him, the name of another manufacturer, must justify the use thus made of a name not his own, by showing that such name is understood by the trade and the public to denote a patented or other article of a particular type, structure or arrangement of parts, and not a mark or sign of a particular manufacturer. It makes no difference in this principle that such name does not appear upon the articles sold, but only in advertisements or price lists; nor that the articles bear the selling manufacturers' own trade mark and labels, stating them to be manufactured by him, and that statements to the same effect appear in the advertisements and price lists. *Singer Manufacturing Co.* v. *Wilson*, 47 L. J., Ch. 481; 3 App. Cas. 376; 38 L. T. 303; 26 W. R. 664—H. L. (E.)

When the first producer of an article of manufacture has identified with it a particular name, whether his own name or a name which is a word descriptive of the article itself, such name becomes a trade mark, and cannot be adopted and employed by another person in advertising a similar article. *Ib.*

Such adoption and employment will be restrained by injunction. *Ib.*

Singer made a sewing machine, to which he gave his own name; it became known by that name. He afterwards took other persons into partnership with him for the sale of the machines known as the Singer sewing machines, and which were made in great variety, and with many modifications, but though not protected by patents, were established in public favour under that name. W. sold sewing machines, and advertised, among others, Singer sewing machines, but used his own trade mark on the machines, and expressly stated in his advertisements that the machines sold by him were manufactured by himself:—Held, that this, nevertheless, constituted a wrongful invasion of the property of Singer, and that W. might be restrained by injunction. *Ib.*

Fraud is not necessary to be averred or proved in order to obtain protection for a trade mark. *Ib.*

"**The Singer" Sewing Machines.**]—In an action to restrain the use by the defendant of the plaintiffs' trade name, the issues were whether the name was a designation of machines of the plaintiffs' manufacture, or of machines of a particular kind of construction; whether the defendant had used the name for the purpose of appropriating the reputation acquired by machines manufactured by the plaintiff company or not; and whether the defendant had by using the name induced purchasers to believe they were buying machines manufactured by the plaintiff company. Defendant who sold (as wholesale agent in London of a company in Berlin) to persons in the trade only, described his machines in his circulars and price list as machines manufactured on the "Singer" system, or the "Singer improved system," and by his statement of defence alleged that, as the plaintiffs' patent had long since elapsed, they were not entitled to any monopoly of the right of advertising or selling machines manufactured on what was known in the trade as the "Singer system":—Held, that the plaintiff company had no exclusive right to use the word "Singer" as applied to sewing machines, and that there was nothing in the defendant's circular, price lists, and invoices calculated to deceive and induce purchasers to believe they were buying machines manufactured by the plaintiffs. Injunction overruled. *Singer Manufacturing Co.* v. *Loog*, 52 L. J., Ch. 481; 8 App. Cas. 15; 48 L. T. 3; 31 W. R. 325—H. L. (E.)

—— "**Apollinaris Water**"—"**London Apollinaris Water.**"]—A company under a grant from the owners, acquired the exclusive right of importing and selling in Great Britain the mineral water produced by a natural spring, called "Apollinaris," at Ahrweiler, in Prussia, which had for some years been known and sold in the English market under the name of "Apollinaris Water," and advertised and sold the same as "Apollinaris Water." Subsequently, the defendant made and sold an artificial mineral water, being the chemical equivalent of the natural water, under the name and description of "London Apollinaris Water, possessing all the properties of the natural water":—Held, that the company was entitled to an

interim injunction to restrain the use of the words "London Apollinaris Water," or of any other name of which the word "Apollinaris" so formed part as to be calculated to mislead the public. *Apollinaris Co.* v. *Norrish*, 33 L. T. 242.

"Hemy's Modern Tutor for the Pianoforte."]—The plaintiffs were the publishers of a work entitled "Hemy's Royal Modern Tutor for the Pianoforte," a revised edition of which had been brought out in 1867, and which was well known and had an extensive sale, but was was not so registered as to secure copyright. In 1874 the defendant employed Hemy to revise an old work, entitled "Jousse's Royal Standard Pianoforte Tutor," which had formerly been in high repute, but had entirely fallen into disuse. This revised work the defendant brought out under the title "Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor," the word "Hemy's," both on the outside of the book and on the title page, being printed in much larger and more conspicuous type than any other of the words:—Held, that the plaintiffs were entitled to an injunction restraining the defendant from offering his work for sale with its present form, title-page, and cover, or any other form, title-page, or cover calculated to deceive persons into the belief that it was the plaintiff's work. *Metzler* v. *Wood*, 47 L. J., Ch. 625; 8 Ch. D. 606; 38 L. T. 544; 26 W. R. 577—C. A.

—— **"The Guinea Coal Company"—"The Pall Mall Guinea Coal Company."**]—The plaintiffs were in August, 1869, and had for some time previously been carrying on business under the style of the "Guinea Coal Company," their offices being at No. 22, Pall Mall. In the early part of 1869, the defendant, who had formerly managed their business, established a business on his own account under the style of the "Pall Mall Guinea Coal Company"; his offices being first at Beaufort Buildings, whence in August, 1869, he removed to No. 46, Pall Mall. The defendant solicited orders principally by circular, sending circulars to many of the plaintiffs' customers, and succeeded in obtaining orders, which the customers afterwards said they had intended for the plaintiffs:—Held, that they were entitled to restrain him from using the name "The Pall Mall Guinea Coal Company" in Pall Mall. *Lee* v. *Haley*, 39 L. J., Ch. 284; L. R. 5 Ch. 155; 22 L. T. 258; 18 W. R. 242.

The bill was filed on the 24th November, 1869:—Held, that there was no laches, inasmuch as the plaintiffs must wait until sufficient proof of the injury they had received was collected. *Ib.*

—— **"Reading Sauce"—"The Original Reading Sauce."**—"Reading Sauce" was first invented and introduced to the public by one James Cocks, but subsequently many manufacturers by unrestrained usage acquired the right to call their articles the "Reading Sauce":—Held, that the description "The Original Reading Sauce" applied only to that made by James Cocks, and those claiming under him, and that they had a right to restrain other parties from using that designation without showing that any purchaser was actually deceived. *Cocks* v. *Chandler*, 40 L. J., Ch. 575; L. R. 11 Eq. 446; 24 L. T. 379; 19 W. R. 593.

—— **"Eureka Shirts"—"Ford's Eureka Shirts."**]—The user by a dealer or a manufacturer in connection with an article of manufacture, of a single word, being a material part of a particular title to which as a trade mark another manufacturer has a right in connexion with the same article, may be an infringement of the trade mark. *Ford* v. *Foster*, 41 L. J., Ch. 682; L. R. 7 Ch. 611; 27 L. T. 219; 20 W. R. 818.

Sale by Retail Dealer—Right to use Trade-mark.]—A manufacturer who sells to a dealer, in bulk, an article usually sold and used in small quantities, without any restriction as to its disposal, must be taken to authorise the dealer to sell it as being his vendor's manufacture. The dealer may therefore call the article by the name registered by the manufacturer as his trade mark. *Condy* v. *Taylor*, 56 L. T. 891.

—— **Without Wilful Misrepresentation.**]—A. being a thread manufacturer of repute, B. bought in the market thread, wound on spools, not made by A., of inferior quality, and cheaper than his, and not bearing his name, but marked with the name of a firm of winders of thread who were known to be accustomed to purchase of A. thread in the hank for the purpose of winding and selling it when wound. B. sold the goods to a wholesale customer, with the assurance (given as he said, without knowledge of any misrepresention) that they were of A.'s make, and invoiced them to the customer under the description of certain numbers which A. had adopted and exclusively used in order to designate his particular manufacture. The customer attached A.'s name to the spools of thread, and retailed it to the public as of A.'s make:—Held, that there was not such a degree of wilful misrepresentation on the part of B. as would justify the court in granting an injunction, and the bill was dismissed, but without costs. *Ainsworth* v. *Walmsley*, 35 L. J., Ch. 352; L. R. 1 Eq. 518; 12 Jur. (N.S.) 205; 14 L. T. 220; 14 W. R. 363.

Wholesale Manufacturer.]—Where A. is ordered by B. to manufacture an article, and stamp it with a trade mark not B.'s, that alone leads to suspicion; but A., having caused the article to be manufactured, and admitting having casually heard of the party entitled to use such trade mark, must submit to a perpetual injunction, and pay costs. *Collins Co.* v. *Walker*, 7 W. R. 222.

—— **To what extent Trade Mark may be Used by.**]—The office of a trade mark is to denote that the article bearing it was manufactured by the owner of the trade mark; and a man has no right to affix a trade mark to an article not manufactured by himself, except for the purpose of showing that the article was selected or examined or certified by himself. *Hirsch* v. *Jones*, 45 L. J., Ch. 364; 3 Ch. D. 584; 35 L. T. 228.

—— **When Suggested by Purchaser not Manufacturer of Goods.**]—H., a London cigar dealer, registered a label at Stationers' Hall, and communicated the same to a manufacturer of cigars at Havannah, who supplied H. with a particular description of cigars under that label, with the addition of the manufacturer's name and address. Afterwards, the manufacturer commenced to sell the same description of cigars under the same label through a London agent. Upon motion by H., who alleged that he had an exclusive right, in the nature of

trade mark, to the label:—Held, that the trade mark was the manufacturer's; and in the absence of evidence of a contract binding him to supply cigars of the particular brand to no one but H., the court refused to grant an interim injunction to restrain the London agent from selling the cigars under the same label. *Ib.*

—— **Under alleged Custom.**]—An American company, incorporated, was established and located in the United States, for manufacturing edge tools of a superior description. The company used particular trade-marks and labels on their manufactures, for which they obtained a great reputation. The company discovered that their manufactures were being imitated, and their marks and labels used, by manufacturers in England; and by the defendant, a manufacturer at Birmingham, and the company thereupon filed a bill against him, alleging that he had been for same time past in the habit of making and selling tools bearing a fraudulent imitation of their marks and labels. He, before putting in his answer, submitted to an injunction, and in his answer admitted the use of the trade-marks complained of, but, by way of rebuttal of the charge of fraud, stated, that in so using the trade marks, he had only followed a custom prevalent at Birmingham for manufacturers of goods of the kind sold by the company, to affix on the goods ordered by merchants a particular trade mark, relying on the respectability of the merchant, when known to them, for the fact that those merchants had authority to act as agents of, or by way of licence from, the person entitled to the exclusive use of the trade marks; and that he had been informed that the company themselves had ordered goods to be manufactured at Birmingham, with their own trade mark upon them, for the purpose of sale in foreign countries. These statements were left uncontradicted by the company. On motion for a decree the court ordered the injunction to be continued, the bill to be retained for a year, with liberty to the plaintiffs to proceed at law to establish their legal right to the marks and labels; but if no proceedings at law within that time should be taken, the bill to be dismissed with costs, otherwise further consideration of all matters reserved. *Collins Co.* v. *Reeves*, 28 L. J., Ch. 56; 4 Jur. (N.S.) 865; 6 W. R. 717.

Alleged Custom that Shipping Agent has Right to Trade Mark.]—An arrangement was made between W., R., and G., that W., a manufacturer, should consign cotton cloths to G. in Rangoon, paying him an inclusive commission. The goods were to be exported through R., who acted as shipping agent, and was to see to the goods being finished and packed, for which services he received a commission from G. A particular mark was by arrangement between the three parties adopted for the goods, of which some portions and the general arrangement were new, and other portions consisted of R.'s name and arms, and of a symbol which had formerly been used by G. After goods had been regularly exported for some years under this arrangement, W. ceased to send goods through R., and commenced exporting them to Rangoon through the agency of F., continuing to use the old mark, except that the name and arms of F. were substituted for those of R. At the same time R. commenced exporting other goods under the old mark. Cross actions were commenced for injunctions, in which R. set up an alleged custom in Manchester, giving the right to the trade marks to the shipping agent:—Held, upon evidence, that no such custom existed. *Robinson* v. *Finlay*, 9 Ch. D. 487; 39 L. T. 398; 27 W. R. 294—C. A.

Held, also, that neither R. nor W. had any exclusive right to the use of the mark, and that both actions must be dismissed. *Ib.*

2. Action to Restrain Infringement.

a. Principles.

i. *In General.*

Principles upon which Injunction will be Granted.]—The principles explained on which interlocutory injunctions to restrain infringements of trade marks and names should be granted. *Read* v. *Richardson*, 45 L. T. 54—C. A.

The court will not grant an injunction to restrain the issue of goods bearing labels containing a false representation, when such falsehood is not an infringement of any right vested in the plaintiff. *Batty* v. *Hill*, 2 N. R. 265; 1 H. & M. 264; 8 L. T. 791; 11 W. R. 745.

The right to ask for the interference of the court in respect of a trade mark is founded, first, on the fact that the plaintiff has acquired the right of using the mark properly: that is to say, that it has not been copied, and does not involve any false representation; secondly, that the article so marked is actually a vendible article in the market; and, thirdly, that the defendant, knowing that to be so, has imitated the mark for the purpose of passing in the market other articles of a similar description. *M'Andrew* v. *Bassett*, 4 De G. J. & S. 380; 4 N. R. 123; 33 L. J., Ch. 561; 10 Jur. (N.S.) 550; 10 L. T. 442; 12 W. R. 777.

The essential ingredients for constituting an infringement of a right to a trade mark are—(1) that the mark has been applied by the plaintiffs properly, i.e. that they have not copied any other person's mark, and that the mark does not involve any false representation; (2) that the article so marked is actually a vendible article in the market; (3) that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description. *Ib.*

The jurisdiction of the court of chancery in the protection of trade marks rests upon property, and fraud in the defendant is not necessary for the exercise of that jurisdiction. *Hall* v. *Barrows*, 4 De G. J. & S. 150; 1 N. R. 543; 3 N. R. 259; 33 L. J., Ch. 204; 10 Jur. (N.S.) 55; 9 L. T. 651; 12 W. R. 322.

The court will grant a perpetual injunction against the use by one tradesman of the trade marks of another, although such marks have been so used in ignorance of their being any person's property, and under the belief that they were merely technical terms. *Millington* v. *Fox*, 3 Myl. & Cr. 338.

Fraud is not necessary to be averred or proved in order to obtain protection for a trade mark. *Singer Manufacturing Co.* v. *Wilson*, 47 L. J., Ch. 481; 3 App. Cas. 376; 38 L. T. 303; 26 W. R. 664—H. L. (E.)

In order to constitute a ground for interference by a court of equity to protect a manufacturer against the use, by another person, of the particular name of his manufactured article, it is not

necessary that there should be a mala mens towards the first purchaser of the article thus imitatively designated. The fault of the imitator is, that the first purchaser may be enabled, through this unwarranted designation. to retail a simulated article at a lower price than would be demanded for the original article, and so the original manufacturer may be injured. *Wotherspoon* v. *Currie*, 42 L. J., Ch. 130 ; L. R. 5 H. L. 508 ; 27 L. T. 393.

The court will not restrain the use of a label on the ground of its general resemblance to the trade mark of another manufacturer, if it is different in the points which a customer would look at in order to see whose manufacture he was purchasing. *Blackwell* v. *Crabb*, 36 L. J., Ch. 504.

It is not necessary, in order to give a right to an injunction, that a specific trade mark should be infringed ; it is sufficient that the court should be satisfied that there was on the whole, a fraudulent intention of palming off the defendant's goods as those of the plaintiff ; but in such a case it is essential that the imitation should be necessarily calculated to deceive. *Woollam* v. *Ratcliff*, 1 H. & M. 259.

It is not necessary in order to maintain a prayer for injunction that the whole of a trade mark should have been imitated. *Braham* v. *Bustard*, 9 L. T. 199 ; 11 W. R. 1061.

To entitle a trader to relief against an illegal use of his trade mark, it is not necessary that the imitation should be so close as to deceive persons seeing the two marks side by side ; but the degree of resemblance must be such, that ordinary purchasers proceeding with ordinary caution are likely to be misled. *Seixo* v. *Provezende*, L. R. 1 Ch. 192 ; 12 Jur. (N.S.) 215 ; 14 L. T. 314 ; 14 W. R. 357.

The actual physical resemblance of the two marks is not the sole question for the court, for if the plaintiff's goods have, from his trade-mark, become known in the market by a particular name, the adoption by the defendant of a mark or name which will cause his goods to bear the same name in the market, is as much a violation of the plaintiff's rights as the actual copy of his mark. *Ib.*

Although the defendant may have some title to the use of a name or mark, he will not be justified in adopting it, if the probable effect of his so doing is to lead the public to suppose, that in purchasing his goods they are purchasing those of the plaintiff. *Ib.* See also *Mitchell* v. *Henry*, post, col. 133.

Resemblance calculated to Deceive.]—The ground on which a court of equity protects trade marks is, that it will not permit a party to sell his own goods as the goods of another ; a party will not, therefore, be allowed to use names, marks, letters, or other indiciæ, by which he may pass off his own goods to purchasers as the manufacture of another person. *Perry* v. *Truefitt*, 6 Beav. 66.

In an alleged infringement of a right to trade marks, the court must ascertain whether the resemblances and the differences are such as naturally arise from the necessity of the case, or whether, on the other hand, the differences are simply colourable, and the resemblances such as are obviously intended to deceive the purchaser. The court will restrain by injunction a trader from using such trade marks as, from their resemblance to the trade marks of another firm, are obviously intended to deceive the purchaser into the belief that he is buying the manufactures of this other firm, the differences being merely colourable, and not made bonâ fide for the purpose of distinguishing the articles. *Taylor* v. *Taylor*, 2 Eq. R. 290 ; 23 L. J., Ch. 255.

Where there is a strong resemblance in matter, colour, and arrangement between the trade mark and its imitation, the court will presume that this is not fortuitous but intentional, with a view to mislead purchasers. *Edelston* v. *Vick*, 11 Hare, 78 ; 18 Jur. 7.

In an action for infringement of a trade mark which is of a type in general use in the trade, it is important to show that the trade mark alleged to infringe, though generally similar to the trade mark alleged to be infringed, was not copied from it, and was adopted without an intention to deceive, and that no case of actual deception has taken place after several years' user. *Baker* v, *Rawson*, 60 L. J., Ch. 49 ; 45 Ch. D. 519 ; 63 L. T. 306.

A. discovered a medicine to which he gave the name of chlorodyne, invented by himself as a fancy title, and not previously known in the medical profession. B. advertised for sale a medicine which he called chlorodyne, and sold as B.'s chlorodyne. A. filed a bill against B., but did not press it to a hearing, and obtained an order dismissing it with costs. B. subsequently advertised his medicine as original chlorodyne, asserting that he was the first inventor. Upon motion for an injunction in a second bill by A., to restrain B. from the use of the term original chlorodyne :—Held, that although A., by dismissing his former bill, has abandoned all right to the exclusive use of the term chlorodyne, he would have been entitled to restrain B. from selling his medicine as original chlorodyne, if he had adduced evidence that any one had been misled by the title into buying B.'s instead of A.'s medicine. *Browne* v. *Freeman*, 12 W. R. 305.

Different, but calculated to Deceive—"Glenfield Starch."]—When a trade mark is not actually copied, the existence of a fraudulent intention is a necessary element in the consideration of a case of this description. The party complained of must be proved to have done the act with the fraudulent design of passing off his own goods as those of the complainant. It is not necessary, however, to show an exact resemblance between the original and the counterfeit—it is sufficient if there is such a resemblance as will mislead an unwary purchaser. *Wotherspoon* v. *Currie*, 42 L. J., Ch. 130 ; L. R. 5 H. L. 508 ; 27 L. T. 393.

In order to constitute a ground for interference by a court of equity to protect a manufacturer against the use, by another person, of the particular name of his manufactured article, it is not necessary that there should be a mala mens towards the first purchaser of the article thus imitatively designated. The fault of the imitator is, that the first purchaser may be enabled, through this unwarranted designation, to retail a simulated article at a lower price than would be demanded for the original article, and so the original manufacturer may be injured. *Ib.*

W. had been for many years a manufacturer of starch at a small hamlet in Scotland, called Glenfield, where there was a stream of water particularly suited for use in the manufacture. Under the name of "Glenfield Starch" his goods

had acquired a great reputation. In 1868, C. set up starch works at Glenfield, and sold starch in packets labelled "Currie & Co., starch manufacturers, Glenfield." In colour these labels resembled those of W., but this colour was used by most starch manufacturers. C.'s agent represented his starch as "Glenfield Starch," and he thereby obtained an increased sale for the article:—Held, that W. was entitled to an injunction to restrain C. from using the word "Glenfield" on his labels, and from representing his starch as Glenfield starch. *Ib.*

In cases of alleged colourable imitations of trade marks, the court has not to consider whether manufacturers could distinguish between the articles, but whether the public would probably be deceived by the alleged spurious imitation. *Shrimpton* v. *Laight*, 18 Beav. 164.

Injunction against imitating a blacking label granted, though the difference appeared on a careful reading. *Day* v. *Binning*, C. P. Cooper, 489.

User of Plaintiff's Boxes or Labels.] — The boxes of tin plates made at particular works at Carmarthen were, for a long series of years, branded with the mark "M.C.S." A lessee of those works, who had used that mark, subsequently removed his manufactory to other works at a distance of forty miles, and there used the same mark. The Carmarthen works were, for some years, unoccupied; but afterwards D., and others as co-partners, having taken a lease of them carried them on, and branded their boxes with the mark "M.C.," and styled themselves the "The M. C. Tin Plate Company," S. then obtained an injunction to restrain D. and his partners from using the mark "M. C." or the designation of "The M. C. Tin Plate Company"; but upon appeal the injunction was dissolved, with liberty to S. to bring an action. *Motley* v. *Downman*, 3 Myl. & Cr. 1; 6 L. J., Ch. 308.

Principles aud rules upon which the court interferes, by injunction, in such cases. *Ib.*

Imitation made Innocently.]—A declaration alleged that the plaintiff agreed with the defendant to manufacture for him fire-bricks, to be marked as he should direct; that he directed that they should be marked with R.'s name, he well knowing that R. manufactured fire-bricks marked with that name, to indicate that they were manufactured by him; that the plaintiff ignorant of the manufacture of fire-bricks by R., and that marking fire-bricks according to the direction of the defendant would be wrongful, manufactured fire-bricks for the defendant, and marked them with the name of R.; that R. filed a bill in chancery for an injunction and account against the plaintiff, and that the plaintiff, in order to compromise the suit, paid R. a sum of money:—Held, that the declaration disclosed two grounds of action; first, because the plaintiff was liable to the injunction, although he used the trade mark of R. innocently, and secondly, because the natural consequence of the defendant's act was to involve the plaintiff in a chancery suit, even if he had the means of defending it, by reason of his having used the trade mark of R. innocently. *Dixon* or *Dickson* v. *Fawcus*, 3 El. & El. 537; 30 L. J., Q. B. 137; 7 Jur. (N.S.) 895; 3 L. T. 693; 9 W. R. 414. See also *Millington* v. *Fox*, supra, col. 118.

If A. has acquired property in a trade-mark, which is afterwards adopted and used by B., in ignorance of A.'s right, A. is entitled to an injunction, but not to an account of profits or to compensation, except in respect of any user, by B. after he became aware of the prior ownership. *Edelston* v. *Edelston*, 1 De G. J. & S. 185; 9 Jur. (N.S.) 479; 7 L. T. 768; 11 W. R. 328.

At law the proper remedy is by an action for deceit, and proof of fraud on the part of the defendant is of the essence of that action; but the court will act on the principle of protecting property alone, and it is not therefore necessary for the party applying for the injunction to prove fraud, or that the credit of the plaintiff was injured by the sale of an inferior article. *Ib.*

Plaintiff must seek Remedy with Clean Hands.] —Where the owner of a trade mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade mark or in the business connected with it, be himself guilty of any false or misleading representation. *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G. J. & S. 137; 3 N. R. 364; 33 L. J., Ch. 199; 10 Jur. (N.S.) 81; 9 L. T. 558; 12 W. R. 289. Affirmed in H. L. ante, col. 107.

It is not a rule either of morality or equity, that a person is not answerable for a falsehood in his trade mark, because it may be so gross and palpable as that no one is likely to be deceived by it. *Ib.*

On what Grounds Name Protected.]—The plaintiff in these cases has not any property in the particular title, but he has a right to prevent others from personating his business by using such a description as would lead customers to suppose they were trading with the plaintiff. *Boulnois* v. *Peake*, 13 Ch. D. 513, n.

Similiarity in Name of Company.]—Where one company assumed a name somewhat similar to the name of another company, but it did not appear that the first company was likely to suffer any injury thereby, a court of equity refused to grant an injunction, leaving the plaintiffs to bring their action. *London and Provincial Law Assurance Society* v. *London and Provincial Joint-Stock Life Insurance Co.*, 11 Jur. 938.

There is nothing in the Companies Act, 1862, to affect the right of a company registered under a particular name to an injunction restraining another company, which, notwithstanding the prohibition of s. 20, against identity of names, has been registered under an identical or a similar name, from carrying on its business under that name, if it is proved that that name is calculated to deceive; the principles applicable to individuals trading under identical or similar names applying equally to companies. *Merchant Banking Co. of London* v. *Merchant's Joint Stock Bank*, 47 L. J., Ch. 828; 9 Ch. D. 560; 26 W. R. 847.

A limited company having once obtained a registered name has the same rights and limitations as to trading under that name as an individual trading in his own name. *Ib.*

The plaintiffs, the Guardian Fire and Life Assurance Company, were established in 1821, and carried on the business of fire and life insurance at 11, Lombard-street. A company called the Guardian Horse and Vehicle Insurance Association (Limited) was established in 1877, and carried on, at No. 31, Lombard-street, the busi-

ness of insurance of horses and vehicles against accident until the year 1880, when the company transferred its business to the defendants, a new company incorporated in March, 1880, and called the Guardian and General Insurance Company (Limited). This new company, in addition to insuring horses and vehicles and persons against accident, proposed to engage in fire insurance business:—Held, in an action by the plaintiffs to restrain the defendants from carrying on their business so as to deceive, that the plaintiff's' and defendants' names were so similar as to lead to confusion, and that an injunction would have been granted to restrain the defendants from carrying on business under the name of the Guardian and General Insurance Company (Limited) had they not given an undertaking to change their name to the Guardian Horse, Vehicle and General Insurance Company (Limited). *Guardian Fire and Life Assurance Co.* v. *Guardian and General Insurance Co.*, 50 L. J., Ch. 253; 43 L. T. 791.

The plaintiff was the proprietor of an old-established library business at the West-end of London. The defendants being the promoters of a projected company, having for a principal object the carrying on of a library business in another quarter of the West-end, proposed to adopt as the title of their undertaking the same trade name as that which the plaintiff had used for a considerable period, but with the addition of the word "Limited":—Held, that the defendants must be restrained from carrying on, in or near London, the business in question under the proposed title, or under any other title, only colourably differing from the name of the plaintiff's business, and also from advertising the intended commencement thereof under such title. *Hoby* v. *Grosvenor Library Co.* 28 W. R. 638.

User of Own Name with Another's.]—A perpetual injunction will be granted to restrain a trader from filling and sending out to the public articles of his own manufacture in bottles, casks, or other receptacles having indelibly impressed thereon the name of another trader, who manufactures an article of a like description, even although such trader places on such bottles, casks, or receptacles a label having his own name thereon. *Rose* v. *Loftus*, 47 L. J., Ch. 576; 38 L. T. 409.

User with Knowledge that another intends to use Name.]—A tradesman may use a name, although he is aware that a neighbouring tradesman intends to use that name. A bootmaker having a shop running up Bedford-street, with the front and entrance in the Strand, wrote up over his shop the words "Civil Service Boot Supply." The Civil Service Supply Association were at that time building a large store at the other end of Bedford-street, in which when finished, they opened a general shop, and they afterwards opened a boot and shoe shop in Tavistock-street, which was not far off. One of the customers of the association had gone to the shop of the bootmaker, mistaking it for that of the association. The association brought an action to restrain the bootmaker from using the words:—Held, that under the circumstances there was no intention on the part of the bootmaker to deceive, and that no rational person would have been deceived by the words so used; and action dismissed. *Civil Service Supply Association* v. *Dean*, 13 Ch. D. 512.

Name of Place.]—An injunction will be granted on an interlocutory motion to restrain the use or imitation of the name of a place, used as a trade mark, if the plaintiff proves primâ facie that such name in the market has come to mean his article obtained from such place. *Radde* v. *Norman*, 41 L. J., Ch. 525; L. R. 14 Eq. 348; 26 L. T. 788; 20 W. R. 766.

Equity against Printer supplying Imitative Labels.]—Where a manufacturer has the exclusive right to use a particular trade mark, which he has been in the habit of procuring to be printed upon paper labels and wrappers, which he pasted on and wrapped round his manufactures, he may obtain an injunction, upon interlocutory motion, against a printer who has made and printed, and is in the habit of selling, imitations of the plaintiff's labels to persons for the purpose of using them fraudulently, to pass off other goods as those of the plaintiff, although the printer himself makes no such use of them; so also, if the plaintiff alleges that persons bought the labels of the defendant for such a fraudulent purpose, and proves that the defendant was in the habit of selling them to anyone who asked for them; and the defendant denies collusion with anyone, and also denies the plaintiff's right to the exclusive use of the mark, and insists upon his own right to continue the printing and selling, the injunction will be granted, although the plaintiff does not allege or prove that the defendant sold them with a fraudulent purpose, and does not distinctly prove that any of the labels sold by defendant were in fact made use of to defraud the plaintiff. The ground of this equity is, that the defendant, by knowingly printing labels in imitation of the plaintiffs' trade mark, and selling them to anyone who asked for them, was supplying the means of committing, and was thus a party to frauds, which courts of equity would interfere to stop at their source. *Farina* v. *Silverlock*, 1 K. & J. 509; 24 L. J., Ch. 632. And see *S. C.*, 1 K. & J. 650; 3 Eq. R. 883; 3 W. R. 352.

On appeal the lord chancellor dissolved the injunction on the ground that as the mark consisted of a label in a certain form, and it was shown that in very many instances labels the same as or similar to it might be sold for a legitimate purpose, the court, in the absence of any proof of actual fraud, would not restrain the printing and sale of such labels until the manufacturer, who alleged that they were used for a fraudulent purpose, had established his case by an action at law. *S. C.*, 6 De G. M. & G. 214; 26 L. J., Ch. 11; 2 Jur. (N.S.) 1008; 4 W. R. 731—L. C.

Importation and Exportation—Action against Carriers—Discovery.]—A firm of forwarding agents in London received from carriers abroad several boxes of cigars bearing forged brands, which were to be delivered to several persons in England. On application by the makers whose brand had been forged, the agents gave information as to the consignors, and offered either to send back the cigars or erase the brands:—Held, on a bill for injunction by the makers whose brands were forged, that the fact of the agents being merely carriers was no defence to the suit; but as they had given sufficient information, and offered to erase the brands, they were not to pay costs. *Upmann* v. *Elkan*, 41 L. J., Ch.

246; L. R. 7 Ch. 130; 25 L. T. 813; 20 W. R. 131.

An action will lie against shipowners who have shipped goods bearing counterfeits of the plaintiff's trade marks for discovery of the names of the consignor from whom the goods were received. *Orr* v. *Diaper*, 46 L. J., Ch. 41; 4 Ch. D. 92; 35 L. T. 468; 25 W. R. 23.

—— **Action by Foreigner—Restraining Deceitful User of Trade Mark in England for Exported Goods.**]—The plaintiffs, who were a company formed in the United States for manufacturing edge tools which they exported to different countries, sought to restrain the defendant, a manufacturer in England, from the use of their trade mark:—Held, upon demurrer, that every alien friend was entitled to apply to the courts of this country for the restraint of a deceitful and fraudulent use of his trade mark practised in England. *Collin's Co.* v. *Cohen*, 3 K. & J. 423; 3 Jur. (N.S.) 929; 5 W. R. 676.

An alien may sue in this country to restrain the fraudulent appropriation of his trade mark, although the goods to which such trade mark applies are not usually sold by him in this country. *Collin's Co.* v. *Reeves*, 28 L. J., Ch. 56; 4 Jur. (N.S.) 865; 6 W. R. 717.

—— **Restraining Exportation of Goods calculated to deceive.**]—Where a trader has a right to a trade-mark on goods sold in a foreign market, an injunction will be granted to restrain the export of goods under another trade mark which may deceive the ultimate purchasers, although it would not deceive Englishmen or the dealers in the foreign market. *Johnston* v. *Orr-Ewing*, 51 L. J., Ch. 797; 7 App. Cas. 219; 46 L. T. 216; 30 W. R. 417—H. L. (E.)

Injunction against the use of trade-mark by defendant was made general, although the plaintiff had never used his trade mark except in the Indian market. *Ib.*

Power of Excluding Goods from particular Markets.]—Your lordships are not called upon to decide whether a ticket, which was a rightful and bonâ fide trade mark of a trader using it, could be excluded by injunction from particular markets (though unimpeachable everywhere else) merely because in those markets it might be liable to be called by a name which the mark of another trader had already acquired there. To that proposition I should not myself, as at present advised, be prepared to assent. *Johnston* v. *Orr-Ewing*, supra—Per Blackburn (Lord).

Registration for Entire Class—User for Part of Class—Exclusive Title for Entire Class.]—In 1879 the plaintiff registered as his trade mark for the whole of class 45: i.e. "tobacco whether manufactured or unmanufactured," a device consisting of (inter alia) a shield with three crowns, and the word "Mixture," underneath; since registration the plaintiff used this trade mark solely on packages containing cut tobacco; subsequently the plaintiff used the shield and three crowns without the word "Mixture," a trade term not appropriate to cigars, or boxes of cigars. The defendants, cigar manufacturers, labelled their boxes with a device consisting of a shield and three crowns. On an application for an injunction to restrain this infringement:—Held, that registration of a trade-mark for an entire class followed by user on one description of goods only, did not give the exclusive right to the use of such trade mark for all descriptions of goods in that class, and that under the circumstances the plaintiff was not entitled to an injunction. *Edwards* v. *Dennis* (30 Ch. D. 454) discussed and applied. *Hargreave* v. *Freeman*, 61 L. J., Ch. 23; [1891] 3 Ch. 39; 65 L. T. 487.

Non-registration—Label.]—In July, 1885, M., of Dizy, in France, commenced the consignment to the plaintiff in London of champagne under the label "Le Court et Cie., Reims," which had then recently been registered in France as his trade mark, and to which in December, 1886, his right was established in proceedings against X. before the French tribunal. Further consignments were made to the plaintiff down to July, 1886, and advertised and sold by him as Le Court et Cie.'s champagne. In March, 1886, the defendant, trading under the name of Short & Co., began to sell (chiefly at a wine bar across the counter) champagne which was sent to him from France by X. as Le Court et Cie.'s champagne; and it appeared that in 1882 he had proposed to register in France a label with the name Le Court et Cie. as corresponding to his own trade name of Short & Co., but from difficulties in obtaining registration abandoned the idea. Upon motion by the plaintiff to restrain the use of the name and brand by the defendant:—Held, that the plaintiff was not entitled to an injunction against the defendant; because, the label being capable of registration in this country and not having been registered, the plaintiff was precluded by s. 77 of the Trade Marks Act, 1883, from instituting proceedings to restrain infringement of a trade-mark. *Goodfellow* v. *Prince*, 56 L. J., Ch. 545; 35 Ch. D. 9; 56 L. T. 617; 35 W. R. 488—C. A.

Compromise of Prosecution for User.]—A prosecution instituted by the defendants against the plaintiff under the Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88), was by agreement compromised, and the plaintiff gave the defendants a written apology, requesting them not further to continue proceedings against him, and authorising them to make such use of the apology as they might think necessary. Upon demurrer to a bill to restrain the excessive publication of this apology:—Held, that the court had no jurisdiction to interfere. *Fisher* v. *Apollinaris Co.*, 44 L. J., Ch. 500; L. R. 10 Ch. 297; 32 L. T. 628; 23 W. R. 460.

—— **Subsequent Sale of Goods Previously Purchased.**]—J. sold, under a trade mark, a medicine known as J.'s ointment. O., without authority, sold an ointment as J.'s ointment, under an imitation of J.'s label. J. having threatened proceedings against O., an agreement was made, by which, after reciting that O. alleged that his invasion of the rights of J. was inadvertent, and that he had discontinued the same, and agreed not again to infringe on such rights, all claims in respect of the invasion, not only with respect to O., but to include all parties who may have purchased the ointment from him, shall be settled and discharged by the payment of 1,000*l.*, the receipt of which was acknowledged; this agreement also contained an undertaking to execute a formal release of all claims and demands in

respect of the infringement. J. having commenced suits against persons who had purchased the ointment from O. previously to the agreement, but retailed it afterwards, O. filed a petition specifically to enforce the agreement, and to restrain J. from proceeding in the suits against the purchasers from O. :—Held, that the agreement did not authorise any sale, after the date of it, of ointment previously purchased from O. *Oldham* v. *James*, 14 Ir. Ch. R. 81—C. A.

Held, secondly, that, even if the terms of the agreement required the construction that J. was to permit ointment previously purchased from O. to be sold under the imitated mark, the court would not specifically enforce such an agreement, as it would be a fraud on the public. *Ib.*

ii. *Delay and Acquiescence. Effect of.*

Effect of Delay.]—In a suit to restrain the user of names in trade in a fraudulent manner, the right to an interlocutory injunction is lost by a delay in filing the bill of nine or ten months since the discovery of the user. *Isaacson* v. *Thompson*, 41 L. J., Ch. 101.

No trader has a right to use a trade mark so nearly resembling that of another trader as to be calculated to mislead incautious purchasers. The use of such a trade mark may be restrained by injunction, although no purchaser has actually been misled; for the very life of a trade mark depends upon the promptitude with which it is vindicated. *Johnston* v. *Orr-Ewing*, 51 L. J., Ch. 797; 7 App. Cas. 219; 46 L. T. 216; 30 W. R. 417—H. L. (E.)

The court will not refuse to grant an injunction to restrain the infringement of a trade mark, on the mere ground that a great number of years have elapsed since it was first infringed by the defendant. But when many years have elapsed before the plaintiff takes steps to restrain the infringement, the court will require clearer proof than it would otherwise have done that the trade mark was adopted by the defendant originally with fraudulent intent, and will require the plaintiff to prove that he has been actually injured by the infringement. *Rodgers* v. *Rodgers*, 31 L. T. 285; 22 W. R. 887—L.JJ.

Infringement took place early in 1869. The bill was filed on the 24th November :—Held, that there was no laches, inasmuch as the plaintiffs must wait until sufficient proof of the injury they had received was collected. *Lee* v. *Haley*, 39 L. J., Ch. 284; L. R. 5 Ch. 155; 22 L. T. 251; 18 W. R. 242.

—— **"Estcourt's Hop Supplement."**]—The plaintiff, who was a manufacturer of an article used as a substitute for hops called "Estcourt's Hop Supplement," employed his son C. as his agent, who thereupon undertook not to disclose the secret of the compound, or at any time be connected with the sale of any article which could be used as a substitute for hops. During the time of his agency C. discovered the secret of the manufacture. He shortly afterwards terminated his agency, and began to sell a practically similar compound, which he called "Hop Essence." A bill was filed against him by the plaintiff to restrain him from continuing the sale, when he submitted and signed an agreement binding himself to observe the former agreement and do the plaintiff no injury in his trade. Subsequently C. associated himself with Taylor, and circulars were issued advertising the sale of "Estcourt's Hop Essence; sole proprietor, James Taylor." A company was formed for the purpose of selling the "Hop Essence" under the name of "Estcourt's Hop Essence." Although the plaintiff ascertained in January, 1874, that a circular had been issued by Taylor, headed "Estcourt's Hop Essence Company," he did not apply to the court until the following August :—Held, that the plaintiff was precluded by delay from any right to relief. *Estcourt* v. *Estcourt Hop Essence Co.*, 44 L. J., Ch. 223; L. R. 10 Ch. 276; 32 L. T. 80; 23 W. R. 313.

—— **Of Acquiescence.**]—A plaintiff laid by for two years before filing a bill for an injunction, having seen labels of the defendant exhibited publicly, which he now complained of as being colourable imitations of his labels :—Held, that such laches disentitled him to relief. *Beard* v. *Turner*, 13 L. T. 746.

In 1847 Joseph R. & Sons obtained an injunction to restrain N. and William R. from using the trade mark "J. R. & Sons." Soon afterwards W. R. entered into partnership with his father, John R., and with a brother, and the three used the trade mark "J. R. & Sons," with a colourable addition. Upon the plaintiffs moving, in 1853, to commit W. R., and denying notice of the breach of the injunction before July, 1852 :—Held, that they were entitled to the order, and that acquiescence, to constitute a defence to such a motion, must amount to a licence to use the mark :—Held, also that the plaintiffs might move to commit W. R. without bringing his partners before the court. *Rodgers* v. *Nowill*, 3 De G. M. & G. 614; 22 L. J., Ch. 404; 17 Jur. 109, 171; 1 W. R. 122, 205, 216.

—— **Knowledge Must be Proved.**]—In order to prove acquiescence by a firm in the piratical use of their trade mark, knowledge of such use must be proved; and that is not accomplished by the proof of publication of advertisements, which would have been an invasion of the rights of the firm if these advertisements have been issued not steadily or uniformly, but interchangeably with other advertisements in some respects similar, but not infringing the rights of the firm. *Kinahan* v. *Bolton*, 15 Ir. Ch. R. 75.

iii. *Misrepresentation by Plaintiff. Effect of.*

Remedy Refused in First Instance.]—If a plaintiff, coming for an injunction in a trade mark case, appears to have been guilty of misrepresentations to the public, a court of equity will not interfere in the first instance. *Perry* v. *Truefitt*, 6 Beav. 66.

Where the plaintiff had used a considerable degree of misrepresentation in statements made to the public respecting the mode of procuring and making up a new description of tea, called "Howqua's mixture," an injunction to restrain the defendant from selling tea under the name employed by the plaintiff, and in a particular kind of package, which the plaintiff had introduced, was refused, until the plaintiff had established his title in a court of common law. *Pidding* v. *How*, 8 Sim. 477; 6 L. J., Ch. 345.

Plaintiffs' Conduct barring Remedy—Alleged Custom in Tobacco Trade—"Dressing up" Goods.]—The plaintiffs, who were manufacturers of and dealers in cigars in England, imported

from Germany cigars made of Havannah tobacco. There was no direct evidence as to the place where they were manufactured, but the court found as a fact that they were also manufactured in Germany. Plaintiffs sold these cigars in England in boxes on which was a label containing their trade mark (registered under the Trade Marks Registration Act, 1875), and consisted of the words "La Pureza," and a pictorial representation of an Indian woman in a state of semi-nudity holding up a bundle of cigars, two winged boys each holding a shield, and a background representing a portion of some tropical country. On one shield was depicted the arms of Spain, and on the other those of Havannah. In the trade mark as registered the shields were blank. A smaller label contained what was apparently the lithographed signature of "Ramon Romnedo." On each box were branded the words "La Pureza" and "Habana." It was proved that "La Pureza" was an old brand, long disused, of Havannah cigars, and that there was no known existing person of the name of "Ramon Romnedo." The court held, that, it having been a general custom in the tobacco trade for over twenty-five years to mark cigar-boxes with the word "Habana," though the cigars had not been imported from Havannah, such a marking did not disentitle the owner of a trade mark for cigars from seeking to prevent infringement; and that, the defendants having used similar marks on their cigar-boxes, the plaintiffs were entitled to an injunction and an account:—Held, on appeal, that, as the trade mark and other marks on the plaintiffs' boxes together amounted to a "dressing-up" of the plaintiffs' cigars, and a misrepresentation that they were cigars manufactured in the Havannah, the action must be dismissed, but without costs, the defendants being entitled only to the costs of the appeal. *Newman* v. *Pinto*, 57 L. T. 31—C. A.

Word ceasing to be "Special and Distinctive."]—In 1876 A. registered as his trade mark the word "Eton," which had been used since 1869, and become known in the trade as denoting cigarettes of his manufacture. He had also been in the habit of selling, and supplying for the purposes of sale, "Eton" cigarettes in boxes so labelled (in conformity with an alleged custom in the trade) as to imply that such cigarettes were manufactured at St. Petersburg by a Russian firm:—Held, that A., by so acting in connection with the word "Eton" as to suggest to persons not in the trade that the cigarettes were not of his making, had destroyed the value of the word as "special and distinctive" within the Trade Marks Act, 1875, s. 10, and accordingly that at the time of registration it had ceased to be his special and distinctive mark capable of registration. And as five years on the register does not (on the authorities) give an indefeasible title to a mark which, from not properly constituting a trade mark within the meaning of the act, ought not to have been registered, A.'s action to restrain an infringement of the mark by B. was dismissed, and rectification of the register by removing the mark on B.'s application allowed. *Wood's Trade Mark, In re, Wood* v. *Lambert*, 55 L. J., Ch. 377; 32 Ch. D. 247; 54 L. T. 314—C. A.

Words "Trade Mark" attached to unregistered Mark—Use of registered Mark not belonging to Plaintiff.]—A firm of retail dealers, who carried on business in several different branches of trade, registered a trade mark for wearing-apparel. They subsequently employed the same mark, with the words "Trade Mark" attached thereto, upon the labels used in their tobacco department. No such mark had in fact been registered by them in respect of tobacco. Upon the same labels the firm used a device which had been registered by R. in respect of tobacco, and had been assigned by him to W., an employé of the firm. W., having left the employment of the firm, granted a licence to G. to use his trade marks, and G. sold tobacco with a label similar to that of the firm. The firm commenced proceedings against G. to restrain him from passing off his goods as and for the goods of the firm. Upon motion for an interim injunction:—Held, that the use of the words "Trade Mark" on goods, attached to a device, amounted to a representation to the public that that device was a registered trade mark; that there was also a representation that the device registered by R. was the registered trade mark of the plaintiffs; and that the plaintiffs, having been guilty of misrepresentation to the public, were not entitled to relief. *Lewis's* v. *Goodbody*, 67 L. T. 194.

Conduct not Barring Remedy—Misrepresentation after Action brought.]—It was alleged by the defendant that the plaintiff was disentitled to relief, because at the time of the trial he was using wrappers which contained a misrepresentation. The plaintiff did not begin to use those wrappers until after the action had been brought:—Held, that there was in fact no misrepresentation in the wrappers in question, but that, even if there had been, a misrepresentation not made till after the commencement of the action would not have affected the plaintiff's title to relief. *Siegert* v. *Findlater*, 47 L. J., Ch. 233; 7 Ch. D. 801; 38 L. T. 349; 26 W. R. 459.

—— **Word "Patent" used of Unpatented Article.**]—The word "Patent" having come to be applied in common language to various manufactured articles as descriptive of a particular quality, without any reference to letters patent, the use of the words "patent thread" as part of the trade mark on an unpatented article, will not prevent a court of equity from protecting such trade mark. *Marshall* v. *Ross*, 39 L. J., Ch. 225; L. R. 8 Eq. 651; 21 L. T. 260; 17 W. R. 1086.

—— **Misrepresentation not forming part of Trade Mark.**]—Since a misrepresentation, not forming a part of the trade mark itself, although used in connection with the trade mark, and with the article to which the trade mark applies, would be no answer to an action of a party to establish his title at law, neither will such a misrepresentation disentitle him to a relief in equity. Ford, a shirt manufacturer, gave the name Eureka to a particular shape of shirt invented by him, and stamped all such shirts with the words "Ford's Eureka Shirts," and with a statement that such words were his trade mark. He advertised the shirts, falsely calling himself the patentee of them, and he falsely described himself on his billheads, &c., as patentee of the shirts. Shirts of the particular shape came to be commonly known in the trade as Eureka. Certain wholesale shirt manufacturers made shirts of the same shape, and stamped them

in the same part of the shirts as "Eureka Shirts":—Held, that Ford was entitled to an injunction to restrain the wholesale manufacturers from using the word "Eureka" as applied to shirts not of Ford's manufacture, except that they were to be at liberty to advertise their shirts as "Eureka" in their trade lists. But having regard to his misrepresentations, the account against them was confined to the time from the filing the bill. *Ford* v. *Foster*, 41 L. J., Ch. 682; L. R. 7 Ch. 611; 27 L. T. 219; 20 W. R. 818.

b. Practice.

i. *Generally.*

Action at Common Law for Infringement.]—If A., a manufacturer, uses the mark of B. for the purpose of giving to articles manufactured by A. the appearance of being of the manufacture of B., B. may maintain an action against A., although A.'s articles are not inferior in quality to B.'s, and although it is not shown that B. has sustained actual damage. *Blofeld* v. *Payne*, 1 N. & M. 353; 4 B. & Ad. 410; 2 L. J., K. B. 68.

Where a plaintiff marked his goods, "Sykes' Patent," to show that they were his own manufacture, and the defendant copied the mark on his goods to show that they were the plaintiff's manufacture, and sold them, so marked, as and for his manufacture:—Held, that an action would lie for the injury, though neither party had a valid patent, and both were named "Sykes." *Sykes* v. *Sykes*, 5 D. & R. 292; 3 B. & C. 541; 3 L. J. (O.S.) K. B. 46; 27 R. R. 420.

An action may be maintained by a manufacturer against another manufacturer who marks his goods with the known and accustomed mark of the plaintiff, where the mark used by the defendant resembles the plaintiff's mark so closely as to be calculated to deceive, and as to induce persons to believe the defendant's goods to be of the plaintiff's manufacture, and the defendant uses such mark with intent to deceive and sells the goods so marked as and for goods of the plaintiff's manufacture, and proof of special damage is not necessary. *Rodgers* v. *Nowill*, 5 C. B. 109; 17 L. J., C. P. 52; 11 Jur. 1039.

In such cases it is enough, at least after verdict, to allege generally that by means of the premises the plaintiff was deprived of the sale of divers large quantities of goods, and lost the profits that would otherwise have accrued to him therefrom. *Ib.*

A declaration alleged that the plaintiffs prepared, vended and sold for profit, medicines called "Morison's Universal Medicines," which they sold in boxes wrapped up in paper, having those words printed thereon; that the defendant, intending to injure the plaintiffs in the sale of the medicines, and to deprive them of profits, deceitfully and fraudulently prepared and made medicines in imitation of the medicines so prepared by the plaintiffs, and wrapped up the same in paper, having "Morison's Universal Medicines" printed thereon, in order to denote that such medicine was the genuine medicine prepared, vended and sold by the plaintiffs; and that the defendant deceitfully and fraudulently vended and sold for his own lucre and gain the last-mentioned boxes of the articles, represented and termed by him to be medicine, by the name and description of "Morison's Universal Medicines," which had been prepared, vended and sold by the plaintiffs; whereas, in truth, the plaintiffs had never been the preparers, venders or sellers thereof:—Held, that the declaration disclosed a good cause of action. *Morison* v. *Salmon*, 2 Scott (N.R.) 449; 2 Man. & G. 385; 10 L. J., C. P. 91.

—— **Imitation—Jury to say if calculated to Mislead.**]—Action for wrongfully, knowingly and fraudulently stamping bars of iron, made by the defendants, with a stamp resembling one used by the plaintiff, which the defendants knew and intended to be in imitation of the plaintiff's, and which was used by the defendants in order to denote that their iron was made by the plaintiff; and for knowingly selling the iron so marked as and for the plaintiff's iron. A correspondence between the parties was given in evidence, in which the plaintiff charged the defendants with using the mark, as being a fraud upon him. The defendants, in answer, asserted that they had used the mark for many years continuously. This was not so in fact; but it was shown that the mark had been adopted by them in the execution of orders received from foreign correspondents:—Held, that it was properly left to the jury to say, first, whether the defendants' mark bore such a close resemblance to the plaintiff's as was calculated to deceive the unwary and injure the sale of the plaintiff's goods; and secondly, whether the defendants used the mark with the intention of supplanting the plaintiff, or whether it was done in the ordinary course of business in execution of orders. *Crawshay* v. *Thompson*, 4 Man. & G. 357; 5 Scott (N.R.) 562; 11 L. J., C. P. 301.

—— **Conflict of Evidence as to, on Interlocutory Application.**]—The plaintiffs registered a trade mark for worsted goods described as "a white selvage on each side of the piece having a red and white mottled thread interwoven the full length of the selvage between the edge of the piece and the edge of the selvage," and deposited a specimen at the patent office museum. The specimen so deposited was undyed, and the selvage was white, the warp being white cotton and the woof white mohair, and nearly in the middle of the selvage was a compound warp thread composed of a thread of white cotton and a thread of Turkey red cotton twisted together. When the goods were dyed black the cotton threads took the dye imperfectly, so that the warp threads in the selvage became grey, while the woof became black, so as to make the selvage dark grey, with a dark red mottled line running along it. The defendants sold black mohair goods with a dark grey selvage of nearly the same shade as that of the plaintiffs, with a twisted thread running along its inner edge, which thread was originally white, red, and yellow, but in the course of dyeing the white became dark grey, and the yellow a dark olive, which could hardly be distinguished. The plaintiffs sought to restrain the sale of these goods as an infringement, and moved for an injunction. There was evidence that the selvage, though not actually white, was what was known in the trade as a white selvage:—Held, by Jessel, M.R., that as the plaintiffs' selvage was not white, and the mottled thread of the defendants was different, and in a different position from that of the plaintiffs, there was no infringement, and that an injunction must be refused. But held by the court of appeal that the principles according to

which the court acts in preventing a man from passing off his goods as those of another are not altered by the Trade Marks Registration Act, and that the question could not be disposed of by simple inspection of the patterns without considering whether the selvage was not, according to the understanding of the trade, a white selvage, and if it was, then whether the differences in quality and position of the defendants' mottled thread were sufficient to distinguish the defendants' goods from those of the plaintiffs, so as to prevent purchasers from being misled, and that as there was a conflict of evidence on these points the motion must stand over till the trial, the defendants undertaking to keep an account. *Mitchell* v. *Henry*, 15 Ch. D. 181; 43 L. T. 186—C. A.

Jurisdiction of Court of Chancery.] — The jurisdiction of the court of chancery in the protection given to trade marks rests upon property, and the court interferes by injunction, because that is the only mode by which property of this description can be effectually protected. *Leather Cloth Co.* v. *American Leather Cloth Co.*, 3 N. R. 264; 4 De G. J. & S. 137; 33 L. J., Ch. 199; 10 Jur. (N.S.) 81; 9 L. T. 558; 12 W. R. 289—Per Westbury, C. Affirmed in H. L., ante, col. 107.

The jurisdiction of the court of chancery, in the protection of trade marks, rests upon property, and fraud in the defendant is not necessary for the exercise of the jurisdiction. *Hall* v. *Barrows*, 4 De G. J. & S. 150; 3 N. R. 259; 33 L. J., Ch. 204; 10 Jur. (N.S.) 55; 9 L. T. 561; 12 W. R. 322.

Where a name, once affixed to a manufactured article, continues to be used after the death of the manufacturer, the name in time becomes a mere trade mark or sign of quality, and ceases to denote, or to be current as indicating, that any particular person was the maker, and would, therefore, be protected. *Ib.*

Where the court is of opinion that the use of a particular mark is likely to deceive, it will not require evidence of actual deception. *Braham* v. *Bustard*, 1 H. & M. 447; 2 N. R. 572; 9 L. T. 199; 11 W. R. 1061; S. P., *Braham* v. *Beachim*, ante, cols. 77—8.

At law the proper remedy is by an action for deceit, and proof of fraud on the part of the defendant is of the essence of that action; but the court will act on the principle of protecting property alone, and it is not therefore necessary for obtaining the injunction to prove fraud, or that the credit of the plaintiff was injured by the sale of an inferior article. *Edelston* v. *Edelston*, 1 De G. J. & S. 185; 9 Jur. (N.S.) 479; 7 L. T. 768; 11 W. R. 328.

An injury by loss of custom is sufficient to support a title to relief, and it is not necessary that proof should be given of persons having been actually deceived, in having bought goods with the defendants' mark, under the belief that they were of the manufacture of the plaintiff. *Ib.*

An owner of a trade mark will not be deprived of remedy in equity, even if it is shown that all who bought goods bearing the mark from the defendant were well aware that the goods were not of the plaintiff's manufacture. *Ib.*

It is enough if the goods were supplied by the defendant for the purpose of being sold again in the market, nor is it necessary to show that any person was deceived, if the resemblance of the articles is such as would be likely to cause one mark to be mistaken for the other. *Ib.*

In granting injunctions to prevent the infringement of trade marks, the court exercises its jurisdiction in aid of courts of law, i.e. where an action could be maintained in a court of law. But it does not exercise an independent jurisdiction. The cases on this subject reviewed and considered. *Foot* v. *Lea*, 13 Ir. Eq. R. 484.

An injunction to restrain a defendant from using the particular style or title adopted by the plaintiff will not be granted if the court entertains the slightest doubt of the plaintiff's right to sustain his title at law. *Purser* v. *Brain*, 17 L. J., Ch. 141.

The court refused to interfere by injunction, on the application of the plaintiff, the owner of a manufactory, to restrain the occupiers of the original manufactory from using a particular mark, but gave him liberty to bring an action at law. *Mottley* v. *Downman*, 3 Myl. & Cr. 1; 6 L. J., Ch. 308.

In case of claims to the exclusive right to particular marks on manufactures, the court exercises a jurisdiction over a legal right, and therefore will not interfere by injunction in the first instance, except in strong cases, and it generally does so by putting the parties on the terms of asserting their legal right by action at law. *Ib.*

Registration—Not a Condition precedent to Action.]—A Dutch company moved to restrain a commission agent from infringing its trade mark, and from shipping goods abroad with its trade mark stamped on them. The writ in the action was issued after the time for registration of trade marks limited by the Trade Marks Registration Amendment Act, 1876, had expired, and before the Trade Marks Registration Extension Act, 1877, had come into force. The company had not before the motion for injunction registered its trade mark:—Held, that registration was not a condition precedent to the company's right to an injunction. *Twentsche Stoom Bleekery Goor* v. *Ellinger*, 26 W. R. 70.

—— For one Class—User for another Class.] —The owner of a trade mark can only sue in respect of an infringement of that trade mark in connection with the particular goods or classes of goods for which his trade mark is registered. *Hart* v. *Colley*, 59 L. J., Ch. 355; 44 Ch. D. 193; 62 L. T. 623; 38 W. R. 440.

Counterfeit of Brand on Wine—Action against Wharfingers for Delivery—Restrained by Injunction.]—The plaintiffs, who were wharfingers, warehoused a quantity of wine branded in imitation of the trade mark of the Veuve Clicquot champagne. The dock warrants passed into the possession of the defendant, who had advanced money upon them. The plaintiffs were afterwards informed that the brand was counterfeit, and that an injunction was about to be applied for, to restrain them from parting with the wine. After the injunction had been granted, but before they had received notice of it, the defendant produced the warrants and demanded the wine on payment of the plaintiffs' charges. The plaintiffs refused to give it up. The defendant sued them at law, and the plaintiffs filed a bill to restrain him from prose-

cuting the action. Injunction granted. *Hunt* v. *Maniere*, 34 Beav. 157; 11 Jur. (N.S.) 28; 11 L. T. 469; 13 W. R. 312. On appeal, injunction continued. *S. C.*, 34 L. J., Ch. 142; 11 L. T. 723.

Trade Mark Rules—June, 1889—Schedule of Fees.]—*See* W. N. 1889, p. 360.

—— **1890.**]—*See* 59 L. J., Orders, p. 1.

ii. *Parties.*

Who must be joined.] — A plaintiff and another person, who carried on distinct trades at different places of business, had derived, from a common predecessor in their respective businesses, the right to use the name of Dent as a trade mark. The defendant having infringed this right:—Held, that the plaintiff, without averring special damage, might sue alone for an injunction, and for the delivery up of the articles so marked to have the name erased. *Dent* v. *Turpin*, 2 J. & H. 139; 30 L. J., Ch. 495; 7 Jur. (N.S.) 673; 4 L. T. 637; 9 W. R. 548.

Held, also, that he might sue alone for an account of profits made by the defendant out of articles so marked, and for payment to the plaintiff of such part of such profits as he should be entitled to. *Ib.*

Two persons, sons of a father, who had originated a manufacture of tobacco pipes, and designated them as "Southorn's Brosely pipes," on the death of their father, manufactured at Brosely, but at separate establishments, and for their separate benefit, pipes of a like character; one of the brothers instituted a suit to restrain the use of this trade mark, the other declining to join in such suit:—Held, that the one brother might alone file a bill for an injunction and account. *Southorn* v. *Reynolds*, 12 L. T. 575.

Persons having no Interest.]—A., the inventor of a medicine, employed B., a foreigner residing abroad, to manufacture it for him there, and sold it in England for his own sole profit; a label and seal, denoting that the medicine was manufactured by B., and sold by A., were affixed to each of the bottles in which it was sold. The defendants imitated the labels and seals; demurrer allowed to a bill by A. and B. to restrain the imitation, and for an account of the sales of the spurious labels and seals, A. having no interest. *Delondre* v. *Shaw*, 2 Sim. 237.

—— **Agents—Amendment.**]—In 1883 H. & Co. agreed to consign their wine for sale in the United Kingdom or its colonies exclusively to the plaintiffs. The plaintiffs brought an action to restrain the defendants, London wine merchants, from selling wine under a name in colourable imitation of H. & Co.'s trade mark. The defendants raised the point of law that the plaintiffs were not capable of suing as they were not themselves proprietors of the trade mark:—Held, that the plaintiffs had no right to bring this action; they had no interest in the trade marks, and had no right to restrain a fraudulent use of them. Leave given to amend the action by making the present owners of the trade mark plaintiffs. *Richards* v. *Butcher*, 62 L. T. 867.

iii. *Evidence and Discovery.*

Evidence—Of Fraud.]—Where a trader has innocently adopted a trade mark which is calculated to deceive by its similarity to another person's trade mark, his continuing to use it after complaint has been made is strong evidence of fraud. *Orr-Ewing* v. *Johnston*, ante, col. 127.

—— **Of Deception.**]—In a trade mark case, the fact that one person has been deceived is not conclusive as to the misrepresentation. *Civil Service Supply Association* v. *Dean*, 13 Ch. D. 512.

In suits to restrain the fraudulent use of a trader's name, or of a trade mark, it is not necessary to give proof of actual deception; it is enough if the acts of the defendant are calculated to deceive. *Hookham* v. *Pottage*, 26 L. T. 755; 20 W. R. 720. Affirmed, L. R. 8 Ch. 91; 27 L. T. 595; 21 W. R. 47.

The court does not interfere to prevent the infringement of a trade mark, unless, in the first place, it has evidence that the public has been actually deceived, or is from inspection satisfied that there is either an intention to deceive or a probability of deception. *Cope* v. *Evans*, L. R. 18 Eq. 138; 30 L. T. 292; 22 W. R. 450.

—— **Of Skilled Witnesses.**]— Evidence of skilled witnesses, that in their opinion the public is likely to be deceived by the similarity of two trade marks, is not of itself sufficient evidence of infringement. *Ib.*

Discovery.]—In a suit to restrain the infringement of trade marks, the defendants refused to disclose the names of their customers, the places to which they had consigned their goods, and the prices which had been paid for them. They also, while producing their books, which confessedly showed orders for goods bearing some of the trade marks claimed by the plaintiffs, sealed up such portions of entries therein as they swore contained orders for the impression of devices other than those claimed by the plaintiffs:—Held, that the defendants need not disclose the names of their customers or the prices of the goods, as such disclosure could not be material to the plaintiffs, and might injure the defendants in their business, but that they must make the rest of the disclosure which they objected to, and that where one of a line of trade marks had been disclosed in the order-book, the whole line must be disclosed. *Carver* v. *Pinto Leite*, 41 L. J., Ch. 92; L. R. 7 Ch. 90; 25 L. T. 722; 20 W. R. 134.

Where a decree has been made directing the defendant to account for all goods sold by him with a stamp thereon, he is compellable to disclose the names of all persons to whom he has sold any such goods; and if he be unable to give such information precisely, he may then (but not otherwise) be required to disclose the names of all persons to whom he has sold any goods which he will not swear positively were unstamped. *Leather Cloth Co.* v. *Hirschfeld*, 1 H. & M. 295; 1 N. R. 551; 11 W. R. 933.

iv. *Account of Profits.*

Scienter.]—If A. has acquired property in a trade mark, which is afterwards adopted and used by B., in ignorance of A.'s right, A. is entitled to an injunction, but not to an account of profits or to compensation, except in respect of any user by B. after he became aware of the prior ownership. *Edelston* v. *Edelston*, 1 De G.

J. & S. 185; 9 Jur. (N.S.) 479; 7 L. T. 768; 11 W. R. 328.

Where a defendant is ordered to account for the profits made by him through a wrongful use of the plaintiff's trade mark, he cannot be charged with bad debts as profits; but on the other hand he cannot charge the plaintiff with the costs of manufacturing the goods in respect of which the bad debts were incurred. *S. C.*, 10 L. T. 780; 12 W. R. 1026.

A defendant is liable, in equity, to account for the profits made by the user of a plaintiff's trade mark, though, at the time of the user, he may have been ignorant of the rights and of the existence of the plaintiff, and notwithstanding that, to entitle him to recover damages at law, it may be necessary to prove a scienter. *Cartier* v. *Carlile*, 31 Beav. 292.

A person innocently selling goods bearing the spurious trade mark of another person is not, in equity, liable to account for the profits made thereby, but the owner of the trade mark is entitled to an injunction. *Moet* v. *Couston*, 33 Beav. 578; 4 N. R. 86; 10 Jur. (N.S.) 1012; 10 L. T. 395.

Effect of Failure to Prove Damage.]—The plaintiffs had obtained a decree restraining the defendants from the use of a trade mark in sales of cloth, and directing an inquiry whether the plaintiffs had sustained any and what damage. The plaintiffs did not prove any direct damage, but, in the absence of evidence to what extent the defendants had used the trade marks, they claimed damages equal to the profits made by the defendants on all their sales of cloth:—Held, that they had failed to prove any damage. *Leather Cloth Co.* v. *Hirschfeld*, 13 L. T. 427; 14 W. R. 78. *And see* 1 H. & M. 295; 1 N. R. 551.

—— **Of Misrepresentations by Plaintiff.**]—Ford, a shirt manufacturer, gave the name Eureka to a particular shape of shirt invented by him, and stamped all such shirts with the words "Ford's Eureka Shirts," and with a statement that such words were his trade mark. He advertised the shirts, falsely calling himself the patentee of them, and he falsely described himself on his bill-heads, &c., as patentee of the shirts. Shirts of the particular shape came to be commonly known in the trade as Eureka. Certain wholesale shirt manufacturers made shirts of the same shape, and stamped them in the same part of the shirts as "Eureka Shirts":—Held, that Ford was entitled to an injunction to restrain the wholesale manufacturers from using the word "Eureka" as applied to shirts not of Ford's manufacture, except that they were to be at liberty to advertise their shirts as "Eureka" in their trade lists. But having regard to his misrepresentations, the account against them was confined to the time from the filing the bill. *Ford* v. *Foster*, 41 L. J., Ch. 682; L. R. 7 Ch. 611; 27 L. T. 219; 20 W. R. 311, 818.

—— **Of Delay.**]—Injunction granted to restrain the use of the plaintiff's trade mark by the defendant, though the scienter was not proved, but an account of profits refused on the ground of delay by the plaintiffs in commencing the suit. *Harrison* v. *Taylor*, 11 Jur. (N.S.) 408; 12 L. T. 339.

—— **Of Offer of Compromise.**]—W.'s manager, without the personal knowledge of W., affixed tickets with T.'s name printed thereon to certain goods of inferior quality to T.'s and made by another manufacturer. On T.'s complaining of this, W. offered to give an undertaking that he would not use such tickets again, and to pay a certain sum, but declined to make a public admission that he had used the tickets in order to defraud T.:—Held, that, notwithstanding W.'s offer, T. was entitled to an injunction with costs, and also to an inquiry as to damages at his own risk. *Tonge* v. *Ward*, 21 L. T. 480.

v. *Costs.*

When given against Defendant.]—A defendant whom the court held, on the chief point in issue, in a suit for infringement of a trade mark, to have been guilty of a fraudulent misrepresentation, was, though successful on another point, ordered to pay the whole costs. *Wheeler & Wilson Manufacturing Co.* v. *Shakespear*, 39 L. J., Ch. 36.

The defendant, in a trade mark suit, insisting on an adverse right, after being made aware that the plaintiff had been defrauded through his agency, ordered to pay the costs of all the proceedings, both at law and in equity. *Farina* v. *Silverlock*, 4 K. & J. 650. And see *Tonge* v. *Ward*, supra.

The defendant innocently used the plaintiff's trade marks, and on being served with the bill, he removed the labels, and gave an undertaking not to sell any more, but refused to pay the costs. No application was made to the defendant before suit, and he said he would have desisted if applied to. At the hearing, the account of profits, which were very trifling, was waived, but a perpetual injunction was granted:—Held, that the defendant must pay the whole costs of suit. *Burgess* v. *Hill*, 26 Beav. 244; 28 L. J., Ch. 356; 5 Jur. (N.S.) 233; 7 W. R. 158. S. P., *Burgess* v. *Hateley*, 26 Beav. 249.

—— **Innocent Consignee.**]—The defendant, who was a china manufacturer, purchased abroad for his own private use a large number of cigars which were consigned to him at the docks here in cases bearing a spurious brand, purporting to be that of the plaintiffs, who were cigar manufacturers. The defendant was not aware that the brand was spurious, nor, except from seeing it on the invoice, that any such brand was in use. Immediately upon the plaintiffs issuing their writ and serving the defendant with notice of motion for an injunction to restrain him from selling the cigars, the defendant stated that he had no intention of selling the cigars, and offered all the relief asked for by the writ, and afterwards at the motion agreed to an undertaking in the terms of the writ, the question of costs being reserved:—Held, that the defendant must pay all the costs of the action. *Upmann* v. *Forester*, 52 L. J., Ch. 946; 24 Ch. D. 231; 49 L. T. 122; 32 W. R. 28; 47 J. P. 807.

—— **Innocent Purchaser.**] — Defendants bought from E., at a cost of 17*s.* 6*d.*, a box of 500 cigarettes bearing a label which was a very close imitation of the registered trade mark used by the plaintiffs upon the boxes in which they sold the cigarettes made by them. The defendants bought the cigarettes under the belief that they were made by the plaintiffs. The plaintiffs served the defendants with a writ and notice of motion for an injunction to restrain them from

infringing their trade mark or selling the cigarettes. The defendants at once returned to E. the greater part of the cigarettes, and, by their affidavit, submitted to abide by any order the court should make, but contended that they ought not to be made to pay the costs:—Held, that there ought to be no order as to costs. *Upmann* v. *Forester* (supra) discussed. *American Tobacco Co.* v. *Guest*, 61 L. J., Ch. 242; [1892] 1 Ch. 630; 66 L. T. 257; 40 W. R. 364.

A person having in his hands or under his control goods bearing a forged trade mark, is bound, upon the fact being brought to his knowledge, at once to submit to do whatever he might be compelled to do upon a bill filed; otherwise, however innocently the goods may have come to him, he will be liable for the costs of a suit instituted by the person whose right is infringed for the purpose of obtaining relief. *Upmann* v. *Elkan*, 40 L. J., Ch. 475; L. R. 12 Eq. 140; 24 L. T. 896; 19 W. R. 867.

The plaintiffs, in a suit to restrain infringement of their trade mark, are entitled to have a spurious imitation of their mark removed from goods, and to a lien on the goods for costs, provided that the owners of the goods, who were not before the court, should not see fit to intervene. *Ib.*

But on appeal, held that he was not bound to pay costs, being entirely innocent of the fraud. *S. C.*, 20 W. R. 131.

—— **Infant Defendant.**]—An infant who had sold spurious articles, representing them to have been manufactured by the plaintiff, ordered to pay the costs of suit for an injunction. *Chubb* v. *Griffiths*, 35 Beav. 127.

When Disallowed—To Plaintiff.]—An owner of a trade mark, having asked for an injunction, together with an account of profits, to which he was not entitled, was not allowed any costs of suit. *Moet* v. *Couston*, 33 Beav. 578; 10 Jur. (N.S.) 1012; 10 L. T. 395; 4 N. R. 86.

Where an order has been made for an interim injunction to restrain an alleged infringement of a trade mark, and the defendant, wishing to avoid further litigation, agreed to pay all costs, and to give an undertaking not to use the trade mark complained of:—Held, that the plaintiff, persisting in carrying on the suit to a hearing, was not entitled to his costs. *Hudson* v. *Bennett*, 12 Jur. (N.S.) 519; 14 L. T. 698; 14 W. R. 911.

—— **To Defendant.**]—If a trader imitates another person's label or trade mark, and sails so near the wind as just to avoid an injunction, though the court does not grant the injunction, it will not willingly give him any costs of the proceedings. *Bass* v. *Dawber*, 19 L. T. 626.

—— **To Plaintiff and Defendant—Where both Parties deceive Public.**]—The court will give no costs on either side in a case where both parties are engaged in the manufacture of an article intended to be used to deceive and mislead the public. *Estcourt* v. *Estcourt Hop Essence Co.*, 44 L. J., Ch. 223; L. R. 10 Ch. 276; 32 L. T. 80; 23 W. R. 313.

Effect of Apology after Writ.]—On 12th June, 1886, an order was received by the defendant for certain goods with labels attached which infringed the plaintiff's registered trade mark, and on 6th July, 1886, a writ was issued to restrain the infringement. On the 7th July, 1886, the defendants offered to compensate the plaintiff without the necessity of legal proceedings, and to destroy the labels and comply with any reasonable request of the plaintiff; on 16th July the plaintiff moved for an injunction:—Held, that, notwithstanding the defendant's offer, the motion was not an unnecessary proceeding, and the defendants must pay the costs caused by what they had done. *Fennessy* v. *Day*, 55 L. T. 161.

An offer by defendants after bill filed to discontinue the use of a trade mark, unless it be also accompanied by an offer to pay the costs and expenses up to that time, or to let the case be argued only upon the question of costs, will not relieve the defendants from the payment of the costs of the suit. *M'Andrew* v. *Bassett*, 10 Jur. (N.S.) 492; 10 L. T. 65; 4 N. R. 12.

On Higher or Lower Scale.]—A submission to a perpetual injunction with costs by a defendant in an action for the infringement of a trade mark does not afford a special ground upon which the court will direct taxation of the costs upon the higher scale under the provisions of Ord. LXV. r. 9. *Hudson* v. *Osgerby*, 50 L. T. 323; 32 W. R. 566.

Lien for—Priority.]—Wine marked with a counterfeit of the plaintiffs' brand had been imported into this country, and A. had made bonâ fide advances on the security of the dock warrants. An injunction having been granted to restrain the dock company from parting with it, the court, on the application of A., ordered the wine to be delivered to him, on the counterfeit brand being removed, but made A. pay the costs of the application:—Held, that the priority of charges on the wine was, first, the expenses of the dock company; secondly, A.'s claim; and, thirdly, the plaintiffs' costs of suit. *Ponsardin* v. *Peto*, *Uzielli*, *In re*, 3 N. R. 237; 33 Beav. 642; 33 L. J., Ch. 371; 10 Jur. (N.S.) 66; 9 L. T. 567; 12 W. R. 198.

A wine merchant brought an action against another wine merchant to restrain him from pirating his trade mark by branding it on the corks of his bottles. Some of the wine in bottles with the pirated trade mark was in the warehouse of certain wharfingers, who were made defendants to the action. In their defence they disclaimed all interest in the matter in dispute, and submitted to act as the court might direct upon having their charges and costs paid. At the trial they contended at the bar that the plaintiff, if his right was established, ought not to touch the bottles for the purpose of removing the branded corks without first paying their charges:—Held, that the wharfingers had done nothing to disentitle them to their costs of the action; and that if the plaintiff had any lien on the wine for his costs it must be postponed to the wharfingers' lien for their charges. *Moet* v. *Pickering*, 47 L. J., Ch. 527; 8 Ch. D. 372; 38 L. T. 799; 26 W. R. 637—C. A. See *Upmann* v. *Elkan*, supra.

3. Assignment, and User by Firms and Representatives.

Assignability.]—The question, how far by the general law a trade mark is assignable, depends greatly upon the nature of the mark and the

mode in which it has been used. A corporate trade mark granted by the Cutlers' Company at Sheffield to a person not free of the company, is, so far as the special acts governing the company are concerned, assignable. *Bury* v. *Bedford*, 4 De G. J. & S. 352; 4 N. R. 180; 33 L. J., Ch. 465; 10 Jur. (N.S.) 503; 10 L. T. 470; 12 W. R. 726.

An American company manufactured a metal, the main use of which was in bearings for machinery. They had not sold any bearings in this country, but had by means of an English partnership trading under their authority procured bearings to be made, and had a commercial interest in their being made, and they had a reversionary right in the goodwill of the business so carried on:—Held, that the American company had a business concerned with the metal bearings, in connection with the goodwill of which a trade mark registered for bearings made of the metal in question could be assigned under s. 70 of the Trade Marks Acts, 1883. *Magnolia Metal Co.'s Trade Mark, In re, Atlas Co., Ex parte*, 66 L. J., Ch. 598; [1897] 2 Ch. 371; 76 L. T. 672—C. A. Varying 45 W. R. 406.

Right of Assignee to use Trade Mark.]—Where a trade mark contains an emblem with such a collocation of words as amounts to an advertisement of the character and quality of the goods, and contains statements which, though true as regards the original adopter of the trade mark, are calculated to deceive the public when used by his assignee, the assignee is not to be entitled to protection in the use of such trade mark. *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. Cas. 523; 35 L. J., Ch. 53; 11 Jur. (N.S.) 513; 12 L. T. 742; 13 W. R. 873. And see *S. C.*, 4 De G. J. & S. 137; 2 N. R. 481; 3 N. R. 264; 33 L. J., Ch. 199; 10 Jur. (N.S.) 81; 9 L. T. 558; 12 W. R. 289.

Although a trader may have a property in a trade mark, giving him a right to exclude all others from using it, if his goods derive their increased value from the personal skill or ability of the adopter of the trade mark, he cannot give any other person the right to affix his name or mark upon their goods, for the effect thereof would be to give them the right to practise a fraud upon the public. *Ib.*

A company purchased all the property, utensils, goodwill of business, and trade marks of a manufacturer; this purchase would authorise the company, really carrying on business at the same place, to continue the use of the manufacturer's name and marks, so as to be protected therein against the infringement of the same. There may be a property in a trade mark which, on the sale of the right to manufacture the goods which it designates, may also be sold and transferred. *Ib.*

Persons of the name of Crockett manufactured leather cloth, and put on it a stamp, describing it as manufactured by them at New Jersey, U.S., and West Ham, Essex, and as being patented, and being tanned. A company bought their manufactured articles, their materials for manufacture, goodwill, and premises, at West Ham, and their trade marks. Semble, that on such a purchase, the continued use by the purchaser of Crockett's original label was not a fraud on their part; and if the use of it had been infringed, it might have been protected. *Ib.*

Assignment in Gross of Right to use Name—Injunction.]—In 1871. John Forrest, who had carried on in London the business of a watchmaker, and had marked his watches "John Forrest, London," died, and a firm of watchmakers in London purchased the goodwill of the business, but did not continue his business except that until 1874 they put "John Forrest, London," on some of their watches. In that year they granted an exclusive licence to another firm in Liverpool to use for seven years the name "John Forrest, London," on their watches, but after the licence had expired they did not use the name themselves, save only in a very few cases. In 1890 they assigned their assets to a trustee for their creditors, and he in 1891 sold their business and the goodwill and lease of the premises, and on the same day he sold to the plaintiff, a watchmaker in Coventry, the name, title and goodwill of the business of John Forrest, London:—Held, that the plaintiff, being a mere assignee in gross of the right to the name of John Forrest, was not entitled to an injunction to restrain the use of such name on watches made by the defendant, who was also a watchmaker in Coventry. *Thorneloe* v. *Hill*, 63 L. J., Ch. 331; [1894] 1 Ch. 569; 8 R. 718; 70 L. T. 124; 42 W. R. 397.

Discovery of Trade Secret.]—When a man has learnt a trade secret from his employer, and practised it after the employer's death, selling the article under the old name, he will not acquire such a right to the exclusive use of the name as a trade mark as will be protected in a court of equity. *Horenden* v. *Lloyd*, 18 W. R. 1132.

Any person who by fair means has gained the knowledge of a trade secret, may, after the death of the original inventor, make and sell the article under the name of the original inventor, provided such person does nothing to induce the public to believe that the article sold by him is made by the successor of the original inventor. *James* v. *James*, 41 L. J., Ch. 353; L. R. 13 Eq. 421; 26 L. T. 568; 20 W. R. 434.

A member of the family of R. J., the original inventor of a secret preparation, having by fair means become possessed of the original receipt, made and sold the article by the name given to it by the original inventor, under the signature of R. J., his own name being R. R. J.:—Held, that he was not entitled, as against the successor of the original inventor, to sell the article under the signature of R. J. singly, or to represent that his was the only genuine preparation. *Ib.* Practically overruled in *Massam* v. *Thorley's Cattle Food Co.*, ante, col. 102.

—— **Person of Same Name.**]—Any person who has become acquainted with the process of manufacturing an article which is in general secret is entitled to manufacture it, and if the name of the first manufacturer has become attached to the article, any person afterwards manufacturing is entitled to describe it by the name of such original manufacturer, and if he happens to be of the same name as the original manufacturer, he may use his name in describing his business, or allow it to be used by a company formed by him for the purpose of carrying on the business, notwithstanding that the representatives of the original manufacturer continue to carry on the old manufacture under the old name. *Massam* v. *Thorley's Cattle Food Co.*,

46 L. J., Ch. 707; 6 Ch. D. 574; 36 L. T. 848. But see *S. C.* in C. A., ante, col. 102.

Son Carrying on Business after his Father's Death.]—Where a person is selling an article in his own name, fraud must be shown to constitute a case for restraining him from so doing, on the ground that the name is one on which another has long been selling a similar article. *Burgess* v. *Burgess*, 3 De G. M. & G. 896; 22 L. J., Ch. 675; 17 Jur. 292.

Therefore, where a father had for many years exclusively sold a sauce under the title of "Burgess's" sauce, a court of equity would not restrain his son from selling a similar article under that name, no fraud being proved. *Ib.*

The plaintiff's father prepared and sold a medicine called "Dr. J.'s Yellow Ointment," for which no patent had been obtained. The plaintiff, after his father's death, continued to sell the same. The defendant sold a medicine under the same name and mark:—Held, that no action could be maintained against him by the plaintiff. *Singleton* v. *Bolton*, 3 Dougl. 293.

On Sale of Business.]—In substance there is no distinction between the sale of a business and goodwill by a trader himself, and a sale by his assignees in bankruptcy. *Hudson* v. *Osborne*, 39 L. J., Ch. 79; 21 L. T. 386.

Therefore, on sale of a business by a trader's assignees in bankruptcy, the trader has no right, upon setting up a fresh business after his discharge, to use the trade marks of his old business, or in any other way to represent himself as carrying on the identical business which was sold, although he has a right to set up again in business of the same kind next door to his old place of business. *Ib.*

In such a case it is no objection to the purchaser's coming for the assistance of the court, that he has continued to use the name of the old business which he found there. *Ib.*

Trade Mark Partnership's Asset.]—Upon the formation of a partnership with a person entitled to the benefit of a trade mark, the mark, in the absence of express provisions in relation to it, becomes an asset of the partnership. *Bury* v. *Bedford*, 4 De G. J. & S. 352; 4 N. R. 180; 33 L. J., Ch. 465; 10 Jur. (N.S.) 503; 10 L. T. 470; 12 W. R. 727.

When in the judgment of the court certain initial letters, surmounted by a crown, had, although originally representing the names of certain partners, become and were a trade mark; that is, a brand which had reputation and currency in the market as a well-known sign of quality:—Held, that as such the trade mark was a valuable property of a partnership constituted by successors to the original partners, but not having the same initials, as an addition to their works, and might be properly sold with the works, and therefore properly included as a distinct subject of value in the valuation to the surviving partner. *Hall* v. *Barrows*, 4 De G. J. & S. 150; 3 N. R. 259; 33 L. J., Ch. 204; 10 Jur. (N.S.) 55; 9 L. T. 561; 12 W. R. 322.

H. Bollmann Condy and Mitchell carried on business together under the style of "Bollmann Condy & Co.," manufacturing and selling a disinfectant, known as Condy's Fluid. After the dissolution of the partnership H. Bollmann Condy set up a business for the same purpose, under the name "H. Bollmann Condy," and Mitchell afterwards set up a similar business under the name of "The Condy's Fluid Company." H. Bollmann Condy sought to restrain Mitchell from using the name of Condy in connection with the article he sold as Condy's Fluid:—Held, that both the partners had an equal right to the use of the trade name of "Condy's Fluid"; and that Condy's contention failed because he had not shown fraud on the part of Mitchell such as to mislead the public into the belief that the article he sold was in reality manufactured by Condy. *Condy* v. *Mitchell*, 37 L. T. 766; 26 W. R. 269—C. A.

A partnership was carried on for fourteen years between B. and G. under the style of B. & Co. On the dissolution the assets were divided, but no arrangement was come to as to the style:—Held, that the name or style of B. & Co. formed an undivided asset of the partnership which belonged to the partners in common after the dissolution, and that B. was not entitled to prevent G. using the style of B. & Co. in his business. *Banks* v. *Gibson*, 34 Beav. 566; 34 L. J., Ch. 591; 13 W. R. 1012.

Two ladies, V. C. and M. W., carried on business in London in partnership under the firm of C. & W. V. C. married L. After this a decree for dissolution was made, and it was ordered that "the said partnership business, and the leasehold premises, trade fixtures, stock-in-trade, goodwill, and business," should be sold as a going concern to M. W. or to L. and wife, whichever should be the highest bidder. M. W. became the purchaser of all the property directed to be sold. L. and wife, who carried on business in Paris under the firm of C. et Cie., commenced an action to restrain M. W. from carrying on the business under the style or firm of C. & W.:—Held, reversing Hall, V.-C., that L. and wife had no right to restrain M. W. from using the name of the old firm. *Levy* v. *Walker*, 48 L. J., Ch. 273; 10 Ch. D. 436; 39 L. T. 654; 27 W. R. 370—C. A.

B., an outgoing partner, claimed that by the terms of the deed of dissolution between himself and L., he was entitled to manufacture a particular article from an original recipe, the property of the late partnership, and to sell it as "L.'s soap" prepared by B.:—Held, that he was entitled to use the old trade name of the article as his trade mark, and to have it registered, although identical with that of the successors of the old firm. *Benbow* v. *Low*, 44 L. T. 875; 29 W. R. 837.

Assignment not Registered.]—Where a trade mark has been registered, an assignee of the registered proprietor can bring an action to prevent the use of the trade mark, without having registered the assignment. *Jolee* v. *Henshaw*, 55 L. J., Ch. 273; 31 Ch. D. 323; 53 L. T. 949; 34 W. R. 269.

4. Registration.

a. Who may Register.

Applicant carrying on Business Abroad.]—Whether in order to entitle a person to have a trade mark registered, he must be carrying on or intending to carry on business in England, quære. *Rivière's Trade Mark, In re*, 53 L. J., Ch. 578; 26 Ch. D. 48; 50 L. T. 763; 32 W. R. 390—C. A.

Joint Mark—Termination of Joint Adventure

—Application by one Party.]—R. J., a merchant in Manchester, for some time prior to the passing of the Trade Marks Act, 1875, shipped cotton drills to A. & Co., a firm at Manilla, for sale on commission, the goods, in common with other goods sold by A. & Co. for other people, bearing a trade mark representing the figure of Britannia, which mark was the property of A. & Co. After the passing of the act, doubts having arisen as to the propriety of using the Britannia mark, R. J. wrote to A. & Co., suggesting the use of a new design; and they sent back a proposed trade mark which represented the house of business at Manilla of A. & Co., with their name on the signboard. Beneath were three columns in Chinese characters. The first represented "R. J., Manchester," the second contained the crest of K. (the Manilla partner of A. & Co.), with words indicating that it was his "chop" or mark, and the third represented "A. & Co., Manilla." On the construction of the letters between the parties, the court held that there was no contract that the mark should be the property of R. J.:—Held, that R. J., after the termination of the joint adventure, was not entitled to register the trade mark in his name, and, semble, that if there had been such a contract, it could not have been enforced, as the trade mark, if registered as the property of R. J., would have been calculated to deceive the public. *Jones's Trade Mark, In re*, 53 L. T. 1—C. A.

Dissolution of Partnership—Late Partners, by Agreement, Entitled to Carry on Business and Use Trade Marks—Old Marks still on Register.]—Where, upon the dissolution of a partnership consisting of five brothers, it was by deed agreed that four of the brothers under one name, and the other brother under another name, were to be entitled to carry on the business and to use the trade marks of the old firm, and that simultaneous applications were to be made by the two new firms for the registration in their respective names of trade marks identical with and similar to those in use by the old firm, and the comptroller, upon such applications being made, had raised two objections—first, that under s. 72, sub-s. 1, of the Patents, &c., Act, 1883, he could not proceed with the applications until the existing entries on the register had been cancelled; and secondly, that identical and similar new marks ought not to be registered in the names of two different parties—the court refused to direct the comptroller to proceed with the applications. *Ehrmann's Trade Marks, In re*, 66 L. J., Ch. 699; [1897] 2 Ch. 495; 77 L. T. 200; 45 W. R. 698.

Semble, an order for cancellation of the old marks might be made under s. 91, sub-s. (c), of the act of 1883 simultaneously with the registration of the new marks, if otherwise unobjectionable. *Ib.*

Quære, whether, for the purposes of the acts, some limitation ought not to be imposed on the application of the doctrine of *Dent* v. *Turpin* (post, col. 181), at all events where more than three persons claim to be assignees of a registered mark. *Ib.*

Assignees—Goodwill—Rectification.]—M. and B., carrying on business as co-partners in New York, instructed their agents in this country, B. and W., to register two trade marks for goods of theirs, of which B. and W. had the exclusive sale. Such trade marks were registered by B. and W. as to one in the name of their firm, and as to the other in the name of W. only. B. and W., having no beneficial ownership in the trade marks, in August, 1884, assigned them to M. and R. In December, 1884, one of the partners in the firm of M. and R. retired, and by deed assigned all his interest in the business of the firm and in the trade marks to the continuing partners. In December, 1885, another partner retired, and three new partners joined the firm, but no assignment was executed by the retiring partner. On a motion by the present partners in the firm of M. and R., and the last retiring partner, under s. 78 of the Patents, Designs, and Trade Marks Act, 1883, that proper notices of the assignments of August, 1884, and December, 1884, might be entered on the register, and that the persons entitled under the last-mentioned assignment might be entered as the present proprietors of the trade marks:—Held, that the application might be granted, as the trade marks had been transmitted in connection with the goodwill of the business of M. and R. within the meaning of s. 70 of the act. *Wellcome's Trade Mark, In re*, 55 L. J., Ch. 542; 32 Ch. D. 213; 54 L. T. 493; 34 W. R. 453.

b. What may be Registered.

i. *Generally.*

Restrictions—Instructions to Persons applying for Registration.]—Applicants for registration of trade marks, who have given undertakings to owners of previously registered trade marks not to use their proposed trade marks for particular articles, must confine their applications accordingly. Whether or not the instructions issued by the comptroller-general to persons applying for registration are binding on the court, the practice which has been in force for many years ought not to be departed from. *König and Ebhardt's Application, In re*, 65 L. J., Ch. 404; [1896] 2 Ch. 236; 45 W. R. 230.

Name—Injunction to restrain Company from applying for Registration.]—An injunction was granted to restrain a proposed new company from applying to the registrar of joint-stock companies for registration under a name which, in the opinion of the court, was calculated to deceive, although the company had not begun to carry on its business. It is not necessary, to entitle the plaintiffs to an injunction, that the defendants should have a fraudulent intent. They are responsible for the reasonable consequences of their actions. The statutory right to register must not be exercised in such way as to violate some other right or offend against the law. *Hendriks* v. *Montagu*, 50 L. J., Ch. 456; 17 Ch. D. 638; 44 L. T. 879; 30 W. R. 168—C. A.

Regulation of Commissioners of Patents forbidding Words in Foreign Characters.]—A regulation issued by the commissioners of patents forbidding the registration as a trade mark of any word in foreign characters:—Held, to be ultra vires and void. *Rotherham's Trade Mark, In re*, 27 W. R. 503. Affirmed, 14 Ch. D. 585; 43 L. T. 1—C. A.

"Essential Particular"—Claim in Application.]—In order to support an application for the

registration of a trade mark, it must be shown, not merely that the trade mark consists of or contains an essential particular, as defined by s. 64 of the Patents, &c., Acts, 1883 to 1888, but that such essential particular has been claimed as such in the application in accordance with the same section. *Bryant and May, In re*, 59 L. J., Ch. 763.

"Essential Particular."]—A person named M. Gianaclis having registered in 1885 the words "Gianaclis Cigarettes" in ordinary capital letters, as his trade mark, not used before August, 1875, for cigarettes, in 1889 brought an action against another cigarette dealer for selling cigarettes in boxes bearing labels with the name "N. Gianaclis." The prayer of the claim did not refer to the registered trade mark, but the fact of the registration was set out in detail in the body of the statement of claim. On motion by the defendant for the removal of the mark from the register:—Held, first, that the mark did not possess any "essential particular" within s. 4 of the Patents, Designs, and Trade Marks Act, 1883, and had consequently been wrongly registered. Secondly, that the applicant was a "person aggrieved" by the wrongful registration, within s. 90 of the same act, as being the defendant in an action in which it was sought to make some use of the registration against him. Thirdly, that the mark should be removed from the register forthwith, since even if fraud were then proved against the defendant, it would not validate the registration. Fourthly, that the costs of the application should be reserved. *Gianaclis' Trade Mark, In re*, 58 L. J.. Ch. 782.

In order that a label, as such, may be registered as a trade mark under s. 64 (1) (c) of the Patents, Designs, and Trade Marks Act, 1883, as amended by s. 10 (1) (c) of the Patents, Designs, and Trade Marks Act, 1888, it is necessary that it should contain one or more of the essential particulars mentioned in the remaining clauses of the same sub-section. *Birmingham Vinegar Brewery Co., In re*, 8 R. 237; 70 L. T. 645.

"Somatose" — "Invented Word" — "Word having no reference to Character or Quality of Goods."]—Upon the application to register the word "Somatose" as a trade mark in respect of an article made from meats and called a pharmaceutical product, its object being nourishment of the human body:—Held (Lindley, L.J., diss.), that "Somatose" was not an "invented word," but that, even if it was an invented word, it was not a "word having no reference to the character or quality of the goods" within s. 64 of the Patents, &c., Act, 1883, as amended by s. 10 of the Patents, &c., Act, 1888, and consequently could not be registered. *Farbenfabriken's Trade Mark, In re*, 63 L. J., Ch. 257; [1894] 1 Ch. 645; 7 R. 439; 70 L. T. 186; 42 W. R. 488—C. A.

"Magnolia"—Description of Character of Goods.]—In order that the name of an article may be the trade mark of the manufacturer it must indicate not the article only, but also that the article is manufactured by the person claiming the name as a trade mark, as distinguished from other persons. The name "Magnolia" being applied to a certain metal, by whomever manufactured, cannot be registered as a trade mark or as the essential part of one. *Barlow* v. *Johnson* (7 Rep. Pat. Cas. 395) distinguished. *Magnolia Metal Co.'s Trade Marks, In re, Atlas Co., Ex parte*, 66 L. J., Ch. 598; [1897] 2 Ch. 371; 76 L. T. 672—C. A. Varying 45 W. R. 406.

The words "Magnolia Anti-friction Metal," as applied to bearings in machinery, have reference to the character and quality of the goods within the meaning of sub-s. 1 (e) of s. 10 of the Trade Marks Act, 1888, "Magnolia" being the name applied to a well-known metal; but the word "Magnolia" alone, as applied to a metal, has not, although it had, prior to the registration of the word as a trade mark, become known as the name of the metal. *Ib.*

Geographical Name.]—A word does not become a "geographical name" within the meaning of s. 10, sub-s. 1 (e), of the Trade Marks Act, 1888, simply because some place on the earth has been called by it—its primary signification not being geographical, and it not being the name of the place where the article named after it is manufactured. *Ib.*

Invented Word—Geographical Name—"Eboline."]—A word formed by adding a common adjectival suffix to the name of an existing place is not "an invented word," but is "a geographical name" within the meaning of sub-ss. 1 (d) and 1 (e) respectively, of s. 64 of the Patents, Designs, and Trade Marks Act, 1883, as amended by the Patents, Designs, and Trade Marks Act, 1888, s. 10, sub-s. 1. *Salt & Co.'s Application, In re*, 63 L. J., Ch. 756; [1894] 3 Ch. 166; 8 R. 682; 71 L. T. 386; 42 W. R. 666.

—— **Description of Article.**]—The word "Satinine" being a descriptive word, not being an "invented word," and having reference to the character and quality of the goods (in this case starch, blue, perfumery, &c.) to which it was proposed to apply it, is not a word which can be registered under s. 10 of the Patents, &c., Act, 1888, which is substituted for s. 64 of the Patents, &c., Act, 1883. *Meyerstein's Trade Mark, In re*, 59 L. J., Ch. 401; 43 Ch. D. 604; 62 L. T. 526; 38 W. R. 440.

An invented word cannot now be registered as a trade mark if it is intended to be descriptive. *Meyerstein's Trade Mark, In re* (supra), followed. *Talbot's Trade Mark, In re*, 63 L. J., Ch. 264; 8 R. 149; 70 L. T. 119; 42 W. R. 501.

——**"Solio"—Photographic Paper.**]—An application was made to register the word "Solio" in connection with photographic paper. The comptroller-general had objected to register it on the ground that it was the practice of the office to refuse registration as trade marks in respect of photographic papers of marks which consisted of the word "Sun," or its equivalent "Sol," with the addition of some ordinary termination or affix, as having reference to the character or quality of the goods, within the meaning of s. 10, sub-s. 1 (e), of the Patents, &c., Act, 1888:—Held, that the court was bound by *Farbenfabriken's Trade Mark, In re* (supra), and *Densham's Trade Mark, In re* (post, col. 153), to decide that if an invented word had reference to the character or quality of the goods to which it was to be applied as a trade mark, it could not

be registered; that, although "Solio" was undoubtedly a newly coined word, and in that sense was an invented word, yet it could not be said to have no reference to the character or quality of the goods to which it was intended to be applied—namely, photographic paper; and that, therefore, the refusal to register it was perfectly right. *Eastman Photographic Materials Co.'s Trade Mark, In re*, 76 L. T. 730—C. A. Reversed in H. L., July, 1898.

Words descriptive of Article—User.]—P. in 1876 registered "braided fixed stars" as a trade mark for matches, alleging that he had used it as a trade mark before the passing of the act. He also at the same time registered a label enveloping the boxes in which his matches were sold, which contained the words "braided fixed stars" in two places so as to be conspicuous on each side of the boxes, but also contained a number of other words. It was shown that at the time when P. introduced the term "braided fixed stars" the term "fixed stars" was known in the trade as denoting a particular class of fusees, and that he had just bought a patent for enveloping the stems of fusees with wire by means of a braiding machine. This patent expired in August, 1881. It appeared from the evidence that P. had not before the act used "braided fixed stars" separately as a trade mark, or otherwise than as a part of the above mentioned label. In October, 1881, an application was made by a rival trader to expunge the registration:—Held, that the registration must be expunged, for that to entitle P. to register these words as a trade mark he must before the act have used them as such alone, and not merely in conjunction with other words:—Held, further, that if they had been so used alone they ought not to have been registered, for that they were only words properly descriptive of the patented article, and that P. had no exclusive right to their use after the patent had expired. *Palmer's Trade Mark, In re*, 24 Ch. D. 504; 50 L. T. 30; 32 W. R. 306.

In 1884 the word "Monobrut" was registered for champagne; it had been previously registered in France, and a specially dry wine was sold thereunder, the term "brut" being a French word for a dry or raw wine. In 1888 this wine was extensively advertised, and R. (the sole agent in England of champagnes bearing the registered trade mark "Monopole" and "Dry Monopole"), on becoming aware of the registration of the word "Monobrut," applied to expunge it from the register:—Held, that "Monobrut" was merely descriptive, and could not therefore be registered in England, and the fact that it was registered in France made no difference; that R. was a "person aggrieved," and that the mark should be expunged. Semble, that "Monopole" and "Dry Monopole" were proper names, inasmuch as they were not descriptive words, and had been therefore properly registered. *Vignier's Trade Mark "Monobrut," In re*, 61 L. T. 495. See *Grossmith's Trade Mark, In re*, post, col. 175.

Messrs. B., being manufacturers of cotton sewing thread, applied for the registration of a considerable number of labels and devices used by them for various periods in their trade, and many of which were registered in foreign countries. The Manchester committee of experts divided the marks into two classes. The registrar refused registration to all the marks in the second class, while, of the marks in the first class, he admitted six to complete separate registration, but refused to register more than one of the remainder as representative of the marks in the first class not separately registered. He further offered a certificate of such representative registration. Upon motion for rectification of the register by registration of all the marks:—Held, that as to the marks placed in the second class, the case was governed by *Orr-Ewing, In re* (in C. A., but see now in H. L., 28 W. R. 412), and that the court would not review the decision of the committee; and that, as to the marks in respect of which representative registration was offered, the case was governed by *Barrows, In re* (post, col. 173), and separate registration of each mark could not be granted. *Brook, In re*, 26 W. R. 791.

Colour Disregarded.]—In the registration of cotton marks, colouring and surrounding lines, edges, and borders, will be disregarded. *Ib.*

Name of Imaginary Person—"Trilby."]—The name of an imaginary person does not come within clause (a) in s. 10 of the Patents, Designs, and Trade Marks Act, 1888, but may come within clause (e) "as a word having no reference to the character or quality of the goods" (Kay, L.J., diss.):—The name "Trilby" held accordingly to be a good trade mark within clause (e) in respect of ladies' gloves, aprons, and blouses. *Holt's Trade Mark, In re*, 65 L. J., Ch. 410; [1896] 1 Ch. 711; 74 L. T. 225; 44 W. R. 369—C. A.

The same construction ought to be placed on the words "individual or firm" in clause (a) as in clause (b)—namely, an individual or firm capable of applying for the registration of a trade mark, and therefore a real individual or firm—Per. A. L. Smith, L.J. *Ib.*

Entire Class—User for part of Class—Exclusive Title for Entire Class.]—An assignee of the goodwill of a business with the right to a trade mark which has been registered by the assignor under the Trade Marks Registration Act, 1875, in respect of an entire class, but of which the articles dealt with in such business form part only, is not entitled to the exclusive user of the trade mark for the entire class, but only for the particular articles in connection with which it is actually used, even though the trade mark may have been on the register for five years. *Edwards v. Dennis, Edwards' Trade Mark, In re*, 55 L. J., Ch. 125; 30 Ch. D. 454; 54 L. T. 112—C. A. Reversing 1 Cab. & E. 428.

Semble, it is not the intention of the act that a man registering a trade mark for an entire class, and yet only using it for one description of goods in that class, shall be able to claim for himself the exclusive right to use it for every description of goods in that class. If he desires to extend his business and apply his trade mark to a new description of goods in the class, he should have his trade mark registered in respect of those goods. Quære, whether a man can claim the exclusive use of a registered trade mark not in actual use in connection with particular goods at the time of registration. *Ib.*

In 1883 E. purchased and took an assignment of the goodwill of the business of an iron merchant and manufacturer, and also of the right to a trade mark, consisting of a device of "Neptune" holding a trident, with the word "Nep-

tune" added, which had been registered by the assignor in 1878, under the Trade Marks Registration Acts, 1875 and 1876, for the whole of class 5, described in the "Trade Marks Journal" as "unwrought and partly wrought metals used in manufacture," E. duly getting himself registered as proprietor of the trade mark. The only business actually carried on by E. and his assignor was and had been that of a manufacturer of iron sheets. In 1880 D. registered a trade mark bearing the word "Neptune" for "steel wire and iron wire" in class 5, his business consisting solely of the manufacture and sale of wire. In 1884 E. brought an action against D. for infringement, on the ground of the alleged similarity of D.'s trade mark. D. then applied by summons under s. 5 of the act of 1875, to have the register rectified by limiting E.'s trade mark to the articles in class 5 other than steel and iron wire:—Held, that inasmuch as the goods sold by E. and D. were entirely distinct, E. was not entitled to an injunction:—Held, also, that, notwithstanding the five years' registration of E.'s trade mark for the whole of class 5, his trade mark must be limited to those articles in the class in connection with which it was being actually used, namely, iron sheets. *Ib.*

Foreign Trade Mark.]—Under sub-s. 3 of s. 103 of the Patents, &c., Act, 1883, a trade mark which has been applied for in the country of origin, whether capable of being registered in that country or not, may be applied for here, but it will not be registered here unless it is a mark otherwise capable of registration under the law of this country. *Carter Medicine Co.'s Trade Mark, In re*, 61 L. J., Ch. 716; [1892] 3 Ch. 472; 3 R. 1; 67 L. T. 747; 41 W. R. 13.

—— **Fraudulent User of.**]—In 1718 G.'s firm, who were manufacturers of iron at Leufsta, in Sweden, registered in Sweden, as their trade mark, the letter L. inclosed in a ring or hoop, commonly known as the "hoop L." In 1878 they registered in England, under the Trade Marks Registration Act, 1875, the hoop L. mark alone, and also in combination with the word "Leufsta." Since 1835 they had exported iron of the highest quality to England for the manufacture of a particular kind of steel known as "blister steel." The hoop L. mark was stamped upon the iron in combination either with the name of their English consignee, or with the word "Leufsta," or with both. They registered these in Sweden as bye-stamps in addition to their original hoop L. mark. H.'s firm, who were English iron and steel and edge tool manufacturers, had for fifty years past used the hoop L. mark, in combination with the name of their firm, as their trade mark upon blister steel manufactured by them from inferior brands of Swedish iron. For this purpose it was necessary to cut off the Swedish mark, as the bars of iron when converted into steel retained upon their surface, unless intentionally obliterated, any marks which might be stamped upon them. A similar practice was adopted by thirty other English firms of iron and steel manufacturers, but this practice did not come to G.'s knowledge until 1881. H. applied, under the Trade Marks Registration Act, 1875, to register the hoop L. mark in combination with the words "Brades Co., Warranted":—Held, that the application must be refused, with costs, upon the ground that, whatever might have been the practice as to the user, it was one which had its inception in fraud, and was calculated to deceive, and therefore, though apparently established by time and usage, could not receive the sanction of the court. *Heaton's Trade Mark, In re*, 53 L. J., Ch. 959; 27 Ch. D. 570; 51 L. T. 220; 32 W. R. 951.

—— **User of Word in Foreign Country.**]—Whether a word used alone as a trade mark in a foreign country before the passing of the Trade Marks Act, 1875, can be registered under the act if it has not been so used in this country, quære. *Leonard* v. *Wells, Leonard's Trade Mark, In re*, 53 L. J., Ch. 603; 26 Ch. D. 288; 51 L. T. 35—C. A. Affirming 32 W. R. 530.

—— **Marks Registered Abroad—Decision of Foreign Tribunal.**]—F. had long used and was the registered proprietor of three trade marks for eau-de-cologne, consisting of (1) a label with his signature and a seal in the corner, and used for pasting on the side of the bottle; (2) a circular stamp on a strip of paper, used for pasting on the cork and down the neck of the bottle; (3) a label containing a picture of F.'s business premises, "Gegenüber dem Julichs Platz," Cologne, with medals and letter press, and used for pasting on boxes in which bottles were packed. B., also a manufacturer of eau-de-cologne, applied for registration in his name of three marks similarly composed, and to be respectively used in the same manner. On motion by F. under s. 6 of the above act, for an injunction to restrain B. from proceeding with his application:—Held (1), that the marks were so nearly resembling F.'s marks as to be calculated to deceive, and that the fact that the picture of the house on B.'s label described as "Gegenüber dem Elogius Platz." Cologne, was said to be a correct view of the house in a street leading out of the Elogius Platz, did not prevent B.'s label being a colourable imitation of F.'s registered label, having regard to the similarity in the letterpress and the position of the medals; (2) that the allegation by B. that he had used his marks for several years without interference, did not primâ facie entitle him to registration, since it was not proved that the original proprietor was aware of such user; and (3) that the injunction must go as to all three marks, notwithstanding that the German court of appeal, reversing the judgment of the court of first instance, had permitted registration of the label with the picture of B.'s business premises, the question being purely one of fact, as to which the foreign decisions were to be regarded merely as opposite verdicts by special juries. *Farina, In re*, 27 W. R. 456.

Foreign Producer—Registration as Importer's Mark.]—The trade mark of a foreign producer cannot be registered by an importer from that producer as his own, whether the goods are produced by a course of manufacture or by a process of nature, nor whether the importer has or has not an exclusive contract for this country, nor whether the producer does or does not consent to the registration. *Apollinaris Co.'s Trade Mark, In re*, 61 L. J., Ch. 625; [1891] 2 Ch. 186; 65 L. T. 6—C. A.

Intention to Use is generally Presumed.]—Although, in the case of a new trade mark tendered for registration, an intention to use

it may usually be presumed, yet registration ought not to be allowed of a mark which has had no prior user, and which it is proved the applicant does not intend to use, but that being an importer of foreign goods, he is only seeking to register the mark for the purpose of excluding from the English market similar goods intended for foreign consumption, and having the mark fixed to them by the foreign producer whose mark it is. *Ib.*

Label containing Device.]—A label containing with other matters a device to which attention is called as being the "trade mark" ought not to be registered, on the ground that the label is likely to mislead the public into believing that the device alone is protected or claimed. *Ib.*

ii. *Fancy Words—Words not in Common Use.*

Name for New Article.]—A name which has been given to a new article, and which is the only name by which it is known, cannot be a "fancy word" as regards that article—Per Fry, L.J. *Waterman* v. *Ayres, Waterman's Trade Mark, In re*, infra, col. 155.

Non-descriptive Word—"Bovril."]—"Bovril" was in 1886 a "fancy word not in common use" within the meaning of s. 64, sub-s. 1 (c), of the Patents, Designs, and Trade Marks Act, 1883, and capable of registration as a trade mark in respect of all substances used as food or ingredients for food. "*Bovril*" *Trade Mark, In re*, 65 L. J., Ch. 715; [1896] 2 Ch. 600; 74 L. T. 805; 45 W. R. 150—C. A.

To enable a common English word to be registered as a "fancy word" under the sub-section, the word must be such that in its fanciful application it is obviously meaningless and obviously non-descriptive in connection with the particular article to which it is applied. *Van Duzer's Trade Mark, In re* (*Melrose case*), and *Leaf, Sons & Co.'s Trade Mark, In re* (*Electric case*) (infra, col. 155), explained. *Ib.*

The fact that a portion of the word "Bovril" has some connection with "ox" does not, the whole word being meaningless, make the word so descriptive as to prevent its being a "fancy word," even though applied to extracts of meat. *Farbenfabriken's Trade Mark, In re* (*Somatose case*) (63 L. J., Ch. 257; [1894] 1 Ch. 645), distinguished. *Ib.*

—— **"Mazawattee."**]—"Mazawattee," a compound of the Hindustani "mazadhar," luscious, and Singhalese "wattee," growth, or garden, as applied to tea or coffee, is neither descriptive of the character or local origin of the goods, nor deceptive, inasmuch as it conveys no meaning to Englishmen or to any class of Englishmen, or to a Hindoo or to a Singhalese. The fact that a word conveys an idea of the East generally does not justify the court in holding that a trade mark is bad as being geographical, or as referring to a particular locality, or to the quality or character of the goods in the class in which it is registered. A word which is not itself descriptive will not be rendered descriptive merely because descriptive words in foreign languages led to its invention and adoption. *Densham's Trade Marks, In re*, 64 L. J., Ch. 634; [1895] 2 Ch. 176; 12 R. 283; 72 L. T. 614; 43 W. R. 515—C. A.

Descriptive Word — "Emolliolorum" — Previously registered Trade Mark — "Molliscorium."]—The word "Emolliolorum," used as a trade mark to designate a preparation for rendering every description of leather waterproof and supple, could not be registered as a "fancy word" under s. 64 of the Patents, &c., Act, 1883, inasmuch as it would convey to the mind of an ordinary Englishman the idea that the preparation would act by softening the articles to which it was intended to be applied, and it is, therefore, descriptive, and would not come within the definition of "fancy word" laid down in *Van Duzer's Trade Mark, In re* (infra, col. 155), nor can it be registered under s. 10 of the Patents, &c. Act, 1888, as an invented word or as a word having no reference to the character or quality of the goods. *Talbot's Trade Mark, In re*, 63 L. J., Ch. 264; 8 R. 149; 70 L. T. 119; 42 W. R. 501.

Descriptive of Pattern — "Gem."]—Where a name or word was originally, or has come to be, descriptive of the article to which it is applied, so that while indicating what the article is, it does not connect it with any particular manufacturer, such name or word cannot be registered as a trade mark. Accordingly, where at the time of an application made in 1884 for the registration of the word "gem" as a trade mark for air-guns which in 1881 had been newly introduced into England and called "Gem" air-guns by the applicant, the word "gem" had become descriptive of a particular pattern of gun, and not merely of the applicant's gun, it was held that the word could not be registered as the applicant's trade mark for air-guns. The word "gem" having now come to indicate the excellence of the article to which it is applied is not now a "fancy word" within the meaning of the Patents, Designs, and Trade Marks Act, 1883, s. 64, sub-s. 1 (c). *Arbenz, In re*, "*Gem*" *Trade Mark, In re*, 56 L. J., Ch. 524; 35 Ch. D. 248; 56 L. T. 252; 35 W. R. 527—C. A.

"Sanitas."]—"Sanitas" is not a "fancy word not in common use" within the meaning of sub-s. 1 (c) of s. 64 of the Patents, Designs, and Trade Marks Act, 1883, and cannot therefore be registered. "*Sanitas*" *Trade Mark, In re*, 58 L. T. 166.

"Red, White, and Blue."]—An application to proceed with the registration of the words "Red, White, and Blue," as "fancy words not in common use" within the meaning of s. 64 of the Patents, Designs, and Trade Marks Act, 1883, was refused. *Hanson's Trade Mark, In re*, 57 L. J., Ch. 173; 37 Ch. D. 112; 57 L. T. 859; 36 W. R. 134.

"Reversi."]—W. registered the word "Reversi" as a trade mark for "a game somewhat analogous to draughts." The word was the name of a game of cards popular in France in the 16th century. In the rules of W.'s game the word "reverse" frequently occurred, and the game depended on each player reversing or turning over his adversary's counters. A. brought out a similar game under the name "Annex," and on the labels of the boxes in which he sold it, he added to the name "a game of reverses." W. brought an action to restrain A. from infringing the trade mark, and A. applied

to remove the trade mark from the register:—Held, that as the word "Reversi" would suggest to an ordinary Englishman the idea that the game had something to do with reversing, it was not a word which obviously could not have any reference to the character of the article, *Van Duzer's Trade Mark, In re* (infra); that it therefore was not a "fancy word," and ought to be removed from the register. *Waterman* v. *Ayres, Waterman's Trade Mark, In re*, 57 L. J., Ch. 893; 39 Ch. D. 29; 59 L. T. 17; 37 W. R. 110—C. A.

"Hand Grenade Fire Extinguisher."]—The words "Hand Grenade Fire Extinguisher" are not capable of registration as fancy words under the Patents, &c., Act, 1883, s. 64, as a trade mark for an instrument consisting of a glass vessel containing a fire-extinguishing fluid intended to be liberated by means of the vessel being broken when thrown by the hand. *Harden Star Hand Grenade Co., In re*, 55 L. J., Ch. 596; 54 L. T. 834.

"Melrose"—"Electric."]—The fanciful or abnormal use of a word not in itself obviously non-descriptive, does not make it a "fancy word" within the Patents, Designs, and Trade Marks Act, 1883, s. 64, sub-s. 1 (c), so as to be capable of registration as a trade mark. Accordingly, applications for a direction to the comptroller-general to proceed with the registration as trade marks of the words "Melrose Favourite Hair Restorer" and "Electric Velveteen," were, in both cases, refused. *Trade Mark Alpine, In re* (infra), questioned. *Van Duzer's Trade Mark, In re, Leaf's Trade Mark, In re*, 56 L. J., Ch. 370; 34 Ch. D. 623; 56 L. T. 286; 35 W. R. 294—C. A.

"Jubilee."]—The word "Jubilee" is not obviously meaningless as regards paper or note-paper, because it may signify that the paper is produced in the jubilee year (1887) of her majesty's reign, and it is, moreover, a common English word used by well-known English authors. Consequently the word "jubilee" is not capable of registration as a trade mark for paper, as a fancy word within s. 64 of the Patents, Designs, and Trade Marks Act, 1883. *Twigood* v. *Pirie*, 56 L. T. 394; 35 W. R. 729.

"National Sperm."]—An application was made for an order upon the comptroller of trade marks to register a mark having the words "Price's Patent Candle Company" in common letters round the upper border and "National Sperm" in the centre, with the address of the company round the lower border:—Held, that the words "National Sperm" not being fancy words "not in common use," the label did not fulfil the requirements of the Patents, Designs, and Trade Marks Act, 1883, s. 64. *Price's Patent Candle Co., In re*, 54 L. J., Ch. 210; 27 Ch. D. 681; 51 L. T. 653.

"Shakspeare" Cigars.]—The word "Shakspeare," as applied to cigars, is not a fancy word not in common use within the meaning of s. 64, sub-s. 1 (e), of the Patents, &c., Act, 1883. *Banks' and James' Trade Mark, In re*, 44 W. R. 32.

"Alpine."]—The word "Alpine" and words of such class, although words in common use and not strictly fancy words, may, when applied to articles such as woollen and cotton goods, be registered as a trade-mark, as they are, if not "fancy words," at least fanciful words when applied to such goods, and so fall within s. 64, sub-s. 1 (c), of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57). *Trade Mark "Alpine," In re*, 54 L. J., Ch. 727; 29 Ch. D. 877; 53 L. T. 79; 33 W. R. 725.

"Strathmore."]—The plaintiff, who was a wine and spirit merchant, registered a trade mark together with the words "Strathmore Blend," which was the name of a certain blend of various whiskeys made and sold by him, and he advertised the same very widely. Many of the plaintiff's customers were in the habit of ordering his whiskey by calling it "Strathmore whiskey," omitting the word "blend," and the whiskey became known in the market as "Strathmore whiskey." The defendant subsequently registered a trade mark and the name of "Strathmore" for a whiskey blended and sold by him. The question was whether the use of the word "Strathmore" by the defendant was calculated to deceive:—Held, that the word "blend" described simply the operation of manufacturing, and was not an essential part of the name of the plaintiff's whiskey; that the word "Strathmore" was a fancy name; that the use of that word by any person, other than the plaintiff, as a name for whiskey, would be calculated to deceive; and that the defendant must be restrained by injunction from using the word either as part of his trade mark or otherwise. Held, also, that it was not lawful for the defendant to register the word "Strathmore" in combination with his trade mark, and that the register must be rectified by striking out the word. *Blair* v. *Stock*, 52 L. T. 123.

Foreign Name of Article.]—The plaintiffs moved for an injunction restraining the defendants from infringing their registered trade marks Boköl and Bokol. The defendants moved under the Patents, Designs, and Trade Marks Act, 1883, to rectify the register by removing the plaintiffs' trade marks therefrom. The words registered as trade marks were well-known terms in the Norwegian and Swedish language to describe a particular class of beer brewed in Norway, and were the proper and only terms used in Norway and Sweden to denote that class of beer. The plaintiffs were importers of this Norwegian beer, and in 1887 they registered these words as trade marks, and now claimed an exclusive right to their use. The defendants, who were also importers of this class of beer, contended that a foreign word, descriptive of an article manufactured in a foreign country, could not be registered as a fancy word, as that would give the person who first registered the foreign name of any foreign product the monopoly of the sale in England of such product:—Held, that, assuming the article had been unknown in England prior to the registration, the words in question, which properly described the article in the language of the country in which it was produced, could not be registered as fancy words, and applied to that article when imported into England, where it was previously unknown and without a name, and that the trade marks ought to be removed from the register, and the motion for injunction refused. *Davis* v. *Stribolt, Davis's Trade Mark, In re*, 59 L. T. 854.

"Fancy Word not in common use"—Resemblance.]—An application was made to the court, under the Patents, Designs, and Trade Marks Act, 1883, on behalf of a company established in America, that the registration of the word "Kokoko" as a trade mark in respect of cotton goods might be proceeded with, notwithstanding the refusal of the comptroller-general to register the same. The evidence showed that "Kokoko" was an onomatopœic word used by the Chippeway Indians of North America to designate a particular species of owl, the word being composed of sounds supposed to resemble the nocturnal cry of the owl. It was admitted that the device of an owl was in common use in the cotton trade in Manchester; and there was also evidence that the word "Coco" had been used for years in connection with cotton goods consigned from Manchester to foreign markets, although it had not been registered as a trade-mark:—Held, that as the device of an owl was common property, the word "owl" could not be registered as a trade mark, even in a foreign language, and even where, as in the present case, there was no evidence of any trade in cotton goods with the Chippeway Indians, because it was possible that such trade might ultimately extend to them:—Held, further, that the word "Kokoko" too nearly resembled the word "Coco" to be entitled to registration. *Jackson & Co.'s Application, "Kokoko" Trade Mark, In re*, 60 L. T. 93.

B., in Dec., 1887, applied to register the word "Oomoo" as a trade mark in respect of wines and spirits. The application was opposed by P., who was the registered owner of a trade mark for wines consisting of the word "Emu," with a representation of that bird, on the grounds that the word "Oomoo" was so similar in sound to the word "Emu" as to be calculated to deceive, and that it was not an invented word, or a word having no reference to the character or quality of the goods in respect of which it was intended to be used within s. 10 of the act of 1888, or, if that act was not retrospective so far as s. 10 amended s. 64 of the act of 1883, then that the word "Oomoo" was not a fancy word within such last-mentioned section. The word "Oomoo" was said to be a word meaning "choice" in the language of the aboriginals of Australia:—Held, that s. 10 was not retrospective in reference to marks applied for, as in this case, antecedently to the commencement of the year 1889, when the act of 1888 came into operation; that there was no such similarity as to be calculated to deceive, and that the word "Oomoo" was obviously meaningless to the ordinary Englishman, and was a fancy word not in common use, and that the applicant was entitled to register the mark. *Burgoyne's Trade Mark, In re*, 61 L. T. 39.

—— **Brand—Words having no reference to Character or Quality of Goods.**]—The words "John Bull Brand" used by a firm of brewers in respect of beer brewed by them were registered by them as a trade mark under the act of 1883. The evidence was that the mark denoted, in the trade, beer brewed by them and nobody else. On a motion to expunge:—Held, first, that the words were not "fancy words not in common use" under the act of 1883; secondly, that the trade mark could not be supported on the distinct ground of consisting of a "brand"; and thirdly, that the case must be decided under the act of 1883 alone; but semble, the words were not "words having no reference to the character or quality of the goods" within the amending act of 1888. *Paine & Co.'s Trade Mark, In re*, 61 L. J., Ch. 365; 66 L. T. 642.

—— **Geographical Words.**]—The names of well-known mineral-water springs, such as "Apollinaris," "Hunyadi Janos," and "Friedrichshall," are geographical names, and are not "fancy words not in common use" within s. 64 of the act of 1883, nor "invented words," or "words having no reference to the character or quality of the goods and not being a geographical name" within the same section, as amended by the act of 1888, whether it is desired to register them in respect of the waters of the springs or of the products of those waters. *Apollinaris Co.'s Trade Marks, In re*, 61 L. J., Ch. 625; [1891] 2 Ch. 186; 65 L. T. 6—C. A.

Combination of Words in common use—Name of Individual or Firm—Brand.]—The plaintiff sought to restrain the infringement of a trade mark for note-paper registered in 1885, consisting of the words "Pirie's parchment bank." They disclaimed "any right to the exclusive use of either the word 'parchment' or the word 'bank' appearing in connection with this mark," these words being in common use in the trade as descriptive terms in regard to paper. The plaintiffs used the mark for a particular quality of paper, and they used it both on the paper itself as a water-mark, and also on the wrappers containing the paper. The defendants applied to have the mark removed from the register:—Held, that assuming that the disclaimer did not preclude the plaintiffs from claiming the exclusive use of the words in combination, and without deciding whether the mark was or was not a "brand" within s. 64, sub-s. 1, clause (c), of the Patents, &c., Act, 1883, the mark could not be supported under that clause, because it consisted only of words in common use, nor under clause (a) of the same sub-section, because the word "Pirie's" in the genitive was not the name of an individual or firm. *Pirie* v. *Goodall*, 61 L. J., Ch. 79; [1892] 1 Ch. 35; 65 L. T. 640; 40 W. R. 81—C. A.

iii. *Distinctive Device, Word, Mark, &c.*

What is—Word or Combination of Letters.]—A word or distinctive combination of letters is not "a distinctive device, mark, or heading" within the meaning of the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91), s. 10, and cannot be registered as a trade mark under the act. *Stephens, Ex parte*, 46 L. J., Ch. 46; 3 Ch. D. 659; 24 W. R. 963.

—— **Series of Combinations of Letters.**]—Where a manufacturer places on his goods a series of combinations of letters as trade marks, each of which serves to indicate to purchasers (1) that the goods are made by the persons using the mark, and (2) the quality of the goods as compared with the goods respectively bearing the other marks in the series, the marks, being exclusively used by the manufacturer, are valid trade marks, and may be registered, notwithstanding that they are indicative of the quality of the goods to which they are applied. *Ransome* v. *Graham*, 51 L. J., Ch. 897; 47 L. T. 218.

—— **Single Letter.**]—A single letter which has been used by a firm as a trade mark before the passing of the Trade Marks Registration Act, 1875, is not a trade mark within the definition contained in s. 10, and cannot be registered thereunder. *Mitchell, In re*, 46 L. J., Ch. 876; 7 Ch. D. 36; 26 W. R. 326.

—— **Simple Medallion with Arms.**]—A coat-of-arms in a medallion formed an important part of the trade mark of A. This medallion, with the same coat-of-arms, being proposed for registration by B. as his trade mark, A. sought to restrain the registration. The court refused relief, on the ground that the simple medallion could not be mistaken for A.'s compound trade mark. *Farina, In re*, 26 W. R. 261.

Signature with descriptive Words.]—Where M. applied to register as a trade mark his signature in combination with the descriptive words "Filtre Rapide," he was allowed to register his signature with the above words added, under s. 10 of the Trade Marks Act, 1875, but was compelled to pay the costs of the registrar, who was the only other person appearing on the motion. *Maignen's Application, In re*, 28 W. R. 759.

Portrait.]—The portrait of the owner of a trade mark may be a "distinctive device" within s. 10, sub-s. 1 (c), of the Patents, Designs, and Trade Marks Act, 1888. *Rowland* v. *Michell*, 66 L. J., Ch. 110; [1897] 1 Ch. 71; 75 L. T. 498—C. A. But see *Anderson's Trade Mark, In re*, infra, col. 165.

"Distinctiveness," how Estimated.]—Semble, when a trade mark is claimed consisting of a device associated with certain words, those words may be regarded in estimating the distinctiveness of the mark. *Dugdale's Trade Mark, In re*, 49 L. J., Ch. 303; 28 W. R. 436.

Independently of Colour.]—Under s. 67 of the Patents, Designs, and Trade Marks Act, 1883, a trade mark may be registered in any colour or colours; but, having regard to s. 64, it must be a trade mark that is distinctive independently of colour. A trade mark of which the only distinction is colour cannot be registered. *Hanson's Trade Mark, In re*, 57 L. J., Ch. 173; 37 Ch. D. 112; 57 L. T. 859; 36 W. R. 134.

In 1872 H., a wholesale grocer, commenced using, for French coffee, a red, white and blue label, and in 1881 he registered it under the Trade Marks Registration Act, 1875, in class 42, for "coffee" only. The label as registered was shaded so as to represent three colours, across it being printed the words "Red, White and Blue." After the passing of the Patents, Designs, and Trade Marks Act, 1883, H. applied for the registration of a red, white and blue label (in colours) for the whole of the goods in class 42, but the comptroller refused to register the label as not being sufficiently distinctive. On a motion by H. for an order on the comptroller to proceed with the registration:—Held, that, having regard to ss. 64 and 67 of the act, the label was not capable of registration as it possessed no distinctive character independently of the colours. *Ib.*

"Special and Distinctive Words."]—A "special and distinctive word" used in the definition of a trade mark in s. 10 of the Trade Marks Registration Act, 1875, means a word which distinguishes the goods to which it is attached as goods made or sold by the owner of the mark; and by using some additional words so as to induce the general public, as distinguished from persons in the secrets of the particular trade, who would not be deceived, to believe that goods so marked are of foreign brand and manufacture, the inventor of the original word is precluded from saying that such word is distinctive of his own manufacture, so as to be capable of registration as his trade mark. *Wood's Trade Mark, In re, Wood* v. *Lambert*, 55 L. J., Ch. 377; 32 Ch. D. 247; 54 L. T. 314—C. A. And see *Harbord, In re*, infra, col. 162.

An application was made for an order upon the comptroller of trade marks to register a mark having the words "Price's Patent Candle Company" in common letters round the upper border and "National Sperm" in the centre, with the address of the company round the lower border:—Held, that the name of the firm printed in common letters not being distinctive, the label did not fulfil the requirements of the Patents, Designs, and Trade Marks Act, 1883, s. 64. *Price's Patent Candle Co., In re*, 54 L. J., Ch. 210; 27 Ch. D. 681; 51 L. T. 653.

The words "any distinctive word," s. 74 (1) (b), relate back to the words "Distinctive . . . or fancy word not in common use" in s. 64 (1) (c), and the word "distinctive" in the latter section must be construed as applying to all the words that follow it. "Distinctive" in s. 74 (1) (b) means "primâ facie distinctive," so that any word which, though primâ facie distinctive, is in reality common to the trade, must be disclaimed when registered as part of a combination. *Burland* v. *Broxburn Oil Co., Burland's Trade Mark, In re*, 58 L. J., Ch. 816; 42 Ch. D. 274; 61 L. T. 618; 38 W. R. 89.

L. opened in various parts of London, and in other towns in Great Britain, houses of refreshment, in which wines, spirits, and other liquors were sold by the cask, bottle, or glass. Previous to the year 1875 he employed in this business the word "Bodega" as his trade mark, and was duly registered under the Trade Marks Registration Act, 1875, as proprietor of such trade mark. Each of these houses was called and known as "The Bodega," the word having been also adopted and used by L. as a trade name, to designate the establishments conducted by him. He continued this trading and the use of the word "Bodega" until the year 1881, when he sold to the plaintiffs, the Bodega Company (Limited), his business and the goodwill thereof, with the stock-in-trade, and other assets including the trade mark "Bodega" and all right to use the same. Thenceforth the company continued to carry on business in the same way, using the word "Bodega" as a trade mark and trade name; and on the 23rd July, 1883, they were registered as the proprietors of the trade mark in succession to L. The company opened an establishment in the city of Dublin, and called it "The Bodega," and, by agreement between them and their co-plaintiff Riviere, the latter acquired all their right in respect of the Dublin house, and to the exclusive use of the "Bodega" brand in Ireland, and power to open any branch "Bodega," and to use the trade mark in Ireland. "Bodega" is a Spanish word, and is used to designate a building used exclusively for the maturing and storing of Spanish wines, and it would not describe an establish-

ment for the retail sale of wines. In the year 1888 the defendant opened a public-house, or retail wine and spirit shop, in Belfast, under the name of "The Bodega Wine Vaults," and used labels on his bottles containing the word "Bodega" printed thereon. The name "Bodega" was well known to the trade and the public generally, as indicating that an establishment called by that name belonged to, and that the business thereof was carried on by, the plaintiff company or some person authorised by them; the wines sold in these establishments were of good quality, had acquired considerable reputation, and were sold at moderate prices, the same wine was to be obtained at all Bodegas, and at the same price, and the name "Bodega" was regarded as a guarantee of the respectability of the establishment so called and of the quality of the goods sold therein:—Held, that the word "Bodega" was a "special and distinctive word," coming within sub-s. 3 of that section, and s. 10 of the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91), that having been used by the predecessors in title of the plaintiffs before the 13th August, 1875, it was properly registered under those acts, and that the plaintiffs were entitled to the exclusive use of it as a trade mark in connection with goods of the classes specified in the registration:—Held, also, that the plaintiffs were entitled to restrain the use by the defendant of the word "Bodega" as a trade name. *Bodega Co.* v. *Owens*, 23 L. R. Ir. 371.

Before the passing of the Trade Marks Registration Act, 1875, the appellants used the words "Perry Davis' Vegetable Pain Killer" as their trade mark for a medicine manufactured and sold by them. After the passing of the act they registered the words "Pain Killer" as their trade mark under s. 10. Upon a motion to amend the register:—Held (by Lord Halsbury, L.C., and Lord Morris) that the words "Pain Killer" were not special and distinctive words within the meaning of s. 10 of the Trade Marks Registration Act, 1875, there being nothing to distinguish goods manufactured by the appellants from goods manufactured by other persons. *Davis* v. *Harbord*, 60 L. J., Ch. 16; 15 App. Cas. 316; 63 L. T. 389—H. L. (E.)

User before 1875—Name of Individual or Firm.]—Where the name of an individual or firm printed in ordinary type has been used as a trade mark before the 13th of August, 1875, and it points out the goods as being those of a particular manufacturer, it may properly be registered as a "special and distinctive" word or words used as a trade mark before the 13th of August, 1875. *Hopkinson's Trade Mark, In re*, 61 L. J., Ch. 387; [1892] 2 Ch. 116; 66 L. T. 487.

—— **Primâ facie Right to Name—Onus probandi—"Family Salve."**]—The plaintiffs had, for fifteen years and upwards, manufactured and sold a medicine under the name of "Reinhardt's Celebrated Family Salve," and in the year 1876 they registered the words "Family Salve" as their trade mark in connection with such medicine, under the Trade Marks Registration Acts. The defendant, in 1868, registered at Stationers' Hall a similar preparation under the title of "Spalding's Universal Family Salve," and he had since manufactured and sold the salve under that name. Both salves were sold in packets encased in wrappers bearing the above titles in full, but the wrappers were so folded that until the packets were opened the words "Family Salve" alone were visible. In an action by the plaintiffs for an injunction:—Held, that the words "Family Salve" were both a "distinctive heading" and also "special and distinctive words used before the passing of the act," within s. 10 of the Trade Marks Registration Act, 1875; that the plaintiffs having by the registration acquired a primâ facie right to the exclusive use of the two words "Family Salve," the onus lay on the defendant to displace that right; and that the defendant having failed to discharge that onus, an injunction must be granted. *Reinhardt* v. *Spalding*, 49 L. J., Ch. 57; 28 W. R. 300.

Separate User of Distinctive Words before 1875.]—In 1877 Perry Davis & Son were registered as proprietors of a trade mark consisting of the words "Pain Killer," in respect of which they claimed user for forty years prior to registration, in connection with a medicine sold by them. On an application by L. for the removal of the name from the register, the evidence showed that, although the medicine had been spoken of and ordered as "Pain Killer," it had not been sold under that name alone. The wrapper round the bottles, and a label attached to the bottles, described the article as "Perry Davis' Vegetable Pain Killer;" on the bottles were stamped the words, "Davis' Vegetable Pain Killer," and the government stamp attached bore the description "Pain Killer" alone:—Held, that as the words "Pain Killer" had not been used alone as a trade mark before the passing of the Trade Marks Registration Act, 1875, they were not a proper mark for registration under s. 10 of that act:—Held, also (by Fry and Lopes, L.JJ.), that the words were not "special and distinctive words" within the meaning of that section. Quære, whether words must be special and distinctive from their own proper nature or internal force, or whether they may acquire a distinctive character by user as applied to goods. *Harbord, In re*, 58 L. T. 695—C. A.

And see *S. C.*, sub nom. *Davis* v. *Harbord*, supra.

In order to obtain registration of a word as having become "distinctive" within s. 64, sub-s. 3, of the Trade Marks Act, 1883, by user or recognition in the trade, such user or recognition must have been prior to August, 1875. Accordingly applications for a direction to the comptroller-general to proceed with the registration as trade marks of the words "Melrose Favourite Hair Restorer" and "Electric Velveteen," the use of which by the applicants would, independently of the act, by user and recognition in the trade since August, 1875, have been entitled to protection, were, in both cases, refused. *Van Duzer's Trade Mark, In re; Leaf's Trade Mark, In re*, 56 L. J., Ch. 370; 34 Ch. D. 623; 56 L. T. 286; 34 W. R. 294—C. A.

In order to entitle a person to register a trade mark under s. 10 of the Trade Marks Registration Act, 1875, consisting of special and distinctive words, or combination of figures or letters, used as a trade mark before the passing of that act, the words must have been used as a trade mark by themselves, and not in conjunction with any other device. In 1876 S. registered the words "Diamond Cast Steel," as a trade mark for steel

and for files. The words were never used on goods by themselves, but always in combination with a device and a name. The words were, however, sometimes stamped on one side of the goods, whilst the device and name were stamped on the reverse side. Upon an application to rectify the register of trade marks by expunging this trade mark:—Held, that the case was within the principles upon which *Palmer's Trade Mark, In re* (infra), was decided; and that as there had been no separate user of the words as a trade mark, the same ought not to have been registered. and must, therefore, be expunged from the register. *Spencer's Trade Mark, In re*, 54 L. T. 659—C. A.

P. in 1876 registered "braided fixed stars" as a trade mark for matches, alleging that he had used it as a trade mark before the passing of the act. He also at the same time registered a label enveloping the boxes in which his matches were sold, which contained the words "braided fixed stars" in two places so as to be conspicuous on each side of the boxes, but also contained a number of other words. It was shown that at the time when P. introduced the term "braided fixed stars" the term "fixed star" was known in the trade as denoting a particular class of fusees, and that he had just bought a patent for enveloping the stems of fusees with wire by means of a braiding machine. This patent expired in August, 1881. It appeared from the evidence that P. had not before the act used "braided fixed stars" separately as a trade mark or otherwise than as a part of the above-mentioned label. In October, 1881, an application was made by a rival trader, to expunge the registration:—Held, that the registration must be expunged, for that to entitle P. to register these words as a trade mark he must before the act have used them as such alone, and not merely in conjunction with other words:—Held, further, that if they had been so used alone, they ought not to have been registered, for that they were only words properly descriptive of the patented article, and that P. had no exclusive right to their use after the patent had expired. *Palmer's Trade Mark, In re*, 24 Ch. D. 504; 32 W. R. 306—C. A.

A trade mark will not be registered as a trade mark in use before the 13th August, 1875, when the only user proved before that date was in combination with other matter. *Baker* v. *Rawson*, 60 L. J., Ch. 49; 45 Ch. D. 519; 63 L. T. 306.

In 1882 the word "Monopole" was registered as a trade mark under s. 10 of the Trade Marks Registration Act, 1875, as being a special and distinctive word used as a trade mark before the passing of the act. The user alleged was upon labels which contained the word "Monopole" in roman type, and below it "Heidsieck & Co., Reims," in a running hand, upon wrappers which resembled the labels upon corks round which inside the bottle the word "Monopole" was printed, "Heidsieck & Co." being printed round a comet at the bottom, and upon packing cases, on one side of which the word "Monopole" was branded, there being other words and marks on the other sides:—Held, on motion to rectify the register of trade marks by expunging the trade mark "Monople," that the word "Monople" had never been used alone as a trade mark before the passing of the act, and that its registration as a trade mark must be expunged. *Richards* v. *Butcher*, 60 L. J., Ch. 530; [1891] 2 Ch. 522—C. A. Affirming 63 L. T. 757.

—— **"Heading"—"Valvoline."**]—L. and E. invented in 1873 a process for making a certain description of lubricating oil which they called "Valvoline," and in that year registered in America as their trade mark the word accompanied by a device. In August, 1877, they registered the same trade mark in England, and in February, 1878, registered the word "Valvoline" alone as their trade mark. After this mark had been five years on the register they commenced an action against W. to restrain him from selling under the name of Valvoline any oil not made by the plaintiffs. W. moved to rectify the register by striking out the trade mark "Valvoline." The court came to the conclusion on the evidence that L. and E. had not used "Valvoline" alone as a trade mark, either in America or England, before the passing of the Trade Marks Registration Act, 1875, but only in conjunction with a device, and that "Valvoline" was a word invented to describe the particular class of oil at the same time as the process was invented, and was used as a descriptive term for that particular kind of oil. The process was not the subject of a patent:—Held, that a single word cannot be registered under the act, on the ground that it was used as a "heading," unless it was so used before the passing of the act; and that, therefore, the trade mark "Valvoline" must be removed from the register. *Leonard* v. *Wells, Leonard's Trade Mark, In re*, 53 L. J., Ch. 603; 26 Ch. D. 288; 51 L. T. 35—C. A. Affirming 32 W. R. 530.

—— **User of Distinctive Words in Registered Trade Mark by other Persons at Time of Registration.**]—The plaintiffs, who were brewers, in 1879 registered as a trade mark in respect of beer a label having on it a figure of "John Bull," and with the words "John Bull brand" printed on it. The mark was capable of registration. At the time of this registration L., a brewer in another locality, sold beer as "John Bull" beer, unknown to the plaintiffs; in 1890 L. abandoned the use of those words:—Held, that, assuming that L. in 1879 could have prevented the plaintiffs from obtaining registration of the trade mark, no one else had a right to complain of the use of those words by the plaintiffs. The court, therefore, refused to order any rectification of the plaintiffs' registered trade mark at the instance of a rival firm of brewers. *Montgomery* v. *Thompson* ([1891] A. C. 217) distinguished. *Paine & Co.* v. *Daniell & Sons' Breweries, Paine & Co.'s Trade Marks, In re*, 62 L. J., Ch. 732; [1893] 2 Ch. 567; 2 R. 491; 68 L. T. 891; 42 W. R. 40—C. A.

"Distinctive Mark."]—In 1861 the plaintiffs registered a design for the shape of blocks of black lead, being a cylinder terminated by a dome at one end. From that time they sold black lead in boxes, upon which a black dome was impressed, and they imprinted a dome upon each block of black lead. This they did without regard to the shape of the blocks they sold, and there was evidence that the term "dome black lead" had become known in the trade as denoting black lead of the plaintiff's manufacture. In 1877 they registered a black dome as their trade mark for "black lead." The plaintiffs having brought an action to restrain infringement of

their trade mark, the defendants applied to have it expunged from the register :—Held, that there was no reason why a dome should not be a distinctive mark for black lead, that the evidence showed it to be in fact distinctive, that it was therefore capable of registration as a trade mark. *James's Trade Mark, In re*, or *James* v. *Parry*, 55 L. J., Ch. 915 ; 33 Ch. D. 392 ; 55 L. T. 415 ; 35 W. R. 67—C. A.

"Distinctive Label."]—In order that a label may be registered as a trade mark under s. 10 of the act of 1875 as being a "distinctive label," it must be a label distinguishing the goods of the person registering it from all others. *Apollinaris Co.'s Trade Marks, In re*, 61 L. J., Ch. 625 ; [1891] 2 Ch. 186 ; 65 L. T. 6—C. A.

—— Prize Medal—"Distinctive Device."]—A representation of an exhibition prize medal is not such a "distinctive device" as to be capable of constituting an essential particular, even though no other similar medal was granted for the same class of goods at the same exhibition. Semble, that a label which contains only elements which are themselves incapable of constituting essential particulars is not as a whole a "distinctive label" within the act, even though those elements are combined and arranged in a manner which is new and has been used by no other trader. *Bryant & May, In re*, 59 L. J., Ch. 763.

"Distinctive Device" — Portrait — Words Publici Juris.]—A device consisting of a portrait of the original inventor of the article sold, with words above and below it, the essential portion of which have become the common property of the trade and publici juris, is not a distinctive device within s. 10 of the Registration of Trade Marks Act, 1875 (repealed by 46 & 47 Vict. c. 57), and cannot be registered as a trade mark under that act. *Anderson's Trade Mark, In re*, 54 L. J., Ch. 1084—C. A. Affirming 26 Ch. D. 409 ; 32 W. R. 677.

—— Descriptive Words.]—Where one person registers under the Trade Marks Registration Act, 1875, a trade mark consisting of a distinctive device, together with a word descriptive of the article to which the mark is to be applied, another person is entitled, notwithstanding such registration, to register for the same goods a trade mark consisting of a different distinctive device, together with a descriptive word identical with or similar to the word comprised in the earlier trade mark. *Horsburgh's Application, In re*, 53 L. J., Ch. 237, n. ; 50 L. T. 23, n. ; 32 W. R. 530, n.

iv. *Similarity—Calculated to Deceive.*

Resemblance calculated to Deceive—Duty of Comptroller.] — Sect. 72, sub-s. 2, of the Patents, Designs, and Trade Marks Act, 1883, provides that, "The comptroller shall not register with respect to the same goods, or description of goods, a trade mark so nearly resembling a trade mark already on the register with respect to such goods, or description of goods, as to be calculated to deceive." The comptroller had refused to register a trade mark in respect of linen and hemp piece-goods, on the ground that it too closely resembled three trade marks which had been already registered in the same class in 1876 and 1884. On a summons to direct the comptroller to proceed with registration of the trade mark :—Held, that, though it were a case in which the similarity might not be such as to induce the court on that fact alone to grant an injunction, it was the duty of the comptroller to consider, having regard to the course of trade, whether the trade mark so nearly resembled the other as to be calculated to deceive, and he would be justified in refusing to register a trade mark so nearly resembling another that registration would encourage litigation ; and that this trade mark was likely to mislead persons wishing to buy linen stamped with one of the earlier trade marks. *Speer, In re*, 55 L. T. 880. See also *Price's Patent Candle Co., In re*, post, col. 177.

The object of the acts which regulate the registration of trade marks is to prevent future litigation. Registration ought, therefore, to be refused to new trade marks which, by reason of their similarity to marks already on the register, are likely, if registered and used, to lead to litigation. *Marks and Tellefsen's Application, In re*, 63 L. T. 234, n.

Application was made for registration of a trade mark consisting of the design of a heart in combination with a number of words including "Parchment Bank," the whole inclosed in a rectangular line, there being on the register a trade-mark for the same class of goods consisting of the words "Pirie's Parchment Bank." The application was rejected on the ground of resemblance calculated to deceive. *Goodall's Trade Mark, In re*, 42 Ch. D. 566 ; 38 W. R. 189.

The defendants in 1877 registered as a trade-mark a device called a "winged cross." In practice they surrounded the mark with two concentric circles, like those which the plaintiffs used ; but they did not register the circles because they were common to the trade. In 1888 the defendants applied for the registration of the winged cross, surrounded by the circles, with a disclaimer of any exclusive right to the circles. The plaintiffs opposed the registration, on the ground that the mark so nearly resembled their own as to be calculated to deceive :—Held, that the registration could not be allowed. *Baker* v. *Rawson*, 45 Ch. D. 519 ; 63 L. T. 306.

Old Mark.]—An application made in November, 1884, by an American firm of oil manufacturers for the registration under the act of 1883 of a trade mark for illuminating oils, which mark had been used by them in America since 1872, and had been known in England as the "White Rose" mark prior to 1875, was refused by the comptroller upon the ground that there had been on the register since 1878 a similar mark for illuminating oils called the "Rosaline" mark, of which an English firm were the proprietors :—Held, that although there was enough similarity between the two marks to render it possible for the public to mistake the one for the other, yet as the "White Rose" was to all intents and purposes an old mark, it ought to be admitted to registration. *"White Rose" Trade Mark, In re*, 54 L. J., Ch. 961 ; 30 Ch. D. 505 ; 53 L. T. 33 ; 33 W. R. 796.

New Mark—Fraudulent User.]—Registration will not be permitted of a new trade mark which, although unobjectionable in itself at the time of application for registration, yet, from a previous association with fraudulent matter, is calculated

to secure to the proprietor the benefit of the fraud. *Fuente's Trade Marks, In re*, 60 L. J., Ch. 308; [1891] 2 Ch. 166; 64 L. T. 196; 39 W. R. 489.

Upon an application to register as a new mark for tobacco a label which bore the words "Fuente —Vera Cruz" being a true statement of the name of the manufacturer and place of manufacture, but which words had, about the time of the passing of the Merchandise Marks Act, 1887, been substituted on the label for words stating, contrary to the fact, that the place of manufacture was Havannah:—Held, that registration must be refused. *Ib.*

Fraudulent User of Foreign Trade Mark.]—See *Heaton's Trade Mark, In re*, ante, col. 152.

Similarity—Mode of Determining.]—The proper mode of determining questions as to the similarity of trade marks is to compare them as actually used, e.g. impressed on metal goods. *Jelly, Son & Jones's Application, In re*, 51 L. J., Ch. 639, n.; 46 L. T. 381, n.

When comparing a trade mark tendered for registration with another mark already on the register or assigned by the Cutlers' Company, Sheffield, for the purpose of ascertaining whether the new mark so nearly resembles the old one as to be calculated to deceive, the court will have regard to the nature of the goods, to the nature and size of the mark, to the mode of affixing it to the goods, to the probable result in practice, and to all the circumstances of the case, and if, having regard to such circumstances, the new mark would be likely to be mistaken for the old one, registration will be refused. *Rosing's Application, In re*, 54 L. J., Ch. 975, n.—C. A.

R. applied for the registration of a new mark for cutlery and metal goods included in classes 12 and 13, such trade mark representing a part of his armorial bearings, and consisting of a curved horn, with a twist in the middle, and surmounted by two roses. The application was opposed by the Cutlers' Company of Sheffield, on the ground that the mark so nearly resembled a Sheffield mark for similar articles assigned forty-five years previously to H., as to be calculated to deceive. H.'s mark consisted of a curved horn, suspended by a looped cord. The marks were sufficiently distinct when printed in a large size, but the court of appeal being of opinion that, in practice, when the two marks were stamped in a small size on small metal articles, and having regard also to the probability of blurring taking place in the process of stamping, the one mark would be likely to be mistaken for the other:—Held, that registration must be refused. *Ib.*

L. had used from 1864, in respect of goods included in class 13, a trade mark consisting of the head of Minerva, down to and including the shoulders, the head bearing a helmet with ringlets hanging down behind. In 1884, being about to extend his business to class 12, he applied to register for that class the same head with the word "Athena" under it. This application was opposed by B., who had used from 1869 a cutler's mark, consisting of a head with the word "way" under it. The head had a sort of wig upon it, with small curls behind, and included the neck and part of the shoulders. In 1884 B. registered this mark under the act of 1883, as an old cutler's mark, but the design actually registered departed from the old mark which he used, the head on the register being an uncovered head with a few sparse hairs upon it, and taking in only a small portion of the neck and no part of the shoulders:—Held, that the question whether a new mark is so like another as to be calculated to deceive is to be decided by considering whether the new mark is so like the other that when both are fairly used one is likely to be mistaken for the other, regard being had to size, the material on which the mark is to be impressed, the effects of wear and tear, and other surrounding circumstances; that L.'s mark was to be compared with the mark B. had put on the register, not with the mark which he had used; and that B., whose evidence was directed to a comparison between L.'s mark and the mark which B. had used, which was much more like L.'s mark than B.'s registered mark was, had not made out that the new mark was calculated to deceive. *Lyndon's Trade Mark, In re*, 55 L. J., Ch. 456; 32 Ch. D. 109; 54 L. T. 405; 34 W. R. 403—C. A. Cp. *Lambert's Trade Mark, In re*, post, col. 178.

User in course of Trade.]—Where an application for the registration of a trade mark is opposed by the proprietor of an earlier trade mark already on the register, on the ground that the new mark has too great a resemblance to the old one, regard must be had to the way in which the new mark will be fairly used in the ordinary course of trade; and if, when so used, the mark will be likely to produce deception, registration will be refused. An application by F. for the registration of a device of a charging bison, which he used with many other details on wrappers on tins of mustard, being opposed by Messrs. C., the proprietors of a registered device of a "bull's head," which they used with other details on wrappers on tins of mustard very similar to those used by F., and the general style and colouring of the wrappers and some of the details being in common use in the trade:—Held, that F.'s mark, as it would be used, would be calculated to deceive, and that registration must be refused. *Farrow's Application, In re*, 63 L. T. 233.

Words in Foreign Characters — Limiting Registration to Goods Exported.]—Where there is already on the register a trade mark consisting of a representation of a golden fan, the court will not direct registration for the same class of a trade mark an essential part of which consists of the words "Golden Fan Brand" in Burmese characters. *Dewhurst's Application, In re*, 65 L. J., Ch. 618; [1896] 2 Ch. 137; 74 L. T. 388; 44 W. R. 672—C. A.

Consents given by the owners of similar trade marks to such registration are evidence that the mark is not calculated to deceive, but do not bind the comptroller's discretion as to allowing registration. *Ib.*

The court has jurisdiction to order registration upon conditions, but has no power to order that a registered mark shall be confined to use on goods exported to a particular country. *Ib.*

—— **Invented Word—Similar Sound.**]—The two words "Pearl" and "Pirle" must be treated on the same footing on the ground of similarity of sound, and the word "Pearl" being held not registrable as a trade mark, the word "Pirle," which is simply a mis-spelling of the word "Pearl," cannot be registered as a trade mark. *Ripley & Son's Trade Mark, In re*, 77 L. T. 495.

—— **Colour not Considered.**]—W. & Co. proposed to register as a trade mark for ale a triangle with a double outline, inscribing within the double outline the words "Beccles Brewery, Established 1830," the inner triangle having within it a conspicuous figure of a church. B. & Co., whose trade mark for pale ale was a plain triangle, which in use was coloured red, applied to prevent the registration of the proposed trade mark as being so similar to theirs as to be calculated to deceive:—Held, by James and Brett, L.JJ. (dissentiente Cotton, L.J.), that as W. & Co. would be at liberty to print their trade mark in whatever colour they pleased, and if printed on a red ground it would be so similar to that of B. & Co. that a purchaser might be misled, the registration ought not to be allowed. *Worthington's Trade Mark, In re*, 49 L. J., Ch. 646; 14 Ch. D. 8; 42 L. T. 563; 28 W. R. 747—C. A.

—— **Rule not applying to Cotton Goods.**]—R. applied for registration of a cotton trade mark, which was coloured, being a gold mohur. It had been placed in the first class by the committee of experts, and had been duly deposited for exhibition and advertised in the official paper under the Trade Marks Registration Act and rules, and the additional rules with respect to cotton goods. D. was the proprietor of a cotton trade mark, which was a silver rupee, and he opposed the registration of R.'s mark:—Held, that R.'s mark was not calculated to deceive, for in such cases the mark which is protected is the registered mark, which has been deposited, and of which the representation can be seen at the places mentioned in the advertisement. *Robinson's Trade Mark, In re*, 29 W. R. 31.

Under Act of 1875.]—The prohibition of s. 6 of the Trade Marks Registration Act, 1875, against registering, in connection with a trade mark, words, the exclusive use of which would not, "by reason of their being calculated to deceive, or otherwise, be deemed entitled to protection in a court of equity," refers to deceptiveness inherent in the words themselves, and not to deceptiveness arising from similarity to words comprised in other trade marks. A device having been registered together with the word "Valvoline" as a trade mark for lubricating oil:—Held, that a different firm might register for the same article the word "Valvoleum" in combination with a different device. *Horsburgh's Application, In re*, ante, col. 165.

The plaintiffs, who were manufacturers and vendors of condensed milk and other similar articles in 1876 registered, in respect of their goods, a trade mark, the distinctive feature of which was the representation of a milk-maid. Previous to this their goods had become known and were ordered by the public under the description of "Milk Maid" or "Dairy Maid" brand, and in 1884 they registered the same mark in conjunction with the words "Milk Maid Brand." In 1882 the defendant who carried on a similar business, registered a mark which, though not altogether like the plaintiff's mark, consisted of a drawing of a dairy-maid or milk-maid in conjunction with the words "Dairy Maid," the registration being in respect of a class of goods which covered those sold by the plaintiffs. He afterwards used this mark in the sale of condensed milk in tins like those of the plaintiffs:—Held, that the plaintiffs were entitled to an injunction restraining the defendant from infringing their mark, and also to have the register rectified by limiting the defendant's mark to goods other than those in respect of which the plaintiff's mark was registered. *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 55 L. J., Ch. 463; 31 Ch. D. 454; 34 W. R. 345. See *Jones's Trade Mark, In re*, ante, col. 145.

Words calculated to deceive—Application of Words to a different Article.]—E. had for many years used the words "Fruit Salt" as his trade mark for an effervescing drink. D. applied to register the same words as part of his trade mark for a baking powder. E. opposed the registration as interfering with his trade mark and calculated to deceive the public:—Held, by Kay, J., and on appeal by Cotton, L.J., that although E. had no monopoly of the use of the words "Fruit Salt," and though the words were descriptive and not in themselves deceptive, yet that under the circumstances they were calculated to deceive the public within the meaning of s. 73 of the Patents, Designs, and Trade Marks Act, 1883, and that the trade mark ought not to be registered:—But held by Lindley and Fry, L.JJ., that although D. had adopted the words "Fruit Salt" on account of the popularity they had acquired through E.'s use of them, yet as D.'s trade mark was a totally different article, which did not interfere with E.'s trade, the court ought not to refuse its registration. *Dunn's Trade Marks, In re*, 58 L. J., Ch. 604; 41 Ch. D. 439; 61 L. T. 98—C. A. Affirmed, sub nom. *Eno* v. *Dunn*, 15 App. Cas. 252; 63 L. T. 6; 39 W. R. 161—H. L. (E.) And see *Jackson Co.'s Application, In re*, and *Burgoyne's Trade Mark, In re*, ante, col. 157; *Grossmith's Trade Mark, In re*, post, col. 175; and *Lambert's Trade Mark, In re*, post, col. 178.

Disclaimer of Exclusive Use.]—Where an applicant (whose bona fides was undoubted) applies to register a trade mark that in no way resembles a mark upon the register except in respect of certain words, the exclusive use of which is disclaimed by the registered proprietor and the applicant, such mark is not calculated to deceive, and should be registered by the comptroller-general of patents. *Lyttus' Trade Mark, In re*, 63 L. J., Ch. 52; [1894] 1 Ch. 193; 8 R. 87; 69 L. T. 690; 42 W. R. 251.

—— **Star—Subsequent Registration of Words "Red Star Brand."**]—Inasmuch as the registration of a device as a trade mark by s. 67 of the Patents, &c., Act of 1883, gives the registered owner the exclusive right to use the same in any colour, a mere description in words of the same device, although confined to some particular colour, cannot be subsequently registered by any other person in respect of the same class of goods. *La Société Anonyme des Verreries de l'Etoile (Trade Mark), In re*, 63 L. J., Ch. 381; [1894] 2 Ch. 26; 7 R. 183; 70 L. T. 295; 42 W. R. 420—C. A.

In 1876, B. & Co., who were export merchants in London, and were in the habit of purchasing glass in Belgium and shipping it from this country to the colonies, registered as a trade mark a star in connection with their window glass, which became known in the trade as "Star Brand" glass. In 1890 a Belgian company registered in England as a trade mark for window glass the words "Red Star Brand,"

having in 1885 registered in Belgium the device of a red star which they had ever since 1880 largely used on cases of glass sent to the United Kingdom. B. & Co. having been informed in 1893 that the Belgian company's glass was being sold in New Zealand under the description of "Red Star Brand," learnt for the first time of the registration of the mark in question, and they thereupon moved to have it expunged from the register of trade marks:—Held, that B. & Co. were entitled to have the mark "Red Star Brand" expunged on the ground that it was calculated to deceive, and that they were persons aggrieved within s. 90 of the Patents, &c., Act, 1883, and that there had been under the circumstances no such delay on their part in applying to the court as would preclude them from relief. *Ib.*

v. *Old Marks and Three Mark Rule.*

Old Mark Registered for Part of a Class—Registration of New Mark for other Goods in same Class.]—A new mark may be registered for some of the goods in a class, even though an old mark of a similar kind has been already registered for other goods in the same class, provided that the goods and the trades of the proprietors are sufficiently distinct for no confusion to take place. *Braby's Application, In re, Shropshire Iron Co.'s Trade Marks, In re*, 51 L. J., Ch. 637; 21 Ch D. 223; 46 L. T. 380; 30 W. R. 675. S. P., *Jelley, Son & Jones's Application, In re*, infra.

A mark which has been used before the coming into operation of the Trade Marks Registration Act, 1875, is an old mark only in respect of the goods on which it has been used. In connection with other goods it is to be treated as a new mark, and will not be granted registration if it clashes with another mark which is old in respect of those goods. *Ib.*

—— **Registration of New Trade Marks resembling Old, by Leave of the Court.**]—There being registered under the Trade Marks Registration Act, 1875, four trade marks including an anchor in respect of goods in class 42 of the first schedule to the rules made under the act, the court refused to give leave to register a new trade mark including an anchor in respect of goods in the same class, but different in character from those goods for which the four trade marks had been registered. *Hargreaves' Trade Mark, In re*, 11 Ch. D. 669; 27 W. R. 450.

—— **Allowed if Dissimilar to other Marks on Register.**]—The court will under r. 19 direct a trade mark to be registered, if satisfied of its dissimilarity to marks actually registered, without inquiring whether it be distinguishable from other marks the subject of pending applications to register. *Dugdale's Trade Mark, In re*, 49 L. J., Ch. 303; 28 W. R. 436.

Three-Mark Rule.]—Old marks, whether cutlers' marks or not, may be registered up to the number of three by different persons in respect of the same goods, even if identical; but this does not apply to new marks, and if the same old mark has been used in respect of the same goods by more than three different persons, it is a common mark. *Jelley, Son & Jones's Application, In re*, 51 L. J., Ch. 639, n.; 46 L. T. 381, n.

The question whether registration should be allowed or not ought to depend upon this: whether or not the party opposing registration would, independently of the registration acts, have been entitled to restrain the use by the applicant of the mark which he proposes to register. *Farina, In re*, 26 W. R. 261.

When a trade mark has been used by not more than three different persons in the same trade as an old mark—that is, before the 13th of August, 1875—each may register it. *Walkden Aërated Waters Co.'s Application, In re*, 54 L. J., Ch. 394, n.

When it has been used by one or two persons as an old mark, it can only be registered by another person as a new mark if the consent of the prior owner or owners is obtained. *Ib.*

Resemblance.]—Semble, that marks which so closely resemble one another that the use of the one might be restrained in an action by the owner of the other, will be treated as identical for the purposes of the above rules. *Ib.*

Common to the Trade.]—The rule of the court is to permit registration, under s. 6 of the Trade Marks Registration Act, 1875, of identical trade marks up to three, though, if more than three applications are made for the registration of similar trade marks, even though such trade marks are old, registration will be refused on the ground that such trade mark is common property. *Benbow* v. *Low*, 44 L. T. 875; 29 W. R. 837.

A mark which had been registered as a trade mark, is at the time of registration "common to the trade" when similar (though not in each case identical) marks are then in use by more than three persons engaged in the same trade, although in some of the cases the mark is not actually placed on the goods, but is only used on billheads, trade circulars, advertisements, or show-cards. *Wragg's Trade Mark, In re*, 54 L. J., Ch. 391; 29 Ch. D. 551; 52 L. T. 467.

When a trade mark has been used by more than three persons engaged in the same trade, it is common to the trade, and cannot be registered by any one. *Hyde & Co.'s Trade Marks, In re*, 54 L. J., Ch. 395, n.; 7 Ch. D. 724; 38 L. T. 777.

When a trade mark had been used by more than three different persons in the same trade, it is not distinctive, but common to the trade, and cannot be registered by any of them. *Walkden Aërated Waters Co.'s Application, In re*, supra.

The words "common to the trade" in s. 74 (1) (*b*) of the Patents, Designs and Trade Marks Act, 1883, must be interpreted in their ordinary grammatical sense as equivalent to "open to the trade," and are not limited or defined by the explanation in s. 75 (3) as "publicly used by more than three persons." *Burland* v. *Broxburn Oil Co., Burland's Trade Mark, In re*, 58 L. J., Ch. 816; 42 Ch. D. 274; 61 L. T. 618; 38 W. R. 89.

The plaintiffs and their predecessors had for a hundred years carried on a brewery at Stone, and their ale had become known as "Stone Ale." They had registered several trade marks which contained the words "Stone Ale" in combination with some device or the name of their firm; and in 1888 they registered as an additional trade mark the words "Stone Ale" alone. The defendant built a brewery at Stone, over which he placed the words "Stone Brewery," and

when that was objected to by the plaintiffs, he altered it to "M.'s Stone Brewery," with a device containing the words "Stone Ale" and a monogram somewhat resembling the plaintiffs' trade mark. The plaintiffs brought an action for an injunction, and the defendant moved under s. 74 of the Patents, Designs and Trade Marks Act, 1883, to enter a disclaimer on the part of the plaintiffs of the exclusive use of the word "Stone," and otherwise rectify the register:—Held (1), that the word "Stone" was not a word common to the trade, and consequently the case did not come within s. 74, and the application for a disclaimer must be refused; (2) that, there being no evidence that the plaintiffs had used the expression "Stone Ale" by itself as a trade mark before the 13th of August, 1875, the plaintiffs could not register it as a trade mark under s. 64, sub-s. 3, of the same act; (3) that the plaintiffs had acquired by user a right to the use of the words "Stone Ale" within the principle of the *Wotherspoon* v. *Currie* (ante, col. 75), and that the conduct of the defendant being in the opinion of the court calculated to deceive the public into supposing that his ales were brewed by the plaintiffs, the plaintiffs were entitled to an injunction. *Thompson* v. *Montgomery*, *Joule's Trade Marks*, *In re*, *Thompson's Trade Marks*, *In re*, 58 L. J., Ch. 374; 41 Ch. D. 35; 60 L. T. 766; 37 W. R. 637—C. A.

Alteration in Old Mark—Essential Particular—Assignee.]—An assignee of a trade mark registered as an old mark is not entitled to have the name or initials of the former proprietor omitted, and another or others substituted, as they form a material part of the mark. *Henry Clay and Bock & Co., In re*, 62 L. J., Ch. 143; [1892] 3 Ch. 549; 3 R. 29; 67 L. T. 614.

Sufficiency of User.]—The applicants, who were iron manufacturers, had for a long period before the passing of the Trade Marks Registration Act, 1875, been in the habit of using as trade marks the letters B B H, which were the initials of the firm, and also the same marks coupled with symbols or words common to the trade, denoting the quality of the iron:—Held, that every mark, or combination of marks or words used as a trade mark before the passing of the Trade Marks Registration Act, 1875, which would have entitled the proprietor to maintain a suit for infringement against any person imitating it, may be registered as a trade mark under the act, and a trader is entitled to register a series of such marks which only differ from each other by combining in different modes a mark common to all of them and peculiar to the trader, with words merely indicative of the quality of the goods marked or symbols common to the trade, a note being in such a case entered in the register specifying the portions of the combination as to which no exclusive right is claimed. *Barrows' Trade Mark*, *In re*, 46 L. J., Ch. 450; 5 Ch. D. 353; 36 L. T. 291; 25 W. R. 407.

Held, on appeal, that the proper mode of registration was to register the trade mark B B H to be used either alone or with any device or words signifying the quality of the iron. *S. C.*, 46 L. J., Ch. 725; 5 Ch. D. 353; 36 L. T. 780; 25 W. R. 564—C. A.

Where it appeared that the customers of a firm of H. & Co. had for many years been accustomed to ask for a certain article by the name of "Coker Canvas," but it did not appear that the words "H.'s Coker Canvas" had been stamped upon any of the goods of the firm or advertised as a trade mark:—Held, that there had been no use by the firm of the words "H.'s Coker Canvas" as a trade mark. *Hayward's Trade Mark*, *In re*, 54 L. J., Ch. 1003; 53 L. T. 487.

Semble, user before the act of a word as part of a trade mark, is not sufficient to render the word registrable as a mark. *Rose* v. *Evans*, 48 L. J., Ch. 618.

Whether the scientific name of a particular tree, limetta, is a distinctive word capable of registration as an old mark in respect of lime-juice, a product of the tree, or preparation of lime-juice—quære. *Ib.*

—— **Alone, not in Combination.**]—To entitle "any special and distinctive word or words" to be registered as a trade mark under the Trade Marks Registration Act, 1875, s. 10, they must have been used alone as a trade mark before the passing of the act and not merely in combination with other words. *Davis* v. *Harbord*, 60 L. J., Ch. 16; 15 App. Cas. 316; 63 L. T. 389—H. L. (E.)

P. in 1876 registered "braided fixed stars" as a trade-mark for matches, alleging that he had used it as a trade mark before the passing of the act of 1875. He also at the same time registered a label enveloping the boxes in which his matches were sold, which contained the words "braided fixed stars" in two places so as to be conspicuous on each side of the boxes, but also contained a number of other words. It was shown that at the time when P. introduced the term "braided fixed stars" the term "fixed stars" was known in the trade as denoting a particular class of fusees, and that he had just bought a patent for enveloping the stems of fusees with wire by means of a braiding machine. This patent expired in August, 1881. It appeared from the evidence that P. had not before the act used "braided fixed stars" separately as a trade mark, or otherwise than as a part of the above-mentioned label. In October, 1881, an application was made by a rival trader to expunge the registration:—Held, that the registration must be expunged, for that to entitle P. to register these words as a trade mark he must before the act have used them as such alone, and not merely in conjunction with other words. *Palmer's Trade Mark*, *In re*, 24 Ch. D. 504; 50 L. T. 30; 32 W. R. 306—C. A.

C. & Co. in 1876 registered as a trade mark the words "Excelsior Spring Mattress." In 1883 they commenced an action in the Palatine Court of the Duchy of Lancaster against B. to restrain him from using their trade mark "Excelsior." B. moved to remove the trade mark from the register on the ground that the word "Excelsior" had not been used as a trade mark before the passing of the act of 1875. It appeared that the word had been used on the bills and notices, but always applying to a mattress made under a patent of B.'s predecessors in business which expired in 1883; that it had been used in combination with a device of a man and a banner on metal plates which were affixed to the mattresses; that an indiarubber stamp containing the words alone had been made, and was usually impressed upon the side of the mattress, and that a photograph was constantly used in selling the goods which showed the mattress with a label attached,

having on it only the words "Excelsior Spring Mattress":—Held, that there had been sufficient user as a trade mark and the mark was rightly put on the register. *Chorlton's Trade Mark, In re*, 53 L. T. 337; 34 W. R. 60.

Foreign User.]—In 1844 the predecessors in business of L. and K. invented a trade mark, and used it on all the articles manufactured by them. L. and K. registered this in 1880. M. now applied for the registration of a trade mark identical with that of L. and K., with the exception that he substituted his own name for that of "Murray and Lanman," which appeared in the original trade mark. He alleged foreign user since 1869, and that he had registered abroad, and claimed to have his trade mark registered here as an old mark under the "three-mark rule":—Held, that the resemblance between the two trade marks was so close that the later one must have been copied from the earlier one; that foreign user alone could not entitle the applicant to registration, or bring him within the operation of the "three-mark rule" as being contemporaneous user before the Trade Mark Act, 1875. *Munch's Application, In re*, 50 L. T. 12.

Abandonment—Evidence of Intention to Abandon.]—An application was made to register the word "emollio" as a trade mark in respect of "an article of perfumery," on the ground that the word was "a special and distinctive word used as a trade mark before the 13th August, 1875," within the meaning of s. 64, sub-s. 3, of the Patents, Designs, and Trade Marks Act, 1883. The word in question had been used on the labels in connection with a perfumed cream by the applicant's father and predecessor in business, who died in 1867. It was doubtful whether, subsequently to that date, there had been any sale of the article. In 1870 the applicant had destroyed all the labels which had "emollio" upon them, and the word was never subsequently used upon any perfumed cream. Since 1881 the applicant had sold a solid tablet contained in boxes, the covers of which were inscribed with "emollio tablet, registered." Certain price lists of perfumery dealers, issued in 1874 and subsequently, referred to emollio perfumed cream and emollio tablet. The registration was opposed by persons who had sold a soap by the name of "emolline," on the ground that the use of the word "emollio" as a trade mark previously to 1875 had been abandoned:—Held, that the use of the word "emollio" on the labels on the perfumed cream had been abandoned, not only by cessation of the user, but also by the destruction of the labels in 1870, whereby an intention to abandon was clearly indicated. Quære, whether a word like "emollio," descriptive of the effect of using the particular article, could be considered to be "used as a trade mark" within the meaning of s. 64, sub-s. 3, of the act; and also whether the use of the word as claimed would not be "calculated to deceive" within the meaning of s. 73. *Grossmith's Trade Mark, "Emollio," In re*, 60 L. T. 612.

vi. *Words Publici Juris.*

What are.]—The test whether a fancy name adopted by a manufacturer as a trade mark for certain goods has become publici juris is the question whether the use of it by other persons in connection with the same goods is calculated to deceive the public, so as to induce them to believe that in purchasing the goods so named they are purchasing goods of the original manufacturer. Consequently, a trade mark may have become publici juris among a certain class, as between the wholesale and retail dealers who will not be deceived by it, and yet may not have become publici juris as between the retail dealers and their ordinary customers. The misrepresentation, such, for example, as falsely calling himself a patentee, which will disentitle a person to relief in equity in respect of an infringement of his trade mark, must be such a misrepresentation as would prevent him from recovering nominal damages in an action brought to establish his right to the trade mark. *Ford* v. *Foster*, 41 L. J., Ch. 682; L. R. 7 Ch. 611; 27 L. T. 219; 20 W. R. 818.

Where a word which has been used by the inventor in connection with a particular class of goods, but has not been registered as a trade mark, is made use of by another, not with any fraudulent intention of counterfeiting the goods of the inventor, but to denote the quality and character of the article sold, and has come to be so understood, it becomes publici juris and cannot thereafter be registered as a trade mark. *National Starch Manufacturing Co.* v. *Munn's Patent Maizena and Starch Co.*, 63 L. J., P. C. 112; [1894] A. C. 275; 6 R. 462—P. C.

Where the inventor, throughout a period of twenty-four years, during which he might have registered the word as a trade mark, takes no step to interfere with its use by other persons in a particular country while protecting it in other places, it may be presumed that it was his intention to allow the word to become publici juris in that country. *Ib.*

New Article named by Inventor.]—If a person who invents a process for making a new article invents at the same time a new name for describing such article, and the article comes to be known by that name only, he cannot afterwards, when everybody is at liberty to make that article, claim a monopoly in the name; therefore, the defendants were not, by using the name, "valvoline," which was the only name by which the substance in question was known, infringing any rights of the plaintiffs, or representing their goods as made by the plaintiffs, and that the fact that the plaintiffs had in consequence of the registration enjoyed a practical monopoly of the name for five years did not, as the name had been improperly put in the register, give them any better right than they would otherwise have had. *Leonard* v. *Wells, Leonard's Trade Mark, In re*, ante, col. 164.

Name of Patented Article.]—Semble, that the name by which a patented article is generally known, and which is therefore descriptive of it, becomes publici juris at the expiration of the patent, and cannot properly be registered as a trade mark. *Ralph's Trade Mark, In re*, 53 L. J., Ch. 188; 25 Ch. D. 194; 49 L. T. 504; 32 W. R. 168; 48 J. P. 135.

A patentee has no exclusive right to the use of words properly descriptive of a patented article, after the patent has expired. *Palmer's Trade Mark, In re*, 24 Ch. D. 504; 50 L. T. 30; 32 W. R. 306—C. A.

User in Combination — No Exclusive Right

to.]—In March, 1885, H. began to sell a preparation for the manufacture of herb beer under the name "herbalin." In June, 1885, M. began to sell a similar preparation under the name "herbaline." H.'s trade was not large, and it appeared from the evidence that M. had not intended to appropriate the word "herbalin." In June, 1887, H. registered a trade mark consisting of a ship and the word "herbalin" under it, and subsequently brought an action against M. to restrain the infringement thereof. M. moved to expunge the word "herbalin" from the register:—Held, that the word "herbalin," being descriptive, could not properly have been registered alone:—Held, also, that though the word "herbalin" could be registered as part of a trade mark, inasmuch as it was (upon evidence) common to the trade, a note must be entered on the register that H. was not entitled to the exclusive use of the word. *Humphries* v. *Taylor Drug Co.* 59 L. T. 820.

Evidence as to—Books of Registrar.]—The books of the registrar of trade marks which show marks the registration of which has been refused, are not evidence that these marks are publici juris. *Orr-Ewing* v. *Johnston*, 13 Ch. D. 434, 442.

c. Practice.

i. *Generally.*

Discretion of Comptroller.]—The Patents, Designs, and Trade Marks Act, 1883, confers upon the comptroller a discretion whether to register a trade mark or not, and he ought to refuse registration where it is not clear that deception may not result. *Eno* v. *Dunn*, 15 App. Cas. 252; 63 L. T. 6; 39 W. R. 161—H. L. (E.)

The comptroller is justified in refusing to register a label so nearly resembling another label already on the register as to be calculated to deceive, until the opinion of the court should have been obtained authorising him to do so. *Price's Patent Candle Co., In re*, 54 L. J., Ch. 210; 27 Ch. D. 681; 51 L. T. 653. See also *Speer, In re*, ante, col. 166.

Appeal to Board of Trade referred to Court—Evidence.]—Since the passing of the Trade Mark Rules, 1890, the board of trade may, on appeal to them from the comptroller, give directions as to evidence, or if the board refers the appeal to the court, the court may be left to direct what evidence is to be adduced. *Roger's Trade Mark, In re*, 13 R. 90.

Opposition to Application—Jurisdiction of Court.]—Where, upon opposition to an application to register a trade mark, the case stands for the determination of the court under s. 69, sub-s. 4, of the Patents, Designs, and Trade Marks Act of 1883, the court has jurisdiction to enter into and determine all questions arising upon the objections, including, in a case where the comptroller has already registered the mark, the question whether the mark has been rightly admitted on the register. *Arbenz, In re*, 56 L. J., Ch. 524; 35 Ch. D. 248; 56 L. T. 252; 35 W. R. 527—C. A.

An application was made by the Sanitas Company to register the word "Sanitas" as a trade mark for goods in class 3, under the Patents, Designs, and Trade Marks Act, 1883. The comptroller-general refused to proceed with the registration, on the ground that there were already on the register two trade marks comprising the word "Sanitas." On the matter being referred to the court, in addition to the objection taken by the comptroller-general, two further objections were raised, and it was contended that no objections ought to be raised that had not been taken by the comptroller:—Held, that any objection could be entertained by the court, and that the refusal to register, based on the previously registered trade marks, was perfectly right. "*Sanitas*" *Trade Mark, In re*, 58 L. T. 166.

Discretion to refuse to direct Registration—Similarity to Mark already on the Register.]—When an application is made to direct the comptroller-general of patents to proceed to register a trade mark which has been objected to on the ground of its similarity to a trade mark already on the register, the court has a discretion to determine whether it will direct registration, though the case may not be one where the registration is actually prohibited by the Patents, Designs, and Trade Marks Act, 1883. *Australian Wine Importers Trade Mark and Mason, In re*, 58 L. J., Ch. 380; 41 Ch. D. 278; 60 L. T. 436; 37 W. R. 578—C. A.

O. registered a trade mark for "spirits" in 1881, and another in 1882. In each there was a representation of a golden fleece, with the words "Golden Fleece," adding in one case the words "Old Jamaica Rum," and in the other "Pure Old Scotch Whiskey." In May, 1887, a company which had been formed in that year applied for registration of a trade mark for "wines," with the representation of a golden fleece and the words "Golden Fleece, Australian Champagne, Sparkling Verdeillio." M., who was O.'s successor in business, opposed the registration:—Held, that if wines were of "the same description of goods" as spirits within the meaning of s. 72 (and, semble, they were) the registration of the company's trade mark was prohibited by the act; but if they were not, still the similarity of the marks was such as, having regard to the similarity of wines and spirits, to be calculated to induce the public to believe the company's wines to be the goods of the same persons as M.'s spirits, and that the court ought not to direct the company's mark to be registered. *Ib.*

Sheffield Register—Old Corporate Mark—Jurisdiction of Cutlers' Company.]—The Cutlers' Company, on the application of L., registered in the Sheffield Registry an old corporate mark of a pipe and dart, of which he was primâ facie owner, notwithstanding notice of opposition by W., the owner of the mark of a pipe only, and without hearing W. W. appealed to the comptroller, who decided that no appeal lay to him against the registration. W. then applied to the court:—Held, that the Cutlers' Company acted rightly in registering L.'s mark without hearing W. in opposition, as the registration was a ministerial duty under sub-s. 2 of s. 81 of the Patents, Designs, and Trade Marks Act, 1883; that there was no appeal to the comptroller; and that L.'s mark was not so similar to that of W. as to be calculated to deceive. *Lambert's Trade Mark, In re*, 37 W. R. 154.

On an application for registration for metal goods in class 5 which were not included in the Cutlers' Company's Act:—Held, that the Cutlers'

Company were not entitled to oppose with respect to goods not included in their acts, and that registration in class 5, limited to the specified articles, should be allowed. *Rosing's Application, In re*, 54 L. J., Ch. 975, n.—C. A.

Refusal by Comptroller to Register—Appeal—Board of Trade.]—A person whose application to register a trade mark has been refused by the comptroller cannot appeal direct to the court from such refusal, as a person aggrieved by the omission of his name from the register under s. 90 of the Patents, Designs, and Trade Marks Act, 1883, but must take the special course prescribed by s. 62, sub-s. 4, of appealing to the board of trade from the comptroller's decision. *"Normal" Trade Mark, In re*, 56 L. J., Ch. 513; 35 Ch. D. 231; 56 L. T. 246; 35 W. R. 464—C. A.

House of Lords varying Original Order of Court.]—Where, under the provisions of the Trade Marks Registration Acts, the registrar cannot proceed with the registration of certain marks without the leave of the court, and the original order of the court is varied by the house of lords, it is necessary that the order of the house of lords should be made an order of the chancery division of the high court. *Orr-Ewing's Trade Marks, In re*, 28 W. R. 412.

Appointment of Agent—Notices—Fresh Application.]—There is nothing in the Trade Marks Act of 1883 to take away the common law right of an applicant for registration who is sui juris to appoint an agent for all the purposes of his application, and if he does so the notices required by the act may properly be sent to him through such agent. If such agent does not inform the applicant of notices received the applicant is entitled to make a fresh application for registration notwithstanding s. 76 of the act of 1883. *Jackson* v. *Napper, Schmidt's Trade Mark. In re*, 56 L. J., Ch. 406; 35 Ch. D. 162; 55 L. T. 836; 35 W. R. 228.

Registration not completed within Twelve Months—Abandonment.]—An application for registration of a trade mark was made in the year 1879, but registration was not effected until February, 1885, after the commencement of the Patents, Designs, and Trade Marks Act, 1883. Sect. 63 of that act provides that "where the registration of a trade mark has not been and shall not be completed within twelve months from the date of the application, by reason of default on the part of the applicant, the application shall be deemed to be abandoned;" and s. 113 provides that the repeal of previous enactments therein contained shall not affect any application pending:—Held, that the effect of s. 63 and s. 113 read together was that such pending applications for registration as were not completed by registration within the period of twelve months prescribed by s. 63 came within the operation of the last-mentioned section, that the registrar of trade marks was therefore bound to treat the application as abandoned, and that the mark was improperly registered. *Hayward's Trade Mark, In re*, 54 L. J., Ch. 1003; 53 L. T. 487.

Sect. 63 of the Trade Marks Act of 1883 is retrospective in its operation. S., a foreigner, applied in 1876, through an English trade-mark society, for registration of a trade mark. The Cutlers' Company gave notice of a similar mark which had been assigned by them, and the registrar thereupon wrote to S., at the society's address, to say that he could not proceed with the application until S. had obtained the leave of the court. This letter was never communicated to S. by the society, who proceeded no further with the application; but S. having seen the advertisement of his application in the "Trade Marks Journal," believed that his mark had been registered, and N., an agent of his, sold goods in England marked with his mark. In the year 1877 the plaintiffs registered a mark resembling the cutlers' mark, and in 1883 brought an action against N. to restrain him from infringement, and S., finding his mark was not on the register, then made a fresh application for registration:—Held, that S. was "in default," and that his original application must be deemed to have been "abandoned" within the meaning of s. 63 of the act of 1883, and could not now be proceeded with. *Jackson* v. *Napper*, supra.

Application by Foreigner—Mark Registered Abroad—Foreign Registration more than Four Months before Application in England.]—In 1885 an American company registered in America a trade mark which had been used by them in that country since 1879. In 1888 they applied for registration of the same mark in England, under s. 103, sub-s. 3, of the Patents, &c., Act, 1883, which provides that a person who has applied for registration of a trade mark in any foreign state with the government of which her majesty is pleased to make any arrangement for the mutual protection of trade marks shall be entitled to registration in this country, provided that his application is made within four months of his applying for registration in the foreign state. At the passing of the act of 1883 no such arrangement existed between this country and the government of any foreign state, but a convention had in 1883 been entered into between certain countries, to which it was contemplated this country might accede, and which was in fact acceded to by this country in 1884, and by America in 1887. It provided that every trade mark registered in the country of origin should be admitted for registration in the other countries of the union:—Held, that the terms of the convention were not carried out by the statute, but that the application could only be dealt with under the statute, according to the true construction of which the application to register in this country, not having been made within the prescribed time, must fail. *Californian Fig Syrup Co.'s Trade Mark, In re*, 58 L. J., Ch. 341; 40 Ch. D. 620; 60 L. T. 590; 37 W. R. 268.

Cancelling of Registration—Lapse of Five Years—Registration of Mark not authorised to be Registered.]—P. registered "braided fixed stars" as a trade mark for matches. After the expiration of five years another manufacturer applied to cancel the registration, on the ground that the words could not be registered as a trade mark, for that "fixed stars" was a name well known in the trade for a particular description of matches before P. used the alleged trade mark, and that the words "braided fixed stars" were only a proper description of a kind of matches made by P. under a patent which had recently expired, and which matches were at

the time of the registration well known in the trade by that name, and differed from the "fixed stars" formerly known by having a braided stem, which was the subject of the patent:—Held, by Chitty, J., that even if s. 3 of the Trade Marks Registration Act, 1875, did not make the lapse of five years conclusive evidence that the alleged trade mark was a proper trade mark, which, semble, it did, it at all events excluded evidence to show that words which primâ facie appeared to be fancy words and proper to constitute a trade mark were not capable of constituting one. His lordship therefore declined to hear evidence on the subject, and refused the application. But held, on appeal, that a mark which is not authorised to be registered as a trade mark does not acquire the character of a trade mark by being on the register for five years, and may be removed from the register though that period has elapsed, and that evidence ought therefore to have been admitted which went to show that at the time of the registration the words "braided fixed stars" were merely descriptive of a kind of matches well known in the trade. *Palmer's Application, In re*, 51 L. J., Ch. 673; 21 Ch. D. 47; 46 L. T. 787; 46 J. P. 772—C. A.

Whether a person sued for using a name which has been five years on the register as a trade mark can defend himself on the ground that it is not a trade mark, quære. *Ib.*

Registration as to particular Articles in Class.]—A trade mark registered under one of the classes given by the rules, but in respect to some particular articles in that class, will be protected under the Patents, Designs, and Trade Marks Act, 1883, as to those articles only. *Jay* v. *Ladler*, 40 Ch. D. 649; 60 L. T. 27; 37 W. R. 505.

—— **Common Law Rights.**]—The common law rights of a tradesman using a trade mark are not affected by the registration of the trade mark, so that, if he has acquired a right to a trade mark as to a certain class of goods, and the trade mark as registered is confined to a part of that class of goods, he will be entitled to protection for the whole class of goods. *Ib.*

Infringement Action—Joint Right to Trade Mark—Parties to Suit.]—A tradesman who carried on business at several places, by will bequeathed to A. his house of business at W., and to B. his house of business at L., and he had been in the habit of using a trade mark on the articles manufactured and sold by him. The privilege of using this trade mark had been infringed by the defendants. A. and B. instituted suits against these parties to restrain the further use of the trade mark by them. They both had prayed accounts against these parties for the goods sold by them having the trade mark. The defendants raised the question, by way of demurrer, that in both suits by A. and B., as they had not separately the exclusive right to use the trade mark, both were necessary parties in each suit:—Held, that the two suits were well constituted, and each could be maintained. *Dent* v. *Turpin*, 30 L. J., Ch. 495; 7 Jur. (N.S.) 673; 4 L. T. 637; 9 W. R. 548.

ii. *Rectification of Register.*

Jurisdiction—Registered Proprietor domiciled out of Jurisdiction.]—The high court of justice in England has jurisdiction under the Patents, Designs, and Trade Marks Acts, 1883 and 1888, to rectify the register of trade marks kept under those acts, notwithstanding that the registered proprietor of the mark affected is domiciled in Scotland or Ireland. *King & Co.'s Trade Mark, In re*, 62 L. J., Ch. 153; [1892] 2 Ch. 462; 67 L. T. 33; 40 W. R. 580—C. A.

—— **Service of Notice of Motion to expunge—Registered Proprietor out of Jurisdiction.**]—No special procedure is prescribed by the acts or rules as to the service on parties interested of notice of application to expunge a trade mark. Therefore it is sufficient if such notice is given as is required by natural justice. Where the registered proprietor of a trade mark registered in England under the Patents, Designs, and Trade Marks Act, 1883, was a British subject domiciled in Ireland out of the jurisdiction of the English court, and therefore could not be served with a notice of motion to expunge the trade mark, it was held sufficient to send him a copy of the notice of motion with a letter informing him that proceedings had been commenced which might affect his interests; and the court heard the motion and made an order, although the registered proprietor did not appear. *Ib.*

Onus of Proof.]—Where a person seeks to remove a trade mark from the register, the onus is upon him to show that it ought to be removed, but though his own evidence may be insufficient for the purpose, the onus is discharged if it appears from the evidence of the owner of the mark that it ought not to be on the register. *Leonard* v. *Wells, Leonard's Trade Mark, In re*, 53 L. J., Ch. 603; 26 Ch. D. 288; 51 L. T. 35—C. A.

Limiting Mark to Particular Goods.]—See *Anglo-Swiss Milk Co.* v. *Metcalf*, ante, col. 170.

Interlocutory Application before Trial.]—See *Gianacli's Trade Mark, In re*, ante, col. 147.

Application within what Time—Lapse of Five Years.]—The right to the exclusive use of a trade mark, after the expiration of five years from the date of registration, given by the Trade Marks Act, 1883, s. 76, is subject to and controlled by s. 90, and therefore any person who considers himself aggrieved by any entry made in the register without sufficient cause is not precluded by the expiration of five years from the date of such registration from showing that the mark ought not to have been registered. *Lloyd's Trade Mark, In re, Lloyd* v. *Bottomley*, 54 L. J., Ch. 66; 27 Ch. D. 646; 51 L. T. 898.

Sections 3 and 4 of the Trade Marks Registration Act, 1875, do not confer on the first or subsequent registered proprietor of a trade mark who has been on the register for five years the absolute right to the exclusive use of his trade mark as against all the world; the intention of the sections is merely to afford him assistance in bringing an action for infringement by dispensing with the necessity of his adducing evidence in that action of exclusive user; and the sections are no bar to an application under s. 5 to rectify the register on the ground that the trade mark is improperly on the register or should be restricted to certain goods. *Edwards* v. *Dennis, Edwards' Trade Mark, In re*, 55 L. J.,

Ch. 125; 30 Ch. D. 454; 54 L. T. 112—C. A. Reversing 1 Cab. & E. 428.

The registration of a mark as a trade mark and the lapse of five years do not, under s. 76 of the Trade Marks Act, 1883, confer on the person who has made the registration an indefeasible title to the use of the mark as a trade mark if, by reason of its being at the time of registration in common use in the trade, it ought not to have been registered. The lapse of five years cannot make good a registration which was in its inception invalid. A trade mark which was originally improperly registered ought even after the lapse of five years, to be removed from the register, because the registration might enable the person who has made it to commit a fraud. *Wraggs' Trade Mark, In re*, 54 L. J., Ch. 391; 29 Ch. D. 551; 52 L. T. 467.

—— **Old Trade Mark or mere Design.**]—A word which has been registered under the trade marks act as an old trade mark, and which has remained on the register for five years unchallenged, will nevertheless be expunged if it be proved to have been used prior to its registration not as a trade mark, but to specify a particular pattern or design. *Harrison, McGregor & Co.'s Trade Marks, In re*, 59 L. J., Ch. 22; 42 Ch. D. 691; 61 L. T. 484.

Material Misrepresentation.]—The plaintiffs in 1877 registered as a "new" trade mark the device of a lighthouse on a rock, enclosed in two concentric circles. The two circles were in fact common to the trade in which the plaintiffs were engaged. In 1888 the plaintiffs registered a label on which was printed (inter alia) their trade mark. In their application for this registration they stated that they had used the label for upwards of ten years before August, 1875. This statement was in fact untrue, inasmuch as they had not used the trade mark till 1877, and they had not used the rest of the label before 1870. In the opinion of the court the misstatement was not made fraudulently, but through carelessness. In 1888 the plaintiffs brought an action against the defendants (who were engaged in the same trade) for infringement of both the trade mark and the label. The defendants then moved to expunge both registrations:—Held (as to the trade mark), that by reason of the circles being in common use in the trade, the lighthouse with the circles ought never to have been registered, and that, therefore, the lapse of five years since the registration was not, under s. 76 of the Trades Mark Act of 1883, a bar to the defendants' application:—Held (as to the label), that the registration must be expunged, on the ground that it had been obtained by means of material misrepresentation. *Baker* v. *Rawson*, 45 Ch. D. 519; 63 L. T. 306.

—— **Overlooking Advertisement.**]—There is no obligation on persons interested to see an advertisement in the "Trade Marks Journal" of an application for registration, and the fact that they have not seen such an advertisement or opposed the application is no bar to their applying to have the mark removed from the register after the registration is complete. *Hyde & Co.'s Trade Mark, In re*, 54 L. J., Ch. 395, n.; 7 Ch. D. 724; 38 L. T. 777.

Non-user—Abandonment.]—In order to deprive a manufacturer of his right to a trade mark, the use of which has been practically given up for a period of five years, mere discontinuance of user for lack of demand, though coupled with non-registration, and non-assertion of any right is not enough; there must be evidence of distinct intention to abandon. In 1874, A., a German soap manufacturer, adopted a trade mark for a particular kind of soap, which for about two years was manufactured and sent to this country in large quantities for exportation to Australia, but from 1876 until 1882 the manufacture and sale of soap thus marked fell off, until it practically ceased, and the existence of the particular mark was in May, 1882, forgotten by A. In 1880, B., a manufacturer of soap in the same part of Germany, adopted, in complete ignorance of A.'s mark, a precisely similar mark for soap sent to this country for exportation to Australia, and in August, 1880, he registered his mark under the trade marks act in this country. In July, 1882, after the commencement of proceedings by B. to restrain an infringement of his registered trade mark by A., A. applied for registration of his mark of 1874. Upon application (1) by B. to restrain this infringement of his trade mark; (2) by A. to have his trade mark registered; (3) by A. to have B.'s trade mark removed from the register:—Held (1), that mere non-user by A. of his mark between 1876 and 1882, though coupled with non-registration, did not, having regard to the fact that he had not ceased to carry on his business, and had not broken up the mould, and that a number indicating soap thus marked was retained on his price lists, did not amount to an abandonment by A. of the mark, so as to give B. any exclusive right to his registered mark. (2) That the existence upon the register of B.'s mark did not prevent the court from granting leave for the registration of A.'s mark. (3) That previous bonâ fide registration of B.'s mark in ignorance of any claim by A., followed by large dealings under that mark, prevented A., after the lapse of two years, from getting B.'s mark expunged from the register. *Monson* v. *Boehm*, 53 L. J., Ch. 932; 26 Ch. D. 398; 50 L. T. 784; 32 W. R. 612.

Extension of Time.]—Where an application for registration of a trade mark was abandoned within the meaning of s. 63 of the Trade Marks Act, 1883, the court in exercise of the discretion given by s. 90 of the act, instead of directing the mark to be expunged, ordered that the register should be rectified by inserting an entry directing that the five years mentioned in s. 76 should begin to run from the date of such entry. *Hayward's Trade Mark, In re*, infra.

Mark calculated to Deceive.]—A firm of distillers registered as a trade mark for their cherry brandy, a hunting-scene in connection with the word "Sportsman." Their cherry brandy consequently became generally known as "The Sportsman's," and also as "Huntsman's" and "Hunter's" cherry brandy. Some years afterwards another firm of distillers registered a trade mark consisting of a hunting scene, and the words "Huntsman's cherry brandy." There was, however, no resemblance between the two hunting scenes:—Held, that, notwithstanding the dissimilarity in the designs, the latter trade mark was got up for the purpose of passing off cherry brandy as that manufactured by the proprietors of the first trade mark, and was calculated to deceive; and that the register must be

rectified by striking out the latter trade mark. *Barker's Trade Mark, In re*, 53 L. T. 23. See also *Blair* v. *Stock*, ante, col. 156.

Where a trade mark contained the words "sole maker" immediately preceding words descriptive of an article, and it was admitted that the persons registering the mark were not the sole makers of that article, the court ordered the mark to be expunged from the register as being calculated to deceive. *Hayward's Trade Mark, In re*, 54 L. J., Ch. 1003; 53 L. T. 487.

Y. & Co. registered a trade mark for fermented liquors, consisting of three triangles, two placed on a third, the space in the centre being blank. J. B. subsequently registered another mark for bottled beer, consisting of three triangles interlaced, the space in the centre containing a stag's head:—Held, on the authority of *Worthington's Trade Mark, In re* (ante, col. 169), that, having regard to the use which the mark subsequently registered might be put to by being coloured, it was calculated to deceive, and that so much of the mark as consisted of the triangular arrangement must be expunged from the register. *Biegel's Trade Mark, In re*, 57 L. T. 247.

Misleading Use of Words "Trade Mark."]—An application by D., a British cigar manufacturer, to register as a new mark for manufactured tobacco a label containing the words "Star of Hope," and a picture, one item of which was a small six-pointed star, was opposed by W. as the registered proprietor of two marks for the same class of goods, one registered in 1877 as an old mark, and consisting of an eight-pointed star, the other registered in 1886 as a new mark, and consisting of a pictorial label, and by the side of the label an eight-pointed star, to which the words "trade mark" were attached. From 1870 to 1884 W.'s first mark was used, upon cigars manufactured for W. by an English firm, in conjunction with the name of a fictitious Spanish firm and the word "Habana"; but W.'s trade in cigars was merely subsidiary to his trade in packet tobacco, on which this mark was also used. W.'s goods were frequently ordered by the public as "star" goods. D. moved to expunge these marks:—Held, first, that D.'s mark was not calculated to deceive apart from W.'s claim to the exclusive right to the name and design of a star, and that it was entitled to registration. Secondly, distinguishing *Wood's Trade Mark, In re* (ante, col. 129), that W.'s first mark was not invalidated on the ground of deceptive user, inasmuch as the only representation made by the "star" was the true representation, that the goods were sold by W., and the user in cigars was comparatively small. Thirdly, that W.'s second mark was misleading by reason of the position of the words "trade mark," and ought to be expunged to the extent of the pictorial label. *Dexter's Application, In re; Wills's Trade Marks, In re*, 62 L. J., Ch. 545; [1893] 2 Ch. 262; 68 L. T. 793. *Cp. cases*, ante, col. 109.

Substitution of one Name for another.]—R. & Co., wine and spirit merchants at Cognac, for some years exported to M. & Co., wine and spirit merchants at Madras, brandy, which was sold by M. & Co. in India, with a label affixed, bearing a trade mark of a red Maltese cross, and the name M. & Co. This trade mark was first put on the bottles in 1875 by R. & Co. at the instance of M. & Co., but the court found that so much of the mark as consisted of a red Maltese cross had been previously used by R. & Co., and that the intention of R. & Co. was that this mark should be exclusively used by M. & Co. so long only as they took their brandies from R. & Co., after which it should be the mark of R. & Co. In April, 1879, M. & Co. wrote to R. & Co., requesting them to register the mark in England for M. & Co., but in September, 1879, R. & Co. registered the mark of the red Maltese cross in their own names. M. & Co. only discovered this in 1882, after the business relations between the two firms had come to an end, when they applied for rectification of the register by striking out the names of R. & Co. and substituting the names of M. & Co. as owners of the trade mark, but the court refused to strike out the names of R. & Co. on the ground that they had only registered their old mark, and not the mark used by M. & Co.:—Held, also, that even if the names of R. & Co. had been expunged from the register, the court would not, on their application, have inserted the names of M. & Co., inasmuch as the requirements of the Trade Marks Registration Act, 1875, and the rules thereunder as to advertisements, &c., in case of an application to register a trade mark, had not been complied with. *Rivière's Trade Mark, In re*, 55 L. J., Ch. 545; 53 L. T. 237—C. A. See also *Wellcome's Trade Mark, In re*, ante, col. 146.

—— **Registration without Proprietor's Consent.**]—M. obtained the registration in his own name of a trade mark belonging to L. without the knowledge or consent of L. Upon application for relief by L.:—Held, that the register could not be rectified by transferring the registration into the name of L. *Marler's Trade Mark, In re, Lawrence, Ex parte*, 44 L. T. 98, n.; 29 W. R. 392, n.

Entry in Wrong Name—Rectification or Fresh Application.]—Where trade marks belonging to A. were registered by mistake in the name of B., and an application was made by A. and B. that B.'s name should be expunged and A.'s name substituted, the application was refused so far as it asked for the entry in A.'s name, and A. was directed to proceed in the usual way to obtain registration. *Kingsford, Ex parte*, 61 L. T. 426.

The sole consignee in England of wines grown at the Auldana vineyards, registered in his own name the word "Auldana" as a trade mark in order to protect the wines coming from that vineyard during the continuance of the agreement constituting him consignee. He became bankrupt, and his trustee sold his business and trade mark to a company who procured themselves to be registered as proprietors of the trade mark; on motion by the holders of the Auldana vineyards:—Held, that the register must be rectified by removing the name of the company and inserting instead that of the owners of the vineyards. *Australian Wine Co., In re*, 61 L. T. 427, n.

—— **In name of one Partner only Instead of that of Firm.**]—A trade mark which was the property of a partnership firm was by mistake registered as the property of one of the partners trading under the style of the firm. Upon application to the court by the firm, it was ordered that the register be rectified by cancelling the name of the registered proprietor and regis-

tring the names of all the partners trading under the style of the firm. *Rust's Trade Mark, In re*, 44 L. T. 98, n.; 29 W. R. 393, n.

Certain trade marks belonging to a foreign firm trading with England had, owing to a mistake on the part of the managing members of the firm, been registered in the name of the senior member as sole proprietors. The senior member having died, and the whole goodwill of the business being the property of the firm:—Held, that the proper course to adopt was for the firm to take an assignment of the trade mark from the legal personal representative in England of the deceased. *Farina's Trade Marks, In re*, 44 L. T. 99, n.; 29 W. R. 391.

Rectification only in case of Error, not on Devolution of Interest.]—The provisions of the Trade Marks Registration Act, 1875, for the rectification of the register by the court, apply only to cases of mistake or error in the original registration, and do not extend to cases where devolution of interest makes it desirable to alter the registration of the name of the proprietor of a trade mark. *Ward, Sturt & Sharp's Trade Mark, In re*, 50 L. J., Ch. 347; 44 L. T. 97; 29 W. R. 395.

—— **Old Mark—Change in Firm Name and Business Address.**]—The court allowed the proprietor of a trade mark registered as having been used prior to August 13th, 1875, to alter it on the register by striking out the old firm's name and address and substituting the present firm's name and address. *Brown's Trade Marks, In re*, 8 R. 762; 71 L. T. 156.

—— **Change of Proprietor's Name—Jurisdiction.**]—A change of name of the registered proprietor of a trade mark authorises the comptroller to cause the new name to be entered on the register as that of a person who "becomes entitled by operation of law to the trade mark" within the meaning of s. 87 of the Patents, Designs, and Trade Marks Act, 1883, as amended by the act of 1888. Neither s. 90 or s. 92 of the Patents, Designs, and Trade Marks Act, 1883, applies to the case. *Patent Plumbago Crucible Co.'s Trade Marks, In re* (7 Rep. Pat. Cas. 282) (s. 90), and *National Wholesale Tea Supply Association's Trade Marks* (10 Rep. Pat. Cas. 164) (s. 92), not followed. *New Ormonde Cycle Co.'s Trade Mark, In re*, 65 L. J., Ch. 785; [1896] 2 Ch. 520; 75 L. T. 50.

—— **Clerical Errors—Essential Particulars.**]—A trade mark for sewing-cotton, as registered, consisted of a lion surrounded with the inscription in Russian, "Ermen and Roby, Manchester." The initial "E" was, however, in the English and not in the Russian character. The owners of the mark had for two years used it in the Russian trade, with the alteration of the English E to the Russian E, and with the insertion of the word "of" in Russian before the word "Manchester." The comptroller having declined to alter the register under s. 91, application to the court was made by the owners, under s. 92 of the Patents, &c., Act, 1883, for leave to add to and alter the registered mark in the manner in which it had been used, and the court acceded to the application on the ground that the addition and alteration were non-essential particulars. *Ermen & Roby's Trade Mark, In re*, 56 L. J., Ch. 177; 56 L. T. 230.

Alteration of Registered Mark—Old Mark—Omitting words "Trade Mark."]—Leave to alter the registration of old marks registered in 1878 by striking out therefrom the words "trade mark" was refused, because, first, the marks being claimed as old marks should be registered just as they were used, and the proposed alteration was a material alteration; and because, secondly, there being on the mark as registered an indication of an intention to claim the device only as the trade mark, the public were entitled to have the same indication of a restrictive claim retained on the register. *Colman's Trade Marks, In re* (post, col. 198), distinguished. *Phillips' Trade Mark, In re*, 61 L. J., Ch. 40; [1891] 3 Ch. 139; 65 L. T. 373.

—— **Mark containing word "Patent"—Alteration by Striking out "Patent."**]—Labels registered in 1876, as old marks, contained the word "patent" used in connection with the description of the article to which the labels were applied. The predecessor of the registered proprietors had carried on business, and had used three of the labels therein so far back as the year 1832, but it could not now be ascertained that any letters patent had ever been granted in respect of the articles to which the labels were applied. The registered proprietors of the labels now applied, under s. 92 of the Patents, Designs, and Trade Marks Act, 1883, for leave to alter the labels by striking out the word "patent," and substituting therefor, in the case of three of the labels, the word "perfect," and in the remaining label the word "polish":—Held, that the court has power under s. 92 of the Patents, Designs, and Trade Marks Act, 1883, to give leave to add to or alter a trade mark registered as an old mark; that an old mark must be registered, and must stand upon the register, in all substantial terms, as it was used before the year 1875; and that the word "patent" being an important part of the trade mark for advertising and trade purposes, was a substantial part of the trade mark, and ought not to be struck out. *Adams' Trade Mark, In re*, 66 L. T. 610.

—— **Name or Initials of Proprietor.**]—A trade mark registered as an old mark ought to be registered and kept registered just as it was used, and, in the absence of special circumstances rendering alteration necessary, no alteration of such mark ought to be allowed. The circumstance that the proprietor of an old mark, whose name or initials form part of such mark, has transferred to another person the business in connection with which the mark has been used, is not sufficient to induce the court to allow an alteration of the mark by substituting the name or initials of the new proprietor for the name or initials of the former proprietor. *Henry Clay and Bock and Co., In re*, [1892] 3 Ch. 549; 67 L. T. 614.

User.]—Whether a mark has been used as a trade mark before August 13, 1875 (so as to be entitled to registration as an old mark under s. 64 of the act), is a pure question of fact, and the evidence that the user of the mark has been confined to packing-cases is not decisive of the question.

The words "Yorkshire relish" by themselves having only been used on packing-cases containing bottles of sauce, and with nothing to indicate

that the words were used as a trade mark or otherwise than as a description of the contents of the cases :—Held, that the words had not been used as a trade mark. *Powell* v. *Birmingham Vinegar Brewery Co.*, infra.

—— **Onus of Proof.**]—On motion to expunge a trade mark registered in 1878 on the grounds (1) that at the time when it was registered, the words had become the ordinary name of the material, and (2) that they had not been used as a trade mark at any time, the burden of proof is on the persons moving to expunge the mark to prove the use of the words as the name of the article before the years 1875 and 1878; and also that the words were not used as a trade mark before 1875. *Edgington's Trade Mark, In re*, 61 L. T. 323.

—— **"Person aggrieved" — Proprietor not "Engaged in any Business, &c."**]—The assignee of a patent for a washing machine applied to it the name of "The Home Washer," and registered the name as his trade mark in respect of it. He did not manufacture the machines, or any other goods in the same class, but granted an exclusive right to a manufacturing firm who paid him royalties. They invented and patented various improvements in the machine, and after the expiration of the patent (six years from the registration of the trade mark) they continued to manufacture the improved machines, and to describe them by the old name, but paid no royalties, and the registered proprietor had not, after a year and nine months from the expiration, begun to manufacture, though he had been in negotiation with manufacturers to do so in conjunction with him :—Held, that the former licensees (against whom the registered proprietor was moving for an injunction) were "persons aggrieved" within r. 33, and that the mark must be removed from the register on the ground that, notwithstanding the negotiations, the registered proprietor was not "engaged in any business concerned in the goods within the same class as the goods in respect to which the mark was registered." *Ralph's Trade Mark, In re*, 53 L. J., Ch. 188; 25 Ch. D. 194; 49 L. T. 504; 32 W. R. 168; 48 J. P. 135.

Semble, that a patentee is "engaged in any business, &c.," so long as he receives royalties under his patent, even though he does not himself manufacture. *Ib.*

Trade Mark used by Foreign Trader.] — R. & Co. registered a trade mark for brandy in England. M. & Co., who carried on business at Madras, but neither carried it on nor intended to carry it on in England, applied to rectify the register by striking out the name of R. & Co. and substituting that of M. & Co. as owners of the trade mark, alleging that they, M. & Co., were the owners of the trade mark, and had instructed R. & Co. to register it in the name of M. & Co., instead of which R. & Co. had registered it in their own name:—Held, that assuming M. & Co. to have no right to register the trade mark in England, it did not follow as a necessary consequence that they could not be aggrieved by its being registered here in the name of another person, and that the case must be dealt with on the merits. *Rivière's Trade Mark, In re*, 53 L. J., Ch. 578; 26 Ch. D. 48; 50 L. T. 763; 32 W. R. 390—C. A.

Old Mark—User on Packing-cases only.]—The expression "person aggrieved" as used in s. 90 of the Patents, Designs, and Trade Marks Act, 1883 (relating to rectification of registers), primâ facie includes any person who manufactures or deals in the class of goods in respect of which a trade mark is registered, and the onus of showing that such person is not prejudicially affected by such registration lies on the tradesman who has registered the mark. *Powell* v. *Birmingham Vinegar Brewery Co.*, 63 L. J., Ch 152; [1894] A. C. 8; 6 R. 52; 70 L. T. 1; 58 J. P. 296—H. L. (E.)

—— **Expunging though Re-registration possible.**]—Where a trade mark has been improperly registered, and an application to remove it from the register is made by a person aggrieved, the mark will not be allowed to remain on the register on the ground that if it were removed it could (in consequence of a change of circumstances in the meantime) be immediately re-registered on a new application: inasmuch as an opportunity must be given to the public by the insertion of the usual advertisement in the "Trade Marks Journal," to oppose the new application on any proper grounds. *Apollinaris Co.'s Trade Marks, In re*, 61 L. J., Ch. 625; [1891] 2 Ch. 186; 65 L. T. 6—C. A.

iii. *Opposition to Registration.*

Opposed Application—Determination of Court thereon.]—In determining on an opposed application for the registration of a trade mark under s. 69, sub-s. 4, of the act of 1883, the court will not direct the comptroller to register a part of the proposed mark, but will only decide whether or not the registration of the mark, as applied for, is to be proceeded with. *Meens' Application, In re*, 60 L. J., Ch. 96; [1891] 1 Ch. 41; 63 L. T. 610; 39 W. R. 216.

—— **Directions as to Manner of Hearing.**]—The defendants in an action for infringement of trade mark having applied for the registration of the trade mark, which they had been restrained by injunction from using, an order was made that the manner in which the matter should be brought before the court should be by motion by the applicants to proceed with the registration, with liberty to either party to use the evidence in the action for infringement, and with further provisions as to evidence. *Johnston's Trade Mark, In re*, 43 L. T. 672.

—— **Practice as to determining Mode of Trial.**]—Where an application is made for registration of a trade mark, and such application is opposed by the proprietors of a registered trade mark, and the case stands for the determination of the court, under the Trade Marks Rules, 1876, r. 16, the proper course is for the applicant to apply in chambers for directions as to the mode of trial, and not for the opponent to move to restrain the applicant from registring his mark. *Simpson's Trade Mark, In re*, 15 Ch. D. 525; 42 L. T. 675; 28 W. R. 760.

Amendment of Notice of Opposition—Appeal referred to Court—Evidence—Jurisdiction.]—On an application to register coming on for hearing before the registrar of trade marks, the opponents wished to adduce further evidence, but the registrar refused to admit it, on the

ground that it referred to matters not mentioned in the notice of opposition. The opponents did not ask for an adjournment or liberty to amend their notice of opposition, but went on with the hearing, and appealed to the board of trade from the order of the registrar allowing the registration. The board referred the appeal to the court, whereupon the opponents gave notice of motion for the hearing of the appeal, and they also gave notice of motion for liberty to amend their original notice of opposition. On the latter motion coming on for hearing:—Held, that the jurisdiction of the court was only to hear and determine the appeal; that, assuming that the appeal was from the refusal of the registrar to admit fresh evidence, the refusal was right, and that the court had no jurisdiction to give leave to amend the original notice of opposition. *Robertson's Application, In re*, 61 L. J., Ch. 470; [1892] 2 Ch. 245; 66 L. T. 873; 40 W. R. 569.

Restricted Mode of User—Undertaking—Note upon Register.]—W. applied for the registration of an old trade mark for goods comprised in classes 11, 12 and 13, having used the mark in connection with the goods comprised in those classes in a particular manner. His application was opposed by a firm who had for many years used, and had obtained registration of, a similar mark, which they used in a different manner from that in which W. used his mark, but upon the same classes of goods:—Held, that registration should be granted to W. on his undertaking (to be noted on the register) not to use his mark in the manner in which the opposing firm used their mark, nor otherwise than in the manner in which he had previously used it. *Whiteley's Trade Mark, In re*, 43 L. T. 627, n.; 29 W. R. 235, n.

Sykes & Company, of Edgeley, a firm of calico-bleachers, having applied for registration as cotton marks of two marks long used by them, the committee of experts placed the marks in the second class, as not being trade marks within the meaning of the act. The marks consisted of (1) a shield in outline, containing the figure of a swan and the letters "S. & Co., E."; it also contained three other letters, subject to variation, being indicative of the date of packing, and the hand employed to pack each particular parcel of calico; (2) a shield in outline, with the letters "R. S. E.," indicative of the former title of the firm, and varying letters as in the other mark. Bleachers' marks are used in a particular mode, being stamped within the fold of the calico before the parcel is stitched up. The committee considered the marks were not trade marks within the act, on the ground that the letters were not quality marks; swans are common marks in the trade, and borders must be disregarded. On application to the court:—Held, that registration of both marks ought to be proceeded with, and that with the registration there should be entered upon the register a note of an undertaking by the applicants not to use the marks otherwise than in the limited mode in which they had formerly applied them. *Whiteley, In re* (supra), followed. *Sykes' Trade Marks, In re*, 43 L. T. 626; 29 W. R. 235.

Sheffield Marks—Opposition to Registration—Duty of Cutlers' Company and Comptroller.]—W. and Sons were the registered owners of a trade mark of a tobacco-pipe (stamped on metal) in respect of class 12 in the schedule to the rules under the Patents, Designs, and Trade Marks Act, 1883—viz. cutlery and edge-tools. L. was the registered owner of a trade mark of a pipe and dart (stamped) in respect of class 12, and also in respect of other classes relating to machinery and metal goods. Both were old marks issued by the Cutlers' Company many years ago. L.'s mark had been regranted in 1839 to X., a freeman of the company, and this was the last entry in the books of the company. No registration of this mark had been made under the Trade Marks Registration Act, 1875, in the London register established under that act for Sheffield marks. X. had assigned the mark to J. & Co., and on their business being taken by L., the pipe and dart mark had been assigned to a trustee for him. Sub-s. 1 of s. 81 of the Patents, Designs, and Trade Marks Act, 1883, provides for the establishment of a new temporary register of trade marks at Sheffield; sub-s. 2 enacts that the Cutlers' Company shall enter in the Sheffield register, in respect of cutlery and other steel and iron goods, marks on the register established under the act of 1875 belonging to persons carrying on business in Hallamshire or within six miles of it, and also enter in such register in respect of the same goods all the trade marks which shall have been assigned by the Cutlers' Company and actually used before the commencement of the act, but not registered under the act of 1875. Other sub-sections provide for the registration of new trade marks by the Cutlers' Company. Sub-s. 12 provides for an appeal to the comptroller by any person aggrieved by a decision of the Cutlers' Company, subject to a further appeal to the court. The marks on the Cutlers' register at Sheffield were to be put on the central register, and after a lapse of five years the new Sheffield register was to be closed. L.'s trade mark was not put on the register in the first instance by the Cutlers' Company, but on the 16th Sept., 1887, on application made by L., the Cutlers' Company entered the mark on the Sheffield register in the name of L. This application was opposed by W. and Sons, but the Cutlers' Company refused to consider their opposition, and the comptroller declined to interfere on the ground that he had no jurisdiction. W. and Sons then moved before North, J., to set aside the refusal of the Cutlers' Company and of the comptroller to hear their opposition to registration; or, in the alternative, to have the register rectified under s. 90 of the act of 1883, but North, J., dismissed the application on both points:—Held, that the Cutlers' Company and the comptroller had a mere ministerial duty to perform—viz. to enter on the new register the old corporate mark, and that their so acting was not a decision under sub-s. 12 of s. 8. Per Bowen, L.J.:—Even if the Cutlers' Company or the comptroller made a mistake, the court could not interfere on behalf of W. and Sons, unless some grievance had been thereby done them; and it was not shown that they had made out a right to ask for the interference of the court:—Held, also, on the question whether W. and Sons were or were not entitled under s. 90, sub-s. 1, of the act of 1883, to have the register rectified by expunging or varying the entry, that this question depended on whether the mark registered in L.'s name was or was not calculated to deceive; that there was no reason to suppose that, when used fairly and without considering any fraudulent

user, which had not been alleged, and which the court apart from any question of trade mark could always deal with—L.'s mark was calculated to deceive; and that, even supposing that L. was not entitled to the old corporate mark, W. & Sons had failed to make out that they were persons entitled to relief under s. 90. *Lambert's Trade Mark, In re*, 61 L. T. 138—C. A.

iv. *Committee of Experts.*

—— **Functions of.**]—The committee of experts at Manchester, appointed under the trade marks registration acts, is not a judicial tribunal. It is appointed to consider and give an opinion on technical matters peculiarly within the knowledge of its members. But a person dissatisfied with the opinion of the committee may move the chancery division to consider it; and that court is not bound to adopt the opinion as conclusive, even though the court may have no reason to think that the committee has proceeded on a wrong principle, or has acted in an improper manner. Great weight is properly to be attributed to the opinion of the committee, but it proceeds ex parte, and the court may direct a full consideration of the matter before the registrar himself. Observations on the manner in which the court is to exercise this supervising authority. *Orr-Ewing* v. *Trade Marks Registrar*, 48 L. J., Ch. 707; 4 App. Cas. 479; 41 L. T. 239; 28 W. R. 17—H. L. (E.)

The decisions of the Manchester committee of experts, although entitled to weight on consideration, are not final, and must, if necessary, be reviewed by the court. *Dugdale's Trade Marks, In re*, 49 L. J., Ch. 303; 28 W. R. 436.

It is not the function of the committee of experts to decide questions of title between rival applicants for registration of identical or substantially identical marks, but to consider whether a mark offered for registration contains the particulars necessary to constitute a registrable trade mark. *Ede, Ex parte*, 28 W. R. 436.

v. *Persons Aggrieved.*

Who are.]—When a mere word not used as a trade mark before the trade marks registration act, is put on the register, any dealer who has used the word in his trade in connection with or as descriptive of an article in which he deals, is a person aggrieved by the registration within the meaning of s. 5 of the Registration Act, 1875. *Rose* v. *Evans*, 48 L. J., Ch. 618.

A person engaged only in trade abroad, and not alleging any intention to carry on trade in this country in connection with the class of goods for which a trade mark has been registered, is not a "person aggrieved" within the meaning of s. 5 of the Trade Marks Act, 1875, so as to be entitled to apply under that section for rectification of the register upon the ground that the registered proprietor has obtained registration in fraud of the true owner of the trade mark. *Riviere's Trade Mark, In re*, 49 L. T. 506.

The patentee of a washing machine having registered the words "The Home Washer" as a trade mark under the Trade Marks Registration Act, 1875, in respect of goods in class 6, which includes washing machines, afterwards granted an exclusive licence of his patent at a royalty. The patent expired in February, 1882, and the patentee not having for a period of over eighteen months been in any way engaged in business connected with the machine, brought an action for an injunction against the former licensees to retrain them from using the trade mark:—Held, that the former owners of the exclusive licence were persons aggrieved within r. 33, and that upon their application the mark must be removed from the register of trade marks. *Ralph's Trade Mark, In re*, 53 L. J., Ch. 188; 25 Ch. D. 194; 49 L. T. 504; 32 W. R. 168.

By reason of the action for infringement, the defendants, who were registered in one of the classes in which the plaintiffs were registered, were as to that class "persons aggrieved" by the plaintiffs' registration; the register must as to that class be rectified by adding a note, that so much of the plaintiffs' mark as consisted of the device of two circles was common to the trade. *Baker* v. *Rawson*, 45 Ch. D. 519; 63 L. T. 306.

In 1873 the owners of the German spring supplying Apollinaris water purported to give to the A. Company, in England, the sole right of selling the water in Great Britain and the colonies. In 1876 the A. Company registered the trade mark "Apollinaris," under the Trade Marks Registration Act, 1875. In 1878 the owners of the spring purported to give the A. Company the sole right of selling the water all over the world. The A. Company refused to supply the V. Company with the water, and bound their customers not to supply them. The V. Company moved to expunge the mark "Apollinaris" from the register:—Held, that, as the V. Company could not obtain the water except from the A. Company, the existence of the trade mark did not prevent them from doing anything lawful and possible, and that, therefore, they were not persons aggrieved within s. 90 of the Patents, &c., Act, 1883. *Apollinaris Trade Mark, In re*, 63 L. T. 162. See *S. C.* in C. A., 35 S. J. 153.

The object of the Trade Marks Registration Act, 1875, s. 5, and the Patents, Designs, and Trade Marks Act, 1883, s. 90, in requiring an applicant for rectification of the register of trade marks to be a "person aggrieved," is only to prevent the interference of common informers or of persons actuated by merely sentimental motives, and not to make evidence of great or serious damage a condition precedent to the right to apply. Whenever one trader, by the wrongful registration of a trade mark, narrows the area of business open to his rivals, and thereby either immediately excludes, or with reasonable probability will in the future exclude a rival from a portion of the trade into which he desires to enter, that rival is a "person aggrieved." If the effect produced, or likely to be produced, by the wrongful registration is not the exclusion, but the hampering of the rival trader, the rival trader is a "person aggrieved." Anyone who is in the same trade as the person who has wrongfully registered a trade mark, and who desires to deal in goods covered by the wrongful registration, is primâ facie a "person aggrieved." When one trader uses the fact of his having a trade mark already on the register as any part of his case against another trader in any legal proceedings—e.g. for the purpose of supporting an application for the registration of another trade mark which the second trader is opposing, the second trader is a "person aggrieved," and none the less so because he may have other means of defending himself. *Apol-*

linaris Co.'s Trade Marks, In re, 61 L. J., Ch. 625; [1891] 2 Ch. 186; 65 L. T. 6—C. A.

The A. Company were owners of a contract with the owners of the German spring supplying Friedrichshall water, purporting to grant them the sole right of selling the water in Great Britain and the colonies. The owners bound their Continental customers not to export the water from the Continent, and a caution to this effect was printed on the labels and circulars. The A. Company registered the word "Friedrichshall" as their trade mark. The A. Company refused to supply the V. Company, and bound their customers not to supply them. The V. Company moved to expunge the mark "Friedrichshall" from the register:—Held, that the V. Company were not persons aggrieved, as, even if they were to import the water from the owners of the spring or their Continental customers, they would take with notice of the A. Company's rights under their contract with the owners. *"Friedrichshall" Trade Mark, In re*, 63 L. T. 162. See *S. C.* in C. A., 35 S. J. 153.

The V. Company moved to expunge the A. Company's mark "Hunyadi Janos," claiming to be persons aggrieved on the ground that the A. Company had threatened proceedings against them for selling a different water under the name of "Hunyadi Lazlo." The application had long stood over, and within less than three weeks of the motion being heard, the A. Company disclaimed the use of the words "Hunyadi" or "Janos," except in combination with each other, which disclaimer was repeated at the bar:—Held, that by reason of the threats the V. Company were persons aggrieved, but that the grievance was so far removed by the disclaimer that the court, having a discretion under s. 90 of the Patents, &c., Act, 1883, would not now entertain the motion to expunge. *"Hunyadi Janos" Trade Mark, In re*, 63 L. T. 162. See *S. C.* in C. A., 35 S. J. 153.

For some time prior to 1895 A. had been carrying on business in America, under the style of the B. Company, as a maker of cameras, registered in America as "Bull's-eye." The B. Company were in the habit of supplying these cameras to the C. Company—an English company—who claimed to be, but were not in fact, sole agents in this country. In June, 1895, the C. Company registered that trade mark in this country, and in August, 1895, the business of the B. Company was sold by A. to D. On a motion by D. to rectify the register by expunging the trade mark registered by the C. Company it was held that, as such registration appeared to have been effected without sufficient cause, D. was a "person aggrieved" within the meaning of s. 90 of the Patents, Designs, and Trade Marks Act, 1883, and rectification was ordered accordingly. *European Blair Camera Co.'s Trade Mark, In re*, 75 L. T. 63.

Under s. 90 of the Patents, Designs, and Trade Marks Act, 1883, requiring an applicant for rectification of the register of trade marks to be a "person aggrieved," any person who is in the same trade as the person who has registered the mark which is alleged to be wrongfully registered, and who may at some future time in the ordinary scope of his business desire to deal in the article covered by the registration, even though at the time of making the application to rectify he has no present or immediate intention or desire to deal in it, is primâ facie a "person aggrieved." *Powell's Trade Mark, In re*, 62 L. J., Ch. 848; [1893] 2 Ch. 388; 2 R. 456; 69 L. T. 60; 41 W. R. 627—C. A. Affirmed, 63 L. J., Ch. 152; [1894] A. C. 8; 6 R. 52; 70 L. T. 1—H. L. (E.)

The words "Yorkshire Relish" alone had, prior to 1875, only been used on packing cases containing bottles of sauce; the bottles of sauce themselves that were in these cases were marked with another trade mark:—Held, upon the evidence, that the user of the words "Yorkshire Relish" upon the packing cases had not constituted user as a trade mark prior to the passing of the Trade Marks Registration Act, 1875, and the words must accordingly be expunged. *Ib.*

And see *Vignier's Trade Mark, "Monobrut," In re*, ante, col. 149, and *Gianacli's Trade Mark, In re*, ante, col. 147.

Proceedings on Refusal to Register.]—An application to the court by a person aggrieved by the refusal of the registrar to enter his name upon the register as the proprietor of a trade mark under 38 & 39 Vict. c. 91, s. 5, r. 43, may be by way of motion that the register may be rectified by entering his name as such proprietor, two clear days' notice of motion being given to the registrar. *Stephens, Ex parte*, 24 W. R. 819.

By the Trade Marks Registration Act, 1875, the registrar acts under the direction of the commissioners of patents. By their direction the registrar refused to allow an advertisement in which the word "registered" was part of the proposed trade mark to appear in the official journal. The trade mark had in fact been registered under 25 & 26 Vict. c. 68. On a summons by the applicant:—Held, that the court could not order his name to be inserted on the register, there not having been the necessary advertisement; and that it could not interfere with the direction of the commissioners to the registrar. *Meikle, In re*, 46 L. J., Ch. 17; 24 W. R. 1067.

Part of Mark common to Trade—Note on Register.]—Where a trade mark, consisting of an essential particular, combined with a device common to the trade, has been registered under the act of 1875, the register may, on the application of a person aggrieved, be rectified by adding a note stating that the added device is common to the trade. *Baker* v. *Rawson*, 45 Ch. D. 519; 63 L. T. 306.

Wrongful Claim of Old User.]—Where a trade mark has been registered with a claim of user prior to the 13th of August, 1875, and such trade mark was in fact not used as a whole before that date, the mark will be expunged from the register on the application of a person aggrieved. *Ib.*

Expunging though Re-registration possible.]—Where a trade mark has been improperly registered, and an application to remove it from the register is made by a person aggrieved, the mark will not be allowed to remain on the register on the ground that if it were removed it could (in consequence of a change of circumstances in the meantime) be immediately re-registered on a new application; inasmuch as an opportunity must be given to the public by the insertion of the usual advertisement in the "Trade Marks Journal," to oppose the new application on any proper grounds. *Apollinaris*

Co.'s Trade Marks, In re, 61 L. J., Ch. 625; [1891] 2 Ch. 186; 65 L. T. 6—C. A.

Expunging — Discovery — Extent of.] — See *Wills' Trade Mark, In re*, ante, col. 185.

vi. *Common Elements—Disclaimer.*

Practice as to.]—H. applied on the 28th of December, 1883, to register as a trade mark a label surrounded by a pattern of ornamental design, and containing in the centre a rectangular black space, bearing the words "Hudson's Carbolic Acid Soap Powder," in white letters. On the outside of the rectangular space were other words descriptive of the purposes and advantages to be derived from the use of the soap powder. This label had not been used before the application:—Held, that the application must be treated as being made under the act of 1875, and the court could not enforce as a term of registration, disclaimer of the words "Carbolic Acid Soap Powder," which were common to the trade and merely descriptive—that act having no provision similar to that contained in s. 74 of the act of 1883; that the label was a distinctive label and capable of registration as a trade mark under the act of 1875, but that only the label as a whole could be claimed as a trade mark, and that no right could be acquired by such registration to the exclusive use of those common words, however long might be the user of them; that, whether under the act of 1875 or of 1883, the fact of there having been no previous user did not prevent the registration—the act of 1875 having effected a change in the law previously existing by making the mere act of registration, as regards any of the particulars specified in s. 10, equivalent to the public user which before that act was the essence of a trade mark. *Hudson's Trade Marks, In re*, 55 L. J., Ch. 531; 32 Ch. D. 311; 55 L. T. 228; 34 W. R. 616—C. A.

When an application is made for the registration of a trade mark composed in part of distinctive elements and in part of elements common to the trade, the proper form of registration is to register the entire mark, and to add a note disclaiming the exclusive right to the common elements. *Kuhn's Trade Marks, In re*, 53 L. J., Ch. 238, n.

Objections having been raised by the owner of a registered trade mark to the proposed registration of another trade mark for use in connection with goods included in classes for which the first mark was used, but no formal opposition having been lodged to the application for registration, an agreement was entered into between the registered owner and the applicant that no formal opposition should be lodged; that the applicant should use his mark in connection only with goods actually exported to certain specified countries; and that he would, in connection with the registration, cause a note of this restriction on the use of his trade mark to be entered on the register. Upon an ex parte application by the applicant, in pursuance of this agreement, the court directed the comptroller of trade marks to enter such a note on the register. *Keep's Trade Mark, In re*, 54 L. J., Ch. 637; 26 Ch. D. 187; 50 L. T. 453; 32 W. R. 427.

Where a trade mark, not otherwise objectionable, contained words which were admitted to be common in the trade, the court directed the register to be rectified by entering thereon a disclaimer of the intention to claim any right of exclusive use of such words. *Hayward's Trade Mark, In re*, 54 L. J., Ch. 1003; 53 L. T. 487.

Two manufacturers of whiskey applied for registration of a trade mark consisting of (amongst other things) the words "Cruiskeen Lawn," and entered into an agreement that they should respectively be at liberty to register their trade marks, but that the user should be restricted, and that a note of the restriction should be entered on the register, with liberty for either party to apply as a person aggrieved for rectification of the register. The marks were registered without a note of the restriction. On the application of both parties an order was made for the rectification of the register by adding a note that the user was limited by the agreement. Notice of the rectification to be given to the comptroller. *Mitchell's Trade Mark, In re*, 54 L. J., Ch. 216; 28 Ch. D. 666; 51 L. T. 900; 33 W. R. 148.

The entry on the register of two similar trade marks in the same class, of a note that the use of the marks registered is restricted by an agreement between the respective owners (the effect of which is not stated) is irregular, and contrary to the provisions of the Patents, Designs, and Trade Marks Act, 1883; but a note of the mutual undertakings not to use the marks except in a certain manner and within specified districts may be entered on the register. *S. C.*, 54 L. J., Ch. 809; 28 Ch. D. 666; 52 L. T. 575; 33 W. R. 480.

Time for.]—A disclaimer under s. 74 (2) of the Patents, Designs, and Trade Marks Act, 1883, of the right to the exclusive use of a common particular must be made in the application for registration. *Goodall's Trade Mark, In re*, 42 Ch. D. 566; 38 W. R. 189. *See now*, Patents Act, 1888, s. 13.

Re-registration with Disclaimed Addition.]—A trade mark already on the register will not be reregistered with the addition only of a device common to the trade, which is disclaimed. *Baker* v. *Rawson*, 45 Ch. D. 519; 63 L. T. 306.

—— Alteration of Registered Mark by Omitting words "Trade Mark"—Terms.]—Proprietors of a number of labels registered as trade marks under the Patents, Designs, and Trade Marks Act, 1883, for articles manufactured by them, applied under s. 92 of the act for leave to alter the registration of their trade marks by striking out the words "trade mark" which appeared on the labels in proximity to certain portions thereof. The labels in question had been registered prior to the Patents, Designs, and Trade Marks Act, 1888:—Held, that the alteration as to new marks should only be allowed upon the terms of the applicants stating the essential particulars of their trade marks, and disclaiming any right to the exclusive use of added matter, in the same way as would have been required by s. 10 of the act of 1888 if the original application for registration had been made under that act. *Colman's Trade Marks, In re*, 60 L. J., Ch. 550; [1891] 2 Ch. 402; 64 L. T. 507; 39 W. R. 488.

—— Label—Trade Name—Refusal to Register without Disclaimer—Appeal from Comptroller.]—The whole name of a person who

applies a trade mark containing his own name need not appear on the trade mark, nor need the whole name of each partner in a firm or the whole name of the firm appear on the face of a trade mark containing the firm name, but it is sufficient if the name is used fairly and bonâ fide on the face of the trade mark in such a way that it cannot be mistaken for anything else than the name of the owner of the trade mark and the manufacturer of the goods to which the mark relates. *Colman's Trade Mark, In re*, 63 L. J., Ch. 403; [1894] 2 Ch. 115; 8 R. 208; 70 L. T. 398; 42 W. R. 555.

The firm of J. & J. Colman, consisting of five persons, all of whom were named Colman, applied to register as a trade mark a label which contained the words "Colman's Mustard." They disclaimed the words "mustard":—Held, that they were not bound to disclaim the word "Colman's," as it was their "own name" within the proviso in s. 64, sub-s. 3 (*i*), of the Patents, &c., Act, 1883, as amended by s. 10 of the Patents, &c., Act, 1888. The doctrine apparently laid down by Lindley, L.J., in *Pirie* v. *Goodall* (ante, col. 158) not applied. *Ib.*

—— **Own Name.**]—The trade name of a business, to which an applicant has succeeded, is not "his own name" within the meaning of the proviso to s. 10 of the act of 1888, and, if it forms part of a trade mark (e.g. a label) sought to be registered, he may be required to disclaim it. *Birmingham Vinegar Brewery Co., In re*, 8 R. 237; 70 L. T. 646.

—— **Crown—Coronet—Added Matter—Disclaimer of Right to Exclusive Use.**]—The royal crown, of which the instructions forbid the representation, is the circlet surmounted by two arches which appears on the royal arms. A representation of a coronet is added matter within s. 74 of the act of 1883 and s. 16 of the act of 1888, the right to the exclusive use of which must be disclaimed. *König and Ebhardt's Application, In re*, 65 L. J., Ch. 404; [1896] 2 Ch. 236.

"Addition to Trade Mark"—Name of Company—"Smokeless Powder."]—Under the Patents, &c., Act, 1883, a trade mark for gunpowder was registered by the Smokeless Powder Company, Limited. The mark was a device or label in the form of a circular target or disc, supported on the one side by a figure of a sportsman, and on the other by a figure of a soldier in uniform. The disc contained an inner circle, within which were certain words and letters, together with figures of bullets or cannon balls. Between this inner circle and the line forming the outside of the disc appeared the words "Smokeless Powder Company, Limited," in large and conspicuous type. No right to the exclusive user of the words "Smokeless Powder" was claimed by the company. On motion by rival traders to rectify the register by expunging the mark, on the ground that the company should have entered on the register a disclaimer of the words "smokeless powder":—Held, that no disclaimer of the words in question was required by s. 74 of the act of 1883, because, first, they were not, within s. 64, sub-s. 1, and s. 74, sub-s. 1*a*, as read together, distinctive words, or a distinctive combination of words, but were ordinary English words forming part of the name of the company, and indicating that it made smokeless powder; and because, secondly, they were part of the whole device or label which formed the mark, and, therefore, not an "addition" thereto within s. 74, sub-s. 1:—Held, also, that the mark was not calculated to deceive within s. 73. The court therefore dismissed the motion, but under the special circumstances of the case dismissed it without costs. *Smokeless Powder Co.'s Trade Mark, In re*, 61 L. J., Ch. 391; [1892] 1 Ch. 590; 66 L. T. 407; 40 W. R. 507.

Injunction—Letters calculated to deceive—Effect of Disclaimer by Plaintiff.]—The plaintiff, W. R., a corset-maker, stamped his corsets in a particular way with the letters "W. R.," and by these and other means his corsets had become known in the market as "W. R." corsets. The defendants, also corset-makers, trading as "W. R. & Co.," sold corsets stamped with the letters "W. R." in precisely the same way in which the plaintiff's corsets were stamped, but with a get-up different in all other respects. The plaintiff moved for an injunction to restrain the defendants from selling their corsets as or for corsets of his make, and from marking their corsets "W. R." in such a manner as to lead to the belief that they were corsets of his make, and he produced evidence tending to show that the public and the trade would be deceived; but this was disputed by the defendants and their witnesses:—Held, that, having regard to the fact that the plaintiff had registered certain trade marks which contained the letters "W. R." with other added matter, and had in each case, after claiming matter which did not include the "W. R.," disclaimed any right to the exclusive use of the added matter, no interlocutory injunction could be granted. *Rosenthal* v. *Reynolds*, 61 L. J., Ch. 508; [1892] 2 Ch. 301; 67 L. T. 162; 40 W. R. 521.

vii. *Costs.*

Costs before Comptroller—Jurisdiction.]—The court has no jurisdiction to order an unsuccessful applicant for registration to pay the costs incurred by the opponent before the comptroller. *Australian Wine Importers' Trade Mark, and Mason, In re*, 58 L. J., Ch. 380; 41 Ch. D. 278; 60 L. T. 436; 37 W. R. 578—C. A.

Where an application to register a trade mark is unsuccessful, the applicant may be ordered to pay the costs of persons opposing the application from the time when, under the Trade Marks Registration Rules, r. 16, the matter is deemed to stand for the determination of the court, but cannot be ordered to pay any costs incurred before that time. *Brandreth, In re*, 47 L. J., Ch. 816; 9 Ch. D. 618; 27 W. R. 281.

Jurisdiction to Order Comptroller to pay Costs.]—Where the comptroller-general of patents unsuccessfully opposes an application for registration, the court has no jurisdiction to order him to pay the costs of the applicant, but may refuse to give him any costs. *Leaf's Trade Mark, In re*, 55 L. J., Ch. 740; 33 Ch. D. 477; 55 L. T. 254; 35 W. R. 99.

Costs of Registrar not opposing Application.]—Where the registrar is served with notice of an application to the court for leave to be given him to proceed with a registration, and he appears, but does not oppose the application,

he must be paid his costs of appearance. *Orr-Ewing's Trade Mark, In re*, 47 L. J., Ch. 807; 8 Ch. D. 794; 38 L. T. 695; 26 W. R. 777—C. A. See also *Maignen's Application, In re*, ante, col. 159.

Costs of Appeal to Court.]—The costs of a successful appeal to the court from a refusal by the comptroller-general to register a trade mark must be paid by the appellant. "*Alpine*" *Trade Mark, In re*, 54 L. J., Ch. 727; 29 Ch. D. 877; 53 L. T. 79; 33 W. R. 725.

—— **To Court of Appeal.**]—The court of appeal has no jurisdiction to give costs against the registrar when the latter is unsuccessful. *Rotherham's Trade Mark, In re*, 49 L. J., Ch. 511; 14 Ch. D. 585; 43 L. T. 1.

Rectification of Register—Costs.]—If a person registers a trade mark to which he was not entitled, although he does so with a bonâ fide belief that he is entitled to it, and after due advertisement in the "Trade Marks Journal," and although no opposition is made to the registration, he may have to pay the costs of a motion to rectify the register by removing the mark. *Hyde, In re*, 7 Ch. D. 724; 38 L. T. 777; 26 W. R. 625.

On an application under s. 5 of the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91), to remove from the register a trade mark of H. & Co., who had registered it as an old mark after advertisement in the "Trade Marks Journal," claiming forty-one years' user, it appeared that for the greater part of that time the mark had been a common mark, and for about six years had been so to the knowledge of H. & Co., and that the applicants, who had long used the same trade mark, were not aware of the advertisement, and had not opposed the registration:—Held, that the trade mark must be ordered to be removed from the register; that there had been no laches on the part of the applicants, and that the respondents must pay the costs. *Ib.*

Where the registration of certain trade marks, composed in part of elements common to the trade, was ordered to be rectified, and the registered proprietor did not consent to the rectification but appeared by counsel on the hearing of the motion:—Held, that the respondents must pay the costs of the application, notwithstanding that no previous notice of it had been given them, and that they had sent notice to all the trade when their registration was effected, after which a year and a half had passed before the motion to rectify was made. *Barrows' Trade Mark, In re* (ante, col. 173), commented on. *Kuhn's Trade Marks, In re*, 53 L. J., Ch. 238, n.

But, semble, that if it had been proved that the common elements in the marks had become common solely by the former common piracy of the applicants for rectification, the respondents being foreigners, the latter would not have been made to pay the costs. *Ib.*

A person who registers a trade mark does so at his own risk, and if he registers one which is common to the trade it will be removed from the register on the application of the parties aggrieved, and he will have to pay the costs of the application. It makes no difference that he was the person who was the first to adopt the trade mark if it had become common at the date of registration. *Hyde and Co.'s Trade Mark, In re*, 54 L. J., Ch. 395, n.; 7 Ch. D. 724; 38 L. T. 777.

C. MERCHANDISE MARKS.

False Trade Description—Intent to Defraud.]—It is no defence to a charge against a person, under s. 2, sub-s. 2, of the Merchandise Marks Act, 1887, of having in his possession for sale, goods to which a false trade description is applied, that there was no intent to defraud the immediate purchaser, and that he was not in fact deceived. *Wood* v. *Burgess*, 59 L. J., M. C. 11; 24 Q. B. D. 162; 61 L. T. 593; 38 W. R. 331; 16 Cox, C. C. 729; 54 J. P. 325.

S., the original patentee, without fraud, sold in packets S.'s patent refined isinglass, a well-known article, which was really only gelatine:—Held, that he ought not to be convicted under s. 2 of the Merchandise Marks Act, 1887, of a "false trade description" merely because the description was not in the strict sense of the words an accurate indication of the material in the packet. To constitute the offence there must be an intention to mislead. *Gridley* v. *Swinborne*, 52 J. P. 791.

A patentee, who, after the expiration of his patent, continues selling the same articles under the description of patent articles, and with the royal arms on the wrappers, is not necessarily guilty of describing the goods falsely as the subject of an existing patent; it is a question of fact for the jury or the magistrate to determine. *Ib.*

The respondents, an English company, entered into a contract with her majesty's government for the supply within a stipulated time of 5,000 barrels of gunpowder of a description known as R.L.G.4. There was no stipulation in the contract that the gunpowder should be of respondents' own manufacture, or of English manufacture. The respondents were, however, manufacturers of the kind of gunpowder mentioned in the contract, and at the time of making such contract intended to manufacture the gunpowder which they had agreed to supply. Owing, however, to two explosions, the respondents' mills became useless for the time being for the manufacture of gunpowder; and in order to fulfil this contract the respondents imported the whole of the gunpowder from Germany, which upon its arrival at the respondents' mills, was placed in barrels supplied by the Government, and a label attached with the words "Chilworth Gunpowder Company, Limited," inserted in the place where the name of the contractor was required to be inserted. There was no indication upon the label that the gunpowder was of German manufacture, but the description of the powder was equal in quality to the powder manufactured by the respondents:—Held, upon the above facts, that the respondents had committed an offence under the Merchandise Marks Act, 1887, s. 2, sub-s. 1 (d), inasmuch as they had applied a false description to goods, and had acted with intent to defraud by reason of not having disclosed to the government the fact that the gunpowder was not of their manufacture. *Starey* v. *Chilworth Gunpowder Co.*, 59 L. J., M. C. 13; 24 Q. B. D. 90; 62 L. T. 73; 38 W. R. 204; 17 Cox, C. C. 55; 54 J. P. 436.

Application to Goods—Place of Manufacture

and Production.]—Where at his establishment in Ireland, the appellant Lipton sold ham, which had been manufactured in America under the descriptions (a) "Lipton's prime mild cure" and (b) "Finest quality smoked ham own cure at Lipton's market." These descriptions are not "a false trade description" within the meaning of the Merchandise Marks Act, 1887. Where the appellant sold ham as "Tracey's mild cure," Tracey being the foreman curer of the appellant:—Held, that the appellant was rightly convicted of an offence under s. 3, sub-s. 3 (c), of the act. Sub-s. 3 is to be construed disjunctively and not conjunctively as regards its subdivisions (b) and (c). *Reg.* v. *Lipton*, 32 L. R., Ir. 115.

—— **Goods partly manufactured Abroad and finished in England.**]—The country in which goods are made or produced within the meaning of s. 3, sub-s. 1 (b) of the Merchandise Marks Act, 1867, is the country where such goods received their finished form.

A person had in his possession for sale margarine packed in cardboard boxes, marked with the words "French Factory." The margarine consisted of a substance manufactured from animal fat at a factory in Paris, and sent thence to an English factory where, by admixture with Danish butter and English milk, it assumed the form in which it was offered for sale:—Held, that as the margarine became the finished product for the first time in England, the words "French Factory" on the boxes was a false trade description within the meaning of ss. 2 and 3 of the Merchandise Marks Act, 1887. *Bischop* v. *Toler*, 65 L. J., M. C. 1; 15 R. 607; 73 L. T. 402; 44 W. R. 189; 18 Cox, C. C. 199; 59 J. P. 807.

—— **Cask of Beer containing less than Thirty-six Gallons—Invoice of "Barrel."**]—Section 5, sub-s. 1 (d), of the Merchandise Marks Act, 1887, by which a person is deemed to apply a trade description to goods, who uses a trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by it, is not limited to cases in which a trade description is used in actual physical connection with goods. An invoice was delivered with a cask of beer of less capacity than thirty-six gallons, in which the cask was described as a "barrel," that is, a vessel containing thirty-six gallons. An information having been preferred against the brewer delivering it, under s. 2, sub-s. 1 (d), of the act, for applying a false trade-mark description to the cask:—Held, that the delivery of the invoice might be an application of a trade description to the cask within the meaning of the act; that if the justices held it to be so, the onus of proof was upon the defendant to show that he had acted without intent to defraud; and that upon this point the prosecutor was entitled to give evidence of previous transactions. *Budd* v. *Lucas*, 60 L. J., M. C. 95; [1891] 1 Q. B. 408; 64 L. T. 292; 39 W. R. 350; 17 Cox, C. C. 248; 55 J. P. 550.

Statute.]—54 Vict. c. 15, *amends the Merchandise Marks Acts*, 1887.

57 & 58 Vict. c. 19, *enables the Board of Agriculture to undertake Prosecutions in certain cases.*

D. DESIGNS.

Rules.]—*See* W. N. 1889, p. 362.

Previous Publication — Samples — Marking registered Designs.]—The inventor of a design for trimmings for corsets submitted it, before taking any steps to obtain registration, to his commission agent, who, in his turn, showed it to certain customers, and obtained orders to be executed at a future time. Registration was effected before any orders were executed. The trimming to which the design was applied was sold in lengths of several yards wrapped round with a paper band, on which were printed the word "Rd." and the registration number:—Held, that the design had been published in the United Kingdom previously to registration, and that the trimming was marked in accordance with the statutory requirements. *Blank* v. *Footman*, 57 L. J., Ch. 909; 39 Ch. D. 678; 59 L. T. 507; 36 W. R. 921.

Article erroneously marked—Proper Steps to insure Marking.]—Section 51 of the Patents, Designs, and Trade Marks Act, 1883, applies to the delivery on sale of articles to which a design registered under the act of 5 & 6 Vict. c. 100, has been applied, and the marking of such goods since the act of 1883 came into operation is regulated by that act. Consequently, the proprietor of a design registered under the act 5 & 6 Vict. c. 100, is in a proper case entitled to the benefit of the proviso contained in s. 51, which relieves him from the forfeiture of his copyright resulting from the omission to mark the articles with the prescribed mark, if he shows that he "took all proper steps to ensure the marking." The proprietor of a registered design instructed the manufacturer, who made for him the articles to which the design was applied, to stamp the proper mark upon them, and furnished him with a die for the purpose. By inadvertence the manufacturer marked some of the articles with a mark which belonged to another design registered by the same proprietor, the copyright of which had expired, using for the purpose by mistake an old die which remained in his possession, and the proprietor, after the act of 1883 came into operation, sold some of the articles thus wrongly marked, without observing the error. The letters "Rd." formed part of both the marks:—Held, that the proprietor had not forfeited his copyright, but that he was protected by the proviso in s. 51. *Upmann* v. *Forester* (ante, col. 138) followed. *Wittmann* v. *Oppenheim*, 54 L. J., Ch. 56; 27 Ch. D. 260; 50 L. T. 713; 32 W. R. 767.

What can be Subject-matter of Registration.]—Where a man claimed registration under the Patents, Designs, and Trade Marks Act, 1883, for the "pattern of a basket, consisting in the osiers being worked in singly, and all the butt ends being outside":—Held, that this did not disclose a proper subject for registration as a design, as it applied to the process of manufacture and to utility, and not to "shape or configuration or ornament." *Moody* v. *Tree*, 40 W. R. 558.

New or Original Design.]—A design is not a proper subject of registration under the Patents, Designs, and Trade Marks Act, 1883, unless there is a clearly marked and defined difference involving substantial novelty between it and any

design previously in use. *Le May* v. *Welch*, 54 L. J., Ch. 279; 28 Ch. D. 24; 51 L. T. 867; 33 W. R. 33—C. A.

A design for a shirt collar was registered, the advantages claimed for which were—the height of the collar above the stud which fastened it in front, the cutting away the corners in the segment of a circle, and the absence of a band. A collar was shown to have been previously in use which had no band, in which the corners were cut away in arcs of circles; but the cutting away was not so wide, and the height above the stud was not so great, as in the registered design: —Held, that the registered design was not new or original within the meaning of the act, and must be removed from the register. *Ib.*

A design which, looked at as a whole, is an obvious imitation of a registered design, constitutes an infringement, notwithstanding differences in matters of detail which do not alter the general effect as judged by the eye. *Harper* v. *Wright and Butler Lamp Manufacturing Co.*, 65 L. J., Ch. 161; [1896] 1 Ch. 142; 44 W. R. 274—C. A.

The registration of a design as applicable for pattern, ornament, shape, and configuration, may be good for the design as a whole, although in one particular — for example, shape — the design is not original; and if the whole design is imitated an action for infringement will lie. *Ib.*

The proprietor of a registered design for a stove, and of later registered designs for particular parts of a stove, sold stoves corresponding with the later designs as regards the parts to which they were applicable, and with the original design in other respects, having placed on such stoves the registered numbers of all the designs:—Held, that, whether he was right or wrong in so marking the stoves, there being no evidence that he had acted fraudulently with intent to mislead the public, he had not thereby lost his rights as registered proprietor. *Ib.*

A person who makes a slight addition to and omits an immaterial part from an old shape is not entitled to register the whole of the old shape with his alterations so as to secure a monopoly of the old part. *Clarke's Registered Design, In re*, 65 L. J., Ch. 629; [1896] 2 Ch. 38; 74 L. T. 631—C. A.

The application of an old design to a new substance used for similar purposes will not entitle it to protection. A shape common to all lamps used before electric lighting was introduced does not become new when it is applied to electric lights. *Ib.*

Common Source.]—In order that a design may be "new and original" within s. 47 of the Patents, Designs, and Trade Marks Act, 1883, the novelty and originality consist in the application to an article of manufacture of an idea, and are not destroyed by the design being taken from a source common to mankind. *Adams* v. *Clementson* (12 Ch. D. 714) questioned. *Saunders* v. *Wiel*, 62 L. J., Q. B. 341; [1893] 1 Q. B. 470; 4 R. 207; 68 L. T. 183; 41 W. R. 356—C. A.

Designs Rules, 1883—Different Classes and Materials.]—Where a design has been registered in one or more of the classes of goods specified in Sched. III. to the Designs Rules, 1883, for a particular article of a certain material, a similar design cannot be registered by another person in another class for a similar article made of a different material, as not being new and original within the meaning of the Patents, Designs, and Trade Marks Act, 1883, s. 47. *Read & Greswell's Design, In re*, 58 L. J., Ch. 624; 42 Ch. D. 260; 61 L. T. 450; 38 W. R. 88.

A design already on the register may be registered in another class for an article applied to a different purpose, but not for an article merely of a different material. A design for a lamp shade made of china in the shape of a rose, was registered in one class. A design for a lamp shade made of linen, also in the shape of a rose, had previously been registered in another class: —Held, that though the materials were different there was no novelty in the china design, which must, therefore (following *Le May* v. *Welch* (supra)), be removed from the register. *Bach's Design, In re*, 42 Ch. D. 661; 38 W. R. 174.

Registration of Design "for Shape or Configuration" — Utility.]—The Patents, Designs, and Trade Marks Act of 1883 (46 & 47 Vict. c. 57), consolidates the law relating to the copyright of designs, and by s. 60 "design" is defined as meaning "any design applicable to any article of manufacture or to any substance," "whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof." The pursuers registered a design for the shape of a kitchen range fire-door with a moulding on the top which had the effect of closing the range to cold air. The defenders manufactured a range fire-door with a moulding on the top which had the same effect:—Held, first, that the court of session in considering whether there had been an infringement of the copyright in the design for the shape of the fire-door were wrong in taking into account the question whether the defenders' design accomplished the same useful object (i.e. that of excluding cold air) as the design of the pursuers; but that there had been in fact an obvious imitation of the registered design and therefore an infringement of the copyright. *Hecla Foundry Co.* v. *Walker*, 14 App. Cas. 550—H. L. (Sc.)

Registration—"Proprietor."]—In May, 1885, G., who was acting as the sole agent and consignee in the United Kingdom, during the year 1885, of toys manufactured in the United States by an American company, and consigned to him by them, registered in his own name the designs in accordance with which some of such toys were manufactured. The company had authorised him to register the designs in his own name, but had not assigned to him the designs, or the right to apply them to goods, the only arrangement between them and G. being that G. should sell in the United Kingdom goods manufactured and consigned to him by the company:—Held, that G. was not the proprietor of the designs within s. 61 of the Patents, &c., Act, 1883, and that the registration in his name was therefore wrongful and must be expunged. *Guiterman's Registered Designs, In re*, 55 L. J., Ch. 309.

Infringement—Action to Restrain—Particulars of Objection—Leave to Amend—Form of Order.]—The practice as to the terms on which the court gives leave to amend particulars of objection in an action to restrain infringement of a patent will be followed in a similar action

with regard to a registered design. *Morris-Wilson* v. *Coventry Machinists Co.*, 60 L. J., Ch. 524; [1891] 3 Ch. 418; 40 W. R. 152.

The discretion of a judge to allow the amendment of particulars in an action for infringement of a patent or design cannot be affected by any practice as to the terms on which such amendment will be allowed. *Morris-Wilson* v. *Coventry Machinists Co.* (supra), commented on. *Woolley* v. *Broad*, 61 L. J., Q. B. 808; [1892] 2 Q. B. 317; 67 L. T. 67; 40 W. R. 596—C. A.

—— **Costs.**]—An innocent infringer of a registered design must pay the costs of a motion for an injunction to restrain him from infringing, though the plaintiff had given him no notice of the infringement before serving him with the writ in the action. *Wittman* v. *Oppenheim*, supra, col. 204.

"Obvious Imitation."]—A firm of calico printers copied the general effect of a design registered by a rival firm, but carefully avoided copying the exact details of the design:—Held, a "fraudulent and obvious imitation" within the meaning of this section of the Patents, Designs, and Trade Marks Act, 1883, and an injunction was granted on the balance of convenience in preference to defendant's keeping an account. *Grafton* v. *Watson*, 51 L. T. 141—C. A.

Agreement for Sale of Goods to which Design applied to one Person exclusively—Right of Action of Purchaser for Infringement.]—The registered proprietor of the copyright in a registered design for lace agreed with a lace-finisher to sell exclusively to him all lace manufactured according to the design in the unfinished state:—Held, that the lace-finisher had no cause of action against a person infringing the design, and thereby injuring him. *Woolley* v. *Broad*, 61 L. J., Q. B. 259; [1892] 1 Q. B. 806; 66 L. T. 680; 40 W. R. 511.

Infringement—Action for Penalties—Interrogatories.]—*See* DISCOVERY.

E. TRADE UNIONS.

Statutes.]—34 & 35 Vict. c. 31, *amends the law of trade unions, and is amended by* 39 & 40 Vict. c. 22 (*Trade Union Act* (1871) *Amendment Act*, 1876).

59 & 60 Vict. c. 30, *is the Conciliation Act*, 1896.

Validity at Common Law.]—The condition of a bond recited that the obligors were manufacturers in Wigan and the neighbourhood, and that combinations of workmen preventing free labour by fear of social persecution, injuriously interfered with the management of their manufactories, and that these combinations were sustained by funds extorted from workmen employed by the manufacturers, and that measures were necessary to protect as well the manufacturers in the free management of their capital as the workmen in the free disposal of their labour; wherefore the manufacturers had agreed, in regard to the amount of wages, the periods of engagement, the hours of work and the general management of their establishments, to act for twelve calendar months in conformity with the lawful resolutions of a majority of the manufacturers present at a meeting, and declared that the bond should be void if this agreement was performed:—Held, that the bond was illegal at common law, and could not be enforced, as being contrary to public policy and in restraint of trade. *Hilton* v. *Eckersley*, 6 El. & Bl. 47; 25 L. J., Q. B. 199; 2 Jur. (N.S.) 587; 4 W. R. 326—Ex. Ch.

Registration.]—The Home Secretary made a regulation providing that upon an application for the registration of a trade union which was already in operation, the registrar, if he had reason to believe that the applicants had not been duly authorised by such trade union to make the same, might, for the purpose of ascertaining the fact, require from the applicants such evidence as might seem to him necessary. An application was made to the registrar, dated December 28th, requiring him to register the Amalgamated Society of Carpenters and Joiners, signed by persons who stated that they were authorised to make it by resolution passed by the executive council of the society. A second application was made, dated December 30th by different persons, to register a society under the same title, the applicants stating that they were authorised to make it by a vote of the whole of the members of the society. The registrar required evidence from both sets of applicants in support of their applications, and being satisfied from the evidence that differences had arisen which had led to the division of the society into two sections, which were represented by the respective applicants, he refused to register the society upon either application:—Held, that, apart from any question as to the validity of the regulations made by the Home Secretary, the registrar had properly refused the applications, as he was not bound upon an application for registration to inquire into differences which existed within the society, and to alter the position of one party by granting registration upon the application of the other. *Reg.* v. *Friendly Societies Registrar*, 41 L. J., Q. B. 366; L. R. 7 Q. B. 741; 27 L. T. 229.

Intimidation—at Common Law.]—Every man has a right to work for the best price he can get; but if others choose to work for less than the usual prices, the law will not permit that violence should be committed towards them, or towards those by whom they are employed, or those with whom they are connected. *Rex* v. *Baar*, 6 Car. & P. 329.

—— **Injunction in Equity to Restrain.**]—The defendants, who were officers of a trade union, gave notice to workmen, by means of placards and advertisements, that they were not to hire themselves to the plaintiffs pending a dispute between the union and the plaintiffs. A bill in equity prayed an injunction to restrain the issuing the placards and advertisements, alleging that by means thereof the defendants had, in fact, intimidated and prevented workmen from hiring themselves to the plaintiffs, and that the plaintiffs were thereby prevented from continuing their business, and the value of their property was seriously injured and materially diminished:—Held, that the acts of the defendants, as alleged by the bill, amounted to a crime, and that a court of equity would interfere by injunction to restrain such acts, inasmuch as

they also tended to the destruction or deterioration of property. *Springhead Spinning Co.* v. *Riley*, 37 L. J., Ch. 889; L. R. 6 Eq. 551; 19 L. T. 64; 16 W. R. 1138.

Power to acquire and hold Land—Devise of Land—Perpetuity.]—A trade union registered under the trade union acts can, by virtue of the provisions of s. 7 of the Trade Union Act, 1871, but not otherwise, acquire and hold land. The word "purchase" in that section is used in its ordinary sense of "buy for money"; not in the technical legal sense of "acquire otherwise than by descent or escheat," and consequently a devise of land by will to such a society is invalid. *Amos, In re, Carrier* v. *Price*, 60 L. J., Ch. 570; [1891] 3 Ch. 159; 65 L. T. 69; 39 W. R. 550.

Rules—Decision of Arbitration Committee—When Binding.]—When a trade is regulated by committees of the masters and workmen respectively, which committees make rules from time to time, and by one of such rules, in case of disputes between a master and his men, an arbitration committee, presided over by a barrister, is to decide, and a particular dispute has been so decided, such decision is not to be considered as imported into all future engagements between masters and men, nor is it binding on persons not parties to that particular reference. *Levey* v. *Hill*, 3 H. & N. 702; 27 L. J., Ex. 259; 4 Jur. (N.S.) 589; 6 W. R. 691—Ex. Ch.

Rules—Legality—Winding up—Distribution of Funds.]—Members of a trade association were expelled for breach of rules in restraint of trade. The association passed a resolution to wind up, with a direction to their trustees to divide the surplus assets among the persons entitled under the rules. An inquiry was directed on summons as to who were the persons entitled, and in what proportions:—Held, that the expelled members were properly excluded in the chief clerk's certificate made in answer to the inquiry. *Strick* v. *Swansea Tin Plate Co.*, 57 L. J., Ch. 438; 36 Ch. D. 558; 57 L. T. 392; 35 W. R. 831.

—— **Trade Protection Society—Rule in Restraint of Trade.**]—A society established for the protection of a particular trade contained a rule that no member should employ any traveller, carman, or outdoor employé who had left the service of another member without the consent, in writing, of his late employer, till after the expiration of two years:—Quære, whether such a society was to any and what extent within the Trade Union Acts, 1871 and 1876. *Mineral Water, &c., Society* v. *Booth*, 36 Ch. D. 465; 57 L. T. 573; 36 W. R. 274—C. A.

—— **Misapplication of Money by Officer—Summary Conviction—Extinguishment of Debt.**]—The treasurer of a local branch of a trades union fraudulently misapplied certain moneys belonging to his society, and was summarily proceeded against and ordered to pay the amount claimed, and 5*l.* by way of penalty. He made default in payment of the two sums and was sentenced to two months' imprisonment with hard labour. He was afterwards proceeded against by the general secretary of the union in the county court for the amount originally claimed, but the county court judge nonsuited the plaintiff on the ground that he was not entitled to maintain the action. The plaintiff moved to set aside the nonsuit:—Held, on the motion to set aside the nonsuit, that, as the plaintiff had had recourse to the remedy provided by s. 12 of 34 & 35 Vict. c. 31, and the defendant had been punished, the punishment suffered by him operated as an extinguishment of the debt. *Knight* v. *Whitmore*, 53 L. T. 233; 33 W. R. 907.

Right of Guardians to Reimbursement.]—A trade union is not a "benefit or friendly society" from which guardians of the poor can claim reimbursement under s. 23 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), s. 23, in respect of the maintenance of a pauper. *Winder* v. *Kingston-upon-Hull*, 20 Q. B. D. 412; 58 L. T. 583; 52 J. P. 535.

Application of Funds — Agreement — Direct Enforcement.]—By the Trade Union Act, 1871, s. 4, it is provided that nothing in the act shall enable the court to entertain any legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to its members. The plaintiffs, members of a trade union within the act, sought for an injunction to restrain other members from applying the funds in a manner contrary to an agreement to provide benefits to members:—Held, that such an injunction would not be a direct enforcement of the alleged agreement, and that the court might entertain the proceeding. *Wolfe* v. *Matthews*, 51 L. J., Ch. 833; 21 Ch. D. 194; 47 L. T. 158; 30 W. R. 838.

—— **Action to enforce Benefit to Member—Jurisdiction.**]—Section 10 of the Trade Union Act, 1876, read in conjunction with s. 4 of the Trade Union Act, 1871, does not confer upon the court any jurisdiction to entertain an action by a nominee of a deceased member of a trade union to recover moneys payable under the rules of the trade union on the death of such member. *Crocker* v. *Knight*, 61 L. J., Q. B. 466; [1892] 1 Q. B. 702; 66 L. T. 596; 40 W. R. 353; 56 J. P. 420—C. A.

—— **Central Society suing Branch for wrongfully dividing Funds.**]—The central body of a society brought an action against a branch to restrain the latter from dividing certain funds in possession of the latter. Some of the rules of the society provided for benefits to members, and there were others which were in restraint of freedom of trade:—Held, that the action could not be maintained—(1) as it was brought to enforce an agreement between members of a trade union to provide benefits to members within the meaning of s. 4 of the Trade Unions Act, 1871; and (2) as the agreement could not have been enforced previously to that act. *Duke* v. *Littleboy*, 49 L. J., Ch. 802; 43 L. T. 216; 28 W. R. 977.

In such cases it makes no difference whether a central society sues a branch, a society sues an individual, or an individual sues a society. *Ib.*

—— **Claim by expelled Member to participate in Property and Benefit of Union.**]—The rules of a trade union provided that the money arising from the subscriptions of its members should be

applicable in various ways for their benefit. They also purported to regulate the affairs of that trade, and provided that any journeyman binding his son in a "foul shop" (being a shop in which non-union men were employed) should be fined, and not be entitled to any benefit until such fine had been paid. The plaintiff, a member of the union, who was alleged to have broken the rule as to apprenticeship, and who, having refused to pay the fine, had been expelled from the union, brought an action against the committee and trustees of the union claiming to be entitled to participate in its benefits, and that the defendants might be restrained from excluding him from such participation:—Held, that as the action was brought to enforce an agreement between members of a trade union "to provide benefits to members," within the meaning of the Trade Union Act, 1871, s. 4, which the court was not by that section enabled to enforce; and as, apart from the act, the union was an illegal association, the plaintiff was not entitled to any relief. *Rigby* v. *Connol*, 49 L. J., Ch. 328; 14 Ch. D. 482; 42 L. T. 139; 28 W. R. 650.

—— **Expulsion of Member of Voluntary Association.**]—The foundation of the jurisdiction of the court to prevent a member of a voluntary association from being improperly expelled is the right of property vested in such member of which he is deprived. *Ib.*

Trade Protection Society—Member—Resignation—Acceptance.]—A member of a voluntary society who has paid his subscription for the current year, and owes no further duties to his fellow-members, may, in the absence of any provision in the rules of the society to the contrary, resign his membership at any time by communicating to the society his intention to resign, and such resignation does not require acceptance. *Finch* v. *Oakes*, 65 L. J., Ch. 324; [1896] 1 Ch. 409; 73 L. T. 716; 60 J. P. 309—C. A.

H. J. N.

TRAMWAYS.

1. *Generally*, 211.
2. *Construction and Management*, 215.

1. GENERALLY.

Parliamentary Deposit—Application of, to Payment of Debts.]—A private act incorporating a tramway company provided that, if within a certain time the undertaking should not be completed or half the capital paid up and expended on the works, the parliamentary deposit, which had been paid into court in pursuance of the standing orders of the houses of parliament, should either be forfeited to the crown, or in the discretion of the court, if the company was insolvent and had been ordered to be wound up, should wholly or in part be applied as part of the assets of the company for the benefit of the creditors. The works were never begun, a small portion of the capital only having been subscribed for, and the company was ordered to be wound up on the ground that it was unable to pay its debts:—Held, that the court could not order the deposited fund to be applied as part of the assets of the company for the payment of its debts, until it was proved that there were debts which could not be paid by means of calls on the shareholders. *Bradford Tramways Co., In re*, 46 L. J., Ch. 89; 4 Ch. D. 18; 35 L. T. 827; 25 W. R. 88—C. A.

The intention of the board of trade regulations under the Tramways Act, 1870, relative to the ultimate disposal of the deposit made by a tramway company on obtaining a provisional order authorising the construction of their tramway, is, first, that the promoters of the company are not, by any subterfuge or device, to get back the deposit, either directly or indirectly, if the tramway is not completed; secondly, that on an application under r. 28 for the application of the deposit, the creditors only are to be considered, and not the shareholders; and, thirdly, that the only creditors to be considered are meritorious creditors, coming with a bonâ fide case. Otherwise the deposit will be forfeited to the crown. *Lowestoft, Yarmouth, and Southwold Tramways Co., In re*, 46 L. J., Ch. 393; 6 Ch. D. 484; 36 L. T. 578; 25 W. R. 525.

The parliamentary deposit made by a tramway company that has failed to construct its tramway within the time limited and has been ordered to be wound up, is not a fund from which the liquidator is entitled to be paid his general costs of the winding-up nor his remuneration. *Colchester Tramways Co., In re*, 62 L. J., Ch. 243; [1893] 1 Ch. 309; 3 R. 168; 67 L. T. 846; 41 W. R. 169.

A company, incorporated under the companies acts, obtained a provisional order to construct a tramway. No tramway was ever commenced, and the company was ordered to be wound up. The only shareholders were the subscribers to the memorandum of association; the only debt due from the company was less than the amount of the deposit fund. The court, on the petition of the official liquidator, under the discretion given by the Tramways Act, 1870, r. 26, ordered the deposit fund to be paid out to the petitioner, to be applied by him for the benefit of the company's creditors, and refused to consider it forfeited to the crown. *Tynemouth Borough Tramways Co., In re*, 33 L. T. 8.

—— **Repayment — Abandonment — "Conclusive" Evidence.**]—The court will not, on the abandonment of a tramway, order the payment out of a parliamentary deposit, except on production of notice of abandonment published by the board of trade in accordance with the requirements of s. 18 of the Tramways Act of 1870, unless it is shown beyond all dispute that such notice cannot be forthcoming. *Dudley and Kingswinford Tramways Co., In re*, 63 L. J., Ch. 108; 8 R. 6; 69 L. T. 711; 42 W. R. 126.

Winding-up—Unregistered Company.] — An unregistered tramway company incorporated by a special act does not fall within the exception of "railway companies incorporated by act of parliament" in s. 199 of the Companies Act, 1862, and it may therefore be wound up under that section. *Brentford and Isleworth Tramways Co., In re*, 53 L. J., Ch. 624; 26 Ch. D. 527; 50 L. T. 580; 32 W. R. 895.

—— **Promoters—Inquiry by Board of Trade.**]—Under an order of the board of trade, made in 1882, certain persons therein named as "pro-

moters" were authorised to construct a tramway. The tramway was in fact constructed and worked by the P. Company, although no sale of the undertaking with the consent of the board of trade had been made to them under s. 44 of the Tramways Act, 1870. In 1889 the P. Company went into liquidation, and an official liquidator was appointed. Upon the representation of the local boards having jurisdiction over the roads where the tramway was constructed, the board of trade directed an inquiry under s. 42 of the Tramways Act, 1842, as to the solvency of the promoters. The official liquidator of the P. Company moved to restrain the inquiry:—Held, that the P. Company, not being "promoters" of the tramway within s. 42 of the tramways act, had no interest to stay the inquiry, and that it was not a proceeding against the company which could be stayed under s. 87 of the Companies Act, 1862. *Pontypridd and Rhondda Valleys Tramways Co., In re*, 58 L. J., Ch. 536; 37 W. R. 570.

Debenture-holders—Manager—Power to appoint.]—A holder of overdue debentures issued by a tramway company incorporated by special act of parliament brought an action to realise his security, and moved for the appointment of a receiver and manager. The company was stated to be insolvent, but had not been ordered to be wound up:—Held, that a tramway company was not within the principle of *Gardner* v. *L. C. & D. Ry.* (L. R. 2 Ch. 201), and that the court would appoint a manager. *Bartlett* v. *West Metropolitan Tramways Co.*, 63 L. J., Ch. 208; [1893] 3 Ch. 437; 69 L. T. 560. *And see Cases*, infra.

—— **Order for Sale of Undertaking.**]—The court has power to order a sale of the undertaking of a tramway company as a going concern in an action by holders of debentures secured thereon. *Bartlett* v. *West Metropolitan Tramways Co.*, 63 L. J., Ch. 519; [1894] 2 Ch. 286; 8 R. 259; 70 L. T. 491; 42 W. R. 500; 1 Manson, 272.

Though an equitable charge or lien usually confers a right to have the property sold, the owner of an equitable charge or lien on an undertaking or business acquired under statutory powers and for public purposes, is not entitled to a judicial sale of such undertakings for the payment of his debt, if the purposes for which it was acquired would be defeated or seriously affected thereby. A tramways company, like a railway company and a waterworks company, is within this exception to the general rule. *Gardner* v. *L. C. & D. Ry.* (L. R. 2 Ch. 201) and *Blaker* v. *Herts and Essex Waterworks Co.* (41 Ch. D. 399) followed. *Hope* v. *Croydon and Norwood Tramways Co.* (34 Ch. D. 730) and *Bartlett* v. *West Metropolitan Tramways Co.* ([1894] 2 Ch. 286) disapproved. *Marshall* v. *South Staffordshire Tramways Co.*, 64 L. J., Ch. 481; [1895] 2 Ch. 36; 12 R. 275; 72 L. T. 542; 43 W. R. 469; 2 Manson, 292—C. A.

—— **Appointment of Receiver and Manager—Penalties—Leave to Distrain.**]—Although the court will not appoint a receiver and manager of a tramway company (*Marshall* v. *South Staffordshire Tramways Co.* (64 L. J., Ch. 481; [1895] 2 Ch. 36, followed), nevertheless, where such a receiver and manager had been appointed prior to the decision in that case, a road authority (empowered by statute to distrain) was given leave to distrain on the property of the tramway company to recover penalties for the non-repair of the tram lines, even though the purposes for which the undertaking was acquired might be defeated or seriously affected thereby. *Pegge* v. *Neath District Tramways Co.*, 64 L. J., Ch. 737; [1895] 2 Ch. 508; 13 R. 762; 73 L. T. 25; 44 W. R. 72; 2 Manson, 474. Appeal compromised, 65 L. J., Ch. 536; [1896] 1 Ch. 684—C. A.

Costs of Provisional Order—Taxation.]—The costs of applications to the board of trade for provisional orders under the Tramways Act, 1870, are to be taxed on the chancery and not on the parliamentary scale. *Morley, In re*, L. R. 20 Eq. 17; 32 L. T. 524; 23 W. R. 532.

Dividends Paid "out of Profits"—Maintenance of Works—Profits of Particular Year.]—The articles of association of a limited tramway company provided that no dividend should be declared except "out of profits"; that the directors should, with the sanction of the company, declare annual dividends "out of profits"; and that the directors should, before recommending a dividend, set aside "out of profits," subject to the sanction of the company, "a reserve fund for maintenance, repairs, depreciation, and renewals." The company had for several years carried on their business, paying a dividend half-yearly on their ordinary shares; but they failed to set apart a reserve fund adequate for the maintenance of their tramway, which eventually became worn out. The company having again declared a half-yearly dividend on their ordinary shares, and the total sum appropriated for the dividend being, as it appeared, much less than the sum required to reinstate the tramway:—Held, that the company could only declare a dividend out of the net profits, and that the net profits could not be ascertained without first restoring the tramway to an efficient condition, or making due provision for that purpose out of the company's assets. An injunction was accordingly granted restraining the company from paying the half-yearly dividend they had declared, but leave was given them to move to dissolve the injunction, in the event of their being able to satisfy the court that there were profits available for the dividend. *Dent* v. *London Tramways Co.*, 50 L. J., Ch. 190; 16 Ch. D. 344; 44 L. T. 91; *Davison* v. *Gillies*, 50 L. J., Ch. 192, n.; 16 Ch. D. 347, n.; 44 L. T. 92, n.

—— **Preference Shareholders.**]—Held, however, that the holders of preference shares, the dividend on which was "dependent upon the profits of the particular year only," were entitled to a dividend out of the profits of any year after setting aside a proportionate amount sufficient for the maintenance of the tramway for that year only; and were not to be deprived of that dividend in order to make good the sums which in previous years should have been set aside by the company for maintenance, but which had been improperly applied by them in paying dividends. *Ib.*

Compulsory Sale—Power of Local Authority to purchase Part.]—When one tramway has been incorporated with others, by statute, in one undertaking, a local authority has power to

purchase such tramway within twenty-one years after the act or order authorising its construction, although no right to purchase the other lines has arisen, or although they may not be within the district of the purchaser's authority, and although the general system of the tram lines "may be disconnected by such purchase." *North Metropolitan Tramways Co.* v. *London County Council*, 60 J. P. 23—C. A. Affirming 72 L. T. 586; 43 W. R. 552.

—— **Basis of Valuation.**]—On a compulsory sale of the undertaking of a tramway company to a local authority, the amount to be paid by the latter under s. 43 of the Tramways Act, 1870, is the value of the tramway—including in that term all real and movable property belonging to the "promoters" necessary for conducting the tramway traffic and all proprietary rights attaching thereto—as successfully constructed and in complete working condition, after deduction of a proper sum for depreciation; but not of rights of user, such rights being conferred upon the "promoters" of the undertaking for the time being by the statute itself and not by the vendors (Lord Ashbourne dissenting). *Edinburgh Street Tramways Co.* v. *Edinburgh (Lord Provost)* and *London Street Tramways Co.* v. *London County Council*, 63 L. J., Q. B. 769; [1894] A. C. 456, 489; 6 R. 317; 71 L. T. 301—H. L. (E.), H. L. (Sc.) Affirming 58 J. P. 816—C. A.

Rating.]—*See* LOCAL GOVERNMENT—RATES.

2. CONSTRUCTION AND MANAGEMENT.

Without Parliamentary Authority—Nuisance.]—A person, without the authority of parliament, but with the concurrence of and by virtue of a contract with the vestry of the parish, laid down in one of the streets of the metropolis a double line of tramways on which omnibuses of a peculiar construction plied for hire. These tramways were dangerous and inconvenient to many of the public, as the wheels of vehicles skidded when crossing the tramway, and horses which put their feet upon it were startled:—Held, that this was a public nuisance, even though those tramways might be for the conveyance of the public generally. *Reg.* v. *Train*, 2 B. & S. 640; 31 L. J., M. C. 169; 8 Jur. (N.S.) 1151; 6 L. T. 380; 10 W. R. 539; 9 Cox, C. C. 180. *S. C.*, at nisi prius, 3 F. & F. 22.

The defendants had statutory powers to lay down certain tramway lines "with all proper works and conveniences connected therewith," but had no statutory power to purchase land or to construct stabling. The defendants bought some land near the plaintiff's premises and erected thereon a large block of stables which occasioned offensive smells and constituted a nuisance to the plaintiff:—Held, that the defendants had no statutory authority to commit the nuisance complained of, and the plaintiff was entitled to an injunction. The fact that the defendants had taken all reasonable care to prevent a nuisance was, therefore, no legal excuse. *Rapier* v. *London Tramways Co.*, 63 L. J., Ch. 36; [1893] 2 Ch. 588; 2 R. 448; 69 L. T. 361—C. A.

Distance between Rail and Footpath.]—Case in which the rule that 9 ft. 6 in. shall intervene between the tramway-rail and nearest footpath was departed from by statutory authority. *Edinburgh Street Tramways Co.* v. *Black*, L. R. 2 H. L. (Sc.) 336.

Relying on certain preliminary agreements, the frontagers of a narrow thoroughfare abstained from opposing the Edinburgh tramways bill; but as it turned out that the act, when passed, allowed the very thing which the frontagers had been most anxious to prevent, they asked and obtained from the court of session an interdict against its execution. But the house of lords recalled the interdict, holding that the question was determined by the statute, which the tramways company was not only entitled to carry out, but bound to obey. *Ib.*

Held, also, that the same consequences would have arisen in the case of a provisional order from the board of trade, when confirmed by parliament. *Ib.*

When the act directs compliance with deposited plans and sections, they are regarded as embodied in the statute. *Ib.*

User of Wheels flanged so as to Run on Tramway.]—Section 54 of the Tramways Act, 1870, prohibits the user of a tramway by unlicensed persons with carriages "having flange-wheels or other wheels suitable only to run on the rail of such tramway." The appellant, an omnibus proprietor, attached to his vehicle a lever with arms having a small revolving disc or roller which the driver might drop into the groove of the rail at the lower side of each forewheel when on the tramway, such discs operating when down as a flange at the point of contact with the rails, but when withdrawn by means of the lever leaving the vehicle free to travel over any part of the road:—Held, that this contrivance (though no obstruction to the tramway) was within the prohibition of the statute. *Cottam* v. *Guest*, 50 L. J., Q. B. 174; 6 Q. B. D. 70; 29 W. R. 305; 45 J. P. 95.

Liability for Accident—Promoters or Lessees.]—The Tramways Act, 1870, regulating tramway companies authorised by statute to use tramcars in the public streets, enacts by s. 55 that, "The promoters or lessees, as the case may be, shall be answerable for all accidents, damages, and injuries happening through their act or default, or through the act or default of any person in their employment, by reason or in consequence of any of their works or carriages. . .":—Held, that s. 55 applies only to a wrongful act or default, and does not make the promoters or lessees answerable for mere accident caused without negligence by their use of tramcars. *Brocklehurst* v. *Manchester Steam Tramways Co.*, 17 Q. B. D. 118; 55 L. T. 406; 34 W. R. 568; 51 J. P. 55.

Removal of Lines—"Road Authority"—Who to Replace.]—A railway company, which had repaired and maintained for forty years a bridge with its approaches over which the plaintiff tramway company had acquired by statute the right to lay, maintain, and use their tramway lines, found it necessary to reconstruct the bridge in the interests of the public safety, and gave to the plaintiff company statutory notices under s. 32 of the Tramways Act, 1870. They then reconstructed the bridge, and the road over it, with the sanction and approval of the local authorities in whom the road was vested, and for the purposes of such reconstruction removed the plaintiffs' tramways. After the reconstruction

the railway company restored the roadway over the bridge and its approaches, and the plaintiffs restored the tramways under protest as to the cost of such restoration :—Held, that the railway company had authority to remove the tramway lines for the purposes aforesaid, and were not under liability to the plaintiffs, provided that they caused as little detriment or inconvenience as possible in carrying out the said repairs. *Wolverhampton Tramways Co.* v. *G. W. Ry.*, 56 L. J., Q. B. 190 ; 56 L. T. 892.

Running Powers over Line of other Company—Tramway in Defective Condition—Trespass.]—The defendants were a company authorised by act of parliament to run tramcars by steam, and had running powers over the line of another tramway company along a highway. By reason of certain points upon such line being defective, a tramcar of the defendants, while being drawn by a steam-engine, went off the line and injured the plaintiff, who was upon the highway :—Held, that the statutory powers of the defendants could not be taken to authorise them to run their tramcars along the highway upon a tramway in a defective condition ; that, the tramway being defective, the defendants in running their tramcar on the highway were doing an unlawful act : and therefore that the defendants were liable as for a trespass in respect of the injury occasioned to the plaintiff by their immediate action. *Sadler* v. *South Staffordshire Tramways Co.*, 58 L. J., Q. B. 421 ; 23 Q. B. D. 17 ; 37 W. R. 582 ; 53 J. P. 694—C. A.

Paving—Control of Local Authority—Reference to Arbitration.]—By a local tramway act, passed after and incorporating the Tramways Act, 1870, the space between the rails and for a distance of eighteen inches beyond each external rail was to be paved by the company to the satisfaction of the local authority for the district with wood or other paving to be approved of by the local authority. On an application by the company the local authority declined to approve of a particular paving, and the company thereupon laid it down without such approval. On an application by the local authority for a mandamus to the company to take up the paving so laid down :—Held, that the powers given to the local authority were subject to the provisions of the Tramways Act, 1870, that a difference had arisen within s. 33 of that act which ought to be determined by a referee appointed by the board of trade, and that the mandamus ought not to be granted. *Reg.* v. *Croydon and Norwood Tramways Co.*, 56 L. J., Q. B. 125 ; 18 Q. B. D. 39 ; 56 L. T. 78 ; 35 W. R. 299 ; 51 J. P. 420—C. A.

A tramway company had constructed a tramway in accordance with the authority given them to do so by a special act and the Tramways Act, 1870, so much of the road as lay between the rails of the tramway and extended eighteen inches on each side of the tramway outside the rails being paved with granite setts. The defendant corporation, who were the road authority of the district in which the tramway in question was laid, gave the company notice of their intention to pave, at their own expense, with wood the whole of the roadway in which the tramway was laid. The company objected on the ground that the work which the corporation proposed to execute was an interference with their tramway, and would largely increase the expense to which they would be put in maintaining and repairing that part of the road which they were bound to repair and maintain, and asked for an injunction to restrain the corporation from so interfering with their tramway :—Held, that the dispute between the parties was not a difference within the meaning of s. 33 of the Tramways Act, 1870, and that the company were not entitled to an injunction. *Reg.* v. *Croydon and Norwood Tramways Co.* (18 Q. B. D. 39) distinguished. *Bristol Trams and Carriage Co.* v. *Bristol Corporation*, 59 L. J., Q. B. 441 ; 25 Q. B. D. 427 ; 63 L. T. 177 ; 38 W. R. 693 ; 55 J. P. 53—C. A.

Liability for Non-repair of Road—Contract with Road Authority.] — Where a tramway company enters into a contract with the road authority under s. 29 of the Tramways Act, 1870, whereby the road authority undertakes the repair of the portion of the road upon which the tramway is laid, the liability for damage occasioned by the non-repair of that part of the road, which would but for such contract be cast by s. 28 upon the tramway company, is transferred to the road authority. *Howitt* v. *Nottingham and District Tramways Co.*, 53 L. J., Q. B. 21 ; 12 Q. B. D. 16 ; 50 L. T. 99 ; 32 W. R. 248.

The effect of a contract made in pursuance of the powers given by s. 29 of the Tramways Act, 1870, by a tramway company with the road authority for the maintenance by the latter of the roadway and lines, is to transfer to the road authority the liability primâ facie imposed by s. 28 upon the company for damage occasioned by the roadway being out of repair. *Howitt* v. *Nottingham Tramways* (12 Q. B. D. 16) approved. *Alldred* v. *West Metropolitan Tramways*, 60 L. J., Q. B. 631 ; [1891] 2 Q. B. 398 ; 65 L. T. 138 ; 39 W. R. 609 ; 55 J. P. 824—C. A.

Repair of Road—Agreement with Local Authority—County Authority.]—By a local tramway act it was provided that in case steam power should be used on the tramway, the tramway company should repair the whole extent of that part of a main road over which their lines passed, but that the company might make such contracts and agreements for the repair of the road with the local authority of the borough as might be approved by the board of trade. It was also provided that no contract or agreement to be entered into under the act should operate to lessen the liability of the company under s. 28 of the Tramways Act, 1870. The road authority of the borough entered into a contract with the company, by which the expenses of maintenance and repair of the road were divided between them. In an action by the borough road authority against the county authority for contribution under s. 13 of the Highways and Locomotives Act, 1878 :—Held, that the county authority were liable to pay out of the county rate one-half of the expenses incurred by the borough authority under the contract. *Over-Darwen Corporation* v. *Lancashire JJ.*, 58 L. T. 51 ; 36 W. R. 140.

An agreement between a county council and a highway board, under s. 11 of the Local Government Act of 1888, by which the highway board became bound to repair roads, does not take away from the county council their rights and liabilities as the "road authority." *Stockport Highway Board* v. *Cheshire County Council*, 61 L. J.,

Q. B. 22 ; 65 L. T. 85 ; 39 W. R. 606 ; 55 J. P. 808.

—— **Expense of Superintendence.**]—A vestry, as the road authority under the Tramways Act, 1870, claimed against a tramway company the expenses of superintending their opening and breaking up of roads under s. 26, for the maintenance and renewal of their tramway :—Held, that so far as the company merely raised the sleepers and rails to the level of the road, or raised the stone packing of the road to the level of the surface of the rails, they were maintaining and keeping the road in good condition and repair under s. 28, and were not liable to the superintendence of the road authority under s. 26. *St. Luke's Vestry* v. *North Metropolitan Tramways Co.*, 1 Q. B. D. 760 ; 35 L. T. 329.

Liability for Obstruction—Nuisance.]—The defendants were the owners of a quay, over which there was a public right of way to their docks. The Great Eastern Railway Company by their private act were empowered to, and did enter into an arrangement with the defendants to lay tramways connecting the docks with the railway system. The company were to keep the tramways in good working order, under the Tramways Act, 1870. The company, as promoters, gave notice to the defendants of their intention to open and break up the road for the purpose of doubling the rails at a particular point. The company did break up the highway for their tramway purposes. The plaintiff was injured by being thrown from his cart through the defective condition of the roadway at the place where the works were being carried out, and brought his action for compensation against the defendants as owners of the highway. The jury at the trial found that the accident to the plaintiff had been caused by the negligence of the railway company, who were in possession of the spot where the occurrence took place, and that the roadway was in a defective condition owing to a breach of duty on the part of the railway company, and gave the plaintiff substantial damages :—Held, that as the railway company were carrying out their works not under the orders or as licensees of the defendants, but under their statutory powers, and were in sole possession of the place where the accident happened, which was entirely under their control, and the negligence causing the accident was that of the railway company and not of the defendants, the verdict ought to be entered for the defendants. *Barham* v. *Ipswich Dock Commissioners*, 54 L. T. 23.

User of Steam Engines—Licence of County Authority.]—The steam engines authorised by statute to be used on tramways are not locomotives within the meaning of the Highways and Locomotives (Amendment) Act, 1878, s. 32, and, therefore, do not require to be licensed by the county authority. *Bell* v. *Stockton Tramways Co.*, 51 J. P. 804.

Regulation as to Lights on Engine—Breach by Engine-driver.]—A tramway company were convicted before justices of the breach of a regulation of the board of trade, made under a local act, relative to lamps being placed and lighted in a conspicuous position on the front of a tramway engine :—Held, that the regulation was not invalid as a regulation, and that its subject-matter need not have been dealt with by a by-law ; that the offence being stated in the words of the regulation was sufficiently described, and that the company were responsible for the personal neglect of their engine-driver. *St. Helens Tramways Co.* v. *Wood*, 60 L. J., M. C. 141 ; 56 J. P. 70.

Liability for Acts of Servants—Scope of Employment.]—Section 52 of the Tramways Act, 1870, which enacts that "it shall be lawful for any officer or servant of the promoters or lessees of any tramway" to detain any person defrauding the company of his fare, must be construed as limited to any officer or servant appointed for that purpose. A tramway company gave to their conductors printed instructions, in which it was ordered that, except in cases of assault, conductors were not to give passengers into custody without the authority of an inspector or timekeeper. The conductor of a car, in which the plaintiff was a passenger, detained the plaintiff, and gave her into custody on a charge of passing bad money :—Held, in an action for false imprisonment against the company, that the defendants were not liable. *Charleston* v. *London Tramways Co.*, 36 W. R. 367. Affirmed, 32 S. J. 557—C. A.

A passenger on a tramway tendered a half sovereign to the conductor of the car in payment of the fare. The conductor, supposing the coin to be counterfeit, gave the passenger in charge to the police. Sections 51 and 52 of the Tramways Act, 1870, empower officers or servants of the promoters or lessees of any tramway, to seize and detain any person seeking to avoid payment of his fare :—Held, that the tramway company were liable in an action against them by the passenger for false imprisonment. *Furlong* v. *South London Tramways Co.*, 1 Cab. & E. 316 ; 48 J. P. 329.

—— **Drunken man entering Tramcar—Duty of Conductor.**]—A person acts illegally and wrongfully in forcing his way, when intoxicated, into a tramcar while it is in motion, and by so doing places himself in a position of peril, and the conductor in a position of difficulty ; assuming the latter did not, under the circumstances, act with the most perfect presence of mind, but still was not guilty of vexatiousness or unnecessary violence, the tramway company is not liable for damages for negligence. *Delany* v. *Dublin Tramways Co.*, 30 L. R., Ir. 725—C. A.

Fares — By-laws of Company.] — P. was charged by the conductor of a tramway company, under a by-law, which says, "Every passenger shall upon demand pay the fare legally demandable for the journey," with not paying upon demand made. The fare was demanded during the journey, and P. objected that it was not legally demandable until the completion of the journey. The company was authorised by act of parliament to "make regulations for regulating the travelling in or upon any carriage belonging to them," and their act also provided that "the tolls, &c., shall be paid to such persons and at such places upon or near to the tramways and in such manner and under such regulations as the company shall by notice appoint" :—Held, that the by-law was authorised by the act, that it was reasonable, and that, as P. had become a passenger and was travelling upon the tramway, he was liable to pay the fare whenever

it was demanded of him by the conductor. *Eggington* v. *Pearl*, 33 L. T. 428.

—— **Amount of.**]—A tramway company scheduled to their act of parliament distinct agreements with municipal authorities not to charge tramway passengers above a fixed fare; but they afterwards obtained legislative authority to substitute omnibuses on certain routes in lieu of the tramways, and to charge a higher fare on these routes:—Held, that the company had no power to increase the fare of passengers using the tramways only. *Edinburgh Street Tramways Co.* v. *Torbain*, 3 App. Cas. 58; 37 L. T. 288—H. L. (Sc.)

—— **Malicious Prosecution — Criminal Proceedings.**]—Proceedings by a tramway company under ss. 51 and 52 of the Tramways Act, 1870 (which relate to non-payment of fares), are of a criminal character, and therefore the company are liable in an action for malicious prosecution brought by the person against whom a summons in respect of such an offence has been dismissed. *Rayson* v. *South London Tramways Co.*, 62 L. J., Q. B. 593: [1893] 2 Q. B. 204; 4 R. 522; 69 L. T. 491; 42 W. R. 21; 17 Cox, C. C. 691; 58 J. P. 20—C. A.

Validity of Agreements regulating Services of Conductors.]—A conductor, at the time of entering the employ of a tramway company, deposited with them the sum of 5*l.*, which, together with any wages due, was agreed to be forfeited in case of any breach by him of the company's rules. It was further agreed that the company's manager was to be the sole judge of whether the company was entitled to retain the whole of the deposit-money and wages due, and that his certificate of the cause of retention should be binding and conclusive evidence between the parties in all courts of justice and before all stipendiary magistrates, and should bar the conductor of all right to recover under any circumstances the moneys so certified to be retained. After three months' service the conductor was discharged from his employ, and the deposit-money as well as wages due were certified by the manager to be forfeited for non-observance of certain rules:—Held, that, in the absence of fraud, such certificate was binding, there being nothing in the agreement that was illegal or void. *London Tramways Co.* v. *Bailey*, 47 L. J., M. C. 3; 3 Q. B. D. 217; 37 L. T. 499; 26 W. R. 494.

Under an Agreement — Right of Way.]—Tenants of quarries situated about three miles from their works, who were accustomed to convey the stones from the quarries to the works by carts, entered into an agreement with their landlord to construct a tramway from the quarry to the works, to run, inter alia, "by the end of the policy" of the landlord; and they further agreed to compensate the farm tenants along the line for any damage done to their farms during the currency of their leases. The landlord agreed, inter alia, to give gratuitously the land required for the tramway. Outside the policy ground there was a private road, the property of the landlord, which, before it reached the tenants' works, ran through another tenant's stone pavement yard. This was the only practical route outside the policy for the tramway; and it was alleged that the only obstacle to laying it along that road was, that the other tenant might refuse to allow it being laid on that part passing through his yard, but for this there were no termini habiles. The tenants claimed that the landlord was bound to give them the use and possession of land for the purpose of the tramway, and that, either (1) "within and by the end of the policy," or (2) "in any other place as suitable and convenient for them in every respect":—Held, that under the agreement the stipulation was that the tramway should pass outside the walls which inclose the policy of the landlord; and that, by agreeing to give gratuitously the lands required, the landlord merely undertook to give the tenants such rights as were vested in him, leaving them (with the power to use his name) to settle with any persons who might have a right or interest entitling them to object to the formation of the tramway. *Sinclair* v. *Caithness Flagstone Quarrying Co.*, 6 App. Cas. 340—H. L. (Sc.)

By-laws — Emission of Steam.] — H. was driver of a steam-engine on a tramway; one of the by-laws enacting that no steam shall be emitted from the engine, so as to be a reasonable ground of complaint to passengers or the public. H. as driver was resting the engine, which was not in good repair, and he could not help emitting steam, and one passenger only, when passing, complained of it:—Held, that H. was rightly convicted, as the by-law was imperative and the evidence was sufficient, though he had no mens rea, and one passenger only complained. *Hartley* v. *Wilkinson*, 49 J. P. 726.

—— **Passenger to Show or "deliver up Ticket or pay Fare."**]—A by-law of a tramway company provided that "each person shall show his ticket (if any) when required so to do to the conductor or any duly authorised servant of the company, and shall also, when required so to do, either deliver up his ticket or pay the fare legally demandable for the distance travelled over by such passenger." A passenger, having paid his fare and received a ticket, inadvertently tore up the ticket, and on being required to deliver it up was unable to do so, and refused to pay the fare a second time:—Held, that the by-law was good, and that the passenger committed an offence against it. *Hanks* v. *Bridgman*, 65 L. J., M. C. 41; [1896] 1 Q. B. 253; 74 L. T. 26; 44 W. R. 285; 18 Cox, C. C. 224; 60 J. P. 312.

A by-law under the Tramways Act, 1870, provided that each passenger should show his ticket (if any) when required so to do to the conductor or any duly authorised officer of the tramway company. A further by-law imposed a penalty for its breach:—Held, that the by-law was reasonable, and a passenger having a ticket which he refused to show had infringed it, and had incurred a penalty. *Lowe* v. *Volp*, 65 L. J., M. C. 43; [1896] 1 Q. B. 256; 74 L. T. 143; 44 W. R. 442; 18 Cox, C. C. 253; 60 J. P. 232.

The by-law of a tramway company which provides that each passenger shall deliver up his ticket when required to do so, or pay the fare for the distance travelled over, is a reasonable by-law. A passenger travelling under such circumstances, who shows his ticket, but refuses to deliver it up on the ground that his journey has not terminated, is liable to the penalty pre-

scribed by the by-law. *Heap* v. *Day*, 34 W. R. 627 ; 51 J. P. 213.

—— **Regulating number of Passengers.**]—It is competent to the local authority of any borough to make and to enforce a by-law under s. 48 of the Tramways Act, 1870, for regulating the number of passengers to be carried in and upon tramcars, and the extent of accommodation to be afforded to them. The assent of the lessees of the line (under s. 46) is not necessary to the validity of such by-law. *Smith* v. *Butler*, 16 Q. B. D. 349 ; 34 W. R. 416 ; 50 J. P. 260.

A tramway company made by-laws forbidding more than a certain number of persons to be carried in a car, and providing that conductors should be liable to a penalty for infringement of any of the by-laws :—Held, that a passenger incommoded by an excessive number of passengers was entitled to prosecute a conductor for breach of the by-law. *Badcock* v. *Sankey*, 54 J. P. 564.

J. M.

TRANSFER.

Of Negotiable Instruments.]—*See* BILLS OF EXCHANGE—NEGOTIABLE INSTRUMENTS.

Of Personal Property.]—*See* BILLS OF SALE.

Of Shares.]—*See* COMPANY.

Of Proceedings.]—*See* PRACTICE.

TRANSFER OF LAND ACT.

See LAND REGISTRY.

TREASON.

See CRIMINAL LAW.

TREASURE TROVE.

See CRIMINAL LAW—CORONER.

TREASURY (LORDS OF).

See PUBLIC OFFICER.

TREASURER (COUNTY).

See RATES.

TREES.

See WASTE AND TIMBER.

TRESPASS.

A. TO THE PERSON.
1. *General Principles*, 224.
2. *When Indictable*, 230.
3. *In Self-defence*, 230.
4. *Defence of Possession of House or Land*, 230.
5. *Defence of Possession of Goods*, 233.
6. *Other Justifications*, 233.
7. *False Imprisonment.* — *See* MALICIOUS PROCEDURE.
8. *In Criminal Cases.* — *See* CRIMINAL LAW.

B. TO LANDS.
1. *Right to Eject Trespasser*, 234.
2. *Action for, Generally*, 234.
3. *Who may Maintain.*
   a. In General, 249.
   b. Tenants in common against each other, 252.
4. *Leave and Licence*, 253.
5. *Notice not to Trespass*, 256.
6. *Practice.*
   a. Declaration and Injunction, 256.
   b. Damages, 259.
   c. Effect of Judgment, 261.

C. TO GOODS.
1. *Right of Possession*, 262.
2. *Action for.*
   a. In General, 263.
   b. Principal and Agent, 266.
   c. Companies, 267.
   d. Joint Trespass, 267.
3. *Damages*, 268.
4. *Restoration of Goods*, 269.
5. *Conversion of Goods.*—*See* TROVER.
6. *Illegal Distress.*—*See* DISTRESS.
7. *Illegal Executions.*—*See* EXECUTION.

A. TO THE PERSON.

1. GENERAL PRINCIPLES.

Assault excludes Consent.]—An assault ex vi termini excludes consent ; therefore, a plea of leave and licence to a declaration charging an assault amounts to not guilty. *Christopherson* v. *Bare*, 11 Q. B. 473 ; 17 L. J., Q. B. 109 ; 12 Jur. 374.

What is Actionable.]—Trespass lies for originally throwing a squib, which, after having been thrown about in self-defence by other persons, at last put out the plaintiff's eye. *Scott* v. *Shepherd*, 2 W. Bl. 892 ; 3 Wils. K. B. 403.

If one of two persons, fighting, unintentionally strikes a third, he is answerable for an assault, and the absence of intention can only be urged

in mitigation of damages. *James* v. *Campbell*, 5 Car. & P. 372.

Throwing water on a person is a battery. *Purcell* v. *Horne*, 3 N. & P. 564; 8 A. & E. 602; 7 L. J., Q. B. 228.

Where A. threw a stick, which struck the plaintiff, but it did not appear for what purpose the stick was thrown:—Held, that it was fair to conclude that the stick was thrown for a proper purpose, and that the striking of the plaintiff was an accident. *Alderson* v. *Waistell*, 1 Car. & K. 358.

A policeman prevented a member of a society from entering the society's room:—Held, that if the policeman was wholly passive, and merely obstructed the entrance as any inanimate object would, this was not an assault by the policeman. *Jones* v. *Wylie*, 1 Car. & K. 257.

A person cannot justify giving another into custody for merely laying hands on him to attract his attention, provided it is not done hostilely. *Coward* v. *Baddeley*, 4 H. & N. 478; 28 L. J., Ex. 260; 5 Jur. (N.S.) 414; 7 W. R. 466.

Detaining a person after the detainer has ceased to be lawful is actionable. Trespass, and not case, was the proper form of action in such circumstances. *Magnay* v. *Burt*, 5 Q. B. 381; D. & M. 652; 7 Jur. 1116—Ex. Ch.

Trespass will not lie against a plaintiff who, without notice, takes a defendant in execution for a debt in respect of which the latter has been discharged under the Irish insolvent act. But if the plaintiff maliciously sued out the writ he was liable to an action on the case. *Ewart* v. *Jones*, 3 D. & L. 252; 14 M. & W. 774; 15 L. J., Ex. 18.

Threats.]—Riding after a person, and obliging him to run away into a garden to avoid being beaten, is an assault. *Martin* v. *Shoppee*, 3 Car. & P. 373.

A. was advancing in a threatening attitude with an intention to strike B., so that his blow would have almost immediately reached B. if he had not been stopped:—Held, that it was an assault in point of law, though, at the particular moment when A. was stopped, he was not near enough for his blow to take effect. *Stephens* v. *Myers*, 4 Car. & P. 349.

A declaration stated that the defendant assaulted the plaintiff, "and also then presented a pistol, loaded with gunpowder, ball and shot, at the plaintiff, and threatened and offered therewith to shoot the plaintiff, and blow out his brains." It was proved, that the parties being on board a ship, the defendant (who was the captain) went into his cabin, and brought out a pistol and cocked it, and presented it at the plaintiff's head, saying, that, if the plaintiff was not quiet, he would blow his brains out:—Held, that if the defendant, at the time he presented the pistol, used words showing that it was not his intention to shoot the plaintiff, this would be no assault. *Blake* v. *Barnard*, 9 Car. & P. 626.

But a threat to shoot a person, coupled with the act of presenting a loaded fire-arm at him, although it is half-cocked, is, in law, an assault. *Osborne* v. *Veitch*, 1 F. & F. 317.

The plaintiff being in the defendant's workshop, and refusing to quit when desired, the defendant and his servant surrounded him, and tucking up their sleeves and aprons, threatened to break his neck if he did not go out, whereupon the plaintiff, apprehensive of violence, departed:—Held, an assault. *Read* v. *Coker*, 13 C. B. 850; 1 C. L. R. 746; 22 L. J., C. P. 201; 17 Jur. 190; 1 W. R. 413.

To Person and Goods—Same wrongful Act—Estoppel.]—Damage to goods, and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and therefore the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently commenced for the injury to the person. *Brunsden* v. *Humphrey*, 53 L. J., Q. B. 476; 14 Q. B. D. 141; 51 L. T. 529; 32 W. R. 944; 49 J. P. 4—C. A.

Injury to be Actionable must be Wilful or Negligent.]—To maintain an action for injury to the person the injurious act must be wilful or the result of negligence. *Holmes* v. *Mather*, 44 L. J., Ex. 176; L. R. 10 Ex. 261; 33 L. T. 361; 23 W. R. 864. S. P., *Stanley* v. *Powell*, 60 L. J., Q. B. 52; [1891] 1 Q. B. 86; 63 L. T. 809; 39 W. R. 76; 55 J. P. 327.

The defendant's horses, while being driven by his servant in the public highway, ran away, and became so unmanageable that the servant could not stop them, but could, to some extent, guide them. The defendant, who sat beside his servant, was requested by him not to interfere with the driving, and complied. While unsuccessfully trying to turn a corner safely, the servant guided them so that, without his intending it, they knocked down and injured the plaintiff, who was in the highway. The plaintiff having sued the defendant for negligence and in trespass, the jury found that there was no negligence in any one:—Held, that, even assuming the defendant to be as much responsible as his servant, no action was maintainable; for since the servant had done his best under the circumstances, the act of alleged trespass in giving the horses the direction towards the plaintiff was not a wrongful act. *Holmes* v. *Mather*, supra.

Committed Abroad.]—It is no bar to an action in this country for an assault and false imprisonment committed by one Englishman upon another at Naples, that by the law of Naples, no proceeding to recover damages for the trespass could be maintained by the plaintiff until after the defendant had been found guilty, and condemned by the criminal tribunal at Naples, before which he had been arraigned in respect thereof; nor is it any bar to such action for the assault that, by the law of Naples, damages in respect of it could only be recovered in one particular form of proceeding, which had been commenced and was still pending. *Scott* v. *Seymour* (*Lord*), 1 H. & C. 219; 32 L. J., Ex. 61; 9 Jur. (N.S.) 522; 8 L. T. 511; 11 W. R. 169—Ex. Ch.

Injury caused by Animals—Liability of Owner.]—The plaintiff, a labourer, was digging a hole in the garden of a house adjoining that of the defendant. A low wall belonging to the defendant divided the gardens. While the plaintiff was at work at the bottom of the hole a dog belonging to the defendant, going over land belonging to third persons on his way to the defendant's garden, leaped into the hole, and, falling on the defendant, injured him severely:—Held, that as the dog was not shown to be mischievous to the knowledge of the owner, no

action would lie either for trespass or any breach of duty. *Sanders* v. *Teape*, 51 L. T. 263.

—— **Animal feræ naturæ—Liability of Owner—Scienter.**]—A person who keeps an animal not belonging to that class which, according to the experience of mankind, is not dangerous to man, keeps it at his own risk; he is therefore liable for injuries caused by such an animal (e.g. an elephant), and his liability is not affected by his ignorance of its dangerous character. *Filburn* v. *People's Palace Co.*, 59 L. J., Q. B. 471; 25 Q. B. D. 258; 38 W. R. 706; 55 J. P. 181—C. A. S. P., *Besozzi* v. *Harris*, 1 F. & F. 92. See also *May* v. *Burdett*, 9 Q. B. 101; 16 L. J., Q. B. 64; 10 Jur. 692.

Parish Officers Cutting Pauper's Hair.]—If parish officers cut off the hair of a pauper in the poor-house by force, and against the will of such pauper, this is an assault; and if done as matter of degradation, and not with a view to cleanliness, that will be an aggravation, and go to increase the damages. *Forde* v. *Skinner*, 4 Car. & P. 239.

Medical Examination—Evidence of Non-Consent or Coercion.]—For a female servant to successfully maintain an action against her mistress and a medical man for an assault upon her, consisting of an examination of her person by such medical man on the instructions of the plaintiff's mistress, the plaintiff must show that she was overpowered by force or had reasonable cause for apprehending violence. Therefore, where the facts showed that the plaintiff reluctantly submitted to her mistress's orders, it was held that the plaintiff failed. *Latter* v. *Braddell*, 50 L. J., Q. B. 448; 44 L. T. 369; 29 W. R. 366; 45 J. P. 520—C. A.

An examination by medical men, in pursuance of an order of a magistrate, of the person of a female, in custody upon the charge of concealing the birth of her illegitimate child, constitutes an assault. *Agnew* v. *Jobson*, 13 Cox, C. C. 625.

Communication of Disease by Sexual Intercourse.]—The communication of venereal disease during illicit sexual intercourse is not an actionable wrong if the act of intercourse has been voluntary; and consent to the intercourse is not vitiated by the fact that it has been induced through wilful concealment of the disease. On the principle ex turpi causâ non oritur actio, such an action is unsustainable. *Reg.* v. *Bennett* (4 F. & F. 1105) and *Reg.* v. *Sinclair* (13 Cox, C. C. 28) distinguished, and held not to apply to a civil action. *Hegarty* v. *Shine*, 4 L. R., Ir. 288; 14 Cox, C. C. 145.

Liability of Candidate at Election—Acts of Mob.]—A candidate for election as member of parliament was accompanied through a borough by a crowd of persons forming a procession in his honour. The windows of certain houses, belonging to members of the opposite political party, were broken by the mob in their course; and he, standing up in a carriage, waved his hat in the air, but with no intention of encouraging the mob in their acts of violence, and made no attempt to leave the carriage or stop the procession, though he remonstrated with those who could hear him on the disgraceful character of their proceedings:—Held, that, under the circumstances, he was not liable for the damage caused by the breaking of the windows. *Peacock* v. *Young*, 21 L. T. 527; 18 W. R. 134.

Tramway in Defective Condition—Tramcar Running off Line and Injuring Person.]—A tramway company was authorised by statute to run cars by steam along a highway. Owing to the defective state of the line, a tramcar, while being drawn by a steam-engine, went off the line and injured the plaintiff, who was upon the highway:—Held, that the defendants' statutory powers could not be taken to authorise the running of tramcars along the highway upon a tramway in a defective condition; that, the tramway being defective, the defendants, in running their tramcar on the highway, were doing an unlawful act; and, therefore, that the defendants were liable as for a trespass in respect of the injury occasioned to the plaintiff by their immediate action. *Sadler* v. *South Staffordshire Tramways Co.*, 58 L. J., Q. B. 421; 23 Q. B. D. 17; 37 W. R. 582; 53 J. P. 694—C. A.

Joint Trespass.]—A sailor, who had lodged for some weeks at a public-house, and also received advances of cash from the person who kept it, having been paid his wages in the presence of the father of the publican, went to the house of the latter, and drinking some spirits, became intoxicated and fell asleep. The father of the publican, in his son's presence, desired a young woman, an acquaintance of the sailor, to take the money out of his pocket, which she did, and laid it on the table. It was 13*l.* 17*s.* 6*d.* The publican took it up, and said he would keep it till the man got sober. When he awoke and asked for his money, the father said it was all right till the morning. After this, by desire of the sailor, a pound in silver was given to the young woman out of the money, and the next morning, on his applying for the remainder, he was offered 2*s.* and some copper as the balance, after deducting what he owed the publican:—Held, that a joint action of trespass was maintainable against both the publican and his father, and that the sailor was entitled to recover the whole amount taken from him, without any other deduction than that of the pound afterwards given to the woman. *Peddell* v. *Rutter*, 8 Car. & P. 337.

—— **Evidence of Statements by Defendant after Trespass.**]—It is competent for the jury to consider the words which the defendant used subsequently to the trespass, in coming to the conclusion whether he was a joint trespasser with those actually committing the mischief. *M'Laughlin* v. *Pryor*, 4 Scott (N.R.) 655; Car. & M. 354; 4 Man. & G. 48; 11 L. J., C. P. 169.

A party, consisting of the defendant and others, hired for a day's excursion a carriage and post horses driven by postillions, who were the servants of the owner of the horses. The defendant rode upon the box. The postillions, in endeavouring to force their way into a line of carriages, overturned a gig and seriously injured the plaintiff, who was in the gig. The defendant, at the time and afterwards, held himself out as responsible for the accident, and used expressions showing that he had a control over the postillions at the time it happened:—Held, that he was liable in trespass. *Ib.*

Evidence of Authority to Commit.]—On the trial, in an action for assault, the plaintiff proved that he was present in the gallery of a large hall where there was a meeting convened

by members of an association, and that the defendant acted as chairman. There was an interruption in the gallery near to the place where the plaintiff was standing, upon which the defendant said, "I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front." The plaintiff was making no disturbance, but, according to his statement, he was seized by a man with a white ribbon in his coat and two policemen, and dragged over some benches to the front part of the gallery, and thereby injured. There was nothing to show the position or duty of those who seized him, or whether any instructions as to keeping order had been given them by the defendant, before the act complained of:—Held, that there was not evidence of any liability on the part of the defendant, as there was not the ordinary relation of master and servant between him and those who assaulted the plaintiff; but only a particular direction as to a particular matter, and that the words used by the defendant did not authorise the officers to act upon their judgment as to who were the persons making the disturbance. *Lucas* v. *Mason*, 44 L. J., Ex. 145; L. R. 10 Ex. 251; 33 L. T. 13; 23 W. R. 924.

Evidence of Son Assault Demesne.]—In an action for an assault it is competent to the defendant to give evidence of an assault by the plaintiff, without a plea of son assault demesne. *Syers* v. *Chapman*, 2 C. B. (N.S.) 438.

—— **Defendant guilty of Excess.**]—Where the defendant pleads this plea, the plaintiff may, under a replication joining issue on the plea, and without replying excess, show that although he struck the first blow the defendant was guilty of excess. *Dean* v. *Taylor*, 11 Ex. 68. But see contra, *Rimmer* v. *Rimmer*, 16 L. T. 238.

Damages—Assault—Forcible Expulsion from House.]—Pending a negotiation for an assignment of a lease, A. was let into possession of the premises as tenant of some kind. The negotiation going off, B. (the landlord) demanded the key, and wrote to A., telling him that he never intended to let him into possession, and A. refusing to go out, B. entered, and forcibly expelled him and his family, in the doing of which the plaintiff and his wife were assaulted:—Held, that although the plaintiff was entitled to recover damages for the assaults, he was not entitled to damages for the expulsion; his tenancy being at the most a tenancy at will, and that having been properly determined. *Pollen* v. *Brewer*, 7 C. B. (N.S.) 371; 6 Jur. (N.S.) 509; 1 L. T. 9.

Evidence in Mitigation of Damages.]—In an action for an assault, though the defendant has not pleaded a justification, he may extract evidence in mitigation of damages in the cross-examination of the plaintiff's witnesses. *Moore* v. *Adam*, 2 Chit. 198.

A. having written a novel, B. published a libel on A. in the form of a critique on the novel, for which A. beat him; B. brought an action for the assault, and A. a cross action for the libel:—Held, that, in the action for the assault, the libel might be given in evidence in mitigation of damages, although it was the subject of another action; but that being so, the defendant ought not to derive much advantage from it in diminishing the damages. *Fraser* v. *Berkeley*, 7 Car. & P. 621; 2 M. & Rob. 3.

2. When Indictable.

The judge is bound to try the issues on the record, and ought not to nonsuit if it appears on the evidence that there has been a felony in relation to the subject-matter of the dispute and the offender has not been prosecuted to conviction. *Wells* v. *Abraham*, 41 L. J., Q. B. 306; L. R. 7 Q. B. 554; 26 L. T. 326; 20 W. R. 659.

In an action by a woman for assault, on her stating that the assault for which she sued was immediately followed by a rape the judge nonsuited her:—Held, rightly. *Wellock* v. *Constantine*, 2 H. & C. 146; 32 L. J., Ex. 285; 9 Jur. (N.S.) 232; 7 L. T. 751. At nisi prius, 2 F. & F. 791. *And see, further*, Criminal Law (*Felony*).

Where there has been criminal intercourse in a case of seduction of a servant, accompanied, in the first instance, with some degree of violence, an action is maintainable for an assault. *Desborough* v. *Holmes*, 1 F. & F. 6.

The objection that there has been no prosecution cannot be taken by plea. *Osborn* v. *Gillett*, 42 L. J., Ex. 53; L. R. 8 Ex. 88.

In order to constitute an assault and battery punishable by the criminal law, the act complained of must be done with a hostile intention. *Coward* v. *Baddeley*, 4 H. & N. 478; 28 L. J., Ex. 260; 5 Jur. (N.S.) 414; 7 W. R. 466.

3. In Self-defence.

Posture of Defence.]—If A. comes up to attack B., and B. puts himself into a fighting attitude to defend himself, this is not an assault by B., and will not, in action by B. against A. for assault, support a plea by A. of son assault demesne. *Moriarty* v. *Brooks*, 6 Car. & P. 684.

Excess.]—Upon issue taken on a plea of son assault demesne, it is necessary to prove an assault commensurate with the trespass sought to be justified. *Reece* v. *Taylor*, 4 N. & M. 470; 1 H. & W. 15; 4 L. J., K. B. 74.

A. seized the bridle of the horse on which B. was riding:—Held, that B., after a request to desist, was justified in striking A. with his riding whip, using no more force than was necessary to obtain his release. *Rowe* v. *Hawkins*, 1 F. & F. 91.

A declaration stated, that the defendant assaulted the plaintiff, and wrenched a stick from his hand, and with the stick and with his fists gave the plaintiff many violent blows. Plea, as to the assaulting the plaintiff with the stick and his fists, son assault demesne:—Held, after verdict, that the plea sufficiently justified the battery with the stick as well as the assault with it. *Blunt* v. *Beaumont*, 2 C., M. & R. 412; 4 D. P. C. 219; 5 Tyr. 1100.

4. Defence of Possession of House or Land.

Extent of Justification.] — Molliter manus imposuit is an answer to the battery. *Titley* v. *Foxall*, 2 Ld. Ken. 308.

An assault by a man in defence of his property is justifiable. *Alderson* v. *Waistell*, 1 Car. & K. 358.

So also is an assault to prevent the plaintiff endeavouring forcibly to break and enter the defendant's close. *Weaver* v. *Bush*, 8 Term Rep. 78.

But it is not justifiable, in order to turn the plaintiff out of the defendant's house, where she continued against his will, to strike her repeated blows, and with great force and violence several times knock her down. *Gregory* v. *Hill*, 8 Term Rep. 299. And see *Johnson* v. *Northwood*, 1 Moore, 420 ; 7 Taunt. 689.

Nor in such a case is it justifiable to strike and wound the trespasser with a truncheon. *Oakes* v. *Wood*, 2 M. & W. 791 ; M. & H. 237 ; 6 L. J., Ex. 200.

Ejecting — Request to Leave.] — Before a person can be assaulted and turned out of church he should be requested to retire. *Ballard* v. *Bond*, 1 Jur. 7.

If a person enters a house with force and violence, the person whose house is entered may justify turning him out (using no more force than is necessary), without making a previous request to him to depart ; but if the person enters quietly such a request is necessary before he can be turned out. *Tullay* v. *Reed*, 1 Car. & P. 6. See also *Scott* v. *Brown*, 51 L. T. 746.

Request to Desist.]—A declaration alleged that the defendant assaulted the plaintiff, and seized, shook, and dragged him about, and struck him many blows, by means of which he was hurt and wounded, and so continued for a long time, to wit, one week. Plea, that the plaintiff, with force and arms, and with a strong hand, and against the will of the defendant, did unlawfully break open the gate to the defendant's close, and in breach of the peace did thereby attempt forcibly to enter and unlawfully trespass upon the close, whereupon the defendant, being in his close during the attempt, defended his possession, and resisted such attempt ; and, because he could not successfully resist without, in a slight degree, committing the trespasses, he did a little unavoidably commit the trespasses, using no unnecessary force :—Held, that the trespass on the part of the plaintiff being alleged by the plea to be forcibly made, the justification was sufficient, though it was not alleged that the plaintiff had been requested to desist. *Polkinhorn* v. *Wright*, 8 Q. B. 197 ; 15 L. J., Q. B. 70 ; 10 Jur. 11.

After Trespass to Land.]—A person on whose land another has committed a trespass, merely by coming upon it, and is going away, has no right to seize and detain him in order to compel him to give his address. *Ball* v. *Axten*, 4 F. & F. 1019.

Calling in Police.]—If a person comes into a house, or is in it, and makes a noise and disturbs the peace of the family, although no assault has been committed, the master of the house may turn him out, or call a policeman to do so. *Shaw* v. *Chairitie*, 3 Car. & K. 21.

A. went to the house of B. to demand a debt, which B. said he could not pay ; angry words passed, and B. told A. to leave his house ; this A. refused to do unless he was paid. Upon this B. sent for a police officer, and had A. locked up in the watch-house :—Held, that if A. was making a disturbance, B. would have been justified in turning him out of his house, but that he was not justified in imprisoning him. *Green* v. *Bartram*, 4 Car. & P. 308.

To a declaration for assaulting and seizing the plaintiff, and forcing him to go as a prisoner from and out of a public-house to a police-station, it is a good justification that the plaintiff came into the plaintiff's tavern and made a disturbance, and assaulted the defendant and others there, whereupon the defendant gave the plaintiff in charge to a constable, and required him to remove and deal with the plaintiff according to law. *Webster* v. *Watts*, 11 Q. B. 311 ; 17 L. J., Q. B. 73 ; 12 Jur. 243.

And see MALICIOUS PROCEDURE.

In Defence of Easement.]—To an action for throwing water over the plaintiff's apartment and herself, it is no plea that the plaintiff was engaged in obstructing an ancient window of the defendant's house, and that the defendant threw water over her to prevent it. *Simpson* v. *Morris*, 4 Taunt. 821.

Evidence—Possession.]—Assault by a master on his servant. Justification of molliter manus to remove him from a house of which the master was possessed :—Held, that evidence of another servant of the defendant's having the key to let himself in to work, nobody living in the house, is sufficient evidence of the defendant's possession, as against the plaintiff, to support the plea. *Hall* v. *Davis*, 2 Car. & P. 33.

In an action for assault and battery, the defendant justified on the ground that he was possessed of a dwelling-house, into which the plaintiff unlawfully entered, and was making a noise and disturbance therein :—Held, that this plea was not supported by proof that the defendant held two rooms in the house in question, and that the plaintiff, who was landlord of the house, and kept the key of the outer door, had unlawfully come into them, and made the disturbance complained of. *Monks* v. *Dykes*, 4 M. & W. 567 ; 1 H. & H. 418 ; 8 L. J., Ex. 73.

—— **Shire Hall.**]—By a private act a shire hall was vested in the justices of the peace for the county, in trust to allow courts of justice to sit there, and to permit and suffer it to be used for such other public purposes as a major part of the justices in sessions should direct. The hall had always been used for the holding of the county musical festivals ; but there was no evidence that the justices had under the act so directed it to be used :—Held, that the stewards of one of those musical festivals had such a possession of the hall that they might justify the turning out an intruder. *Thomas* v. *Marsh*, 5 Car. & P. 596.

—— **Cricket Ground.**]—To an action for an assault, the defendant pleaded that the defendant and twenty-one other persons were possessed of a close, and were there playing a lawful game of cricket ; that the plaintiff was unlawfully on the close, and unlawfully interrupted the twenty-two, whereupon the defendant, for himself and by authority of the twenty-one others, requested him to depart from the close, and desist from interrupting their game, and, upon his refusal so to do, removed him. The facts were, that the defendant and ten others of the club, who had possession of the field under an agreement, and eleven of a strange club, were playing on the field, and the plaintiff interrupted them by remaining on the ground when requested to leave :—Held, that the plea was not proved, as it was founded on the right of possession of the twenty-two in the close.

Holmes v. *Bagge*, 1 El. & Bl. 782; 22 L. J., Q. B. 301: 17 Jur. 1095.

By an agreement between A., the owner of a field, and a committee of a cricket club, A. agreed to let, and the committee to hire, a close, to be used as a cricket ground by the club, and for that purpose only; the tenancy to be determinable by notice in writing at the end of any season. Declaration for an assault. Plea, justification in right of the possession. Replication, that the plaintiff and the defendant were jointly possessed:—Held, that proof on the part of the plaintiff of the agreement, and that the plaintiff and the defendant were both members of the committee, proved the issue. *Ib.*

—— **Attempt to Eject.**]—If the defendant pleads that the plaintiff was making a disturbance in the defendant's public-house, and that, the plaintiff refusing to depart, the defendant laid hands on him and turned him out, this plea is proved, if it is shown, that, in consequence of the plaintiff refusing to go, the defendant assaulted him, with a view of turning him out of the house, though in fact the defendant could not succeed in actually turning the plaintiff out. *Moriarty* v. *Brooks*, 6 Car. & P. 684.

5. Defence of Possession of Goods.

What Justifiable.]—An owner of goods (or his servants acting by his command) which are wrongfully in possession of another, may justify an assault, in order to repossess himself of them, no unnecessary violence being used. *Blades* v. *Higgs*, 10 C. B. (N.S.) 713; 30 L. J., C. P. 347; 7 Jur. (N.S.) 1289; 4 L. T. 551. S. P., *Rex* v. *Milton*, 1 M. & M. 107.

To an action for an assault and battery, the defendant pleaded that the plaintiff seized the defendant's horse and gig, and was driving them away, and dispossessing the defendant of them, and would, in breach of the peace, have dispossessed him of them; wherefore the defendant defended his possession, and resisted the plaintiff's endeavour, and in so doing committed the assault:—Held, that evidence which showed that the plaintiff seized the defendant's horse for the purpose merely of obtaining his name and address, did not support the plea. *Gaylard* v. *Morris*, 3 Ex. 695; 18 L. J., Ex. 297.

6. Other Justifications.

Order of Parliament.]—To a claim for damages for an assault committed on plaintiff, a member of parliament, whilst attempting to enter the house of commons for the purpose of taking his seat, the defendant pleaded in justification thereof that the house had previously resolved and ordered that the defendant (one of its officers) should "remove the plaintiff from the house until he should engage not further to disturb the proceedings of the house," and that, acting in pursuance of such order, the defendant resisted and removed the plaintiff:—Held, on demurrer, that the plea was good. *Bradlaugh* v. *Erskine*, 47 L. T. 618; 31 W. R. 365.

Correcting Pupil.]—A music-master of a cathedral is not justified in even moderately beating a chorister for singing at a catch club; though such singing might be injurious to his performing in the cathedral. *Newman* v. *Bennett*, 2 Chit. 195. See *Winterburn* v. *Brooks*, 2 Car. & K. 16.

As Master of Ship.]—Action for assaulting the plaintiff and putting him in irons, and imprisoning him. Plea, that the defendant was commander of a ship of war on the high seas, and that the plaintiff was steward of the ship, and, as such steward, the servant of the defendant, and had access to the defendant's cabin, and the charge of the defendant's goods there; that moneys of the defendant had been feloniously stolen out of a desk in the cabin upon two occasions; and that the defendant, having good and probable cause of suspicion, and suspecting the plaintiff to be guilty of or concerned in the stealing of the moneys, did, as commander, put him in irons, and so detain him (the same being a reasonable mode of detainer) until he could examine into and investigate the circumstances of suspicion against the plaintiff according to law:—Held, that the plea showed a sufficient justification. *Broughton* v. *Jackson*, 18 Q. B. 378; 21 L. J., Q. B. 265; 16 Jur. 886.

Held, also, that the putting in irons must be taken to be a reasonable mode of detainer; and that if there was excess in the mode of detainer the plaintiff should have new assigned. *Ib.*

As Marshal Keeping Order.]—One of the marshals of the city of London, whose duty it was, on the day of a public meeting in the Guildhall, to see that a passage was kept for the transit to the carriages of the members of the corporation and others, directed a person in the front of the crowd at the entrance to stand back, and, on being told by him that he could not for those behind him, struck him immediately on the face, saying that he would make him:—Held, that in so doing the marshal exceeded his authority, and that he should have confined himself to the use of pressure, and should have waited a short time to afford an opportunity for removing the party in a more peaceable way. *Imason* v. *Cope*, 5 Car. & P. 193.

B. To Lands.

1. Right to Eject Trespasser.

Use of Force in Ejecting.]—Where a person has gained possession of property, but has no title to it, being in fact a trespasser, the rightful owner is entitled to use force in ejecting him, so long as he does him no personal injury. *Scott* v. *Brown*, 51 L. T. 746.

2. Action for, Generally.

Balloon passing over Land.]—Quære, whether it is a trespass to pass over land in a balloon. *Kenyon* v. *Hart*, 6 B. & S. 249; 34 L. J., M. C. 87; 11 Jur. (N.S.) 602; 11 L. T. 733; 13 W. R. 406.

Trespasser ab initio.]—The act by which a person is to be deemed a trespasser ab initio must of itself be a trespass. No abuse of an authority originally lawful will render him liable to an action of trespass unless a substantive trespass be committed in the course of that abuse. *Shorland* or *Shortland* v. *Govett*, 5 B. & C. 485; 8 D. & R. 257; 4 L. J. (O.S.) K. B. 212; 29 R. R. 294.

Right to Vertical Column of Air.]—The owner of two contiguous houses in the city of London conveyed one of them to B. by a deed which correctly marked out on a plan the ground site of the house conveyed. Over this site there projected on the first floor a room of the owner's house, which was supported by the other house:—Held, that the right to the vertical column of air over the projection was determined by the ground site, and hence belonged not to the owner, but to B. *Corbett* v. *Hill*, 39 L. J., Ch. 547; L. R. 9 Eq. 671; 22 L. T. 263.

Cutting Trees or Taking Minerals in Copyholds.]—In an ordinary estate of copyhold the property in the trees and minerals is in the lord, the possession in the copyholder. If a stranger or the lord cuts trees or takes minerals, the copyholder can maintain trespass. *Eardley* v. *Granville*, 45 L. J., Ch. 669; 3 Ch. D. 826; 34 L. T. 609; 24 W. R. 528.

Removing or Defacing Tombstone.]—Trespass is maintainable for removing or defacing a tombstone, at the suit of the person who erected it or by his heir or representative. *Spooner* v. *Brewster*, 3 Bing. 136; 10 Moore, 494; 3 L. J. (o.s.) C. P. 203; 28 R. R. 613.

Detention of Distress Damage feasant.]—Distress damage feasant may be taken for injury done to chattels upon the land, as well as to the land itself. An action of trespass is not maintainable so long as the distress is detained. *Roscoe* v. *Boden*, or *Boden* v. *Roscoe*, 63 L. J., Q. B. 767; [1894] 1 Q. B. 608; 10 R. 173; 70 L. T. 450; 42 W. R. 445; 58 J. P. 368.

Percolation of Water from Soil placed against Wall.]—A statement of claim alleged that the defendants deposited on their land and against a wall of the defendants, adjoining the house of the plaintiff, a large quantity of soil, clay, &c., thereby raising the surface of the defendants' land above that of the land on which the plaintiff's house was built; and that the plaintiff's house was consequently injured by the percolation of water through the defendant's wall:—Held, that the statement showed a good cause of action. *Hurdman* v. *N. E. Ry.*, 47 L. J., C. P. 368; 3 C. P. D. 168; 38 L. T. 339; 26 W. R. 489—C. A.

Entry to Repair Defences of Port.]—To an action for entering the plaintiff's close, called the manor of S., the defendant pleaded, that from time immemorial there has been, and still is, a public port, partly within the manor, and also in a river, which has been a public and common navigable river from time immemorial; and that there is in that part of the port which is within the manor, an ancient work or erection, belonging to the port, necessary for the preservation of the same, and for the safety and convenience of the ships resorting thereto; that the work being damaged and in decay, it became necessary that the work should be repaired, but that the plaintiff did not nor would repair the same, but wholly neglected so to do; wherefore the defendant entered and repaired it; and a verdict having been found for the defendant:—Held, that the plaintiff was entitled to judgment, notwithstanding the finding, inasmuch as it did not state that immediate repairs were necessary, or that any persons bound to do so had neglected to repair after notice had been given them for that purpose, or that a reasonable time for repairing the same had elapsed, or that the defendant had occasion to use that port; and it was doubtful whether the plea would have been good, even had it contained those allegations. *Lonsdale* (*Earl*) v. *Nelson*, 3 D. & R. 556; 2 B. & C. 302; 2 L. J. (o.s.) K. B. 28; 26 R. R. 363.

Landlord Entering on Premises to Repair.]—A lessor who, in the absence of express power in the lease, enters upon the demised premises to repair them on breach of the lessee's covenant to repair, even though under a superior lease the lessor is liable to forfeiture for non-repair, and, though he enters by leave of weekly sub-tenants, commits a trespass which will be restrained by injunction. *Stocker* v. *Planet Building Society*, 27 W. R. 877—C. A.

Landlord removing Roof of Tenant's House on Refusal of Tenant to give up Possession.]—The plaintiff, who was tenant to the defendant of a cottage, wrongfully refused to give up possession on the expiration of his tenancy. The defendant, who was desirous of rebuilding the cottage, obtained a justices' order under 1 & 2 Vict. c. 74, requiring possession to be given up within twenty-one days. On the same day that this order was obtained the defendant sent some workmen to remove the roof, and in the course of such removal, which was effected without any personal violence, certain portions of the roof unavoidably fell on to the plaintiff's furniture in the room below, and damaged same. In an action for trespass and injury to the furniture:—Held, that the above facts disclosed no cause of action. *Jones* v. *Foley*, 60 L. J., Q. B. 464; [1891] 1 Q. B. 730; 64 L. T. 538; 39 W. R. 510; 55 J. P. 521.

Distress—Agreement with Tenant as to its Disposal—Default—Entry by Landlord.]—A landlord who had taken some unthreshed corn as a distress for rent, agreed that the tenant should thresh it out and dispose of it in a particular way. The tenant threshed a small quantity, and then left off:—Held, that after a reasonable time had elapsed, it was not a trespass for the landlord to enter the barn and thresh out the corn. *Huddlestone* v. *Pearson*, 3 L. J. (o.s.) K. B. 43.

—— Remaining on Premises after Distress has ceased to be Lawful.]—Trespass was the proper form of action for continuing on the plaintiff's premises to keep possession of goods distrained after the distress had ceased to be lawful. *Ladd* v. *Thomas*, 12 A. & E. 117; 4 P. & D. 9; 9 L. J., Q. B. 345.

Trespass to Sub-Lessee's Boxes and Stalls.]—The lessee of a theatre held it under a lease in which he covenanted not to convert it to any other use than for acting or performing operas or theatrical entertainments. He demised certain boxes and stalls to a sub-lessee, reserving power of access for the purpose of repairing; the sub-lessee covenanted only to use the same for the purpose of viewing and hearing the operas and other entertainments. The underleases contained covenants for quiet enjoyment. The lessee demised the theatre for a term of three months for the purpose of holding religious meetings

To enable these meetings to be held, the stalls were covered with a flooring, the division between the boxes removed, and other temporary structural alterations made: — Held, that a trespass had been committed by the lessee and persons claiming under him in thus entering upon the sub-lessee's boxes and stalls without his licence, and the conversion of the theatre for other than theatrical purposes was a derogation from the grant and a breach of the covenant for quiet enjoyment. *Leader* v. *Moody*, 44 L. J., Ch. 711; L. R. 20 Eq. 145; 32 L. T. 422; 23 W. R. 606.

Highway—Right of Public.]—If a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made, and the easement acquired, he is a trespasser. *Harrison* v. *Rutland (Duke)*, 62 L. J., Q. B. 117; [1893] 1 Q. B. 142; 4 R. 155; 68 L. T. 35; 41 W. R. 322; 57 J. P. 278—C. A.

The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the right of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public. *Ib.*

In cases where a person trespasses on another's land, having done so frequently in the past, and having expressed an intention to do so in the future, the court has power under Ord. XXV. r. 5, to make a declaration that such person is a trespasser. *Ib.*

Fishery—Arm of the Sea.]—Where in an action for trespass to a several fishery the defendant pleaded that the locus in quo was an arm of the sea, and the plaintiff joined issue:—Held, that the defendant was entitled to succeed if it appeared that the locus in quo was in fact an arm of the sea; and that if the plaintiff, admitting that it was an arm of the sea, still claimed a several fishery, he was bound to set up his claim in a reply. *Crichton* v. *Collery*, 19 W. R. 107.

—— **Special Custom.**]—The plaintiff, while fishing for pilchards, had nearly encompassed the fish with a net, but the defendant, by rowing his boat to the opening, disturbed the fish and prevented the capture. The plaintiff brought trespass, and issues being joined on the plaintiff's possession of the fish, and on the fish being his:—Held, that he was not entitled to recover, no special custom of the fishery being proved. *Young* v. *Hichens*, D. & M. 592; 6 Q. B. 606.

—— **In Inland Waters.**]—In trespass to a several fishery in an inland lake at a place called Fenmore, the issue was whether the fishery was the several fishery of the plaintiff. The plaintiff gave evidence by documents of his title to a several fishery in the whole lake and parol evidence of acts of ownership in portions of the lake, but not at Fenmore. The judge directed a verdict for the plaintiff:—Held, that it ought to have been submitted to the jury to say whether the plaintiff had a several fishery at Fenmore. *Bristow* v. *Cormican*, 3 App. Cas. 641—H. L. (Ir.)

Foxhunting.]—A person is not justified in entering the land of another against his will for the purpose of foxhunting. *Gundry* v. *Feltham* (1 Term Rep. 334) discussed. *Paul* v. *Summerhayes*, 48 L. J., M. C. 33; 4 Q. B. D. 9; 39 L. T. 574; 27 W. R. 215; 14 Cox, C. C. 202. See also *Baker* v. *Berkeley*, 3 Car. & P. 32.

By Animal.]—The defendants' horse having injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendants':—Held, that there was a trespass by the act of the defendants' horse, for which the defendants were liable, apart from any question of negligence on their part:—Held, secondly, that the damage to the plaintiff's mare was not too remote. *Ellis* v. *Loftus Iron Co.*, 44 L. J., C. P. 24; L. R. 10 C. P. 10; 31 L. T. 483; 23 W. R. 246.

An ox belonging to the defendant, and while being driven by his servants through the streets of a country town, entered the plaintiff's shop, which adjoined the street, through the open doorway and damaged his goods. No negligence on the part of the persons in charge of the ox was proved:—Held, that the defendant was not liable. *Tillett* v. *Ward*, 52 L. J., Q. B. 61; 10 Q. B. D. 17; 47 L. T. 546; 31 W. R. 197; 47 J. P. 438.

Injury caused to Animal by Poisonous Tree on Boundary Fence — Liability of Adjoining Occupiers of Land.]—A person having a dangerous thing upon his land, and being under no obligation to fence against his neighbour's cattle, is not liable for damages caused by the dangerous thing to his neighbour's cattle when trespassing on his land. *Rylands* v. *Fletcher* (L. R. 3 H. L. 330) discussed and distinguished. *Ponting* v. *Noakes*, 63 L. J., Q. B. 549; [1894] 2 Q. B. 281; 10 R. 265; 70 L. T. 842; 42 W. R. 506; 58 J. P. 559.

Overhanging Branches of Trees.] — Where branches of a tree growing upon the land of one owner overhang that of another, the owner of the land encroached upon may, without notice to his neighbour, cut so much of the branches as overhang his land, provided he can do so without going on his neighbour's land. Per Lord Macnaghten: Whether the law would be the same in the case of young trees or shrubs which might be transplanted, quære. The owner of a tree cannot acquire the right for it to overhang his neighbour's land either by prescription or the statute of limitations. *Lemmon* v. *Webb*, 64 L. J., Ch. 205; [1895] A. C. 1; 11 R. 116; 71 L. T. 647; 59 J. P. 564—H. L. (E.)

Forcible Entry.]—An attempt to eject by force a person having a legal title to land brings the person who makes it within the provisions of the statute against forcible entry, though the possession of the person having such legal title has only just commenced, though he may himself have obtained it by forcing open a lock, though his ejection has not been made by a "multitude" of men, nor attended with any great use of violence, and though the person who attempts to eject him may even set up a claim to the possession of the land. *Lows* v. *Telford*, 45 L. J., Ex. 613; 1 App. Cas. 414; 35 L. T. 69; 13 Cox, C. C. 226—H. L. (E.)

But damages cannot be recovered for such forcible entry, which is an indictable offence.

Beddall v. *Maitland*, 50 L. J., Ch. 401 ; 17 Ch. D. 174 ; 44 L. T. 248 ; 29 W. R. 484.

And see *Edridge* v. *Hawker*, or *Edwick* v. *Hawkes*, 50 L. J., Ch. 577 ; 18 Ch. D. 199 ; 45 L. T. 168 ; 29 W. R. 913 ; and *Jones* v. *Foley*, ante, col. 236.

In an action for breaking and entering a house, the allegation vi et armis does not imply a forcible entry. *Harvey* v. *Bridges*, 3 D. & L. 55 ; 14 M. & W. 437 ; 14 L. J., Ex. 272. S. P., *Wright* v. *Burroughes*, 3 C. B. 685 ; 4 D. & L. 438 ; 16 L. J., C. P. 6.

Entry on Land under Arrangement with Receiver — Refusal of Equitable Owner to sanction Arrangement—Right of such Owner to maintain Trespass.]—The defendant was let into possession of certain premises under an arrangement with the receiver of an estate for a tenancy for a term of years. The plaintiff, who had an equitable interest in the estate, declined to sanction any other than a yearly letting, whereupon the defendant intimated that as he could not get a lease he would leave, and he did leave before he had been six months in possession :—Held, that he was not liable to the plaintiff either in trespass or use and occupation, and semble, that he was not liable at all. *Sloper* v. *Saunders*, 29 L. J., Ex. 275.

Mortgage—Default in Payment—Seizure by Agent.]—The respondent mortgaged a sheep run to the appellant. The deed fixed no time for the repayment of the money, but only stipulated that if the mortgagor should make default in payment of the amount on demand, the mortgagee should be at liberty to enter. It appeared from the covenants in the deed that it was the intention of the parties that the mortgagor should remain in possession until default was made ; but there was no express stipulation to that effect. During the absence of the respondent the appellant sent an agent to the station with a demand in writing for repayment, which was served on the respondent's wife, and in default of payment the appellant's agent immediately took possession of the run and the sheep on it :—Held, that as the respondent had no opportunity of inquiring into the truth of the agent's statement, there was no default which justified the appellant in entering into possession and seizing the property, and that the respondent was entitled to substantial damages. *Moore* v. *Shelley*, 52 L. J., P. C. 35 ; 8 App. Cas. 285 ; 48 L. T. 918—P. C.

Erecting Hoarding.]—The plaintiff was the owner in fee of a cottage, the defendant owned some land immediately adjoining. The plaintiff alleged that the defendant had erected on the plaintiff's land a hoarding on poles in order to block out the access of light to a window in the cottage, and had in so doing committed a trespass. The plaintiff also alleged that the poles and hoarding produced a rattling and creaking noise which was an intolerable nuisance to the plaintiff and his tenants. The plaintiff claimed an injunction to restrain the trespass and the nuisance. At the trial it was proved that the cottage was in the occupation of a weekly tenant of the plaintiff, who was not a party to the action. There was no evidence that the acts of the defendant had caused any diminution of value of, or other injury to, the reversion :—Held, that the poles and hoarding not being of such a character as to injure the reversion, the plaintiff could not maintain an action for trespass nor obtain an injunction. *Cooper* v. *Crabtree*, 51 L. J., Ch. 544 ; 20 Ch. D. 589 ; 46 L. T. 573 ; 30 W. R. 579—C. A.

—— **Other Obstacles.**]—Trespass is the proper remedy for nailing a board so as to overhang the plaintiff's close. *Pickering* v. *Rudd*, 4 Camp. 219 ; 1 Stark. 56 ; 16 R. R. 777.

So, for the continuance of an act (as driving hold-fasts) for which trespass lies, and in which form of action the plaintiff has before recovered. *Lawrence* v. *Obee*, 1 Stark. 22.

Pulling down Inhabited House.]—Where a house has been unlawfully erected on a common, a commoner whose enjoyment of the common is interrupted by it may pull it down. *Perry* v. *Fitzhowe*, 8 Q. B. 757 ; 15 L. J., Q. B. 239 ; 10 Jur. 799.

But he is not justified in pulling it down if there are persons in it at the time. *Ib.*

If a mere stranger erects a building upon land belonging to another, the owner of the land is justified in pulling down the building for the purpose of ejecting the intruder, and the fact of the latter being at the time in the building will not be any ground for maintaining an action of trespass against the real owner. *Burling* v. *Reed*, 11 Q. B. 904 ; 19 L. J., Q. B. 291 ; 14 Jur. 395.

A commoner may pull down a building wrongfully erected upon the common, and which prevents his exercising his right as fully as he otherwise might, provided he does no unnecessary damage. *Davies* v. *Williams*, 16 Q. B. 546 ; 20 L. J., Q. B. 330 ; 15 Jur. 752.

A declaration alleged that the defendant entered a dwelling-house and land, which dwelling-house was actually inhabited by the plaintiff and his family, and in which he was ; and whilst the plaintiff was therein, pulled down and destroyed the dwelling-house and the fixtures therein, and assaulted the plaintiff therein, and ejected and expelled him and his family therefrom ; and seized, converted, and destroyed the materials of the house. The defendant pleaded, as to the entering, pulling down, and destroying the house and fixtures therein, and seizing the materials, that he was entitled to common of pasture over the land ; and because the house was wrongfully erected on the land, so that without pulling it down he could not use or enjoy the common of pasture in so ample and beneficial manner as he otherwise would and ought to have done, he necessarily and unavoidably committed the trespasses, doing no unnecessary damage :—Held, that the plea was bad, since the defendant was not justified in pulling down the house when the plaintiff and his family were in it. *Jones* v. *Jones*, 1 H. & C. 1 ; 31 L. J., Ex. 506. See also *Jones* v. *Foley*, ante, col. 236.

Regaining Possession of Property.]—A man is not justified in entering the close of another to take away his own goods and chattels which are in that close owing to some negligent or wrongful act of his own. *Anthony* v. *Haney*, 8 Bing. 186 ; 1 M. & Scott, 300 ; 1 L. J., C. P. 81.

But if a party takes the goods of another, and places them upon his own land, the owner may enter that land for the purpose of retaking them, without making himself liable in trespass. *Patrick* v. *Colerick*, 3 M. & W. 483 ; 7 L. J., Ex. 135.

If A. wrongfully places goods in B.'s building, B. may lawfully go upon A.'s close adjoining the

building for the purpose of removing and depositing the goods there for A.'s use, and trespass quare clausum fregit will not lie. *Rea* v. *Sheward* or *Shuard*, 2 M. & W. 424 ; 6 L. J., Ex. 125.

To an action for breaking and entering a yard, the court allowed the defendant to plead that he went there for the purpose of viewing a mare belonging to him, which had been recently stolen, and was then in a stable within the yard. *Webb* v. *Beavan*, 7 Scott (N.R.) 936 ; 6 Man. & G. 1055.

To prevent Murder.]—A private person may justify breaking and entering the plaintiff's house, and imprisoning his person, so that he may prevent him from committing murder on his wife. *Handcock* v. *Baker*, 2 Bos. & P. 260 ; 5 R. R. 587.

Police Officer—Open House.]—A police officer, hearing a noise in a public-house at one o'clock in the night, entered the house, the door being open :—Held, that this was not a trespass. *Rex* v. *Smith*, 6 Car. & P. 136.

Authority of Agent to Commit.]—A local board employed B. to manage its sewage farm. He had general powers of management, and was not interfered with by the board. Thinking to do good to the farm under his management, and to the neighbourhood, by widening and straightening a stream, he cut away the plaintiff's land on the bank :—Held, that the board was not liable for the trespass so committed, inasmuch as the authority given to B. was confined to the farm, and he was acting entirely beyond the scope of such authority when he went off the farm and damaged the land. *Bolingbroke* (*Lord*) v. *Swindon New Town Local Board*, 43 L. J., C. P. 287 ; L. R. 9 C. P. 575 ; 30 L. T. 723 ; 23 W. R. 47.

Committed Abroad.]—An action for damages for trespass to land situated in a foreign country, founded on a disputed claim of title to such land, cannot be tried in the courts of this country. *British South Africa Co.* v. *Companhia de Moçambique*, 63 L. J., Q. B. 70 ; [1893] A. C. 602 ; 6 R. 1 ; 69 L. T. 604—H. L. (E.) S. P., *Doulson* v. *Matthews*, 4 Term Rep. 503 ; 2 R. R. 448. See also *The M. Moxham*, 46 L. J., P. 17 ; 1 P. D. 107 ; 34 L. T. 559 ; 24 W. R. 650.

In Pursuit of Game.]—*See* GAME.

Joint Trespassers.]—In a joint action the plaintiff should go for one trespass done at the same time, in which all were implicated ; and if he goes for a trespass done at a time when they were not present, he will not afterwards be allowed to go for one at a time when they were. *Sedley* v. *Sutherland*, 3 Esp. 202.

But where plaintiff proved a trespass on a given day by three of four, but failing to implicate the fourth in that act of trespass, abandoned it, and proceeded to prove a joint trespass by the four on a subsequent day :—Held, that he was at liberty so to do. *Roper* v. *Harper*, 5 Scott, 250 ; 4 Bing. (N.C.) 20.

In trespass against several, if any one suffers judgment by default, the plaintiff need only give evidence to affect the rest ; and it is matter for the jury, whether the trespass proved is the same as that confessed ; but the plaintiff cannot be non-suited. *Harris* v. *Butterly*, Cowp. 483.

Description of Premises.]—The word "close" includes as well the subsoil as the soil. *Cox* v. *Glue*, 5 C. B. 533 ; 17 L. J., C. P. 162 ; 12 Jur. 185.

A declaration stated that the defendant broke and entered "lands of the plaintiff, covered with water, being the bed and channel of the river T., and under the same, in the several parishes of L. and L., in the county of G." :—Held, before the Reg. Gen. T. T. 1853, that the declaration sufficiently described the locus in quo by name. *Beaufort* (*Duke*) v. *Vivian*, 7 Ex. 580 ; 21 L. J., Ex. 204.

The locus in quo should be designated by abuttals or other description, as it was at the time of the trespass, and not at the time of the declaration. *Humfrey* v. *L. & N. W. Ry.*, 7 Ex. 325 ; 22 L. J., Ex. 149.

A plea justifying a trespass, as committed in exercise of a right of way, is sufficiently certain as to the premises in respect of which the way is claimed, if it describes them as "a close in the parish," &c., "and county," &c., "called B., with lands thereunto adjoining ; and another close called M., and divers, to wit, two other closes next adjoining thereunto ;" claiming a way from B. to M. and back, for the better use, occupation, &c., of B. and the lands adjoining thereto, and of M. and the adjoining closes respectively. *Holt* v. *Daw*, 16 Q. B. 990 ; 20 L. J., Q. B. 365.

A description of a close by two abuttals only is a sufficient description of the premises. *North* v. *Ingamells*, 9 M. & W. 249 ; 1 D. (N.S.) 151 ; 11 L. J., Ex. 15.

The plaintiff's close was described by abuttals ; plea, seisin in fee in the defendant, and issue thereon. The plaintiff is entitled to recover for a trespass done in a close in his lawful possession, answering to the description in the declaration, although the defendant also has a close answering to the same description. *Lempriere* v. *Humphrey*, 4 N. & M. 638 ; 3 A. & E. 181 ; 1 H. & W. 170.

The owner of a close called Hall Close, removed an old fence, and added to his close a small slip of land adjoining a public road. In an action for an alleged trespass committed upon this slip of land a year after the inclosure, the plaintiff, in his declaration, described the locus in quo as Hall Close :—Held, that it was well described. *Brownlow* v. *Tomlinson* or *Walker*, 1 Scott (N.R.) 426 ; 1 Man. & G. 484 ; 8 D. P. C. 827.

Bankruptcy of Plaintiff.]—A declaration stated a breaking, entering, damaging the doors, hinges and locks, spoiling the grass and fruit trees, and exposing the plaintiff's goods to sale on his premises, by means of which he was not only disturbed in the possession of his house, but prevented from carrying on his business, and deprived of the enjoyment of his goods. The defendant pleaded, that, before action brought, the plaintiff became a bankrupt :—Held, on general demurrer, that, as there were some causes of action included in the declaration which would not pass to the assignees, the plea, which embraced the whole, and was not addressed to any particular part of the declaration, was substantially bad. *Rogers* v. *Spence*, 12 Cl. & F. 700.

Several Issues.]—In trespass quare clausum fregit, where there are several issues, and amongst them one on the plaintiff's possession of the

close, the plaintiff has a right to a trial of all the other issues, though it appears on the opening of the evidence that he was not in possession of the close. *Fry* v. *Monckton*, 2 M. & Rob. 303.

Justification—Separate Trespasses.]—Breaking the doors and locks being not aggravation merely, but a substantive trespass, distinct from the breaking and entering of a house, must be separately justified. *Curlewis* v. *Laurie*, 12 Q. B. 640.

To a declaration for breaking and entering the plaintiff's house, and taking and carrying away his goods, and converting them to the defendant's use, the defendant pleaded a justification of the entry, that the house was the freehold of A., and that he entered as his servant, and, because the goods were incumbering the close, he removed them off to a convenient distance :—Held, that the allegation of the conversion of the goods was mere matter of aggravation, and that the plea therefore was not bad for omitting to justify it. *Pratt* v. *Pratt*, 6 D. & L. 20 ; 2 Ex. 413 ; 17 L. J., Ex. 299.

In an action for breaking and entering the plaintiff's house, and expelling him therefrom, the breaking and entering are the gist of the action, and the expulsion is merely aggravation : therefore, a justification as to the breaking and entering will cover the whole declaration. *Taylor* v. *Cole*, 3 Term Rep. 292 ; 1 H. Bl. 555 ; 1 R. R. 706.

The plaintiff declared for breaking his close, and set out the close by abuttals. The defendant justified, alleging that the close was part of an allotment of six acres made by commissioners duly authorised for certain purposes in execution of which he entered. The plaintiff denied that the close was part of the six acres in the plea supposed to have been allotted ; and thereupon issue was joined. The close, set out by abuttals, was not all within the allotment, but that part in which the actual trespass occurred was within it :—Held, that the justification was made out. *Bassett* v. *Mitchell*, 2 B. & Ad. 99 ; 9 L. J. (o.s.) K. B. 140.

—— **Under Process.**]—In an action for breaking and entering the plaintiff's close and taking his goods, the defendant may justify under a sufficient legal process if he had it in fact at the time, although he declared then that he entered for another cause. *Crowther* v. *Ramsbottom*, 7 Term Rep. 654 ; 4 R. R. 540.

—— **Several Defendants.**]—Where several join in one justification, it is either good or bad for all. *Anon.*, Lofft, 364.

Declaration against three ; plea by all, not guilty ; separate pleas of justification by two ; replication to these pleas that those two were guilty of excess ; rejoinder by all three, that they were not all three guilty of excess ; the rejoinders held ill, and judgment for the plaintiff. *Morrow* v. *Belcher*, 7 D. & R. 187 ; 4 B. & C. 704 ; 4 L. J. (o.s.) K. B. 42.

—— **Identity of Trespass.**]—Where a plea justifies a trespass, it need not expressly aver the identity of the trespass justified with that declared for, provided the identity be manifest from the whole subject matter. *Carridge* v. *Lautour*, 7 L. J. (o.s.) K. B. 33.

Liberum tenementum.]—In trespass quare clausum fregit, the defendant is entitled to plead liberum tenementum, with a plea denying the close to be the plaintiff's. *Slocombe* v. *Lyall*, 6 Ex. 119 ; 2 L., M. & P. 33 ; 20 L. J., Ex. 95.

It is pleadable to an action for breaking and entering the plaintiff's house, where the name of the premises is particularly set forth in the declaration. *Harvey* v. *Brydges*, 3 D. & L. 55 ; 14 M. & W. 437 ; 14 L. J., Ex. 272 ; 9 Jur. 759. Affirmed, 1 Ex. 261—Ex. Ch.

A declaration alleged that the defendant, with force and arms, broke and entered a house and land of the plaintiff, then in his actual possession and occupation, and with force and arms ejected the plaintiff and his family from the occupation of the same ; to which the defendant pleaded liberum tenementum :—Held, good. *Ib.*

But liberum tenementum, to a declaration charging an assault upon the plaintiff, is a bad plea. *Roberts* v. *Taylor*, 1 C. B. 117 ; 3 D. & L. 1 ; 14 L. J., C. P. 87 ; 9 Jur. 330.

Upon a plea of liberum tenementum the defendant has the choice to what parcels he will apply his plea ; and if the plaintiff insists on a trespass in other parcels, he must newly assign. *Hawke* v. *Bacon*, 2 Taunt. 156 ; 11 R. R. 545.

The plea of liberum tenementum gives implied colour, for it admits a possession sufficient as against a wrongdoer ; but it denies his rightful possession, and asserts a right to immediate possession in the defendant. *Doe* v. *Wright*, 2 P. & D. 672 ; 10 A. & E. 763.

It renders it incumbent on the defendant to prove title, either by deed or by showing twenty years' actual possession. *Brest* or *Grice* v. *Lever*, 7 M. & W. 593 ; 9 D. P. C. 246 ; 10 L. J., Ex. 337.

On a plea of liberum tenementum to an action for a trespass to a close named in the declaration, the defendant is entitled to a verdict, if he establishes a title to that part of the close on which the trespass was committed, and is not bound to prove a title to the whole close. *Smith* v. *Royston*, 8 M. & W. 381 ; 1 D. (N.S.) 124 ; 10 L. J., Ex. 437.

A declaration stated, that the defendant, with force and arms, and with a strong hand, and against the form of the statute, broke and entered a house, being in the actual occupation and possession of the plaintiff, and in a forcible manner broke open the doors and windows, and also with force and arms assaulted the plaintiff, and with a strong hand put out and expelled the plaintiff therefrom. Plea, as to the breaking and entering, and breaking the doors, liberum tenementum :—Held, that the plea was good, inasmuch as it justified the breaking and entering, which was the gist of the action, the breaking and entering with a strong hand and against the form of the statute being aggravation. *Davison* v. *Wilson*, 11 Q. B. 890 ; 17 L. J., Q. B. 196 ; 12 Jur. 647.

The plea admits such a possession in the plaintiff as would maintain the action against a wrongdoer, but asserts in answer that the defendant is the freeholder, with a right to the immediate possession. *Ryan* v. *Clarke*, 7 D. & L. 8 ; 18 L. J., Q. B. 267 ; 13 Jur. 1000.

To an action for breaking and entering the plaintiff's dwelling-house, ejecting and expelling the plaintiff and his family therefrom, and seizing his goods, the defendant pleaded, as to the trespasses in and to the dwelling-house, and seizing and taking the goods, liberum tenemen-

tum. The plaintiff traversed the liberum tenementum, and new-assigned the expulsion:—Held, that the new assignment was bad, the plea justifying the expulsion, as well as the breaking and entering of the dwelling-house, and the seizure of the goods. *Meriton* v. *Coombes*, 1 L., M. & P. 510; 9 C. B. 787; 19 L. J., C. P. 336.

Replications.]—A replication of an outstanding term in a stranger confesses the freehold, and presumptive right of immediate possession, but avoids the presumption, which is a consequence of the right of freehold, and by so doing makes the defendant a wrongdoer, notwithstanding he is the freeholder, and falls back upon the possession of the plaintiff, which was asserted in the declaration, and admitted in the plea, and is sufficient against a wrongdoer. *Ryan* v. *Clarke*, 7 D. & L. 8; 18 L. J., Q. B. 267; 13 Jur. 1000.

Where a defendant justifies a trespass for preventing a tortious act of the plaintiff, who relies on a licence which rendered his act lawful, he ought to reply the licence. *Taylor* v. *Smith*, 7 Taunt. 156.

A freehold of customary tenements within a manor, though such tenements are not held at the will of the lord, and are transferable by lease and release and admittance, is in the lord; and, therefore, where, in an action by the customary tenant against the lord, the latter pleads liberum tenementum, the derivative and subordinate interest of the tenant ought to be replied. *Thompson* v. *Hardinge*, 1 C. B. 940; 14 L. J., C. P. 268; 9 Jur. 927.

A replication, by way of estoppel, may be replied to a plea of liberum tenementum, and if the plaintiff does not avail himself of that liberty, but merely joins issue on the plea, the matter, which might have been so replied, is not conclusive evidence in his favour, but is merely evidence to go to the jury. *Faversham (Lord)* v. *Emerson*, 11 Ex. 385; 3 C. L. R. 1379; 24 L. J., Ex. 254.

In an action for breaking and entering the plaintiff's land, and building thereon a wall and a cornice, a verdict was found for the defendant on the plea of liberum tenementum. In a subsequent action by the devisees of the former defendant against the former plaintiff and his wife, for injury to the reversion by the wife breaking and entering the land and pulling down the cornice, the defendants were held to be estopped, by the record in the former action, from giving evidence to show that the land under the cornice had not been in dispute. *Whittaker* v. *Jackson*, 2 H. & C. 926; 33 L. J., Ex. 181; 11 L. T. 155.

—— **Involuntary Trespass—Sufficiency of Tender of Amends.**]—Where the defendant pleads under 21 Jac. I, c. 16, s. 5, that the trespass was involuntary, and that before action he tendered a certain sum (naming it) being sufficient amends, the plaintiff may reply either that that sum was not tendered or that it was not sufficient amends, but not generally that the defendant did not tender sufficient amends. *Williams* v. *Price*, 1 L. J., K. B. 258.

—— **Continuing Trespass.**]—A declaration alleged that the defendants wrongfully raised an embankment near the plaintiff's house, and wrongfully continued the same, by reason whereof large quantities of water flowed against and into the house. Plea, that the embankment was raised and continued by the defendants under certain acts of parliament. Replication, that although the embankment was raised and continued under the acts of parliament, the flowing of the water against and into the house was occasioned by the wrongful construction and negligent and improper raising of the embankment, and the want of proper and sufficient drains to the same, and the continuing the embankment so wrongfully constructed and insufficiently drained:—Held, that the replication was not a departure from the declaration. *Brine* v. *G. W. Ry.*, 2 B. & S. 402; 31 L. J., Q. B. 101; 8 Jur. (N.S.) 410; 6 L. T. 50; 10 W. R. 341.

Traverse of Command.]—If the defendant pleads soil and freehold in another, by whose command he justifies the trespass, such command may be traversed by the plaintiff. *Chambers* v. *Donaldson*, 11 East, 65; 10 R. R. 435. And see *Cary* v. *Holt*, 11 East, 70, n.

The only ground upon which the authority of a servant is traversable in an action of trespass is, the protection of the person or property of a party from the officious and wanton interference of a stranger, where the principal might have been willing to waive the right. *Dobree* v. *Napier*, 3 Scott, 201; 2 Bing. (N.C.) 781; 5 L. J., C. P. 273.

A defendant pleaded that the locus in quo was the soil and freehold of T., and justified under him as his servant and by his command. The replication traversed the command. T. was a minor, and a ward in chancery, and the defendant the receiver and agent for the estate:—Held, that from this the jury might infer a general authority to do the act, and if they so inferred, ought to find for the defendant; and that upon this issue the plaintiff was not entitled to show that he held under a lease, and to insist that the act was therefore such as an infant could not authorise. *Ecer* v. *Jones*, 9 Q. B. 623; 16 L. J., Q. B. 42; 10 Jur. 965.

New Assignment.]—There cannot be a new assignment except where there is a special plea. *Smith* v. *Milles*, 1 Term Rep. 475.

Where the plaintiff in his declaration avers a single act of trespass, which the defendant justifies, there can be no new assignment. *Taylor* v. *Smith*, 7 Taunt. 156.

Where a justification is pleaded, to which the plaintiff new assigns that the action is brought for another and different trespass than that mentioned in the plea, and not guilty is pleaded to the new assignment; if the plaintiff gives in evidence only one trespass, it is incumbent on him to show that the trespass is clearly a different one from that mentioned in the plea: if the circumstances are alike, the jury ought to consider it to be the same. *Darby* v. *Smith*, 2 M. & Rob. 184.

To an action for breaking the plaintiff's close and laying a railroad thereon, the defendant justified under the reservation contained in certain deeds. The plaintiff new assigned to the plea that the trespasses were committed on other and different occasions, and to a greater extent than was necessary, and for other and different purposes, and on other parts of the close; to which there was judgment by default:—Held, that the plaintiff could not dispute that some species of railroad was within the reservation, but that the question was, whether the railroad was constructed in a direction or in a manner

unauthorised by the reservation. *Dand* v. *Kingscote*, 6 M. & W. 174; 2 Railw. Cas. 27; 9 L. J., Ex. 279.

The locus in quo was described as "abutting on the south and east on a close in the occupation and possession of the defendants." The defendants (a railway company) pleaded that they took possession of a part of the close abutting on the south on the fence of their railway, under 8 & 9 Vict. c. 20, ss. 32, 33, which was the trespass complained of. It appeared at the trial, that at the time the trespass was committed, the close abutted on the fence of the railway, but afterwards the company took possession of and purchased a small part of it adjoining the railway, so that the plaintiff's description was correct at the time of the declaration, but not at the time of the trespass:—Held, that the plaintiff, not having new assigned, was not entitled to recover. *Humfrey* v. *L. & N. W. Ry.*, 7 Ex. 325; 22 L. J., Ex. 149.

Where the defendant pleaded liberum tenementum, as occupier for thirty years, having a right to dig sand and marl; and that the defendant having occasion to exercise the right, and for the purpose of the right, and in the exercise of the right, as occupier of the land, and in order to the cultivation thereof, committed the trespass complained of; to which the plaintiff replied by traversing the plea in the form given by 15 & 16 Vict. c. 76, s. 77; the plaintiff having proved a trespass, and no evidence being adduced in support of the right claimed:—Held, that the defendant was entitled to a verdict, as the plaintiff ought to have new assigned. *Glover* v. *Dixon*, 9 Ex. 158; 2 C. L. R. 309; 23 L. J., Ex. 12; 17 Jur. 1012.

Where the general issue is on record, and the defendant means to suffer judgment by default on a new assignment, so much of the general issue as applies to the trespasses newly assigned should be withdrawn. *Cross* v. *Johnson*, 4 M. & Ry. 290; 9 B. & C. 613. See *Price* v. *Seaward*, Car. & M. 23.

Evidence—Right to Possession — Onus.]—A party who insists upon remaining on the land of another against his will, and therefore primâ facie against right, ought to show all the circumstances which make such possession lawful, and abridge the general rights of property. *Hayling* v. *Okey*, 8 Ex. 531; 22 L. J., Ex. 139; 17 Jur. 325; 1 W. R. 182—Ex. Ch.

—— **Distinct Trespasses—One Trespass Alleged.**]—A declaration alleged that the defendant, on the 6th of March, broke and entered the plaintiff's house, and continued therein for eight days. Plea, payment into court, as to the first three days, and not guilty as to the residue. It was proved that the defendant, having quitted the house on the third day, returned on the fifth and continued therein for three more days:—Held, that evidence of the latter trespass was rightly received under the declaration, though it only alleged one trespass with a continuando. *Percival* v. *Stamp*, 9 Ex. 167; 2 C. L. R. 282.

Admissions and Conduct of Defendant.]—In an action for breaking and entering the plaintiff's mine and taking coals, evidence of working by the plaintiff in another part of the same mine, within eighty yards of the place of the trespass, coupled with a statement by the defendant, that he had got the coal, and was willing to pay such amount as should be settled by arbitration, is evidence of the plaintiff's being in possession of the place where the trespass was committed. *Wild* v. *Holt*, 9 M. & W. 672; 1 D. (N.S.) 876; 11 L. J., Ex. 285.

In an action against five persons for breaking into the plaintiff's house, in which they have paid money into court, the plaintiff cannot go into proof (as evidence of malice), that, nine months after the trespass, one of them indicted him for perjury. *Newton* v. *Holford*, 1 Car. & K. 537.

Evidence of the conduct of the parties before the trespass complained of, if it has reference to it, may be receivable; but not evidence of the act of one defendant done by him long after the trespass. *Ib.*

Refusing Entrance to Plaintiff.]—In an action for breaking and entering the plaintiff's apartment, it appeared that the plaintiff had taken furnished lodgings in the defendant's house for a term, and that the only entrance to them was through the defendant's street door and lobby; and the evidence to show the breaking and entering by the defendant was, that, before the term had expired, the defendant prevented the plaintiff from entering the house, telling him he should no longer have the apartments:—Held, sufficient evidence for the jury to infer a breaking and entering of the apartments by the defendant. *Lane* v. *Dixon*, 3 C. B. 776; 16 L. J., C. P. 129; 11 Jur. 89.

Nature of Right.]—Issue being taken on pleas justifying a trespass, in exercise of a right, evidence is admissible to show that the entry was not at a proper time, and that the plaintiff resisted the entry on that ground. *Lynn* v. *Comer*, 2 F. & F. 244.

Recalling Witnesses.]—The plaintiff's counsel, after he has closed his case, may recall a witness to prove that the locus in quo was in the possession of the plaintiff, which he had omitted to do on his previous examination. *Brown* v. *Giles*, 1 Car. & P. 118; 28 R. R. 769.

Entering Verdict — Several Defendants.]—The application to a judge, in the course of a cause, to direct a verdict for one or more of several defendants in trespass, is strictly in his discretion; and that discretion is to be regulated not merely by the fact, that, at the close of the plaintiff's case, no evidence appears to affect them, but by the probabilities, whether any such will arise before the whole evidence in the cause closes. *Sowell* v. *Champion*, 2 N. & P. 627; 6 A. & E. 407; 7 L. J., Q. B. 197.

In trespass against several, there cannot be a verdict for any of them until the case for the plaintiff is finally closed by the complete examination of all his witnesses, nor so long as the cross-examination of any of them is reserved. *Souch* v. *Champion*, 1 F. & F. 495.

Where a verdict was found against one only of several defendants, the evidence applying to all, but no leave was given at the trial for leave to enter a verdict against the others:—Held, that a verdict could not be entered against them. *Stirling* v. *Cozens*, 3 D. P. C. 790.

If two defendants suffer judgment by default, and the plaintiff executes writs of inquiry against them separately, and takes several damages against them, it is irregular; and if the plaintiff enters up final judgment with those several damages against the defendants, it is erroneous; but

the court will permit the plaintiff to set aside his own proceedings before final judgment on payment of costs. *Mitchell* v. *Milbank*, 6 Term Rep. 199.

3. Who may Maintain.

a. In General.

Occupancy.]—Mere prior occupancy of land, however recent, gives a good title to the occupier, whereupon he may recover against all the world, except such as can prove an older and a better title in themselves. *Catteris* v. *Cowper*, 4 Taunt. 547; 13 R. R. 682.

Semble, that the daughter, or even a female servant of the occupier of a house, has such a possession of her bedroom as will enable her to maintain trespass against a person who wrongfully forces himself into it while she is in bed. *Lewis* v. *Ponsford*, 8 Car. & P. 687.

Proof that the plaintiff was in separate possession of two rooms of a house, is sufficient to satisfy an allegation that he was in possession of the messuage. *Fenn* v. *Grafton*, 2 Bing. (N.C.) 617; 3 Scott. 56; 2 Hodges, 58. See *Monks* v. *Dykes*, 4 M. & W. 567; 8 L. J., Ex. 73.

The actual possession of crown lands, under a parol licence from the crown, entitles the party in possession to maintain trespass against a wrongdoer. *Harper* v. *Charlesworth*, 6 D. & R. 572; 4 B. & C. 574; 4 L. J. (O.S.) K. B. 22; 28 R. R. 405.

Trespass lies in respect of possession only, independent of this right, where it is clear and unequivocal; but the damages are in such a case to be given in respect of the possession only. *Peachey* v. *Wing*, 5 L. J. (O.S.) K. B. 55.

—— **For Limited Purpose.**]—Where contractors for making a navigable canal erected a dam composed of piles and earth, with the consent of the owner of the soil, for the purpose of completing their work:—Held, that they might maintain trespass against the defendants as wrongdoers, for breaking and destroying the same. *Dyson* v. *Collick*, 1 D. & R. 225; 5 B. & Ald. 600.

The proprietor of land agreed to grant leases to the defendant of certain houses which he had undertaken to build on the land; the defendant to hold the land and premises for eighty years, yielding therefor 400*l.* a year rent, and to build a wall all along the west side of the land; the landlord to have a right of way over the streets between the houses. The defendant entered, paid rent, built houses, and obtained leases of the houses as fast as they were built:—Held, that he was, under these circumstances, in possession of the soil between the houses, and that the landlord could not maintain an action against him for erecting a wall on the west side of the land, across the end of one of the streets. *Alexander* v. *Bonnin*, 4 Bing. (N.C.) 799; 6 Scott, 611; 1 Arn. 337; 8 L. J., C. P. 53.

Where A. was seised in fee of a close upon which the burgesses of a borough had a right, during a portion of the year, to depasture their cattle, and had, during that period, exclusive possession of the close:—Held, that A. might maintain an action against a party who, during that period, committed a trespass in the subsoil by digging holes, but not against any one who, during that period, merely rode over the close. *Cox* v. *Glue*, 5 C. B. 533; 17 L. J., C. P. 162; 12 Jur. 185.

Nature of Title.]—D. and H. agreed between themselves, in writing, to purchase lands then in the market. By this agreement D. was to have the surface at three-fourths, and H. the minerals at one-fourth of the whole purchase-money. H. afterwards entered into a contract with the owner of the lands to purchase them from him. The lands were duly conveyed to D. by the owner, H. being a party to the purchase deed, and executing a release of all his interest in the lands to D. Afterwards, by an indenture of the 12th July, 1834, D. granted, bargained and sold to H., his executors, administrators, and assigns, all the minerals lying under the lands, upon terms substantially the same as those contained in the previous agreement between D. and H. The indenture of the 12th July, 1834, was not inrolled as a bargain and sale, and there was no livery of seisin to make it operate as a feoffment. There were seven seams of coal and minerals lying under the lands, and soon after the execution of the deed, H. began to work and get the coal under the lands, and continued so to do between 1835 and 1844. He did not, however, go below the two first seams of coal, and, on his ceasing to work in 1844, H. left tramways, implements, &c., in the tunnels and levels he had made. In 1855, H. by deed, conveyed the minerals (except the two first or upper seams), with power to dig for and get the coal, to the plaintiffs, who shortly afterwards entered, and bored down below the two first seams, in order to try for, but they did not work, the coal. D. died in 1848, and in 1857 his devisee and heir-at-law, by deed, granted the lands (except the coal thereunder theretofore sold and conveyed to H.) to S., subject as to the beds of coal under the same to the indenture of the 12th July, 1834. In 1872 S. granted a lease of the coal under the lands to the defendants, and they entered and worked, and got coal under the lease in 1872. On the first of January, 1873, the surviving trustee for sale of D. granted and confirmed unto S. and his heirs, all the seams and beds of coal lying under the lands, subject to such right or interest as legally passed to H., his executors, administrators or assigns, under the indenture of the 12th July, 1834. H. died in 1861:—Held, that the plaintiffs, through H., had sufficient possession of all the seams of coal to entitle them to maintain trespass against the defendants, who were mere wrongdoers, for intruding upon the plaintiff's mines. *Low Moor Co.* v. *Stanley Coal Co.*, 34 L. T. 186—C. A.

Possessory Right.]—A possessory right, sufficient to maintain trespass, may be resorted to, even after it has appeared that the plaintiff has in fact no legal title, and when the locus in quo is the soil of a street, and the actual possession he sets up is by his recent commencement of a building upon the locus in quo, the pulling down of the incomplete walls of which was the trespass complained of, and which was pulled down on the suggestion that they constituted a nuisance to a highway. *Every* v. *Smith*, 26 L. J., Ex. 344.

Mortgagee out of Possession.]—Trespass will not lie against the occupier of land at the suit of a mortgagee, who has never been in actual possession, or been seised of the land, and has not obtained a judgment in ejectment either by default or by verdict, and therefore he cannot in such case waive the tort and maintain an action for use and occupation. *Turner* v. *Cameron's*

Coalbrook Steam Coal Co., 5 Ex. 932; 20 L. J., Ex. 71.

Lessees.]—The tenant of a mortgagor, whose tenancy was created after the mortgage, and has never been recognised by the mortgagee, cannot maintain trespass against the mortgagee for entering and distraining on the land under the powers of the mortgage. *Gibbs* v. *Cruikshank*, 42 L. J., C. P. 273; L. R. 8 C. P. 454; 28 L. T. 735; 21 W. R. 734.

An entry is not necessary to the vesting of a term of years in the lessee, but for the purpose of maintaining an action of trespass the lessee must enter, since that action is founded on the actual possession. *Harrison* v. *Blackburn*, 17 C. B. (N.S.) 678; 34 L. J., C. P. 109; 10 Jur. (N.S.) 1131; 11 L. T. 454; 13 W. R. 135.

Lessors.]—A person legally entitled to land, having entered without making any formal declaration of his entry, may maintain trespass against a person wrongfully in possession at the time of entry, and continuing in such possession afterwards. *Butcher* v. *Butcher*, 7 B. & C. 399; 1 M. & Ry. 220; 6 L. J. (O.S.) K. B. 51; 31 R. R. 237.

A lessor having entered at the expiration of the term, may sue in trespass persons claiming under the late tenant as well as the late tenant himself. *Hey* v. *Moorehouse*, 8 Scott, 156; 6 Bing. (N.C.) 52; 9 L. J., C. P. 113.

Executor.]—An executor can maintain trespass for injury to a chattel real of his testator done in the testator's lifetime. *Hone* v. *Hamilton*, Ir. R. 9 C. L. 15.

Heir.]—After entry by an heir at law, his right of possession relates back to the time his legal right to enter accrued, so as to enable him to support an action against a wrongdoer for a trespass committed at a time antecedent to the entry. *Barnett* v. *Guildford* (*Earl*), 11 Ex. 19; 24 L. J., Ex. 281; 1 Jur. (N.S.) 1142; 3 W. R. 406.

It makes no difference in this respect that the wrongdoer is an abator, and the cases in which a contrary doctrine is laid down are not law. *Ib.*

Tenant for Life.]—Where the interest of A., a tenant, ceases before the expiration of the term of letting, by the death of his landlord, the tenant for life, A. will not be presumed to have continued in possession after such death, and, in the absence of any subsequent entry, or other act done by him, he has not a sufficient possession of the land, either actual or constructive, to entitle him to maintain trespass. *Brown* v. *Notley*, 3 Ex. 219; 18 L. J., Ex. 39.

Where it is necessary to a plea of justification under a lease from a tenant for life, that he should be still living, the defendant must aver the continuance of the life, otherwise the plea is bad on general demurrer. *Dayrell* v. *Hoare*, 4 P. & D. 114; 12 A. & E. 356; 9 L. J., Q. B. 299.

Servant after Notice.]—The plaintiff was employed by the Highgate Archway Company to collect toll for them, and lived in the toll-house, one shilling per week being deducted from his wages by way of rent. The company having ceased to collect toll at the particular spot, he was dismissed from their employ, and received a notice to leave the house, which he promised to do:—Held, that these circumstances did not constitute him a tenant of the company; and, therefore, that he could not maintain trespass against their agent for pulling down the toll-house. *Hunt* v. *Colson*, 3 M. & Scott, 790.

The committee of a society having dismissed their manager, entered on and expelled him from a house they had put him into possession of and allowed him to occupy as such manager, and in which he had also been allowed to carry on his own business as a bookseller, and took possession of, but offered to return his stock, which, however, he never had applied for:—Held, that he could not sue them, either in trespass or trover. *White* v. *Bailey*, 2 F. & F. 385. A rule for a new trial was afterwards refused. 10 C. B. (N.S.) 227; 30 L. J., C. P. 253; 7 Jur. (N.S.) 948.

The plaintiff was master of a school which was under the control of trustees, and, as such, was allowed to occupy a schoolhouse. The trustees had drawn up certain rules, one of which provided for the master's dismissal, in case of misconduct. In pursuance of this rule, the trustees, on the 28th June, dismissed the plaintiff, who acquiesced in the dismissal, and the school was then peaceably taken possession of by the trustees and locked up. On the following day the plaintiff re-entered by force. On the 11th July he was ejected by the trustees. To an action against them for such eviction, the trustees pleaded that the plaintiff was not possessed:—Held, that he had not, by his re-entry, a prima facie right of possession against the trustees as wrongdoers. *Browne* v. *Dawson*, 12 A. & E. 624; 4 P. & D. 355; 10 L. J., Q. B. 7.

Date of Entry.]—Trespass is not maintainable by a person who comes into possession after the commission of the trespass. *Pilgrim* v. *Southampton and Dorchester Ry.*, 8 C. B. 25; 18 L. J., C. P. 330. But see *Barnett* v. *Guildford* (*Earl*), col. 251.

b. Tenants in Common against Each Other.

When actual Ouster.]—One tenant in common cannot maintain trespass or trover against his co-tenant for cutting and carrying away the grass off their land unless there has been an ouster, or unless it is shown that the grass has been destroyed. *Jacobs* v. *Seward*, 41 L. J., C. P. 221; L. R. 5 H. L. 464; 27 L. T. 185—H. L. (E.) Affirming 18 W. R. 953—Ex. Ch.

A. and B. being tenants in common of land, B. entered the land, cut the grass, put a lock upon the gate, and carried away the grass. There was no evidence that he kept the gate locked, but there was evidence that he opened the gate for A.'s son to take away the hay of a former year:—Held, that these facts did not amount to an ouster, so as to enable A. to maintain an action of trespass against B., nor to a destruction of the common property, so as to entitle him to maintain an action of trover. *Ib.*

Held, also, that the court was right in refusing to allow an amendment of the declaration by converting the action into an action for an account under 4 Anne, c. 16, s. 27. *Ib.*

Trespass quare clausum fregit lies by one of several tenants in common against his co-tenant where there has been an actual expulsion. *Murray* v. *Hall*, 7 C. B. 441; 18 L. J., C. P. 161; 13 Jur. 262.

So it lies by one tenant in common against his co-tenant (or the licensee of the latter), for digging up and carrying away the soil of the close of which they are tenants in common, for such an act is an ouster. *Wilkinson* v. *Haygarth*, 12 Q. B. 837 ; 16 L. J., Q. B. 103 ; 11 Jur. 104.

To such an action, a plea that the close is not the close of the plaintiff is not supported by proof that he is tenant in common of it with others who authorised the trespass. *Ib.*

The plaintiff and defendant being tenants in common of a wall, the defendant removed the coping stones and increased the height of it, so as to form the back of a building which he erected against it, and carried up a chimney upon it :—Held, evidence of an ouster, for which an action was maintainable. *Stedman* v. *Smith*, 8 El. & Bl. 1 ; 26 L. J., Q. B. 314 ; 3 Jur. (N.S.) 1248.

Where a tenant in common of a garden wall in the course of building operations pulled down the wall and in rebuilding same encroached on the ground of the other tenant in common, who was a reversioner, the court ordered that the wall should be divided longitudinally between the co-tenants, and refused a mandatory injunction to remove the encroachment, but granted damages to the reversioner in respect thereof, as it was of a permanent character. *Mayfair Property Co.* v. *Johnston*, 63 L. J., Ch. 399 ; [1894] 1 Ch. 508 ; 8 R. 781 ; 70 L. T. 485.

Paying into Court.]—Where one tenant in common brings an action against his co-tenant, and the declaration takes no notice of his limited interest, but alleges an expulsion or a total destruction, the defendant may pay money into court in respect of the damage to the plaintiff's share, and as to the residue plead liberum tenementum, or traverse the plaintiff's property. *Cresswell* v. *Hedges*, 1 H. & C. 421 ; 31 L. J., Ex. 497 ; 8 Jur. (N.S.) 767 ; 7 L. T. 70 ; 10 W. R. 777.

4. Leave and Licence.

Must be specially Pleaded.]——A licence to enter the plaintiff's house, if pleaded, is a bar to an action for breaking and entering his house, and debauching his daughter, but it cannot be given in evidence under the general issue. *Bennett* v. *Alcott*, 2 Term Rep. 166.

A plea of leave and licence means leave and licence in fact, and a licence in law must be specially pleaded. *Moxon* v. *Savage*, 2 F. & F. 182.

Exceeding Licence.]—A tenant from year to year being desirous of letting his house for a quarter, quitted and left it locked, with authority to his landlord to let it during his absence, if an opportunity offered, and for that purpose left the key with a neighbour ; an opportunity occurred of letting the house, but the person who had the key having absconded, the landlord entered by placing a ladder against the house and raising the first-floor window, and after showing the inside of the house, left it in the same state as before ; the house was afterwards entered by persons unknown, and some of the tenant's furniture and wearing apparel were stolen ; and the tenant having brought an action against the landlord for breaking and entering the house, and leaving it insecure, in consequence of which his furniture and wearing apparel were stolen :—Held, that a plea of leave and licence was no answer to the action. *Ancaster* v. *Milling*, 2 D. & R. 714. *S. C.*, sub. nom. *Acaster* v. *Binney*, 1 L. J. (O.S.) K. B. 168.

Presence at Creditors' Meeting.]—A person who, as the duly appointed proxy of a creditor, attends a meeting of creditors convened to be held in a particular room by the occupier of same, has, after the acceptance of his proxy by such occupier of the premises, a right to be in the room, and he cannot be treated as a trespasser if, before the termination of the meeting, he is requested to leave the room and refuses to do so. *Vaughan* v. *Hampson*, 33 L. T. 15.

At Race-course.]—E. was the steward of the Doncaster races. Tickets of admission to the grand stand were issued, with his sanction, and sold for a guinea each, entitling the holders to come into the stand and the inclosure round it, during the races. The plaintiff bought one of the tickets, and was in the inclosure during the races, when the defendant, by order of E. desired him to leave it, and on his refusing to do so, after a reasonable time had elapsed for his quitting it, put him out, using no unnecessary violence, but not returning the guinea :—Held, that, on this evidence, the jury was properly directed to find the issue for the defendant. *Wood* v. *Ledbitter*, 13 M. & W. 838 ; 14 L. J., Ex. 161.

Sub-lessee—Clause against Sub-letting.]—Sub-letting premises to a person gives him a licence to occupy same, even where the sub-lessor is prohibited from sub-letting and where such person is in possession he is entitled to remain there until the licence has been revoked by a competent authority. Authority to commit a trespass on such premises derived from the administrator of the sub-lessor, who obtained administration after the committing of the trespass, does not relate back so as to justify it. *Littleton* v. *McNamara*, Ir. R. 9 C. L. 417.

Licence to Eject.]—A licence by a tenant to his landlord to eject him on a specified day without any process of law is void, as authorising the commission of an act which is made illegal by the act 5 Ric. 2, st. 1, c. 8. *Edwick* v. *Hawkes* or *Edridge* v. *Hawker*, 50 L. J., Ch. 577 ; 18 Ch. D. 199 ; 45 L. T. 168 ; 29 W. R. 913.

If a person, who has a legal right of entry upon land which is in the possession of a wrongdoer, is allowed to enter peaceably through the outer door, it is still illegal for him to turn out the wrongdoer with violence. *Ib.*

The plaintiff being distrained on for rent, gave the defendant, her landlord, the following undertaking : "In consideration of Mr. C. giving me the furniture distrained for rent, I undertake to give him possession of the premises on or before one week from the date hereof." The plaintiff acted on this instrument, by selling some of the furniture for her own use, and at the end of a week the defendant took possession. The plaintiff having sued him in trespass, and the defendant having pleaded leave and licence :—Held, that the above instrument established the plea. *Feltham* v. *Cartwright*, 5 Bing. (N.C.) 569 ; 7 Scott, 695 ; 9 L. J., C. P. 67.

A. let premises to B., by an agreement, which contained clauses for payment of rent and for repairing the premises ; and a clause, that, in case of non-payment of the rent, or non-perform-

ance of the conditions, it should be lawful for A., without demand, to enter upon and take possession of the premises, and expel B. therefrom, without legal process: and that, in case of such entry, and of an action being brought for the same, the defendant might plead the leave and licence of B. to A. for the entry or trespasses complained of. In an action by B. against C., for breaking and entering the premises, and assaulting the plaintiff, C. pleaded leave and licence. Rent being in arrear from B. to A., C., under a written order from A., entered and forcibly expelled B. The agreement was given in evidence:—Held, that the plea was sustained by the evidence. *Kavanagh* v. *Gudge*, 7 Man. & G. 316; 7 Scott (N.R.) 1025; 1 D. & L. 928; 13 L. J., C. P. 99; 8 Jur. 362.

To seize and sell Goods—Demand.]—A licence by deed to enter a dwelling-house at any time or times, and seize certain chattels and sell the same, will not justify a breaking and entering unless a demand of the goods has been first made, together with an intimation of the authority under which such demand is made. *Aikins* v. *Brunton*, 14 W. R. 636.

To fetch Goods Sold.]—A licence is not implied by law to the purchaser of goods (though sold under an execution or a distress) to enter upon the premises of the former owner and take them away, although they have remained there with his assent. *Williams* v. *Morris*, 8 M. & W. 488; 11 L. J., Ex. 126.

To support a plea of leave and licence to an action for taking away goods under such circumstances, there must be proof of an express agreement that the purchaser should enter on the premises and take the goods. *Ib.*

To build.]—A plea of leave and licence to erect and maintain a wall upon a given spot is not supported by proof of a licence to erect only. *Alexander* v. *Bonnin*, 6 Scott, 611; 4 Bing. (N.C.) 709; 1 Arn. 337; 8 L. J., C. P. 53.

Pending definite Agreement.]—The plaintiff and the defendant having agreed, on a dispute existing between them as to a right of way, that the defendant should use the way ad interim, without prejudice, until it should be determined how the question should be settled:—Held, the plaintiff having locked the gate, and the defendant having broken the lock, that the equitable position of the parties was not such as to bar an action of trespass. *Hyde* v. *Graham*, 1 H. & C. 593; 32 L. J., Ex. 27; 8 Jur. (N.S.) 1229; 7 L. T. 563; 11 W. R. 119.

Revocation.]—In trespass quare clausum fregit on several days; plea, leave and licence to the whole. If some of the trespasses were committed after the licence was revoked, the plaintiff need not new assign, as the defendant, by his plea, undertakes to prove a licence sufficient to cover all the acts of trespass. *Haward* v. *Grant*, 1 Car. & P. 448.

Where no Authority.]—If A. gives B. leave to go on a field, in which A. has no right, and B. goes there, this will not make A. liable as a co-trespasser with B.; but if A. orders and authorises B. to go on the field, and he does so, A. is a joint trespasser with B.; the latter being an authority, the former a leave and licence only. *Robinson* v. *Vaughton*, 8 Car. & P. 252.

5. Notice not to Trespass.

Waiver.]—Trustees for sale of premises gave notice, dated May 18, 1824, to A., the rightful occupier of a cottage thereon, not to trespass on any part thereof, and afterwards brought an action against him for trespassing on an orchard. The same parties gave another notice to A. on the 18th March, 1825, and before the trial, to quit the possession of all the ground which he rented or held under them:—Held, that the second notice acknowledged A. as a tenant, and operated as a waiver of the first, which had treated him as a trespasser, and consequently that the action did not lie. *Barton* v. *Cordy*, M'Clel. & Y. 278; 1 Car. & P. 664.

6. Practice.

a. Declaration and Injunction.

Declaration that Person a Trespasser.]—In cases where a person trespasses on another's land, having done so frequently in the past, and having expressed an intention to do so in the future, the court has power under Ord. XXV. r. 5, to make a declaration that such person is a trespasser. *Harrison* v. *Rutland* (*Duke*), 62 L. J., Q. B. 117; [1893] 1 Q. B. 142; 4 R. 155; 68 L. T. 35; 41 W. R. 322; 57 J. P. 278—C. A.

Waste.]—The court has no jurisdiction to restrain a trespass which does not amount to waste. *Turner* v. *Ringwood Highway Board*, L. R. 9 Eq. 418; 21 L. T. 745; 18 W. R. 424.

Injunction against a mere trespasser committing waste refused. *Mogg* v. *Mogg*, Dick. 670.

The tendency of the authorities upon the subject of injury to real property is to break down the old distinction that existed between waste and trespass. *Lowndes* v. *Bettle*, 4 N. R. 609; 33 L. J., Ch. 451; 12 W. R. 399.

Exceeding Right.] — Injunction granted against trespass where trespasser exceeded a limited right to enter lands and take stone from a quarry. *Thomas* v. *Oakley*, 18 Ves. 184; 11 R. R. 181.

Trespass causing Irreparable Damage.]—The court will, by mandatory injunction, restrain a trespass the continuance of which will inflict irreparable damage upon persons in possession. Damage which it is impossible to measure will be deemed irreparable. *L. & N. W. Ry.* v. *Lancashire & Yorkshire Ry.*, 36 L. J., Ch. 479; L. R. 4 Eq. 174; 17 L. T. 43; 15 W. R. 810. S. P., *Cowper* (*Earl*) v. *Baker*, 17 Ves. 128. See also *Haigh* v. *Jaggar*, 2 Colly. 231; and *Ardley* v. *St. Pancras Union*, post, col. 258.

A. demised certain lands to B., and for some years allowed B. and his under-tenants to cut turf out of a bog adjoining the lands demised; some acres of the bog having been reclaimed, B. set them, alleging that they formed part of the lands demised by A. In 1836 A. by notice demanded possession of the land reclaimed, and withdrew the permission to cut turf from the bog. An ejectment being brought for the recovery of the reclaimed lands, and B. still continuing to cut turf as before, pending the

ejectment, A. filed a bill for an injunction to restrain him. The injunction was refused, as the case was not one of a sudden and irreparable injury, and therefore the court would not interfere in a case of trespass. *Sandys* v. *Murray*, 1 Ir. Eq. R. 29.

The court will not grant an injunction to restrain a person from committing a trespass, where it is temporary only; otherwise, where it has continued so long as to become a nuisance. *Coulson* v. *White*, 3 Atk. 21.

Title Inconclusive.]—After a railway company had purchased a piece of land from A., who was mentioned in the book of reference to be the owner of it, B., a neighbouring landowner, part of whose land the company had also taken, claimed to be owner of the piece of land, and filed a bill for an injunction to restrain the company from continuing in possession of it, and from committing waste on it. But, the affidavits as to title on both sides being inconclusive, the court refused the injunction. *Webster* v. *S. E. Ry.*, 1 Sim. (N.S.) 272; 6 Railw. Cas. 698; 20 L. J., Ch. 194; 15 Jur. 73.

On bill stating intent of defendant to encroach on plaintiff's land, &c., by building, defendant, by answer, claiming title to land himself, motion for injunction was refused, not being sufficient to try title on. *Bateman* v. *Johnson*, Fitzg. 106.

Title Disputed.] — Injunction in trespass granted where the title was disputed. *Kinder* v. *Jones*, 17 Ves. 110.

Title not Disputed.]—When the plaintiff's title is not disputed the court will grant an injunction to restrain acts of trespass without requiring him first to bring an action. *Goodson* v. *Richardson*, 43 L. J., Ch. 790; L. R. 9 Ch. 221; 30 L. T. 142; 22 W. R. 337.

When water pipes had, without the consent of the owner of the soil, been laid in the soil of a highway, an injunction to restrain the continuance of the pipes was granted; the owner of the soil not being left to his remedy at law, and not being required to establish his right at law. *Ib.*

The facts that the soil under the highway was of no value to the owner, and that his motive for applying to the court was not connected with the enjoyment of his land, were held not to be reasons against the granting of the injunction. *Ib.*

Where Damages no Adequate Remedy — Pauper Defendant.]—Where a bill was filed praying for an injunction to restrain various acts of trespass committed against the plaintiff, and of annoyance to his tenants, by a pauper defendant, the court, on demurrer, granted the injunction, as recovering damages at law against a pauper did not constitute an adequate remedy. *Hodgson* v. *Duce*, 2 Jur. (N.S.) 1014; 4 W. R. 576.

Cutting Timber—Collusion with Tenant.]—Injunction granted against trespasser cutting timber by collusion with tenant, without prejudice to the case of a mere trespasser. *Courthope* v. *Mapplesden*, 10 Ves. 290.

—— Trespasser in Possession under Articles to Purchase.]—Injunction granted against the cutting of timber by a trespasser, viz. by a person who had got possession under articles to purchase. *Crockford* v. *Alexander*, 15 Ves. 138; 10 R. R. 44.

—— Threat to continue Trespass.]—In 1859 H. brought ejectment against S. to recover a piece of woodland. S. set up adverse possession for more than twenty years, and the action was discontinued. H. shortly afterwards took up his residence in a house close to the wood, and frequently walked in the wood, turned cattle into it, and cut the brambles there. In 1873 he cut down a tree in the wood, and threatened to cut more, upon which S. filed his bill for an injunction:—Held, that after H. had, by bringing ejectment, admitted S. to be in possession of the wood, the acts done by H. must be looked upon only as acts of trespass not putting him into possession, and that S., being in possession, was entitled to an interlocutory injunction to restrain him from cutting timber. *Stanford* v. *Hurlstone*, L. R. 9 Ch. 116; 30 L. T. 140; 22 W. R. 422.

Paupers going to Relieving Office.]—The guardians of the poor, wrongfully claiming a right of way to their relieving office over the plaintiffs' lands, invited paupers to come that way for relief; the trespass by the paupers causing serious injury to the plaintiffs, an injunction was granted to restrain the guardians, their servants, workmen, and agents, from trespassing. *Ardley* v. *St. Pancras Union*, 39 L. J., Ch. 871.

In considering the injury, the possible as well as the actual use of the injured premises will be regarded. *Ib.*

Fishery—Enclosing Bed of River.]—Where parties have established a right to a several fishery in part of a tidal river the court will grant an injunction to restrain a party from enclosing the bed of the river (the effect of which would be to destroy the fishery) without necessarily deciding or entering upon the question of the ownership of the soil. *Bridges* v. *Highton*, 11 L. T. 653.

Bill of Sale—Man in Possession—Claim of Landlord.]—Where, after the expiration of a tenancy for years, the holder of a bill of sale of the furniture of the late tenant put and continued a man in possession of the furniture upon the premises under a power in his security:—Held, that the landlord was entitled to treat the bill of sale holder as a mere trespasser; and in an action against him by the landlord to restrain him from selling the goods on the premises or continuing in possession, an interlocutory injunction was granted in those terms. *Smith* v. *Brown*, 48 L. J., Ch. 694.

Landlord and Tenant—Mesne Landlord Entering on Premises—No Express Power in Lease.]—A mesne landlord entering on demised premises in the absence of express power in the lease, though himself liable to forfeiture for non-repair, will be restrained by injunction. *Stocker* v. *Planet Building Society*, 27 W. R. 877—C. A.

Party Wall—Tenants in Common.]—Where a tenant in common of a garden wall in the course of building operations pulled down the

wall and rebuilt the same on a concrete foundation which encroached upon the land of the other tenant in common who was a reversioner, the court ordered that the wall should be divided longitudinally between the co-tenants, and refused a mandatory injunction to compel the wrongdoer to remove the encroaching foundation, but granted damages to the reversioner in respect of the trespass on the ground that it was of a permanent nature. *Mayfair Property Co.* v. *Johnston*, 63 L. J., Ch. 399; [1894] 1 Ch. 508; 8 R. 781; 70 L. T. 485.

Practice — Requiring Defendant to Admit Facts.]—On a bill to restrain the continuance of a trespass alleged to have been actually committed, the court, in putting the plaintiff to his motion, will not require the defendant to admit any fact that enters into the question of trespass, at least unless such fact be clearly and unqualifiedly admitted in the answer. *Beaufort (Duke)* v. *Morris*, 2 Ph. 683; 12 Jur. 614.

b. Damages.

Encroachment—Party Wall—Trespass of a Permanent Nature.]—Where a tenant in common of a wall in the rebuilding of same encroached on the land of the other tenant in common who was a reversioner, the court ordered that the wall should be divided longitudinally between the co-tenants, and refused a mandatory injunction to compel the removal of the encroachment, but granted damages to the reversioner in respect of the trespass on the ground that it was of a permanent nature. *Mayfair Property Co.* v. *Johnston*, 63 L. J., Ch. 399; [1894] 1 Ch. 508; 8 R. 781; 70 L. T. 485.

Against Rightful Owner—Forcible Entry.]—Damages cannot be recovered against a rightful owner of land for a forcible entry on land; but for any independent wrong connected with such entry damages may be recovered even by a person whose possession was wrongful. *Beddall* v. *Maitland*, 50 L. J., Ch. 401; 17 Ch. D. 174; 44 L. T. 248; 29 W. R. 484.

Exemplary Damages.]—The jury in an action for damages for breaking and entering certain premises, may give exemplary, as distinguished from compensating, damages, if they believe, on the evidence, that the defendant entered the premises in a mode which he at the time knew was illegal. *Reeves* v. *Penrose*, 26 L. R., Ir. 141.

Aggravation.]—Trespass for breaking and entering the plaintiff's dwelling house may be well laid to have been done under a false charge and assertion, that the plaintiff had stolen property in her house, per quod she was injured in her credit, for that is laid only as matter of aggravation; and the jury may give damages for the trespass, as it is aggravated by such false charge. *Bracegirdle* v. *Orford*, 2 M. & S. 77.

Mining beyond Boundary.]—A. was the owner of a small feu of about an acre and a half in extent. The surface of the ground was occupied by miners' cottages, and underneath was coal. When A. purchased the feu he was under the impression that all the minerals under the feu, as under all the ground surrounding it, had been reserved to the superior; but that was a mistake, for in the deed granting the feu there was no reservation of coal. The superior granted the whole property in the coals in all the surrounding land to R. and C. They, under the impression that they had the whole of the coal, including the coal under the acre and a half, worked out and disposed of the coal under A.'s acre and a half; and in doing so damaged the surface. A. could not have worked the coal at a profit himself; there was no person to whom he could dispose of it but to R. and C.; and the element of wilful trespass, and the element of special and exceptional need of support to the surface, were absent. In a claim by A. for (1) the value of the coal; (2) a sum for "way-leave" and the advantage obtained by working through instead of round the feu; and (3) for damages done to the houses on the surface:—Held, affirming the decision of the court below, that the value of the coal taken must be the value of the coal to the person from whom it is taken, at the time it is taken, and that the best evidence in the peculiar circumstances of this case of that value was the royalty paid by R. and C. for the surrounding coalfield; therefore A. was entitled to the lordship on the coal excavated, calculated at that rate; together with the payment of a sum for damage done to the houses on the surface. *Livingstone* v. *Rawyards Coal Co.*, 5 App. Cas. 25; 42 L. T. 334; 28 W. R. 357; 44 J. P. 392—H. L. (Sc.)

In an action for getting and taking coal from a coal mine, the proper measure of damages is the value of the coal as soon as it is severed from the freehold, which may be ascertained by deducting from the saleable value of the coal at the pit's mouth the expense of carrying it there from the mine. *Morgan* v. *Powell*, 3 Q. B. 278; 2 G. & D. 721; 11 L. J., Q. B. 263; 6 Jur. 1109.

In an action for taking coals from the plaintiff's mine, where the defendant is a mere wrongdoer, the measure of damages is the value of the coals at the time when they first existed as chattels; and the defendant is not entitled to any deduction for the expense of getting them, or for a rent payable to the mineowner on coals got from the mine. *Wild* v. *Holt*, 9 M. & W. 672; 1 D. (N.S.) 376; 11 L. J., Ex. 285.

Taking Soil.]—T. demised land to the plaintiff at an annual rent for twenty-one years, with liberty to dig half an acre of brick earth annually; the lessee covenanted that he would not dig more, or, if he did, that he would pay an increased rent of 37*l.* per half acre, being after the same rate that the whole brick earth was sold for. A stranger dug and took away brick earth; the lessee recovered against him the full value of it:—Held, that he was entitled to retain the whole damages. *Attersoll* v. *Stevens*, 1 Taunt. 183; 9 R. R. 731.

In an action for cutting into the plaintiff's close, and carrying away the soil, the proper measure of damages is the value to the plaintiff of the land removed, not the expense of restoring it to its original condition. *Jones* v. *Gooday*, 8 M. & W. 146; 1 D. (N.S.) 50; 10 L. J., Ex. 275.

Land—Continuous User—Compensation—Tipping Mining Spoil.]—In assessing damages for trespass by tipping mining spoil for eight years on another's land, the value of the land to the wrongdoer for the purposes for which it was used by him must be taken into consideration. The principle of the wayleave cases, *Jegon* v. *Vivian*

(40 L. J., Ch. 389 ; L. R. 6 Ch. 742) and *Phillips* v. *Homfray* (L. R., 6 Ch. 770), that a trespasser shall not be allowed to use another person's land without paying for it, applied on the ground that the trespasser, besides injuring the land, had also had the use of it. *Whitwham* v. *Westminster Brymbo Coal and Coke Co.*, 65 L. J., Ch. 741 ; [1896] 2 Ch. 538 ; 74 L. T. 804 ; 44 W. R. 698—C. A.

Conversion of Produce.]—In an action for the recovery of land, and for damages for conversion of its produce :—Held, that the measure of damages was the value of the produce which the lands were capable of yielding at the time they were taken possession of, after deducting the expenses of management. However wilful and long-continued the trespass may have been, there is no law which authorises the disallowance of such expenses or the infliction of a penalty on the defendants beyond the loss sustained by the plaintiff. *McArthur* v. *Cornwall*, 61 L. J., P. C. 1 ; [1892] A. C. 75 ; 65 L. T. 718—P. C.

Interest.]—Where a plaintiff proves by parol that he occupies the premises under a written agreement from W., and the defendant produces a lease from W., made and taking effect about the time of the acts complained of as trespasses ; in order to entitle him to more than nominal damages, the plaintiff must show the duration of his interest, which he can only do by the production of the written instrument. *Twyman* v. *Knowles*, 13 C. B. 222 ; 22 L. J., C. P. 143 ; 17 Jur. 238.

Action for breaking and entering the dwelling house of the plaintiff, and taking away goods therein, not alleging them to be his goods :—Held, that the plaintiff was not entitled to damages for the value of the goods, as they were not alleged to be his property. *Pritchard* v. *Long*, 9 M. & W. 666 ; 1 D. (N.S.) 883 ; 11 L. J., Ex. 306.

Costs.]—In an action for breaking and entering a house, and taking and selling goods, the plaintiff is not entitled to recover the costs of setting aside a warrant of attorney and all subsequent proceedings under which the trespass was committed. *Holloway* v. *Turner*, 6 Q. B. 928 ; 14 L. J., Q. B. 143 ; 9 Jur. 160.

c. Effect of Judgment.

Where trespass continuing.]—Trespass is the proper remedy for wrongfully continuing a building on the plaintiff's land, for the erection of which the plaintiff has already recovered compensation ; and a recovery, with satisfaction for erecting it, does not operate as a purchase of the right to continue such erection. *Holmes* v. *Wilson*, 10 A. & E. 503. See *Thompson* v. *Gibson*, 7 M. & W. 456 ; 9 D. P. C. 717 ; 10 L. J., Ex. 330.

Therefore, where the trustees of a turnpike road built buttresses to support it on the land of A., and A. thereupon sued them and their workmen for such erection, and accepted money paid into court in full satisfaction of the trespass for such erection :—Held, that, after notice to the trustees to remove the buttresses, and a refusal to do so, A. might bring another action against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar. *Ib.*

Recovery in Replevin no Bar.]—A recovery in replevin is a bar to any action for the same taking of the same goods, as all damages may be then recovered, but not to an action for trespass to land committed at the time of such taking. *Gibbs* v. *Cruikshank*, 42 L. J., C. P. 273 ; L. R. 8 C. P. 454 ; 28 L. T. 735 ; 21 W. R. 734.

A person let into possession of mortgaged property by the mortgagor, he being left in possession only by the sufferance of the mortgagee, has no title against the mortgagor, except after his assent to the assignment or tenancy. *Ib.*

C. TO GOODS.

1. Right of Possession.

Mere Possession.]—The plaintiff, at the time of the trespass, must either have the actual possession or a constructive possession in the property which is the subject of the trespass. *Smith* v. *Milles*, 1 Term Rep. 480.

A. commissioned her brother to buy a cow for her, and a fortnight afterwards he bought a cow ; but, before the cow had either come to A.'s hands or she had assented to the purchase, the cow was taken by B. :—Held, that A. had such a property in the cow as would enable her to maintain trespass against B. for taking the cow. *Thomas* v. *Phillips*, 7 Car. & P. 573.

If an owner of a chattel gratuitously permits another person to use it, the owner may maintain trespass for an injury done to it while it is so used. *Lotan* v. *Cross*, 2 Camp. 464.

A shopkeeper, who has the possession of goods sent to him on sale or return, may maintain trespass for their injury in his own name. *Colwill* v. *Reeves*, 2 Camp. 575.

As Servant.]—A master of a flyboat, who is hired by a canal company at weekly wages, may maintain trespass for cutting a rope fastened to the vessel, whereby it was towed along an inland navigation, although the vessel and the rope were the property of the company. *Moore* v. *Robinson*, 2 B. & Ad. 817 ; 1 L. J., K. B. 4.

A. hired a steamboat for an excursion, the owner's captain navigating her:—Held, that the hirer had not such a possession as to justify him in forcibly turning out a stranger whom the captain had allowed to come on board. *Dean* v. *Hogg*, 10 Bing. 345 ; 4 M. & Scott, 188 ; 6 Car. & P. 54 ; 3 L. J., C. P. 113.

Assignee.]—Where goods are assigned as security for an advance of money, upon trust to permit the assignor to remain in possession of them until default in payment at the time stipulated, and upon further trust to sell them upon such default being made, the assignee has a sufficient possession to enable him to maintain trespass against a wrongdoer. *White* v. *Morris*, 11 C. B. 1015 ; 21 L. J., C. P. 185 ; 16 Jur. 500.

Auctioneer.]—An auctioneer put into possession of fixtures attached to the freehold for the purpose of selling them, the purchaser being bound to detach and remove them, has not such a possession as will support trespass de bonis asportatis for their wrongful removal. *Davis* v. *Danks*, 3 Ex. 435 ; 18 L. J., Ex. 213.

Qualified Right.]—A., being indebted to B., it was agreed that B. should keep A.'s cow till the

debt was paid; that A. might drive her away every morning and night to be milked; and if he did not return her, that B. might retake her whenever and wherever he found her. A. drove her away, and kept her three weeks, whereupon B. retook her. In an action by A. against B. for so doing:—Held, that these facts supported a plea denying A.'s property in the cow. *Richards* v. *Symons*, 8 Q. B. 90; 15 L. J., Q. B. 35; 10 Jur. 6.

Incomplete Possession.]—The plaintiff and the defendant were owners of boats employed in a fishery. The plaintiff's boat cast a fishing sean round a shoal of mackerel, with the exception of a comparatively small opening, which the sean did not quite fill up, but through which, in the opinion of the witnesses, the fish could not escape. The defendant's boat then came through the opening and took the mackerel:—Held, that the plaintiff could not maintain trespass for taking his fish, his possession not having been complete. *Young* v. *Hichens*, D. & M. 592; 6 Q. B. 606.

Possession of Trespasser.]—Title to property created merely by the act of reducing a thing into possession necessarily implies a reduction into possession effected by an act which is not in any way of a wrongful nature. Such an act, therefore, effected by one who is at the moment a trespasser, cannot create a title to property. *Blades* v. *Higgs*, 11 H. L. Cas. 621; 20 C. B. (N.S.) 214; 34 L. J., C. P. 286; 11 Jur. (N.S.) 701; 12 L. T. 615; 13 W. R. 927.

Setting up Jus tertii as an Answer.]—A., being in possession of a piano, which he had previously mortgaged with other goods by a bill of sale to B., sold it to the plaintiff, who took possession of it, and removed it from premises which A. held as tenant to the defendant. The sale to the plaintiff was a bonâ fide transaction. The defendant, to whom a year's rent was due by A., and being unaware of B.'s mortgage, or of the sale to the plaintiff, caused the chattel to be taken out of the plaintiff's possession and replaced in the premises held by A. Thereupon B. claimed it as his property, but the defendant, after B.'s claim had been made, distrained and sold the piano, together with other goods, for the rent due, when it was purchased amongst other property by B., who paid the defendant the rent due, and the costs and expenses of the distress, retaining the balance of the purchase money. In an action for trespass in taking away the piano, and for its conversion:—Held, that the defendant could not defeat the action by showing that the title to the chattel was in B. under the bill of sale, and that the plaintiff was entitled to a verdict. *Haggan* v. *Pasley*, 2 L. R. Ir. 573.

In an action for seizing goods in the possession and apparent ownership of the plaintiff, the defendant cannot set up the title of a third person to defeat the action. *Nelson* v. *Cherrill*, 1 M. & Scott, 452; 7 Bing. 663; 9 L. J. (O.S.) C. P. 227. S. P., *Carter* v. *Johnson*, 2 M. & Rob. 263.

2. Action for.

a. In General.

Where Contract Imperfect.]—Where a party purchased, by a verbal contract, a crop of growing grass, with liberty to go on the close where it grew, for the purpose of cutting and carrying it away:—Held, that he could not maintain trespass against the seller for taking away his horse and cart from the close, which he had brought there for the purpose of carrying away the grass; for this was in substance an action charging the defendant on a contract, within the 4th section of the statute of frauds. *Carrington* v. *Roots*, 2 M. & W. 248; 6 L. J., Ex. 95.

—— Sending back Infected Horse to Vendor.]—The purchaser of a horse sent it back to the seller on the ground of non-compliance with a warranty. The horse did comply with the warranty, and, whilst in the purchaser's stables, contracted a contagious disease. Of this the purchaser was unaware when he sent back the horse. On arriving back at the seller's stables other horses of the seller's contracted the disease from it, and died:—Held, that the seller could not recover damages from the purchaser for the loss of those other horses. *Wright* v. *Hetton Downs Co-operative Society*, 1 Cab. & E. 200.

Locking up Goods.]—The wife of G.'s brother was present in his house at G.'s death, and put away jewellery belonging to him in a cupboard, with the bonâ fide object of protecting it. The jewellery disappeared:—Held, that her act amounted to a trespass, and the executor of G. was entitled to nominal damages. *Kirk* v. *Gregory*, 45 L. J., Ex. 186; 1 Ex. D. 55; 34 L. T. 488; 24 W. R. 614.

Semble, that if the articles had reasonably required protection, and the act of the wife had been a reasonable precaution for that purpose, the trespass would have been justified. *Ib.*

The defendant claiming rent in arrear from the plaintiff, his lodger, locked the door of the room in which the plaintiff's goods were deposited, and refused to allow the plaintiff to enter and remove them, saying that he should not have them until he had paid his rent:—Held, that the acts of the defendant did not amount to a taking, and that the trespass was not maintainable. *Hartley* v. *Moxham* or *Moxon*, 3 G. & D. 1; Car. & M. 504; 3 Q. B. 701; 12 L. J., Q. B. 41; 6 Jur. 946.

If in an action for taking goods the defendants plead that L. was possessed of a room, and that they, as his servants, removed the goods, which were encumbering the room, to a convenient distance; this plea is disproved, if it is shown that the defendants locked up the goods in the room, and took away the key. *Jones* v. *Lewis*, 7 Car. & P. 343.

By Custom House Officer.]—Where a custom house officer took by force, from under the arm of a passenger landing from a vessel, a portfolio containing school drawings, without making any previous demand:—Held, that, as drawings which had not paid duty were liable to forfeiture under 3 & 4 Will. 4, c. 56, the officer was not liable in trepass de bonis asportatis. *De Gondouin* v. *Lewis*, 2 P. & D. 283; 10 A. & E. 117; 9 L. J., Q. B. 148.

Where goods, liable to payment of duty, have been landed and warehoused, and examined by custom house officers in the regular execution of their duty, no action can be maintained against such officers for the detention of the goods, under a belief that they are liable to forfeiture, though it ultimately appears they were not so liable. *Jacobsohn* v. *Blake*, 7 Scott (N.R.) 772; 6 M. & G. 919; 13 L. J., C. P. 89; 8 Jur. 272.

By Landlord.]—A landlord who has accepted the rent in arrear, and the expenses of the distress, after the impounding, cannot be treated as a trespasser merely because he retains possession of the goods distrained, although his refusal to deliver them up to the tenant may amount to a conversion, so as to render him liable in trover. *West* v. *Nibbs*, 4 C. B. 172 ; 17 L. J., C. P. 150.

If a landlord puts in a distress and declares that he distrains and does really intend to distrain certain goods on the premises which are not by law distrainable ; for this alone neither trespass nor trover will lie. *Beck* v. *Denbigh*, 29 L. J., C. P., 273 ; 6 Jur., (N.S.) 998 ; 2 L. T. 154 ; 8 W. R. 392.

By Constable under Warrant.]—A constable having a warrant authorising the seizure of certain specified goods alleged to have been stolen, seized those goods and others not specified in the warrant ; the latter goods were not likely to furnish evidence of the identity of the former :—Held, that he was liable to an action of trespass, though a copy of the warrant had not been demanded. *Crozier* v. *Cundy*, 9 D. & R. 224 ; 6 B. & C. 232 ; 5 L. J. (O.S.) M. C. 50 ; 30 R. R. 311.

Trespass by Relation.]—The rule, that a party cannot be made a trespasser by relation, is only applicable where the act complained of was lawful at the time. *Tharpe* v. *Stallwood*, 5 Man. & G. 760 ; 6 Scott (N.R.) 715 ; 12 L. J., C. P. 241.

Trespass lies against a person who takes a beast as an estray, although lawfully at first, and afterwards abuses it by riding and labouring it. *Oxley* v. *Watts*, 1 Term Rep. 12 ; 1 R. R. 133.

Where cattle escape through defect of the defendant's fences, trespass will lie if he drives them into the highway and there leaves them. *Carruthers* v. *Holles*, 8 A. & E. 113 ; 3 N. & P. 246 ; 1 W. W. & H. 264.

Mixing Goods.]—If A., for a fraudulent purpose, mixes his goods with B.'s, still, if they can be distinguished, he may maintain trespass against a person who, having a right to take B.'s goods, ignorantly takes those of A. *Colwill* v. *Reeves*, 2 Camp. 575.

How differing from Conversion.]—In trespass a party is liable if he takes the property only for an instant ; but in trover he is not liable unless he also proceeds to a conversion. *Price* v. *Helyar*, 4 Bing. 597, 604 ; 1 M. & P. 541 ; 6 L. J. (O.S.) C. P. 132.

Practice.—Allegation that goods are Plaintiff's.]—In an action for taking goods out of a dwelling house, it must be alleged that they are the goods of the plaintiff. *Pritchard* v. *Long*, 9 M. & W. 666 ; 1 D. (N.S.) 883 ; 11 L. J., Ex. 306.

—— Justification—To what it must go.]—In an action for taking the plaintiff's hog, and converting the same to the defendant's use, the conversion is only matter of aggravation, and need not be justified or answered, for the conversion is not a trespass vi et armis. *Dye* v. *Leatherdall*, 3 Wils. K. B. 20.

A declaration charged the defendant with taking and carrying away the goods of the plaintiff, and also with converting them to his own use :—Held, that such conversion was merely matter of aggravation ; and a plea justifying the taking the goods and carrying them away, but omitting to justify their conversion was sufficient. *Pratt* v. *Pratt*, 6 D. & L. 20 ; 2 Ex. 413 ; 17 L. J., Ex. 299.

A defence to an action of trespass for destroying a machine, that it was on the defendant's ground without his license, and that it was injured in removing it, must be specially pleaded. *Page* v. *Ratcliff*, 1 L. J., C. P., 57.

Evidence of Possession.]—In an action for taking goods and chattels, the defendant pleaded that the goods were not the goods of the plaintiff. The plaintiff proved that he had purchased them of the sheriff, under an execution issued against B. The defendant proved that he had subsequently taken them in execution as the goods of B. they being at the time in B.'s possession :—Held, that this evidence was admissible, and that it was competent for the judge to put it to the jury to say whether the previous sale to the plaintiff was bonâ fide or fraudulent. *Ashley* v. *Minnett*, 3 N. & P. 231 ; 8 A. & E. 121 ; 1 W. W. & H. 155 ; 7 L. J., Q. B. 133.

A. brought an action against B. for taking two tables and a chair. He pleaded not guilty. It was proved that B. took two chairs and a table in the house of D. ; but none of the witnesses knew A., and there was no evidence of any kind to connect A. with the goods taken in D.'s house :—Held, that, to entitle A. to recover, there must be some evidence to connect him with the goods taken. *Forman* v. *Dawes*, Car. & M. 127.

b. Principal and Agent.

Liability of Principal.]—Whether a seizure of particular goods under a fi. fa. was directed by the execution creditor, so as to make him liable for the act of the sheriff, is a question of fact. It is not within the scope of the implied authority of the solicitor of a judgment creditor issuing a fi. fa. to direct the sheriff to seize particular goods. *Jarmain* v. *Hooper*, infra, distinguished. *Smith* v. *Keal*, 9 Q. B. D. 340 ; 47 L. T. 142 ; 31 W. R. 76—C. A. Affirming 51 L. J., Q. B. 487 ; 46 J. P. 615.

A direction by the attorney to the sheriff to seize under a writ of execution is an act done by an agent within the scope of his authority, and binds the principal. The client, therefore, is liable in trespass for the act of the attorney, in directing the sheriff to take the goods of the wrong party. *Jarmain* v. *Hooper*, 1 D. & L. 769 ; 6 Man. & G. 827 ; 13 L. J., C. P. 63 ; 8 Jur. 127. S. P., *Morris* v. *Salberg*, 58 L. J., Q. B. 275 ; 22 Q. B. D. 614 ; 61 L. T. 283 ; 37 W. R. 469 ; 53 J. P. 772—C. A.

Where goods of a party are seized under a process which has issued in a suit in which such party is a defendant, but the seizure takes place without the knowledge or authority, or in the name of the plaintiff in such suit, the circumstances that the goods afterwards came to his hands, and that he, knowing the circumstances of the seizure, refuses to give them up, do not make him a trespasser. *Wilson* v. *Tumman*, 6 Scott (N.R.) 894 ; 1 D. & L. 513 ; 12 L. J., C. P. 306.

A mere ratification of a previous trespass does not make the party ratifying a trespasser. *Ib.*

A principal is not liable for the wrongful acts of his agent, though he receives a benefit from them, unless, at the time of the receipt, he has notice of the illegality. *Freeman* v. *Rosher*, 13 Q. B. 780; 18 L. J., Q. B. 340.

Where a broker, under a warrant from the landlord, authorising him to distrain the goods and chattels of the tenant, seized a fixture, which was afterwards sold, and the proceeds paid to the landlord:—Held, that the receipt of the proceeds did not make the landlord a trespasser, it not being shown that he was aware of the illegal seizure. *Ib.*

A. authorised B., a broker, to distrain for rent due to him from C. B. having entered for the purpose of executing the warrant, took away books and papers (which were assumed not to be distrainable), and omitted to insert them in the inventory:—Held, that A. was liable, jointly with B., in trespass. *Gauntlett* v. *King*, 3 C. B. (N.S.) 59.

Solicitor, when Personally Liable.]—Action for wrongful seizure of goods against an execution creditor, and her attorney, jointly. The attorney, who had given the sheriff a fi. fa. against C., sent a man with the sheriff, to point out his goods. He pointed out goods which the sheriff seized, and which, on an interpleader issue, where found to be the goods of D.:—Held, that the attorney, by the direction which he had given the sheriff, had made himself personally liable in trespass. *Power* v. *Fleming*, Ir. R. 4 C. L. 404.

Held, also, that, the attorney having directed the sheriff to seize the goods which the man sent should point out, the consequence was just the same as if he had himself pointed out the wrong goods, and directed the sheriff to seize them. *Ib.*

Licence by Agent.]—A man, who takes possession of a ship by consent of the plaintiff's agent, is not liable to an action of trespass. *Mills* v. *Dawson*, Peake's Add. Cas. 59.

c. Companies.

Liability of.]—Trespass will lie against a corporation for seizing and converting goods to their own use. *Maund* v. *Monmouthshire Canal Co.*, 2 D. (N.S.) 113; Car. & M. 606; 4 Man. & G. 452; 5 Scott (N.R.) 457; 3 Railw. Cas. 159; 11 L. J., C. P. 317; 6 Jur. 932.

Trespass will not lie against a railway company for the act of their servant, who, whilst in the performance of his duty in driving a locomotive engine, runs over the plaintiff's sheep upon the railway. If the plaintiff had a right to have his sheep there, or if they were not wrongfully there and the injury was occasioned by the want of skill or care on the part of the company's servant, or in consequence of their order to drive at a certain speed, an action on the case, and not trespass, is the proper remedy. *Sharrod* v. *L. & N. W. Ry.*, 7 D. & L. 213; 6 Railw. Cas. 239; 4 Ex. 580; 11 Jur. 23.

d. Joint Trespass.

What Constitutes.]—A person who knowingly receives from another a chattel which the latter has wrongfully seized, and afterwards, on demand, refuses to give it back to the owner, does not thereby become a joint trespasser, unless the chattel was seized for his use or benefit. *Wilson* v. *Barker*, 1 N. & M. 409; 4 B. & Ad. 614.

An attorney who delivers a precept to a sheriff's bailiff, who thereupon acts under it, is not therefore a co-trespasser with the bailiff. *Sowell* v. *Champion*, 6 A. & E. 407; 2 N. & P. 627; W., W. & D. 667; 7 L. J., Q. B. 197.

3. Damages.

Costs and Expenses.]—In an action for taking the plaintiff's goods in execution under a warrant of attorney and judgment, which were afterwards set aside as illegal, the plaintiff cannot claim as part of the damage his costs incurred in vacating the warrant of attorney and judgment. *Holloway* v. *Turner*, 6 Q. B. 928; 14 L. J., Q. B. 143; 9 Jur. 160. S. P., *Loton* v. *Devereux*, 3 B. & Ad. 343; 1 L. J., K. B. 103.

Where a defendant had wrongfully seized the plaintiff's goods, but had not removed them from the house in which the plaintiff resided, and another wrongdoer, against the will of the defendant, seized the goods while thus in the defendant's possession, the plaintiff was held entitled in trespass to recover as damages from the defendant the amount she had been forced to pay to the second wrongdoer, to redeem the goods from him. *Keene* v. *Dilke*, 4 Ex. 388; 18 L. J., Ex. 440.

D. obtained, as special damage, in an action against an execution creditor and her attorney, a verdict for the costs of the interpleader proceedings, which he had taxed against the execution creditor, and for the payment of which by her he had an order of the court, but which he was unable to recover:—Held, that, as his action was brought against both the execution creditor and her attorney, the same damages must be recovered against both; that, as D. had an order which was equivalent to a judgment of the court against her, he could not recover the amount of them as damages against her, and, therefore, the verdict should be reduced by the amount. *Power* v. *Fleming*, Ir. R. 4 C. L. 404.

For Forcible Entry.]—Damages cannot be recovered against the rightful owner for a forcible entry on land, for the stat. 5 Ric. 2. st. 1, c. 8, only makes a forcible entry an indictable offence, and does not create any civil remedy for it. But for any independent wrong (such as an assault or an injury to furniture) committed in the course of the forcible entry, damages can be recovered, even by a person whose possession was wrongful, for the statute makes a possession obtained by force unlawful, even when it is so obtained by the rightful owner. *Beddall* v. *Maitland*, 50 L. J., Ch. 401; 17 Ch. D. 174; 44 L. T. 248; 29 W. R. 484.

Extent of Injury.]—A.'s carriage was driven against the wheel of B.'s chaise; the collision threw a person, who was in the chaise, upon the dashing board, the dashing board fell on the back of the horse and caused him to kick, and thereby the chaise was injured:—Held, that B. was entitled to recover against A. damages commensurate with the whole of the injury sustained. *Gilbertson* v. *Richardson*, 5 C. B. 502; 17 L. J., C. P. 112; 12 Jur. 292.

In an action of damages for taking goods under irregular legal process where special damage is alleged and claimed but not proved, the plaintiff is nevertheless entitled at least to

nominal damages, or to such substantial damages as the jury thinks adequate. *Doss* v. *Doss*, 14 L. T. 646; 14 W. R. 590—P. C.

A person who has moved the goods of another without a lawful right to do so, even to put them out of the way, is liable only for the natural consequences of the removal. *Walker* v. *Sheerman*, 3 F. & F. 259.

On a declaration for taking the plaintiff's goods, chattels and effects, he may recover the value of fixtures. *Pitt* v. *Shew*, 4 B. & Ald. 206.

To Person and Goods—Same Wrongful Act—Estoppel.]—Damage to goods, and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights and give rise to distinct causes of action; and, therefore, recovery of damages for one of these causes of action is no bar to recovery of damages for the other. *Brunsden* v. *Humphrey*, 53 L. J., Q. B. 476; 14 Q. B. D. 141; 51 L. T. 529; 32 W. R. 944; 49 J. P. 4—C. A.

Mitigation of.]—In an action for taking the plaintiff's goods, the defendant having pleaded not guilty, cannot, in mitigation of damages, give in evidence a repayment by him, after action brought, of money produced by the sale of the goods. *Rundle* v. *Little*, 6 Q. B. 174; 13 L. J., Q. B. 311; 8 Jur. 668.

Reducing Damages.] — A person having obtained several very valuable articles without paying for them, the tradesmen on hearing that he was reputed to be a swindler, went to his house, gained admittance, broke open an inner door, and took away part of the goods. He brought an action for trespass and obtained a verdict. The court refused to reduce the damages by allowing the tradesmen to set off against it the amount of the debts due to them. *Hawkins* v. *Baynes*, 1 L. J. (o.s.) K. B. 167.

4. Restoration of Goods.

Under certain circumstances the court will stay the proceedings in an action for seizing goods, on the defendant's restoring the goods, or paying the full value of them, with the costs of the action. *Pickering* v. *Truste*, 7 Term Rep. 53. And see *Earle* v. *Holderness*, 4 Bing. 462; 1 M. & P. 254; 6 L. J. (o.s.) C. P. 68.

But the court refused to stay proceedings in an action for seizing goods, on the defendant's restoring them or their value, with costs, where it would not have ended the suit, and the value was disputed. *Knot* v. *Barker*, 3 Anst. 896.

In Criminal Cases.]—*See* Criminal Law.

J. S. H.

TRIAL.

See Practice—Criminal Law.

TRINIDAD.

See Colony.

TRINITY HOUSE.

See Shipping.

TROVER AND CONVERSION.

1. *Parties*, 270.
2. *What Amounts to Conversion.*
   - *a.* In General, 274.
   - *b.* Detention after Demand, 277.
   - *c.* Claim of Right or Interest, 280.
   - *d.* Sale, 281.
   - *e.* Waiver of Conversion, 284.
3. *Right of Action.*
   - *a.* Property and Possession, 285.
   - *b.* For what it Lies.
     - i. In General, 287.
     - ii. Negotiable Instruments, 289.
   - *c.* On Sale of Goods, 292.
   - *d.* After Theft of Goods, 295.
   - *e.* Where Goods obtained by False Pretences or Fraud, 297.
   - *f.* Property Lost or Found, 300.
   - *g.* Property Given or Exchanged, 300.
   - *h.* Goods Seized or Taken in Execution, 301.
   - *i.* Between Landlord and Tenant, 302.
   - *k.* Against Carriers, Warehousemen, or Wharfingers, 304.
4. *Practice.*
   - *a.* Restoration of Goods and Chattels, 306.
   - *b.* Damages, 307.
   - *c.* Costs, 311.
   - *d.* Effect of Judgment, 311.

1. Parties.

By whom Maintainable—Joint Owners.]—Four joint owners of goods delivered them to a pawnee, to be redelivered in a certain event. After the happening of the event the assignee of three of the joint owners demanded the return of the goods, which was wrongfully refused. The fourth joint owner was abroad, and did not assent to the demand:—Held, that the assignee could not maintain trover against the pawnee. *Harper* v. *Godsell*, 39 L. J., Q. B. 185; L. R. 5 Q. B. 422; 18 W. R. 954.

If an article is deposited by one, with the authority of another, and received by the bailee to keep on the joint account of the two, one alone cannot lawfully demand it without the authority of the other, so as to maintain trover upon the bailee's refusal to deliver it. *May* v. *Harvey*, 13 East, 197; 12 R. R. 322.

Where the question was, whether goods were the property of the plaintiff alone or jointly with S.:—Held, that, as the plaintiff and S. had made joint orders for the disposition of the goods, the plaintiff alone could not recover. *Nathan* v. *Buckland*, 2 Moore, 153.

A declaration stated that the plaintiff was possessed as of his own property of four horses, which the defendant converted and disposed of to his own use. Pleas, first, that they were not the property of the plaintiff, and, secondly, that a judgment was recovered against F., and that the defendant (a sheriff's officer) seized them under an execution against F., the same being

the goods and chattels of F., and liable to be seized and taken as aforesaid, and not being the property of the plaintiff. To which the plaintiff replied, that they were his cattle and property. At the trial, it was found by the jury that they were the property of the plaintiff and F. jointly:—Held, that the issue raised by the defendant was, whether the cattle were the sole property of F., and the jury having found that they were the joint property of the plaintiff and F., that the plaintiff was entitled to recover. *Furrar* v. *Beswick*, 1 M. & W. 682; 1 Tyr. & G. 1053; 5 L. J., Ex. 225.

Two persons jointly interested in a chattel having made a joint demand for it, may, notwithstanding, maintain separate actions in respect of it, against a person who unjustly detains it. *Bleaden* v. *Hancock*, 4 Car. & P. 152; M. & M. 465.

—— **Member of Society.**]—A member of an amicable society, entrusted with a box containing the fund, and bound by bond to keep it safely, cannot maintain trover against another member and a third person who took it from him. *Halliday* v. *Camsell*, 1 Term Rep. 658; 1 R. R. 346.

—— **Copyholds — Trover by Lord for Trees severed by Tenant.**]—The right to trees severed by the tenant of a copyhold or a customary freehold is primâ facie in the lord, and in general he may maintain trover for them when so severed. *Fleming* v. *Simpson*, 2 Man. & Ry. 169; 6 L. J. (o.s.) K. B. 207. S. P. *Eardley* v. *Granville*, 45 L. J., Ch. 669; 3 Ch. D. 826; 34 L. T. 609; 24 W. R. 528.

—— **Trustees.**]—Trustees having a title to chattels with an immediate right of possession can sue in trover for the chattels although they may never have taken actual possession, but have allowed the goods to remain in the occupation of their cestui que trust; and although the title may be liable to be defeated by the claim of some third party, yet the wrongdoer cannot set up the title of that third party as a defence to an action against himself for the recovery of the goods. *Barker* v. *Furlong*, 60 L. J., Ch. 368; [1891] 2 Ch. 172; 64 L. T. 411; 39 W. R. 621.

—— **Tenants in Common against each other.**]—One tenant in common cannot maintain trespass or trover against his co-tenant for cutting and carrying away the grass off their land unless there has been an ouster, or unless it is shown that the grass has been destroyed. *Jacobs* v. *Seaward*, 41 L. J., C. P. 221; L. R. 5 H. L. 464; 27 L. T. 185—H. L. Affirming 18 W. R. 953—Ex. Ch.

One tenant in common of a chattel cannot maintain trover for it against his companion, unless the latter has so disposed of it as to render it impossible that the plaintiff should ever take and use it. *Fennings* v. *Grenville* (*Lord*), 1 Taunt. 241; 9 R. R. 760.

The conversion of a chattel by a tenant in common from its general and profitable application, though it changes the form of the substance is not such a destruction of the subject matter as to prevent the plaintiff from taking and using it in its altered state; therefore it creates no right of action. *Ib.*

One of two tenants in common of a chattel is not liable in trover at the suit of his co-tenant for the mere sale of the chattel, though he is for such a disposition as amounts to a destruction of it. *Mayhew* v. *Herrick*, 7 C. B. 229; 18 L. J., C. P. 179; 13 Jur. 1078.

There need not be an actual destruction; any disposal of the property in such a manner as to prevent a co-tenant from obtaining his share is a conversion. *Ib.*

When one tenant in common forcibly took a ship out of the other's possession, and secreted it from him so that he did not know where it was carried, and changed the name of it, and it afterwards got into a third person's hands, who sent it on a foreign voyage where it was lost:—Held, that it was proper to be left to the jury, whether the destruction was not by the means of that tenant in common. *Barnardiston* v. *Chapman*, 4 East, 121.

The secret removal of entire chattels by one tenant in common, without the consent or knowledge of the other, and for the purpose of selling them and applying the proceeds to his own use, does not amount to a conversion, nor is it an unlawful act for which the tenant can maintain an action, even although the removal has created a lien on the chattels by a third party. *Jones* v. *Brown*, 25 L. J., Ex. 345; 4 W. R. 680.

Observation on the rule that one tenant in common cannot maintain trover against another. *Wickham* v. *Wickham*, 2 Kay & J. 496.

—— **On Bankruptcy.**]—One of two tenants in common of goods committed an act of bankruptcy; after which the defendant, by direction of the other tenant in common, sold the goods:—Held, that the assignees of the bankrupt could not recover from the defendant the proceeds of the sale in an action for money had and received, nor maintain detinue. *Morgan* v. *Marquis*, 9 Ex. 145; 2 C. L. R. 276; 23 L. J., Ex. 21.

Assignees of two bankrupt partners declared in trover for property which had belonged to the bankrupts, alleging a possession in themselves as assignees, and a conversion since the bankruptcy. It appeared that a separate fiat had first issued against one partner, under which the goods were seized by the sheriff, and sold; subsequently to which a joint fiat was issued against both, and the plaintiffs were appointed assignees:—Held, that they could not recover against the sheriff for an undivided moiety as the property of the partner against whom the separate fiat had issued. *Edwards* v. *Hooper*, 11 M. & W. 363; 12 L. J., Ex. 304; 7 Jur. 378.

—— **Mortgagee — Tenant's Fixtures.**]—The mortgagee of tenant's fixtures has a right or interest in the land which the tenant who has mortgaged cannot defeat by a subsequent surrender of his lease to his landlord. If he does so surrender, the mortgagee has a right to enter and sever such fixtures, and may maintain an action against an incoming tenant who has prevented him from exercising that right, in which action he may recover the value of the fixtures as severed. *London & Westminster Loan & Discount Co.* v. *Drake*, 6 C. B. (N.S.) 798; 28 L. J., C. P. 297; 5 Jur. (N.S.) 1407; 7 W. R. 611.

—— **Assignee under Voidable Bill of Sale.**]—The plaintiff having seized the goods of S., under a fi. fa. issued upon a judgment founded on a warrant of attorney previously given to him by

S., took an assignment of the goods from the sheriff by bill of sale. The defendants, who were landlords to S., distrained for rent, and seized the goods under such distress whilst the plaintiff was in possession of them. Three days afterwards, S. filed a petition in bankruptcy, on which he was declared a bankrupt, and assignees were appointed. The assignees did not interfere with or demand the goods of the plaintiff, but they commenced an action against the plaintiff for the conversion of the goods. In an action for an excessive distress, brought by the plaintiff against the defendants, the jury found that the warrant of attorney was given as a fraudulent preference of the plaintiff over the other creditors, in contemplation of bankruptcy:—Held, that the property in the goods vested in the plaintiff by the bill of sale, subject to be divested by the assignees; and that, as the assignees had not interfered, the plaintiff was the owner of the goods, and the defendants, being wrong-doers could not set up the title of the assignees to defeat the plaintiff's action. *Newnham* v. *Stevenson*, 13 C. B. 285; 20 L. J., C. P. 111; 15 Jur. 360.

Several Defendants.]—In trover against several all cannot be found guilty on the same count, without proof of a joint conversion by all. *Nicoll* v. *Glennie*, 1 M. & S. 588.

A written notice of demand to deliver up deeds was served on three persons at different times and places:—Held, that it was for the jury to say, from the whole of the evidence, whether they had not previously agreed to act in such a manner with reference to the deeds as to render their refusal, although separately given, evidence of a joint conversion. *Atkin* v. *Slater*, 1 Car. & K. 356.

Corporations.]—Trover, as well as trespass, lies against a corporation aggregate. *Maund* v. *Monmouthshire Canal Co.*, 3 Railw. Cas. 159; 4 Man. & G. 452; 2 D. (N.S.) 113; 5 Scott (N.R.) 457; Car. & M. 606; 11 L. J., C. P. 317; 6 Jur. 932.

A contractor, having engaged with a railway company to construct a portion of their line, employed a sub-contractor to fence the line, who, for that purpose, placed timber near it. This timber having been sold to the plaintiff, was afterwards taken away by the workmen employed on the railway; a claim to the timber having been made on behalf of the plaintiff on a director of the company, the claimant was recommended by him to attend a meeting of the company, which he did, and was informed, by the same director, that there was a prospect of an amicable arrangement, and that, in all probability, his claim would be met:—Held, in trover against the company, that there was not sufficient evidence to make the company liable. *Glover* v. *L. & N. W. Ry.*, 5 Ex. 66; 19 L. J., Ex. 172.

Husband and Wife.]—Where, in trover against husband and wife, the declaration stated a conversion by both:—Held, sufficient, after verdict. *Keyworth* v. *Hill*, 3 B. & Ald. 685.

The plaintiff's goods had been taken in execution under process against B.'s goods, and placed upon the premises of the defendant, who was an innkeeper; upon a demand of them by the plaintiff, in the absence of the defendant, the wife of the defendant said that she would consult the attorney who had issued the execution, and after having done so refused, saying she was not to deliver them up, and that he would save her harmless:—Held, sufficient evidence of a conversion. *Catterall* v. *Kenyon*, 2 G. & D. 545; 3 Q. B. 310; 11 L. J., Q. B. 260; 6 Jur. 507.

The goods of a woman with whom a man had contracted a bigamous marriage were seized and sold under an execution against the man. Afterwards, the woman ascertaining that the man had committed bigamy, brought trover against the sheriff for the value of her goods:—Held, that she was entitled to succeed. *Glasspoole* v. *Young*, 7 L. J. (O.S.) K. B. 305.

Conversion by Servant.]—A servant may be charged in trover, although the act of conversion is done by him for the benefit of his master. *Stephens* v. *Elwall*, 4 M. & S. 259.

Whether he has any authority or not from his master for so doing. *Perkins* v. *Smith*, 1 Wils. K. B. 328.

In trover to recover the value of a quantity of bricks, evidence that men fetched them away, saying, that they were ordered by the defendant so to do, and that his name was painted on the cart in which they were taken, is not evidence to connect the defendant with the taking them away. *Everest* v. *Wood*, 1 Car. & P. 75.

A servant, acting under the orders of his master, in detaining another's goods, is guilty of a conversion as well as his master, but a packer, having, in the exercise of his business, shipped goods which had been pledged by a factor to several persons, under the orders of a third person who employed him for that purpose, is not guilty of a conversion. *Greenway* v. *Fisher*, 1 Car. & P. 190.

Where goods, which had been saved from fire, were carried to a warehouse by the servants of an insurance company, of which the defendant, as one of such servants, kept the key, and on his being applied to by the owner to deliver them up to him, refused to do so without an order from the company:—Held, that this was not such a refusal as amounted to a conversion. *Alexander* v. *Southey*, 5 B. & Ald. 247; 24 R. R. 348.

By Agent.]—If a principal ratifies the unauthorised purchase by his agent of a chattel which the vendor had no right to sell, he is guilty of a conversion, although he had no knowledge of the circumstances which made the sale unlawful. *Hilbery* v. *Hatton*, 2 H. & C. 822; 33 L. J., Ex. 190; 10 L. T. 39. And see *Pothonier* v. *Dawson*, Holt, 383; 17 R. R. 647.

2. What Amounts to Conversion.

a. In General.

Nature of Dealing with Property.]—In trover the party is supposed to have obtained possession of the goods lawfully, but to have unlawfully converted them to his own use. *Golightly* v. *Ryn*, Lofft, 88.

It is not every wrongful act depriving a party of the possession of his goods that amounts to a conversion. *Thorogood* v. *Robinson*, 6 Q. B. 769; 14 L. J., Q. B. 87; 9 Jur. 274.

Where the plaintiff's goods and servants were on land which the defendant recovered in ejectment, and the defendant, on entering, under the writ of possession, turned the plaintiff's servants off the land, and would not let them remain for the purpose of removing the goods, there having

been no subsequent demand or refusal:—Held, that the jury might find that there was no conversion. *Ib.*

To constitute a conversion of goods for which trover will lie, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right. *Heald* v. *Carey*, 11 C. B. 977; 21 L. J., C. P. 97; 16 Jur. 197.

A mere refusal by the defendant to deliver to the plaintiff a chattel of his which is on the defendant's premises is not evidence of a conversion, but a denial by the defendant of the plaintiff's right to it, or a refusal by which the defendant exercises a dominion over the chattel, is. *Wilde* v. *Waters*, 16 C. B. 637; 24 L. J., C. P. 193; 1 Jur. (N.S.) 1021; 3 W. R. 570.

The forcible taking possession of a house and fixtures by the assignee of a term of the house is not a conversion of such fixtures. *Longstaff* v. *Meagoe*, 4 N. & M. 211; 2 A. & E. 167; 4 L. J., K. B. 28. See *Beddall* v. *Maitland*, 50 L. J., Ch. 401; 17 Ch. D. 174; 44 L. T. 248; 29 W. R. 484.

Cashing Forged Bill.]—Cashing a bill according to the tenor of a forged indorsement is a conversion apart from any question of negligence. *Kleinwort* v. *Comptoir Nationale d'Escompte de Paris*, 63 L. J., Q. B. 674; [1894] 2 Q. B. 157; 10 R. 259.

Cutting Seals off Deed.]—Cutting off the seals of a deed is a conversion. *Standring* v. *Grundy*, 6 L. J., Ex. 181.

Intention to Appropriate Goods.]—When one by an authorised act deprives another of his goods, though without any intention to appropriate them to his own use, it is a conversion of the goods. *Hiort* v. *Bott*, 43 L. J., Ex. 81; L. R. 9 Ex. 86; 30 L. T. 25; 22 W. R. 414.

The defendant having through an error of the consignor of goods received what purported to be an invoice of goods sold by the consignor to the defendant through a named broker, and an order which required a railway company to deliver the goods to the order of the consignor or consignee, indorsed the order to the broker, who thereby obtained from the company, and made away with the goods:—Held, that, though the defendant indorsed the order with the intention of correcting what he believed to be an error and of returning the goods to the consignor, yet since the circumstances did not require him to indorse the order or interfere with the goods in any way, he was liable in trover to the consignor. *Ib.*

A mere wrongful asportation of a chattel does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use, or that of some third person, or unless the act done has the effect either of destroying or changing the quality of the chattel. *Foulds* or *Foulds* v. *Willoughby*, 8 M. & W. 540; 1 D. (N.S.) 86; 10 L. J., Ex. 364; 5 Jur. 534.

Repudiation of Illegal Purpose.]—When goods are delivered for an illegal purpose, the person delivering the goods may repudiate the illegal purpose at any time before it has been carried out, and recover back his goods. *Taylor* v. *Bowers*, 46 L. J., Q. B. 39; 1 Q. B. D. 291; 34 L. T. 938; 24 W. R. 499—C. A.

Duress—Notice.]—The plaintiff being lawfully possessed of bills of exchange given him by a trader, the defendant, acting on behalf of the creditors of the trader, who had taken proceedings to make him bankrupt, came to the plaintiff when ill in bed, and demanded the bills, and, on the plaintiff's refusal to give them up, told him, that if he did not, the expense of the bankruptcy would fall on him, and the commissioner would be very severe with him. The plaintiff was much agitated, and delivered up the bills. The plaintiff's agent afterwards, while the bills were in the defendant's possession, informed him of the circumstances under which they had been given to the plaintiff, and told him that he (the defendant) and his employers had no right to them; but the defendant notwithstanding handed them over to his employers:—Held, first, that the original taking was not a conversion, inasmuch as there was no such duress as would have avoided a contract, or have enabled the plaintiff to maintain trespass de bonis asportatis. Held, secondly, that the defendant was guilty of a conversion by delivering the bills to his employers after notice of the facts. *Powell* v. *Hoyland*, 6 Ex. 67; 20 L. J., Ex. 82.

Accidental Flood — Goods Unlawfully Deposited.]—Where timber was placed on the defendant's land without his leave by the plaintiff, and the defendant, while digging a pit, cut and destroyed a part of the timber, and a part of it was accidentally washed away, it was held that there was no conversion of the timber. *Simmons* v. *Lillystone*, 8 Ex. 431; 22 L. J., Ex. 217; 1 W. R. 198.

Agreement to Sell and Account.]—A. intrusted B. with goods to sell in India, agreeing to take back from B. what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price. B. not being able to sell the goods in India himself, left them with an agent, to be disposed of by him, directing the agent to remit the money to himself in England:—Held, that A. could not maintain trover against B. for the goods. *Bromley* v. *Coxwell*, 2 Bos. & P. 438; 5 R. R. 648.

Intention to Benefit.]—Where an injury has been done to a chattel belonging to another, in endeavouring to do a service to such person out of charity, or to prevent mischief from the act of other persons, trover will not lie for it. *Drake* v. *Shorter*, 4 Esp. 165.

A pipe of wine belonging to A. was deposited in B.'s cellar, and was bottled at a time during which there were conflicting claims to it by A. and the assignees of the party to whom it was sent, and who resided in B.'s house. By whom, or by whose orders the wine was bottled did not appear, though there was some evidence that it was likely to be injured from not being bottled:—Held, that it was a question for the jury whether the act of bottling operated as a conversion. *Philpott* v. *Kelley*, 4 N. & M. 611; 3 A. & E. 106; 1 H. & W. 134; 4 L. J., K. B. 139.

Held, also, that it was a question for the jury whether the drinking of a part of the wine, taken in connection with the bottling, amounted to a conversion; and they having found that it did not, the court refused to disturb the verdict. *Ib.*

Evidence.]—A person, when served with notice of demand for certain deeds, merely said, "that he would consult his attorney":—Held, that this expression, coupled with his subsequent conduct in not giving up the deeds, amounted to evidence of a conversion. *Atkin* v. *Slater*, 1 Car. & K. 356.

But where the defendant, in answer to a demand for property, bonâ fide referred the plaintiff to his solicitor, and no application was made to the solicitor, it was held there was no conversion. *Jones* v. *Yates*, 9 B. & C. 532; 4 Man. & Ry. 615; 7 L. J. (o.s.) K. B. 217.

In an action for conversion of a bill of exchange, it being proved that the defendant had said, in answer to a demand for it, that he could not give it up because it had been burnt, and he not being called as a witness:—Held, that the case was rightly left to the jury, and, that their verdict for the plaintiff was justified by the evidence. *M'Kewen* v. *Cotching*, 27 L. J., Ex. 41; 6 W. R. 16.

If a person who has possession of the goods of another, on being desired by the owner to send them to a particular place, not only refuses to send them to that place, but says generally that he will not deliver them up unless payment of a debt due from the owner to him is guaranteed, such general refusal is evidence of a conversion, although he might not be bound to send the goods to any particular place. *Sharp* v. *Pratt*, 3 Car. & P. 34.

A demand and a qualified refusal to deliver on the ground that the defendant had received notice of demand from a third party is evidence of a conversion. *Atkinson* v. *Marshall*, 12 L. J., Ex. 117.

b. Detention after Demand.

Nature of.]—Detention against a lawful demand is primâ facie evidence of a conversion. *Golightly* v. *Ryn*, Lofft, 88.

The defendant had in his possession a boiler belonging to the plaintiff, the plaintiff demanded it, and the defendant at first refused to restore it, but before the issuing of the writ tendered it:—Held, no conversion. *Hayward* v. *Seaward*, 1 M. & Sc. 459.

The demand and refusal necessary to afford evidence of a conversion must be absolute and unqualified. *Philpott* v. *Kelley*, 4 N. & M. 611; 3 A. & E. 106; 1 H. & W. 134; 4 L. J., K. B. 139. See also *Atkinson* v. *Marshall*, supra.

A. lent goods to B., who died, and on his death the goods came into the possession of C., who, when the goods were demanded of him, said that he should do nothing but what the law required. C. did not afterwards deliver up the goods:—Held, to be a sufficient conversion by C. *Davies* v. *Nicholas*, 7 Car. & P. 339.

The owner of a gun delivered it to B. to be sold for him, and B. delivered it to C. on trial, who kept it for some time, during which the gun was burst; the owner afterwards demanded the gun in the following terms: "I give you notice that the gun is my property, and I demand the same of you, and require you to deliver it up in the same plight in which it was when delivered to you." C. answered that he would pay ten times the value rather than repair it:—Held, that such demand and refusal were not evidence of a conversion. *Rushworth* v. *Taylor*, 3 Q. B. 699; 3 G. & D. 3; 12 L. J., Q. B. 80; 6 Jur. 945.

Taking the property of another, by assignment from one who has no authority to dispose of it; as taking an assignment of tobacco in the king's warehouse, by way of pledge from a broker who had purchased it there, in his own name, for his principal; and refusing to deliver it to the principal, after notice, and demand by him; none other than the person in whose name it was warehoused being able to take it out—is a conversion. *M'Combie* v. *Davies*, 6 East, 538; 2 Smith, 557; 8 R. R. 534.

A widow who was administratrix of an insolvent, being applied to by his assignees for some papers that had been in his possession at the time of his decease, answered that they were in the hands of her attorney:—Held, not sufficient evidence of a conversion. *Canot* v. *Hughes*, 2 Bing. (N.C.) 448; 2 Scott, 663; 1 Hodges, 410; 5 L. J., C. P. 177.

A., who was paying his addresses to a lady, lost her letters and two memorandum-books, containing remarks of his own; B. found them and kept them, on the ground that the books contained matter injurious to him, and also showed them to others; A. sent a person to demand them of B., who, at first, refused to give them up at all; but before the person left, said he would not give them to him, but would to C. or D. C. went, and B. offered to give him the letters and one book, which C., after consulting with A., accepted, saying, that he made a sacrifice to obtain the letters:—Held, that there was a conversion of the whole. *Clendon* v. *Dinneford*, 5 Car. & P. 18.

A refusal to deliver goods by a person ignorant of the real owner is not evidence of a conversion. *Green* v. *Dunn*, 3 Camp. 215, n.

Setting up Attachment.]—On a demand of goods by the real owner, the defendant refused to deliver them, stating as his reason for the refusal, that they had been attached in his hands by a foreign attachment in a suit against a third party, from whom he had received them as his own, which was the fact:—Held, no evidence of a conversion. *Verrall* v. *Robinson*, 2 C., M. & R. 495; 4 D. P. C. 242; 1 Gale, 244; 5 Tyrw. 1069.

Wine, the property of a plaintiff, being in the warehouse of the defendant, a wharfinger, notice from the mayor's court was served on the defendant, attaching in his hands all the goods of H., from whom the plaintiff had purchased the wine, and at the same time the defendant was informed that the attachment had reference to the wine. The plaintiff demanded the wine from the defendant's clerk, producing the delivery warrant which had been issued by the defendant to B., a former owner, and indorsed by him to H., and by H. to the plaintiff. The defendant's clerk said that there was a difficulty in consequence of the attachment, and referred the plaintiff to the defendant, whom he could not find. The plaintiff's attorney thereupon wrote, demanding the wine before eleven o'clock the next morning. The defendant's attorney replied, asking for time for inquiry, but a writ was issued before that answer was received:—Held, that there was some evidence of a conversion; that the conduct and position of the defendant was evidence from which the jury might infer whether or not he had been guilty of a conversion of the wine, and that, before arriving at a conclusion, it was proper for the jury to consider whether the defendant had a bonâ fide doubt as to the plaintiff's title to the wine, and

whether a reasonable time for clearing up that doubt had elapsed before the action was commenced. *Pillot* v. *Wilkinson*, 3 H. & C. 345; 34 L. J., Ex. 22; 12 W. R. 1084—Ex. Ch.

Demanding Receipt.]—For the refusal to deliver up documents unless a receipt is given for same, trover will lie. *Cobbett* v. *Clutton*, 2 Car. & P. 471.

Refusal of Agent.]—In trover against a defendant for not delivering some wine deposited with her by way of security for an advance of money:—Held, that it was not sufficient evidence of a conversion to show that her son, who acted as her general agent, refused to give it up; and that it was necessary to prove that such agent acted under a special direction in order to make the defendant liable. *Pothonier* v. *Dawson*, Holt, 383; 17 R. R. 647. *And see Cases* ante, col. 274.

Sufficiency of Demand.]—A demand in writing left at the defendant's house is sufficient. *Logan* v. *Houlditch*, 1 Esp. 22.

If a verbal demand and a demand in writing are made at the same time for the purpose of bringing an action, and the one has no reference to the other, evidence of the verbal demand is sufficient, without the production of the writing. *Smith* v. *Young*, 1 Camp. 439.

The plaintiff being entitled to the five best beasts as heriots, marked seven beasts, claiming all as heriots, and left them in the possession of the defendant, who was the owner up to the time of marking. The plaintiff afterwards applied to the defendant, who still had possession of the seven, for the beasts generally, but the defendant refused to give them up, without qualifying his refusal:—Held, no conversion of any of the beasts, the demand having reference to a seizure of seven, and it not being ascertained that any five were legally chosen. *Abington* v. *Lipscombe*, 1 Q. B. 776; 1 G. & D. 230; 10 L. J., Q. B. 330; 6 Jur. 257.

Evidence.]—It is not necessary to give notice to produce a written demand of the article for which the action is brought. *Hammond* v. *Plank*, Peake, 166, n.

Authority of Party Demanding.]—A. brought an action against B. for taking away a filly; B. justified the taking as the servant of C.; the jury found a verdict for A. with damages, subject to a reference to D., to ascertain to whom she belonged, which was to depend on whether a scar should appear on a certain part of her body; and in case it should, the verdict for A. was to stand; if not, it was to be entered for B. The filly was delivered to D. by the consent of all parties, and he made his award, and found her to belong to A., and accordingly ordered the verdict found for him to stand; C., ten days after the award, demanded the filly of D., who refused to deliver her, and a month afterwards C. brought an action for her recovery:—Held, that the detention of the filly by D. did not amount to a conversion. *Gunton* v. *Nurse*, 5 Moore, 259; 2 Br. & B. 447.

Where a demand of the goods is not made by the party himself, a refusal, on the ground that the party applying is unknown, or not properly authorised, is not sufficient to support the action. *Solomans* v. *Dawes*, 1 Esp. 83.

Where A. refused to give up the chattels when demanded by the owner, on the ground that he had purchased them from B., who was the owner's servant, and it appeared that B. had no authority to sell:—Held, evidence of a conversion by A., although he had made the purchase bonâ fide, and in the belief that B. had such authority. *Metcalfe* v. *Lumsden*, 1 Car. & K. 309.

Necessity of Demand.]—Where property has been wrongfully and fraudulently taken, a demand and refusal are not necessary to enable the plaintiff to maintain trover. *Granger* v. *Hill*, 5 Scott, 561; 1 Arn. 42; 4 Bing. (N.C.) 212; 7 L. J., C. P. 85.

Where goods are delivered under a contract to do something with them, and to deliver them according to the party's undertaking, an omission of the party doing what he so undertook to do will not sustain trover unless there has been an actual refusal to redeliver. *Severin* v. *Keppell*, 4 Esp. 156.

The defendant came to the plaintiff's house, which was left in the care of a servant, and said, that, having authority from the lord chancellor, he was come to take charge of the goods in the house; he put a man in possession, and took an inventory of the goods; and subsequently the servant was by him refused admittance into the house. The judge nonsuited the plaintiff, on the ground that, without a demand, there was no evidence of a conversion:—Held, that there was some evidence which ought to have been submitted to the jury. *Needham* v. *Rawbone*, 6 Q. B. 771, n.; 9 Jur. 274.

Statute of Limitations.]—To support a plea of the statute of limitations, by showing a conversion more than six years before action brought, the defendant must either prove an actual conversion in fact, or give evidence of a positive and an absolute demand and refusal before that period. *Philpott* v. *Kelley*, 4 N. & M. 611; 3 A. & E. 106; 1 H. & W. 134; 4 L. J., K. B. 139.

The statute of limitations is no bar to an action if brought within six years after the demand and refusal, although more than six years have elapsed since the person intrusted with the article has wrongfully parted with the possession of it. *Wilkinson* v. *Verity*, 40 L. J., C. P. 141; L. R. 6 C. P. 206; 24 L. T. 32; 19 W. R. 604.

c. Claim of Right or Interest.

Nature of, in General.]—To maintain trover there must be some exercise of ownership over the chattel taken inconsistent with the owner's right of dominion over it. *Foulkes* v. *Willoughby*, 8 M. & W. 540; 1 D. (N.S.) 86; 10 L. J., Ex. 364.

If a person detains goods under any claim of interest in himself, so as to deprive the person entitled to the possession of them of his dominion over them, it is a conversion. *Burroughes* v. *Bayne*, 5 H. & N. 296; 29 L. J., Ex. 185; 2 L. T. 16.

Claim of Lien.]—If one having a lien upon the goods, when they are demanded of him, claims to retain them upon a different ground, making no mention of the lien, trover may be maintained against him without any tender having been made of the amount of his lien. *Boardman* v. *Sill*, 1 Camp. 410, n.

A refusal grounded on a claim of right, to deliver up goods on demand, is evidence of a conversion, though the defendant may have a

lien on them. *Cannee* v. *Spanton*, 8 Scott (N.R.) 714; 7 Man. & G. 903; 14 L. J., C. P. 23; 8 Jur. 1008.

—— **On Goods Shipped.**]—The captain of a ship who had taken goods on freight, and claimed to have a lien upon them, delivered them to a bailee. The real owner demanded them of the latter, and he refused to deliver them without the directions of the bailor:—Held, that the bailor not having any lien upon the goods, the refusal was a sufficient conversion. *Wilson* v. *Anderton*, 1 B. & Ad. 450; 9 L. J. (O.S) K. B. 48.

A vendor shipped, by order of a vendee, goods, which by the bill of lading were consigned to a third person at a foreign port. Before the vessel sailed, the vendee stopped payment, and the vendor thereupon demanded the goods of the captain, without tendering freight or expenses of unshipping. The captain refused to deliver, solely on the ground that he had signed a bill of lading for the consignee:—Held, sufficient evidence of a conversion to maintain trover at the suit of the vendor. *Thompson* v. *Trail*, 9 D. & R. 31; 6 B. & C. 36; 2 Car. & P. 334; 5 L. J. (O.S.) K. B. 34.

Goods delivered to a person claiming them wrongfully, who pays freight and other charges, cannot be detained for those expenses against the rightful owner. *Lempriere* v. *Pasley*, 2 Term Rep. 485.

A tender of freight and charges is not necessary previously to bringing trover for goods, of which a party has wrongfully obtained the possession. *Ib.*

Solicitor's Lien.]—The evidence of the conversion of a deed was, that when the deed was demanded from the defendant, he said he would deliver it up; but that it was then in the hands of his attorney, who had a lien upon it:—This was held insufficient. *Smith* v. *Young*, 1 Camp. 439.

In an action against A. and B. for a lease, the evidence of conversion was as follows:—A demand having been made upon A., he declined to give up the lease until rent due to B. was paid; but he added, that it was more B.'s business than his own, and as he was not in, he (A.) would either send the lease in the course of the day or would write the plaintiff a letter declining to return it. The plaintiff receiving neither lease nor letter, issued a writ on the following morning:—Held, that this amounted to an absolute refusal, notwithstanding A. and B. had at the time (though it was not mentioned) a lien upon the lease for a small sum due to them for business done by them as attorneys for the plaintiff. *Weeks* v. *Goode*, 6 C. B. (N.S.) 367.

On Taking out of Pledge.]—A., having goods at a pawnbroker's, delivered the duplicate to B. to take them out of pledge; B. took them out accordingly, and paid the amount due on them. On A. sending to B. for the goods, B. said he had not got them, and refused to tell who had them:—Held, that B. had no right to insist on a tender of the money he had advanced to get them out of pledge. *Jones* v. *Cliff*, 1 C. & M. 541; 3 Tyr. 576; 2 L. J., Ex. 189.

d. Sale.

In Breach of Bailments.]—The hirer of a piano who sends it to an auctioneer to be sold is guilty of a conversion, as well as the auctioneer, who refuses to deliver it up unless the expenses incurred are first paid. *Loeschman* v. *Machin*, 2 Stark. 311; 20 R. R. 687.

A bailee of goods for hire, by selling them determines the bailment, and the bailor may maintain trover against the purchaser, though the purchase was bonâ fide. *Cooper* v. *Willomatt*, 1 C. B. 672; 14 L. J., C. P. 219; 9 Jur. 598.

Under an agreement between the plaintiff and the defendant that C. should be employed by them, for a certain time, and the plaintiff should be employed for a certain time also, and that the parties should be allowed to have the use of certain goods for a certain period, and at the expiration of the agreement the goods should be given up to the plaintiff; the goods having been, during the term, applied by the defendant to a purpose in contravention of the agreement, and not having been delivered by him at the end of the term:—Held, that the bailment had been determined, and that the plaintiff might maintain trover. *Bryant* v. *Wardell*, 2 Ex. 479.

By Assignees.]—A., by deed, dated the 28th of September, 1845, conveyed goods to B. subject to a proviso, that if he should pay B. the sum thereby secured on the 22nd of March, 1850, or at such earlier day or time as B. should appoint by giving A. fourteen days' notice, and should pay interest in the meantime half-yearly, the deed should be void, and it was agreed between the parties that until default should be made in payment of the principal at the time specified, or the interest after fourteen days' notice, it should be lawful for A., his executors or administrators, to hold and enjoy the goods. A. continued in possession of the goods according to the agreement, until the 13th of December, 1849, when he became bankrupt, and his assignees, on the 19th of February, 1850, sold the whole of the goods absolutely, and not merely the bankrupt's interest in them. No demand had been made on A. by B. (or by the assignees of B.) for the principal money or interest in the meantime:—Held, first, that the deed did not give a mere possession and use of the goods to A. as bailee or tenant at will, but the right of possession and use for the term ending the 22nd of March, 1850, defeasible by non-payment of the principal or of the interest according to the terms of the deed; but, secondly, that the sale by the assignees of A. the bankrupt, destroyed the bailment; and, thirdly, that the sale by the assignees was equivalent to a sale by the bailee himself, and consequently that trover would lie by the assignees of the mortgagee against the assignees in bankruptcy of the mortgagor for the conversion by the sale of the goods during the term. *Fenn* v. *Bittleston*, 7 Ex. 152; 21 L. J., Ex. 41.

Of Property Pledged to be Redeemed.]—A. deposited a dock warrant for brandies with B., as a security for a loan, which was to be repaid on the 29th of January, or, in default, the brandies were to be forfeited. On the 28th, B. agreed for the sale of the brandies to C., and on the 29th delivered to him the dock warrant, and C. took actual possession of the brandies on the 30th:—Held, that the sale on the 28th, and the delivery of the dock warrant to the vendee on the 29th, A. having the whole of that day to redeem it, amounted to a conversion. *Johnson* v. *Stear*, 15 C. B. (N.S.) 330; 33 L. J., C. P. 130; 10 Jur. (N.S.) 99; 9 L. T. 538; 12 W. R. 347.

A. deposited goods with B. as security for the repayment of a loan in one month. At the end of the month B. entered into an agreement for an indefinite extension of the credit, A. agreeing to pay interest monthly. At the end of the second month, neither the principal nor interest being paid, B. wrote to A. demanding the payment of an amount in excess of what was actually due, and informing him that if it was not paid he should sell the goods. The money not being paid, B. sold the goods:—Held, in trover by A. against B., that B. had no right to sell till he had properly determined the extension of the credit, and that sending a letter demanding an excessive amount had not that effect, and therefore A. was entitled to recover the value of the goods. *Pigot* v. *Cubley*, 15 C. B. (N.S.) 701; 33 L. J., C. P. 134; 10 Jur. (N.S.) 318; 9 L. T. 804; 12 W. R. 467.

Scrip certificates for shares were pledged to secure an advance, for the repayment of which no particular date was fixed. The pledgor became bankrupt and the pledgee sold a portion of the certificates to satisfy his debt without making demand for payment or giving any notice of his intention of selling. The assignee in bankruptcy of the pledgor's estate, without making any tender of the amount of the debt, brought trover for the certificates against the pledgee:—Held, that the action was not maintainable. *Halliday* v. *Holgate*, 37 L. J., Ex. 174; L. R. 3 Ex. 299; 18 L. T. 656; 17 W. R. 13—Ex. Ch.

Custom to take Damaged Goods.]—Where, by the custom of the trade, a calico-printer is bound to take goods damaged in the printing, the mere circumstance of their being damaged confers no such property in them on him as to authorise him to sell them, unless the owner has elected that he should take them. *Laclouch* v. *Towle*, 3 Esp. 114.

Sale by Auctioneer of Goods comprised in Bill of Sale.]—By a memorandum of agreement the plaintiff let on hire certain cabs to P. Subsequently the plaintiff made an advance of a sum of money to P., taking as security a bill of sale on all his goods. Neither the agreement to hire nor the bill of sale were registered under the bills of sale act. P. took the goods (all of which were included either in the agreement to hire or the bill of sale) to the defendant and instructed him to sell. The defendant, being without notice of the plaintiff's claim, advanced money to P. upon the goods, sold them by auction, and, after deducting expenses and commission, paid over the balance to P. In an action brought to recover the value of the goods, on the ground of their alleged conversion by the defendant:—Held, that the plaintiff was entitled to recover, since the dealing with the property and sale by the defendant amounted to a conversion of the goods. *Cochrane* v. *Rymill*, 40 L. T. 744; 27 W. R. 776.

—— **"In the Course of his Business as Auctioneer."**]—An auctioneer who in the ordinary course of his business sells by public auction for A. goods ostensibly belonging to A., but really belonging to B., and without notice pays over the proceeds of sale to A., is not guilty of a conversion. *Turner* v. *Hockey*, 56 L. J., Q. B. 301. S. P., *National Mercantile Bank* v. *Rymill*, 44 L. T. 767—C. A.

The liability of auctioneers and of agents generally in respect of the wrongful conversion of goods depends upon whether they deal with the goods with the view of passing the property in them, or whether they merely settle the price or otherwise act as mere intermediaries between the owner and the purchaser; in the former case they are liable, in the latter case they are not. *Turner* v. *Hockey* (supra) commented on. *Barker* v. *Furlong*, 60 L. J., Ch. 368; [1891] 2 Ch. 172; 64 L. T. 411; 39 W. R. 621.

—— **Auction on Private Premises.**]—The owner of certain household furniture assigned it by bill of sale to the plaintiffs. Subsequently to the assignment, the assignor employed the defendants, a firm of auctioneers, to sell it by auction on her behalf at her private residence. The defendants, who had no notice of the bill of sale, accordingly sold the furniture at the assignor's residence, and in the ordinary course delivered it there to the purchasers. The plaintiffs brought trover:—Held, that the defendants were liable. *Consolidated Co.* v. *Curtis*, 61 L. J., Q. B. 325; [1892] 1 Q. B. 495; 40 W. R. 426; 56 J. P. 565.

An undischarged bankrupt, to whom his creditors had given, by a resolution duly passed, a certain quantity of his furniture, assigned that furniture by bill of sale to the plaintiff, and afterwards sent it to the defendant, an auctioneer, who sold it and paid the money received to the bankrupt. In an action for conversion:—Held, that the plaintiff was entitled to the furniture, for that the bankrupt could, under the resolution of his creditors, dispose of it to the plaintiff, and that there was no jus tertii which the defendant could set up. *Brown* v. *Hickinbotham*, 50 L. J., Q. B. 426.

—— **Stolen Goods in Market Overt.**]—The defendants were public sale masters, and carried on business in a legally established cattle market, where a market overt for the sale of cattle and sheep was held once a week. A number of sheep, which had been stolen from the plaintiff, were brought on a market day to the stand of the defendants by the thief, who employed the defendants to sell the sheep for him. The defendants, in ignorance of the theft, placed the sheep in their stand, and sold and delivered them to a purchaser by whom they were removed:—Held, that the defendants were liable in an action of trover for the value of the sheep. *Delaney* v. *Wallis*, 14 L. R., Ir. 31; 15 Cox, C. C. 525—C. A. S. P., *Ganly* v. *Ledwidge*, Ir. R. 10 C. L. 33.

e. Waiver of Conversion.

Effect of.]—The defendant sold the goods of D. under a bill of sale. D. became bankrupt, and his trustee petitioned the court of bankruptcy to set aside the sale as fraudulent or void, and order payment of the proceeds (the amount of which he knew) to him. The court so ordered, and the money was paid. The trustee afterwards being dissatisfied with the amount realised, and desiring to obtain the difference between the value of the goods and proceeds of the sale, brought trover against the defendant:—Held, that he could not do so, as by his acts he had waived the tort. *Smith* v. *Baker*, 42 L. J., C. P. 155; L. R. 8 C. P. 350; 28 L. T. 637.

The assignees of a bankrupt are not entitled to waive a sale of the goods as a conversion, and rely on a subsequent demand and refusal. *Ed-*

wards v. *Hooper*, 11 M. & W. 363 ; 12 L. J., Ex. 304 ; 7 Jur. 378.

A servant of a bankrupt, without authority, sold the bankrupt's goods to the defendant, who had notice of the act of bankruptcy. His assignees delivered to the defendant a bill of parcels as for goods sold and delivered by the bankrupt, and made two several demands for payment, which the defendant refused, and he also refused to deliver up the goods when they were subsequently demanded :—Held, that the demand for payment amounted only to a qualified offer by the assignees to adopt the sale, and that they were not thereby precluded from suing in trover. *Valpy* v. *Sanders*, 5 C. B. 887 ; 17 L. J., C. P. 249 ; 12 Jur. 483.

A person having once affirmed the acts of another, who wrongfully sold his property, cannot afterwards treat him as a wrongdoer, and maintain trover. *Brewer* v. *Sparrow*, 7 B. & C. 310 ; 1 Man. & Ry. 2 ; 6 L. J. (O.S.) K. B. 1.

If an owner of goods, after a tortious sale of them, waives the conversion and claims the proceeds of the sale, part of which is paid to him, he cannot afterwards treat the seller as a wrongdoer and maintain trover against him. *Lythgoe* v. *Vernon*, 2 H. & N. 180 ; 29 L. J., Ex. 164.

Owner Standing by.]—The owner of goods, who stands by and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them bonâ fide, cannot recover them from the vendee. *Gregg* v. *Wells*, 10 A. & E. 90 ; 2 P. & D. 296 ; 8 L. J., Q. B. 193.

3. Right of Action.

a. Property and Possession.

Nature of Right.]—Trover must be founded on the right of property in the plaintiff. *Pyne* v. *Dor*, 1 Term Rep. 55.

And the plaintiff must have the right of possession as well as the right of property at the time. *Gordon* v. *Harper*, 7 Term Rep. 9 ; 2 Esp. 465 ; 4 R. R. 369. S. P., *Owen* v. *Knight*, 4 Bing. (N.C.) 54 ; 6 D. P. C. 245 ; 5 Scott, 307 ; 7 L. J., C. P. 27 ; and *Bloxam* v. *Saunders*, 4 B. & C. 951 ; 7 D. & R. 407.

While the right of property in a chattel is admitted to be in one person, the right of possession of that chattel cannot be absolutely and adversely in another. *Clerk* v. *Adam*, 1 Cl. & F. 242.

Joint Owners—Right to Possession in one Co-owner—Conversion by Other.]—The plaintiff, who was owner of a personal chattel, parted with a half-share in it to another person on an agreement that the plaintiff was to have possession of the chattel until it should be sold. The plaintiff entrusted the chattel to his co-owner for the purpose of its being taken to an auctioneer for sale. The co-owner lodged the chattel with the defendant as security for a debt due from him to the defendant. In an action by the plaintiff to recover the chattel from the defendant :—Held, that, under the agreement, the plaintiff had a special property in the entire chattel which entitled him to the possession of it and to recover it from the defendant. *Nyburg* v. *Handelaar*, 61 L. J., Q. B. 709 ; [1892] 2 Q. B. 202 ; 67 L. T. 361 ; 40 W. R. 545 ; 56 J. P. 694—C. A.

Property of Servant.]—A servant, being engaged for a year, at thirty guineas and a suit of clothes, was provided with a livery suit on his entering the service. He was wrongfully turned away within the year :—Held, that he could not maintain trover for the clothes, for he had no property in the clothes till he had served the year. *Crocker* v. *Molyneux*, 3 Car. & P. 470.

A calico-printer is entitled, after having discharged his head colourman, to the book in which that servant has entered the process for mixing colour during his service, although many of the processes were the invention of the head colourman himself. *Makepeace* v. *Jackson*, 4 Taunt. 770 ; 14 R. R. 664.

Present Possession.]—In order to maintain trover the plaintiff must have a right to the present possession of the goods. *Bradley* v. *Copley*, 1 C. B. 685 ; 14 L. J., C. P. 222 ; 9 Jur. 599.

Trover may be maintained by a gratuitous bailor of cattle against a wrongdoer who takes them out of the possession of the bailee. *Nicolls* v. *Bastard*, 1 Tyr. & G. 156 ; 2 C., M. & R. 659 ; 1 Gale. 295 ; 5 L. J., Ex. 7.

A person who is entitled to the temporary possession of a chattel, and delivers it back to the owner for an especial purpose, may, after that purpose is satisfied, and during his temporary right, maintain trover for it against the owner. *Roberts* v. *Wyatt*, 2 Taunt. 268 ; 11 R. R. 566.

Mere possession of goods is sufficient to maintain trover against a wrongdoer. *Jeffries* v. *G. W. Ry.*, 5 El. & Bl. 802 ; 25 L. J., Q. B. 107 ; 2 Jur. (N.S.) 250 ; 4 W. R. 201.

A. has sufficient property in goods shipped by B. for the specific purpose of placing funds in the hands of A. to meet a bill drawn by B. upon A., to entitle A. to maintain trover, although no bill of lading is executed, and A. holds merely a receipt signed by the mate of the vessel, acknowledging the shipment of the goods to be delivered to A. *Evans* v. *Nicholl*, 3 Man. & G. 614 ; 4 Scott (N.R.) 43 ; 11 L. J., C. P. 6.

Profit à prendre.]—The plaintiff, under a licence of the owner of the soil to search for tin ore, had, in searching for that mineral, made excavations in the soil. The defendant carted away some of the soil which the plaintiff had so thrown out, the plaintiff not having abandoned his right to search the soil thrown out for ore. In trover for the removal of the soil :—Held, that the plaintiff had, as against the defendant, a mere wrongdoer, a sufficient possessory title to the mass thrown out to enable him to maintain the action. *Northam* v. *Bowden*, 11 Ex. 70 ; 24 L. J., Ex. 237.

A plaintiff who claims a right to cut rushes on a common, and cuts five or six loads, which the defendant carries away, may maintain trover for them. *Rackham* v. *Jesup*, 3 Wils. K. B. 332, 338.

On Loss of Lien.]—If a person having a lien on goods wrongfully parts with them, the owner's right to the possession revives, and he may maintain trover for them. *Scott* v. *Newington*, 1 M. & Rob. 252.

The plaintiff, in May, 1868, sent twenty bedsteads to the defendants to be repaired. The work was done, but notwithstanding repeated requests by the defendants for their removal, the plaintiff did not send for them, and they remained with them unpaid until January, 1871, when the defendants shipped them to Melbourne for sale, to which place the plaintiff had expressed an

intention of exporting them. In an action of trover brought to recover damages a verdict was found for the plaintiff. The defendants moved for a new trial on the ground that there was no evidence of conversion, as the defendants had a lien on the goods, besides which, the goods were not sold, being still in the hands of the defendants' agents :—Held, that there was no ground shown for disturbing the verdict. *Allen* v. *Peyton*, 21 W. R. 108.

Setting up Jus tertii.]—A., being in possession of a piano, which he had previously mortgaged with other goods by a bill of sale to B., sold it to the plaintiff, who took possession of it, and removed it from premises which A. held as tenant to the defendant. The sale to the plaintiff was a bonâ fide transaction. The defendant, to whom a year's rent was due by A., and being unaware of B.'s mortgage, or of the sale to the plaintiff, caused the chattel to be taken out of the plaintiff's possession, and replaced in the premises held by A. Thereupon B. claimed it as his property ; but the defendant, after B.'s claim had been made, distrained and sold the piano, together with other goods, for the rent due, when it was purchased amongst other property by B., who paid the defendant the rent due, and the costs and expenses of the distress, retaining the balance of the purchase-money. In an action for trespass in taking away the piano, and for its conversion :—Held, that the defendant could not defeat the action by showing that the title to the chattel was in B. under the bill of sale, and that the plaintiff was entitled to a verdict. *Haggan* v. *Pasley*, 2 L. R., Ir. 573.

A wrongdoer cannot set up jus tertii in answer to an action of trover. *Jeffries* v. *G. W. Ry.*, supra.

Evidence of Property.]—If a plaintiff offers written evidence to establish property, which he fails in doing, he will not be allowed to recur to and rely on a mere possessory title. *Sheriff* v. *Cadell*, 2 Esp. 617.

In trover for a ship "with apparel and appurtenances thereto belonging," the plaintiff having failed as to the ship cannot set up a distinct title to a new boat and cordage. *Shannon* v. *Owen*, 1 M. & Ry. 392 ; 6 L. J. (O.S.) K. B. 61.

Plea, "not Possessed."]—The plea that the plaintiff was not possessed puts in issue the right of the plaintiff to the possession of the goods, as against the defendant, at the time of the conversion. *Isaac* v. *Belcher*, 7 D. P. C. 516 ; 5 M. & W. 139 ; 8 Car. & P. 714. S. P., *Owen* v. *Knight*, 4 Bing. (N.C.) 54 ; 6 D. P. C. 245 ; 5 Scott, 307 ; 7 L. J., C. P. 27 ; and *Nicolls* v. *Bastard*, 1 Tyr. & G. 156 ; 2 C., M. & R. 659 ; 1 Gale, 295 ; 5 L. J., Ex. 7.

b. For what it Lies.

i. *In General.*

Part of Chattels.]—It lies for an undivided part of a chattel. *Watson* v. *King*, 4 Camp. 272 ; 1 Stark. 121 ; 16 R. R. 790.

Dog.]—It lies for a dog that was lost, and which the defendant refused to deliver, unless paid for his keeping. *Binstead* v. *Buck*, 2 W. Bl. 1117.

Agreement.]—Trover lies for an unstamped agreement, if it can, upon payment of a penalty and stamp duty, be stamped and rendered available. *Scott* v. *Jones*, 4 Taunt. 865 ; 14 R. R. 686.

Deeds.]—In trover against an attorney, for a deed which had been prepared by him, it appeared at the trial that the defendant had delivered to the plaintiff a bill, containing a charge for preparing the deed upon the plaintiff's retainer :—Held, that the deed was the property of the plaintiff ; and that the defendant could not set up, as a defence, that the deed was a voluntary conveyance by the plaintiff's father to the plaintiff, to give him a colourable right to kill game ; and that the defendant retained it as the attorney of the plaintiff's father, as alien for his professional charges. *Lord* v. *Wardle*, 4 Scott, 402 ; 3 Bing. (N.C.) 680.

A. having agreed to purchase of B. the remainder of a term, the latter delivered to him the lease in order that he might get an assignment made out ; A. then obtained an enlargement of the term from the original landlord, and refused to accept an assignment or pay the full price agreed on, because B.'s under-tenant had removed some fixtures :—Held, that B. might insist on A. accepting the assignment, and, after demand and refusal of the lease, might maintain trover for it. *Parry* v. *Frame*, 2 Bos. & P. 451 ; 5 R. R. 651.

Upon a contract for the sale of an estate, the title and abstract to be made at the vendor's expense, the purchaser is entitled to the custody of the abstract until either the purchase is finally rescinded by consent, or declared impracticable by a court of equity ; and when the contract is determined, the abstract becomes the property of the vendor ; if the sale proceeds, the abstract is the property of the vendee ; but an opinion written thereon on the seller's paper by his own consent continues to be his property. *Roberts* v. *Wyatt*, 2 Taunt. 268 ; 11 R. R. 566.

A. sold an estate to B., who paid part of the purchase money, and the title deeds were deposited with C. to be delivered up to B. when he paid the residue ; A. got possession of them again, and pledged them to D. for a valuable consideration :—Held, that B., on tendering the remainder of the purchase money, was entitled to recover the deeds from D. *Hooper* v. *Ramsbottom*, 1 Marsh. 414 ; 6 Taunt. 12.

Where a purchaser of a small part of an estate takes a covenant from the vendor to produce the title deeds whenever it shall be necessary, and the deeds, afterwards come into the vendee's possession on his taking a mortgage of the other part of the estate, and he then assigns the mortgage to a third person, not mentioning the deeds, such third person cannot maintain trover against him for the deeds. *Yea* v. *Field*, 2 Term Rep. 708 ; 1 R. R. 603.

A. having contracted to purchase an estate of B., procured the deeds of conveyance to be prepared at his own expense, and sent them to the latter for execution ; when executed, they were delivered to a servant to be returned, but the servant delivered them to C., an attorney, to whom B. was indebted for business done. In consequence of the refusal of other necessary parties to join in the conveyance, A. threw up the contract and demanded the deeds from C., who refused to deliver them up until his demand against B. was satisfied :—Held, that trover would lie by A. against C. for the deeds in a cancelled, if not in an uncancelled, state

Esdaile v. *Oxenham*, 5 D. & R. 49; 3 B. & C. 225; 27 R. R. 331.

Interfering with Testator's Effects.]—Trover lies against a party for wrongfully interfering with a testator's effects. *Bear* v. *Soper*, 2 Ken. 441.

Fixtures.]—An action lies for wrongfully preventing a mortgagee from exercising his right to remove tenants' fixtures included in his mortgage. *London and Westminster Loan and Discount Co.* v. *Drake*, 6 C. B. (N.S.) 798; 28 L. J., C. P. 297; 5 Jur. (N.S.) 1407; 7 W. R. 611.

Fixtures left in a freehold house which was sold by public auction without any stipulation regarding them and into which the purchaser entered under a conveyance, are not the subject of trover by the vendor. *Colegrave* v. *Dias Santos*, 3 D. & R. 255; 2 B. & C. 76; 1 L. J. (O.S.) K. B. 239.

Trover will not lie for fixtures which a tenant has left annexed to the freehold, after he has quitted possession with the leave of his landlord, for the purpose of enabling him to make terms as to their purchase by the incoming tenant. *Ruffey* v. *Henderson*, 17 Q. B. 575; 21 L. J., Q. B. 49; 16 Jur. 84.

Certain parts of a machine put up by a tenant during his term, and capable of being removed without injuring the other parts of the machine or the building, and had been usually valued between the outgoing and incoming tenant, were held the goods of the outgoing tenant, for which he might maintain trover. *Davis* v. *Jones*, 2 B. & Ald. 165; 20 R. R. 396.

A ladder fixed to the ground and to a beam above and which was the only means of access to a room above; a crane nailed at top and bottom to keep it in its place, but not let into the wall; and a bench nailed to the wall, held not to be goods and chattels for which trover would lie after the expiration of the term. *Wilde* v. *Waters*, 16 C. B. 637; 24 L. J., C. P. 193; 1 Jur. (N.S.) 1021; 3 W. R. 570.

ii. *Negotiable Instruments.*

Bills of Exchange.]—If A. indorses a bill, drawn in his favour and accepted, to B., in order that he may raise money for A. by negotiating it, and B. gives it to C., who puts it into the hands of D., without consideration, two years after the bill is due, A. may recover back the bill from D. in trover. *Goggerley* v. *Cuthbert*, 2 Bos. & P. (N. R.) 170; 9 R. R. 632.

R. being employed to procure a bill of exchange to be discounted for the plaintiff, instead of doing so, indorsed it, and placed it in the hands of the defendant, who was the clerk to a creditor of R. The defendant carried the bill to R.'s account with his creditor, and though afterwards apprised of the circumstances under which R. held the bill, refused to restore it:—Held, that the defendant was liable to the plaintiff in trover. *Cranch* v. *White*, 1 Bing. (N.C.) 414; 6 Car. & P. 767; 4 L. J., C. P. 113.

The plaintiff delivered to the defendant a bill, which the latter was to get discounted for his own benefit. The defendant remitted the bill to his agents, with directions to place it to his credit, which they did, less the discount. It was left to the jury to say, whether or not the defendant had been guilty of a wrongful conversion:—Held, that this was a proper direction upon an issue on the plea of not possessed. *Wilkinson* v. *Whalley*, 5 Man. & G. 590; 6 Scott (N.R.) 631; 1 D. & L. 9; 12 L. J., C. P. 270; 7 Jur. 468.

——**Payment—Forged Indorsement—Liability of Banker.**]—Cashing a bill according to the tenor of a forged indorsement, is a conversion apart from any question of negligence. An action is therefore maintainable by the true payee in respect thereof. *Kleinwort* v. *Comptoir Nationale d'Escompte de Paris*, 63 L. J., Q. B. 674; [1894] 2 Q. B. 157; 10 R. 259.

——**Misapplication of Part of Proceeds.**]—If a party, authorised by the holder of a bill of exchange to get it discounted, and to apply the proceeds in a particular way, does get it discounted but misapplies any part of the proceeds, he cannot be sued in trover for the bill, but must be sued for money had and received. *Palmer* v. *Jarmain*, 2 M. & W. 282.

If a party receiving a bill payable to order, for the purpose of getting it indorsed for another person, procures the indorsement and pays in the bill to his own account at his banker's, with intent to appropriate the proceeds, and before the bill is due draws upon such account (though not specifically upon the credit of the bill), and his draft is honoured, an action of trover may be commenced against him before the bill is due, but not an action for money had and received. *Atkins* v. *Owen*, 4 A. & E. 819; 2 H. & W. 59; 6 N. & M. 309; 6 L. J., K. B. 267.

—— **Necessity of Demand.**]—A banker, after notice, discounted a bill drawn on a customer and by the acceptance made payable at his bank, after it had been lost by the holder, and afterwards debited his customer with the amount of the bill, wrote a discharge on it and delivered it up to the customer as the banker's voucher of his account:—Held, that the banker was thereby guilty of a conversion, and that the loser of the bill might recover in trover without a previous demand of the bill. *Lovell* v. *Martin*, 4 Taunt. 799; 14 R. R. 668.

—— **Direction to Retain.**]—A., resident abroad, remitted a bill to B., his agent in England, drawn by A., and specially indorsed by him to C., with whom his children were at school, in payment of C.'s account for their board and education. B. got the bill accepted by the drawees, and sent a letter by post to C., stating that he had received a commission from A. to pay her some money on account of his children, and desired to be informed when and how it should be delivered. While the bill remained in B.'s hands, he received directions from A. to keep it, and the proceeds, in his hands, and to have a fair investigation into C.'s accounts, and after such investigation, to pay her what might be due to her. No such investigation took place, and B. detained the bill:—Held, that C. could not recover it in trover. *Brind* v. *Hampshire*, 1 M. & W. 365; 1 Tyr. & G. 790; 5 L. J., Ex. 197.

—— **Plaintiffs not Party to Special Agreement.**]—L. & Co., a London firm, agreed with C. & Co., also a London firm, to make advances on a cargo per S., consigned to M. & Co., at Moulmein on the terms that L. & Co. should have a lien on the cargo and its proceeds; and that M. & Co. should remit the proceeds as soon

as realised through L. & Co. L. & Co. accordingly advanced to C. & Co. 6,000*l*. M. & Co. were informed of the arrangement, and agreed to it. Afterwards, L. & Co. requested C. & Co. to pay off their advances. C. & Co. informed M. & Co. of this, and requested them to draw on them in favour of L. & Co. in anticipation. L. & Co. were not aware of this application. M. & Co. wrote to C. & Co., expressing dislike to the style of draft, but assenting to do as requested, and adding, in a letter of the same date, "we trust you will take care we are protected in this matter." Inclosed was a letter, addressed to L. & Co., unsealed, advising them of a draft. The draft was on C. & Co., payable six months after sight to L. & Co. C. & Co. accepted the draft, handed it and the letter to L. & Co., and afterwards duly honoured the draft. Afterwards a similar draft was sent in a similar letter, stating the draft to be "in anticipation of the arrival of the S., addressed to L. & Co., but open, and in a letter to C. & Co." When it arrived, C. & Co. were in such circumstances as to be aware that they could not honour it. They therefore suppressed both letter and draft; M. & Co. approved of their conduct. Subsequently C. & Co. became bankrupts; and the unaccepted draft came into the hands of their assignees. L. & Co., whose advances had not been paid off, demanded the draft from them, and, on its being refused, brought trover:—Held, that L. & Co. had no property in the draft, which had not been drawn under the agreement to which they were a party, but under a separate arrangement between C. & Co. and M. & Co.; and that, under the arrangement between C. & Co. and M. & Co., the former would have done wrong if they had handed over the draft to L. & Co., when aware that they could not protect it. *De Lizardi* v. *Pennell*, 6 El. & Bl. 742; 25 L. J., Q. B. 387; 2 Jur. (N.S.) 1227.

—— **Custom on Delivery out—Negligence.**]—It is the regular and usual course of business in commercial transactions to deliver out a bill of exchange, left for acceptance, to any person who mentions the amount, and describes any private mark upon it; and if the clerk of the party leaving it by his conduct enables a stranger to discover the mark or number, in consequence of which the bill is delivered out to him, the party leaving it cannot maintain trover for the bill against the party who so delivered it out. *Morrison* v. *Buchanan*, 6 Car. & P. 18.

—— **Evidence of bona fides.**]—In trover for a bill of exchange, it appeared that the defendants were bankers, and had discounted bills for A. B., who sent the bill by his clerk, to inquire whether they would discount it, and to inform them of an agreement between him and C. D., with respect to the title. The defendants subsequently placed this bill to the credit of A. B. At the trial, neither side having called the clerk to prove that he had delivered the message:—Held, that as the presumption was, that the defendants were bonâ fide holders of the bill for value, and also that they had acted honestly, it could not be presumed that the clerk had delivered the message, and therefore that the defendants were entitled to the bill. *Middleton* v. *Barned*, 4 Ex. 241.

Scrip of Foreign Government.]—The scrip of a foreign government, issued by it on negotiating a loan (which scrip promises to give to the bearer, after all instalments have been duly paid, a bond for the amount paid, with interest), is by the custom of all the stock markets of Europe a negotiable instrument, and passes by mere delivery to a bonâ fide holder for value. English law follows this custom; and any person taking it in good faith obtains a title to it independently of the title of the person from whom he took it. *Goodwin* v. *Robarts*, 45 L. J., Ex. 748; 1 App. Cas. 476; 35 L. T. 179; 24 W. R. 987—H. L. (E.)

The scrip promised to give the bearer a bond for the amount paid. A person who took this scrip as being negotiable, could not, after he had negligently allowed another person the means of transferring (even fraudulently) the possession of it to a bonâ fide holder, be heard to deny that the instrument was a negotiable instrument transferable to bearer by delivery. *Ib.*

Where the holder of Prussian bonds, issued by the sovereign of that country to secure the payment of a national loan, deposited them with an agent for a special purpose, and the agent pledged them to a third person without fraud on the part of the latter:—Held, that, as the bonds were made payable to the bearer, they could not be recovered in trover by the real owner. *Georgier* v. *Mieville*, 4 D. & R. 641; 3 B. & C. 45.

Share Certificates.]—A. deposited with B. certain share certificates in a company as security for a loan, and afterwards assigned all his personal estate to trustees for the benefit of his creditors. The assignees gave notice of the assignment to the company, but B. omitted to give notice of his equitable lien:—Held, that, notwithstanding the omission of such notice, the trustees could not maintain trover against B. for the certificates. *Broadbent* v. *Varley*, 12 C. B. (N.S.) 214.

Exchequer Bills.]—An exchequer bill (the blank in which was not filled up) having been placed for sale in the hands of S., he, instead of selling, deposited it at his bankers, who made him advances to the amount of its value:—Held, that the owner thereof could not maintain trover against the bankers, as the property in such bill passed by delivery, as in the case of bank-notes and bills of exchange. *Wookey* v. *Pole*, 4 B. & Ald. 1; 22 R. R. 594.

c. On Sale of Goods.

Goods subject to Vendor's Lien.]—The purchaser of goods which remain in the possession of the vendor, subject to the vendor's lien for unpaid purchase-money, cannot maintain an action of trover against a wrongdoer. *Lord* v. *Price*, 43 L. J., Ex. 49; L. R., 9 Ex. 54; 30 L. T. 271; 22 W. R. 318.

Where Goods not Paid for.]—The purchaser of goods cannot maintain trover for them, without paying the price; for though he acquires the right of property by the purchase, he can only acquire the right of possession by the payment or tender of the price; and in order to maintain trover, he must have both the right of property and the right of possession. *Bloxam* v. *Saunders*, 7 D. & R. 396; 4 B. & C. 941; 28 R. R. 519.

But on the contract for the sale of a specific chattel on credit, time, without express stipulation, is not of the essence of the contract; and the vendee, on tender of the price, though after

the expiration of the period of credit, may maintain trover against the vendor to recover such chattel. The vendor cannot rescind the contract on nonpayment at the day. *Martindale* v. *Smith*, 1 G. & D. 1; 1 Q. B. 389; 10 L. J., Q. B. 155; 5 Jur. 932.

If a tradesman sells goods to be paid for on delivery, and his servant by mistake delivers them without receiving the money, he may, after demand and refusal to deliver or to pay, bring trover for his goods against the purchaser. *Bishop* v. *Shillito*, 2 B. & Ald. 329, n; 20 R. R. 457 n.

Appropriation of Goods.]—Trover will not lie by the purchaser of goods, which form part of a larger quantity belonging to the seller, unless there has been a separation of the specific part sold from the rest. *Austen* v. *Craven*, 4 Taunt. 644; 1 Marsh. 4, n.; 13 R. R. 714.

The plaintiff, by bought and sold notes, contracted to sell to the defendant oil at a certain price, "to be free delivered and paid for in fourteen days by cash, less 2*l.* 10*s.* per cent. discount." Having at the time oil at a wharf, he gave an order to the wharfinger to transfer some of that to the defendant. The wharfinger transferred it in his books to the defendant's name, and signed a notice of the transfer directed to the defendant, which the plaintiff's clerk on the same day took to the defendant, and demanded a cheque in payment. The defendant refused to give the cheque, but retained the notice and got possession of the oil against the will of the plaintiff, who, as the jury found, never intended to part with the notice or the oil, except on condition that a cheque was given:—Held, that as the sale was of no specific oil, and as the defendant refused to comply with the condition, no property passed to him by the transfer in the wharfinger's books, and that the plaintiff could maintain trover. *Godts* v. *Rose*, 17 C. B. 229; 25 L. J., C. P. 61; 1 Jur. (N.S.) 1173; 4 W. R. 129.

An appropriation of goods, under a contract of sale, may mean a mere election by the vendor, where he has the right himself to choose what articles he will supply in performance of his contract, in which case the property does not pass; or it may mean that both parties to the contract have agreed that particular goods shall be the articles to be supplied, and yet the appropriation may not operate so as to pass the property. *Wait* v. *Baker*, 2 Ex. 1; 17 L. J., Ex. 307.

But where both parties have agreed that particular goods shall be the articles contracted for, and shall become the property of the vendee, and nothing further remains to be done in order to transfer the goods, that is an appropriation which operates in law so as to vest the property in the vendee. *Ib.*

Under a contract for the sale of goods, to be selected by the vendor, a selection and a delivery to a common carrier for the vendee is a delivery to the vendee, whose agent the carrier becomes: and if there is a binding contract, and the article agrees with it, such delivery is such an appropriation as leaves nothing more to be done in order to transfer the goods, and therefore the property passes. *Ib.*

But in the case of a delivery on board a ship, under a bill of lading, the captain is in possession of the goods, and carries for and on behalf of the vendor, and the delivery does not operate as in the case of a common carrier, though the ship is expressly hired for the vendee; it is an appropriation only in the sense of an election, and does not vest the goods in the vendee. *Ib.*

Right of Owner to follow Proceeds of Sale.]—Where a person wrongfully obtained goods and sold them, and the proceeds of sale were paid into a colonial bank for the purpose of transmission to its London branch, he receiving bills of exchange to the amount of the proceeds drawn by the colonial bank on its London branch:—Held, that the owners of the goods were entitled to follow the proceeds in the hands of the bank, and to be paid the amount of the bills, as bills, as they became possessed of them. *Comité des Assureurs Maritimes* v. *Standard Bank of South Africa*, 1 Cab. & E. 87.

Delivery.]—M., being indebted to B., entered into an agreement as follows: "I, M., agree to allow B. to have my horse, van, cart and two sets of harness for what I owe B., and that B. to maintain the horse and keep possession of it and cart and harness, and to have his name on the van and cart, until I repay to B. 39*l.* 13*s.* 4*d.* B. has received into possession the horse, van, cart and the two sets of harness, this 24th day of December, 1860." B. not having room on his premises for all the goods, left part with M., and having eventually been declared insolvent, M. took back the goods which B. had on his premises, which were then seized by the broker of the provisional assignee, upon which M. brought an action and obtained a verdict; leave being reserved to set it aside on the ground that the property sought to be recovered passed to B. under the agreement:—Held, that there had been a complete delivery of all the goods, and that the property had passed, and therefore that an action for conversion could not be maintained. *Martin* v. *Reid*, 11 C. B. (N.S.) 730; 31 L. J., C. P. 126; 5 L. T. 727.

—— **Resale.**]—A. contracted to sell to N. & K. 100 tons of oil to be delivered alongside a vessel in the Thames, and paid for in cash in exchange for mate's receipt. N. & K. entered into a contract with the defendants, who were shipowners, whereby the defendants agreed to give room in their ships for the export of 400 tons of oil during the season. There was a stipulation between N. & K. and the defendants, that no goods should be received on board unless a clean receipt could be given for them. A. in pursuance of his contract with N. & K. brought alongside one of defendants' vessels fifty barrels of oil, which were taken on board, but the defendants failed to give a clean receipt. A. demanded re-delivery of the oil, and, on this being refused, brought an action of trover against the defendants. The oil was subsequently sold by N. & K., who then paid A. the contract price:—Held, that A. was precluded from saying that the goods were his when he demanded re-delivery; and that he was not entitled to recover from the defendants the loss of interest on the price caused by the delay in payment. *Armstrong* v. *Allen*, 4 E. 107; 67 L. T. 738; 7 Asp. M. C. 293—C. A.

Contract for Performance of Work.]—The buyer of a chattel, ordered to be made for him, acquires no property in the chattel till it is finished and delivered to him; and therefore, before then, cannot maintain trover for it, though he has paid the price beforehand. *Mucklow* v. *Mangles*, 1 Taunt. 318; 9 R. R. 784. S. P.,

Woods v. *Russell*, 1 D. & R. 58 ; 5 B. & Ald. 942 ; 24 R. R. 621.

An unfinished gig, which has been previously selected and paid for by the plaintiff, was taken in execution under a fi. fa., and left in care of the judgment creditor, who, when it was finished, assisted in giving it up to the plaintiff. The sheriff afterwards retook it. Trover was brought, and the execution found fraudulent :—Held, that, whether the property in the gig passed or not to the plaintiff before the seizure, trover was maintainable, and the sheriff could not retake it, even to secure his poundage. *Goode* v. *Langley*, 7 B. & C. 26 ; 9 D. & R. 791; 5 L. J. (o.s.) K. B. 353.

B., a builder, undertook to build an hotel for a company, of which the defendants were the trustees, and to do all the work, except the plumbing and ironmongery, which were to be done by the defendants' workmen. It was agreed, that if B. became bankrupt, it should be lawful for the defendants to take possession of the work already done, and put an end to the agreement, and that they should pay to B. so much money only as should be adjudged to be the value of the work already done and fixed by him. The defendants employed a clerk of the works, whose duty it was to inspect the materials supplied by the bankrupt, and none were used upon the building but such as had been approved by him. Before the hotel was completed B. became a bankrupt. Shortly before the bankruptcy, some deal sash-frames were lying at the bankrupt's premises ; to these the ironmongers of the defendants had supplied pulleys, and in this state they had been seen and approved by the clerk of the works. After the bankruptcy, the sash-frames were brought to the defendants' premises ; the assignees then made a demand of the sash-frames, and upon the defendants' refusal to deliver them, brought trover: —Held, first, that this was a contract for the performance of certain work, and not for the sale of goods, and that the sash-frames did not become the property of the defendants until they were fixed to the building. *Tripp* v. *Armitage*, 4 M. & W. 687 ; 1 H. & H. 442 ; 8 L. J., Ex. 107 ; 3 Jur. 249.

Held, also, that although the defendants might be entitled to keep the sash-frames, for the purpose of severing the pulleys, yet a demand of the sash-frames generally, and a general refusal, were evidence of a conversion. *Ib.*

d. After Theft of Goods.

See Sale of Goods Act, 1893, s. 24, sub-s. 1, re-enacting in part s. 100 of the Larceny Act, 1861.

Prosecution of Offender.]—In an action for trover and trespass for a brooch, the pleas being not guilty and not possessed, the jury found a verdict for the plaintiff. A rule for a new trial having been obtained, on the ground that it appeared from the evidence that the brooch was taken by the defendant under such circumstances as to prove a charge of felony, and that the judge ought, therefore, to have nonsuited the plaintiff :—Held, that the judge was bound to try the issues on the record, and that he was right in not having nonsuited the plaintiff. *Wells* v. *Abraham*, 41 L. J., Q. B. 306 ; L. R. 7 Q. B. 554 ; 26 L. T. 326 ; 20 W. R. 659.

The objection cannot be taken by plea. *Osborne* v. *Gillett*, L. R. 8 Ex. 88.

The owner of goods stolen prosecuting the felon to conviction, cannot recover their value from the person who purchased them in market overt, and sold them again before conviction, notwithstanding the owner gave him notice of the robbery while they were in his possession. *Horwood* v. *Smith*, 2 Term Rep. 750 ; 2 Leach, C. C. 586, n. ; 1 R. R. 613.

But the owner of chattels stolen, who prosecutes the thief to conviction, may recover their value from a person who purchased them from the thief by a bonâ fide sale, but not in market overt, before the conviction, notice of the felony having been given whilst they were in his possession. *Peer* v. *Humphrey*, 2 A. & E. 495 ; 4 N. & M. 430 ; 1 H. & W. 28 ; 4 L. J., K. B. 100.

Trover is maintainable to recover the value of goods which have been stolen from the plaintiff, and which the defendant has innocently purchased, although no steps have been taken to bring the thief to justice ; for the obligation which the law imposes on a person to prosecute the party who has stolen his goods does not apply where the action is against a third party innocent of the felony. *White* v. *Spettigue*, 13 M. & W. 603 ; 1 Car. & K. 673 ; 14 L. J., Ex. 99 ; 9 Jur. 70.

It is not necessary for the owner of stolen goods to prosecute the thief to conviction before he can recover them in an action against an innocent third person. *Lee* v. *Bayes* or *Robinson*, 18 C. B. 599 ; 25 L. J., C. P. 249 ; 2 Jur. (N.S.) 1093.

Against Salesmaster.]—A salesmaster, who in market overt publicly sells and afterwards delivers a stolen beast, although he does so innocently and in the ordinary course of his business, is responsible, in trover, to the true owner for the value of the beast. *Gauly* v. *Ledwidge*, Ir. R. 10 C. L. 33. S. P., *Delaney* v. *Wallis*, 14 L. R. Ir. 31 ; 15 Cox, C. C. 525—C. A.

Effect of Order of Restitution.]—Goods which have been stolen may be recovered in trover from the purchaser of them in market overt upon a conversion by him subsequent to the conviction of the felon, without any order for restitution having been made. *Scattergood* v. *Sylvester*, 15 Q. B. 506 ; 19 L. J., Q. B. 447 ; 14 Jur. 977.

Section 100 of the Larceny Act, 1861, gives the owner of a stolen New Zealand bond no right to recover it from the holder. *Chichester* v. *Hill*, 52 L. J., Q. B. 160 ; 48 L. T. 364 ; 31 W. R. 245 ; 15 Cox, C. C. 258 ; 47 J. P. 324.

Bills and Notes Stolen.]—Trover will lie for the produce of a stolen bank-note in the hands of a third person, after conviction of the theft. *Golightly* v. *Ryn*, Lofft, 88.

A promissory note delivered by the defendant to the plaintiff, payable to the plaintiff's order, was stolen from the plaintiff by his clerk, who, after forging the plaintiff's indorsement, obtained payment from the defendant's banker ; the banker handed the note to the defendant :—Held, that the plaintiff was entitled to recover the amount at the hands of the defendant in an action of trover, notwithstanding six weeks had elapsed before the plaintiff discovered and gave the defendant notice of the loss of the note. *Johnson* v. *Windle*, 3 Bing. (N.C.) 225 ; 3 Scott, 608 ; 2 Hodges, 202 ; 6 L. J., C. P. 5.

If a party possess himself of a stolen bill or

note improperly, a demand and refusal are not necessary previously to an action brought for its recovery by the loser. *Beckwith* v. *Corrall*, 3 Bing. 444; 11 Moore, 335; 2 Car. & P. 261; 4 L. J. (O.S.) C. P. 139.

Property in Hands of Police.]—The plaintiff was tried and acquitted on a charge of stealing a diamond ring and pin found on his person. The defendant, a superintendent of police, into whose hands the articles had come in the ordinary course of proceedings, did not deliver them to the plaintiff, but within a reasonable time applied to a metropolitan police magistrate under 2 & 3 Vict. c. 71, s. 29, for an order as to how he was to dispose of them. The magistrate, after hearing evidence, including that of the plaintiff, adjourned the hearing to a day not yet expired. In an action for the detention and conversion of the articles:—Held, that the defendant, having within a reasonable time proceeded in accordance with the provisions of the act, to place the matter in the hands of the magistrate, was not liable. *Bullock* v. *Dunlap*, 46 L. J., Ex. 150; 2 Ex. D. 43; 35 L. T. 633; 25 W. R. 98; 13 Cox, C. C. 367. Affirmed, 36 L. T. 194; 25 W. R. 293; 13 Cox, C. C. 581—C. A.

If a person is stopped with a horse under suspicious circumstances, and the horse is placed at an inn by the police, and the innkeeper directs an auctioneer to sell the horse for its keep, the latter is liable to be sued in trover by the owner. *Binns* v. *Pigott*, 9 Car. & P. 208.

The police have power under a warrant for the arrest of a person charged with stealing goods, to take possession of the goods for the purposes of a prosecution. A person is, therefore, justified in refusing to hand over goods to one claiming to be the owner, if such person has been entrusted with them by the police who have taken possession of them under such circumstances. *Tyler* v. *L. & S. W. Ry.*, 1 Cab. & E. 285.

Purchase from Police.]—Various quantities of tallow, the property of different persons, were deposited in warehouses on a bank of the Thames. A fire took place, in consequence of which the tallow melted and flowed down into the sewers, and thence into the river, from which several portions of it were unwarrantably taken by different persons. A., one of these persons, sold some of it to B., which was taken from him by the police, and he was charged before a magistrate with the possession of tallow supposed to have been stolen or unlawfully obtained. The magistrate dismissed the charge, but ordered the tallow to be detained, under 2 & 3 Vict. c. 71, s. 29, and it was sold by direction of the commissioner of police before the twelve months limited by s. 30 had expired. C. having purchased the tallow from the police:—Held, that A. had no property in the tallow entitling him to maintain an action against C. for its conversion. *Buckley* v. *Gross*, 3 B. & S. 566; 32 L. J., Q. B. 129; 9 Jur. (N.S.) 986; 7 L. T. 743; 11 W. R. 465.

e. When Goods obtained by False Pretences or Fraud.

See Sale of Goods Act, 1893, s. 24, sub.-s. 2.

Conviction.]—W. purchased and obtained delivery of certain sheep from the defendant by false pretences. The plaintiff purchased the sheep from W. and paid W. for them without knowledge of the fraud, the defendant having done nothing in the meantime to avoid the contract between himself and W. The defendant finding that the sheep were on the plaintiff's premises retook possession of them; W. having been convicted of obtaining the sheep by false pretences on the prosecution of the defendant:—Held, that the effect of 24 & 25 Vict. c. 96, s. 100, was not to revest the property in the sheep in the defendant as against the plaintiff, who had acquired a good title to them before the conviction, and consequently that the defendant was liable in an action by the plaintiff for the value of the sheep. *Moyce* v. *Newington*, 48 L. J., Q. B. 125; 4 Q. B. D. 32; 39 L. T. 535; 27 W. R. 319; 14 Cox, C. C. 182. Cf. *Bentley* v. *Vilmont*, 57 L. J., Q. B. 18; 12 App. Cas. 471; 57 L. T. 854; 36 W. R. 481; 52 J. P. 68—H. L. (E.); and Sale of Goods Act, 1893, s. 24, sub.-s. (2).

Effect on Property.]—The obtaining goods upon false pretences, under colour of purchasing them, does not change the property. *Noble* v. *Adams*, 7 Taunt. 59; 2 Marsh. 366; Holt, 248; 17 R. R. 445. See also *Nickling* v. *Heaps*, 21 L. T. 754.

Mistake as to Vendee.]—The plaintiffs, who were linen manufacturers at Belfast, received an order for goods signed "A. Blenkarn & Co.," 37, Wood-street, London, the word "Blenkarn" being so written as to resemble "Blenkiron." The goods were afterwards forwarded and addressed to "A. Blenkiron & Co.," 37, Wood-street, the plaintiffs being under the belief that they were in correspondence with the well-known firm of "Blenkiron & Sons," who carried on business at 123, Wood-street. The goods were ordered and received by Alfred Blenkarn who had an office at 37, Wood-street, and the plaintiffs were induced by his fraud to send the goods to him. The plaintiffs, on discovering the fraud, prosecuted Blenkarn for obtaining goods by false pretences, and he was found guilty. Before his conviction he had sold part of the goods to the defendants who had no knowledge of the fraud and they had re-sold them to other persons:—Held, that there was no valid contract for the sale of the goods by the plaintiffs, and that they were entitled to recover them from the defendants in an action of trover. *Cundy* v. *Lindsay*, 47 L. J., Q. B. 481; 3 App. Cas. 459; 38 L. T. 573; 26 W. R. 406; 14 Cox, C. C. 93—H. L.

The plaintiffs, owners of a large quantity of acid in barrels, employed brokers to sell it. The brokers contracted with B. for the purchase of part, and gave him an order on the plaintiffs that they should deliver to him, or his order, a certain number of tons of acid. B. sold his interest in this contract to E. who sold it to L. A. bought the same of L., falsely representing himself as agent for V., and thereby, on pretence of inspecting the acid, obtained from L. the brokers' orders on the plaintiffs for the quantity. These orders had been indorsed over and passed from one purchaser to another, and when delivered by L. to A. were indorsed by L., specially deliverable to himself. A. presented the brokers' orders to the plaintiffs, and, stating that he had purchased the acid of L. on his own account, though nominally for V., induced the plaintiffs to give him a transfer, or delivery order, on the wharfinger in whose warehouse the acid was lying, authorizing the transfer

into A.'s name of certain specific casks of acid, amounting to the quantity in the brokers' orders mentioned. The wharfinger thereupon transferred the specific casks of acid into A.'s name. A. immediately borrowed money of the defendant and pledged the casks of acid with him, as a security for the repayment, handing over to the defendant the warrants which he had made out by means of which the defendant obtained possession of the acid :—Held, that, as A. obtained the delivery order from the plaintiffs by false and fraudulent representation that he had purchased acid by a subsale from a purchaser from the plaintiffs, there was no privity of contract between the plaintiffs and A., consequently, that the latter could not convey a good title in the casks of acid to the defendant, though a bonâ fide pawnee for value, but that the plaintiffs might recover the acid back from him in trover. *Kingsford* v. *Merry*, 1 H. & N. 503 ; 26 L. J., Ex. 83 ; 3 Jur. (N.S.) 68 ; 5 W. R. 151—Ex. Ch.

The plaintiff having been imposed upon by a swindler, consigned a box at Birmingham by the defendants, as common carriers, to J. W., in London. The defendants found that no such person resided there, but upon receiving a letter signed J. W., requesting that the box might be forwarded to a house at St. Albans, they delivered it there to a person calling himself J. W., who showed that he had a knowledge of the contents of the box ; that person having disappeared :—Held, in an action of trover against the defendants, that they were liable. *Stephenson* v. *Hart*, 4 Bing. 476 ; 1 M. & P. 357 ; 6 L. J. (O.S.) C. P. 97 ; 29 R. R. 602.

Where Transaction Void or Voidable.]—Where a debtor voluntarily gave B., one of his creditors, a warrant of attorney on which B. entered up judgment and issued execution, and the sheriff seized and sold the goods, and A. within three months presented his petition, and an assignee was appointed :—Held, that the assignee could not treat the transaction as void from the beginning, and maintain an action against B. on an alleged wrongful conversion at the time of the seizure. *Young* v. *Billiter*, 8 H. L. Cas. 682 ; 30 L. J., Q. B. 153 ; 7 Jur. (N.S.) 269 ; 3 L. T. 196—H. L. Reversing 6 El. & Bl. 1 ; 4 W. R. 369.

Innocent Possession of Goods Fraudulently Obtained.]—A person who, however innocently, obtains the possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or for that of any other person, is guilty of a conversion, unless the possession was obtained by him as finder or as bailee, or by purchase in market overt or from an agent, so as to be protected by the Factors' Acts. *Hollins* v. *Fowler*, 44 L. J., Q. B. 169 ; L. R. 7 H. L. 757 ; 33 L. T. 73—H. L. Affirming 20 W. R. 868—Ex. Ch.

Though a fraudulent vendee may be sued in trover by the vendor, yet the right of action does not exist against every person into whose hands the property may have passed subsequently. *Sheppard* v. *Shoolbred*, Car. & M. 61.

—— **Evidence.**]—The plaintiffs sued for goods, of which they alleged they had been deprived by fraud in the defendant's agent :—Held, that they might prove the contract made by the agent, without calling him as a witness, although the defendant was not privy to the fraud. *Irving* v *Motly*, 7 Bing. 543 ; 5 M. & P. 380 ; 9 L. J. (O.S.) C. P. 161.

f. Property Lost or Found.

Title of Finder.]—The place in which a lost article is found does not constitute any exception to the general rule of law, that the finder is entitled to it as against all persons except the owner. *Bridges* v. *Hawkesworth*, 21 L. J., Q. B. 75 ; 15 Jur. 1079.

A person entering a shop found on the floor a bundle of bank notes which had been accidentally dropped there by a stranger. The party who lost them could not be found :—Held, that as against every one but the true owner, the property in the notes belonged to the finder and not to the owner of the shop, notwithstanding that the finder had immediately on picking up the bundle handed it over to the latter, with a view to its being restored to the true owner if he should return, and the owner of the shop had advertised the finding in the newspapers, the finder not having intended to waive his title, and having before he demanded the notes back offered to repay the expense of the advertisements, and to indemnify the shopkeeper against any claim. *Ib.*

Where an owner of land has the right to exercise a control over it, and to prevent unauthorised interference, and some article (abandoned by its true owner) is found by a stranger, either upon or beneath the surface of the land, the presumption is that the right to possession of the article found is in the owner of the land, and not in the finder. *South Staffordshire Waterworks* v. *Sharman*, 65 L. J., Q. B. 460 ; [1896] 2 Q. B. 44 ; 74 L. T. 761 ; 44 W. R. 653.

Trover lies for a lost bank note, which the defendant has tortiously converted to his own use, though part of the proceeds has been paid by him to the plaintiff. *Burn* v. *Morris*, 4 Tyr. 485 ; 2 C. & M. 579 ; 3 L. J., Ex. 193.

The acceptance of part does not affirm the taking, so as to waive the tort, but the amount received will go in reduction of damages. *Ib.*

A deputy vice-admiral who received an anchor and hawser, alleged to have been left at sea, from the finder, refused on application by the real owner to deliver them up, until the salvage was paid, or security given for the payment of it :—Held, that this was a conversion, but that if he had merely refused to deliver them up until it was ascertained whether salvage was due or not, it would not have amounted to a conversion. *Clark* v. *Chamberlain*, 2 M. & W. 78 ; 2 Gale, 217.

—— **Person obtaining Possession of Land.**]—One who comes into possession of land, on which he finds a block of stone belonging to another, is not justified in removing it to a distance. Such removal supersedes the necessity of proving formal demand in an action of trover. *Forsdick* v. *Collins*, 1 Stark. 173 ; 18 R. R. 757.

g. Property Given or Exchanged.

Gift—Policy on Life.]—R. insured his life and handed the policy to his mother, telling her she might keep it ; but there was no assignment of the policy. On R.'s death his administratrix brought an action for the recovery of the policy :—Held, that though the gift passed no right to

the mother to recover the money secured by the policy, the administratrix could not maintain detinue or trover against her for the document. *Rummens* v. *Hare*, 46 L. J., Ex. 30; 1 Ex. D. 169; 34 L. T. 407; 24 W. R. 385—C. A.

—— **Intention of Intestate.**]—Declarations by an intestate, that he meant that a person with whom he resided should have his furniture and effects for what he owed her, are insufficient to entitle such person to take and retain possession of the property. *Royston* v. *Hankey*, 3 M. & Scott, 381.

—— **Effect of Delivery.**]—A verbal gift of a chattel, without actual delivery, does not give the property to the donee. *Irons* v. *Smallpiece*, 2 B. & Ald. 551; 21 R. R. 395.

And a mere verbal gift of a chattel to a person in whose possession it is, does not pass any property to the intended donee. *Sharr* v. *Pilch*, 4 Ex. 478; 19 L. J., Ex. 113.

A father gave his son a watch, some printed books, and several articles of wearing apparel:—Held, that, although the son was under age (viz. sixteen years old), the father could not maintain trover against a person who detained the property, because the right of possession was not in him, but in his son. *Hunter* v. *Westbrook*, 2 Car. & P. 578.

A barge, while in the possession of the donee, and worked by him as servant to the owner, was given to him by the owner; afterwards the donee worked it, and paid the wages of the crew on his own account until the donor's death:—Held, that the property thereby became vested in the donee. *Winter* v. *Winter*, 4 L. T. 639; 9 W. R. 747.

On Exchange of Property.]—The plaintiff exchanged a watch with the defendant for a pair of candlesticks, which the latter warranted to be silver:—Held, that the plaintiff could not maintain trover for the watch, on proof that the candlesticks were of base metal. *Emanuel* v. *Dane*, 3 Camp. 299.

A person, having three bills of exchange, applied to a county banker, with whom he had had no previous dealings, to give for them a bill on London of the same amount, and the bill given by the banker was afterwards dishonoured:—Held, that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange. *Hornblower* v. *Proud*, 2 B. & Ald. 327; 20 R. R. 456.

h. Goods Seized or Taken in Execution.

Liability of Purchaser.]—Where a sheriff, under a fi. fa. against A., sells the goods of B., the purchaser is liable to the latter in trover, although he purchased such goods at a public sale directed by the sheriff. *Farrant* v. *Anon.*, 3 Stark. 130; 23 R. R. 761.

—— **Of Officer of Court.**]—An officer of an inferior court of record, seized, under a fi. fa. against A., partnership property of A. and B., and sold it to various purchasers, who carried it away:—Held, that the seizure and sale, under the circumstances, did not amount to a conversion. *Mayhew* v. *Herrick*, 7 C. B. 229; 18 L. J., C. P. 179; 13 Jur. 1078.

—— **Of Auctioneer.**]—The plaintiff lent a pianoforte to W., in whose hands it was seized under a distress for rent. While the landlord's bailiff remained in possession, by W.'s consent, a fi. fa. against W., at the suit of another creditor, was put into the premises, and the officer seized the pianoforte, and removed it to the premises of an auctioneer for sale:—Held, that the plaintiff (after a demand and refusal to deliver it) was entitled to recover it from the auctioneer. *Turner* v. *Ford*, 15 M. & W. 212; 15 L. J., Ex. 215.

Sale when Sheriff in Possession.]—Possession of goods by a sheriff under a fi. fa. does not prevent the debtor from making an effectual sale of the goods by delivery to a purchaser while the sheriff is in possession. *Union Bank of London* v. *Lenanton*, 47 L. J., C. P. 409; 3 C. P. D. 243; 38 L. T. 698.

i. Between Landlord and Tenant.

Trees and Minerals in Copyhold Lands.]—In an ordinary estate of copyhold the property in the trees and minerals is in the lord, the possession in the copyholder. If a stranger or the copyholder cuts trees or takes minerals, the lord can bring trover. *Eardley* v. *Granville*, 45 L. J., Ch. 669; 3 Ch. D. 826; 34 L. T. 609; 24 W. R. 528. S. P., *Fleming* v. *Simpson*, 2 M. & Ry. 169; 6 L. J. (o.s.) K. B. 207.

Crops.]—Trover will lie for corn cut by an outgoing tenant after the expiration of his term, though sown by him before that time, under an idea that he was entitled to an away going crop. *Davis* v. *Connop*, 1 Price, 53; 15 R. R. 693.

Trover does not lie by an in-coming tenant to recover the value of the away going crops taken by the off-going tenant, who continued to hold the land as tenant from year to year after the expiration of an old lease, which reserved to him the right, after the end of the term at Lady Day, "to fence in and preserve all such hard corn as should be sown on the premises the winter seedness preceding, so as the same exceeded not twenty-nine acres, and was summer fallowed and well manured, and at harvest to reap and carry away the same." *Boraston* v. *Green*, 16 East, 71; 14 R. R. 297.

Wrongful Execution.]—Where goods leased as furniture with a house have been wrongfully taken in execution by a sheriff, the landlord cannot maintain trover against the sheriff pending the lease. *Gordon* v. *Harper*, 7 Term Rep. 9; 2 Esp. 465; 4 R. R. 369.

Fixtures.]—If a landlord under a distress for rent in arrear severs fixtures from the freehold and disposes of them, he is liable in trover. *Dalton* v. *Whittem*, 3 Q. B. 961; 3 G. & D. 260; 12 L. J., Q. B. 55; 6 Jur. 1063.

A lessee cannot, even during his term, maintain trover for fixtures attached to the freehold. *Mackintosh* v. *Trotter*, 3 M. & W. 184; 7 L. J. Ex. 65.

Where a tenant of a mill without the permission of his landlord severed certain machinery from the mill, and it was afterwards seized under a fi. fa. by the sheriff and sold by him:—Held, that no property passed to the vendee and that the landlord was entitled to maintain trover for same even during the continuance of the term.

Farrant v. *Thompson*, 5 B. & Ald. 826; 2 D. & R. 1.

Wrongful Distress.]—A lodger may maintain an action if his goods are taken on an excessive distress by the landlord of the party under whom he occupies. *Fisher* v. *Algar*, 2 Car. & P. 374.

If a party pays money in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrongdoer. *Shipwick* v. *Blanchard*, 6 Term Rep. 298; 3 R. R. 175.

A., a tenant, owed rent to B., his landlord; B. distrained for more rent than was due, and removed the goods to the auction rooms of C.; A. gave C. notice not to sell, and C. delivered the goods back to the person from whom he received them:—Held, that, as some rent was due from A. to B., C. was not liable to A. in trover. *Whitworth* v. *Smith*, 5 Car. & P. 250; 1 M. & Rob. 193.

—— Goods of Mortgagor distrained by Mortgagee—Tenancy—Notice of.]—A mortgage deed by which a messuage and premises were conveyed to the trustees of a building society to secure payment by the mortgagor of the sums payable by him under the rules of the society contained a provision that in case of default in such payment, then immediately or at any time after such default should have been made, the mortgagor should and would hold the premises, expressed to be thereby conveyed, as yearly tenant to the trustees from the day of the date of the deed at a certain yearly rent, and that the trustees should have the same remedies for recovering the rent as if the same had been reserved by a common lease. Default was made by the mortgagor under the deed, and in the following year the trustees distrained, for a year's rent, the goods of the plaintiff which were upon the premises. No notice was ever given to the mortgagor by the trustees of the society that they intended to treat him as a tenant. The plaintiff brought trover for the goods so distrained against the trustees:—Held, that the trustees were not entitled to treat the mortgagor as a tenant until they had given him notice of their intention to alter the relation in which he stood to them, from that of mortgagor and mortgagee to that of tenant and landlord; that consequently the distress could not be justified, and that the plaintiff was entitled to recover. *Clowes* v. *Hughes*, 39 L. J., Ex. 62; L. R. 5 Ex. 160; 22 L. T. 103; 18 W. R. 459.

Bill of Sale—Landlord Refusing Removal.]—The plaintiff was the holder of a bill of sale over the goods of M. Default having been made in payment of the sum secured, he put a man in possession, and afterwards went to M.'s house to remove them. Upon his arrival at the house he was met by the defendant, M.'s landlord, who told him that rent was in arrear, and that until it was paid the goods should not be removed; and measures were taken by the defendant to use force, if necessary, to prevent their removal. It was then after sunset, and therefore too late in the day to distrain, and the defendant intended to prevent the plaintiff from removing the goods, with a view of distraining on the day following. The plaintiff continued in possession of the goods, but made no attempt actually to remove them; and, except by intimating his intention to prevent their being removed, the defendant did not take possession of, or assume dominion over them. In an action of trover:—Held, that there was no evidence of conversion; and by Bramwell, B., that an actual prevention by force of the removal of the goods would not have amounted to a conversion. *England* v. *Cowley*, 42 L. J., Ex. 80; L. R. 8 Ex. 126; 28 L. T. 67; 21 W. R. 337.

Right to Lease.]—After the expiration of a lease (containing covenants of the lessor under seal), the lessor is not entitled to the possession of the indenture as against the lessee, and therefore trover does not lie by the former against the latter for the lease. *Hall* v. *Ball*, 3 Man. & G. 242; 3 Scott (N.R.) 577; 10 L. J., C. P. 285.

k. Against Carriers, Warehousemen and Wharfingers.

Warehousemen—Pledge by Consignee—Delivery Order.]—When goods are shipped under a bill of lading drawn in parts, to be delivered to the consignee "or his assigns, the one of which bills being accomplished, the others to stand void," the master, or the warehouseman who has the custody of the goods under the Merchant Shipping Act, 1862, ss. 66—78, is justified in delivering them to the consignee on production of one part, although there has been a prior indorsement for value to the holder of another part; provided the delivery be bonâ fide and without notice or knowledge of such prior indorsement. Goods having been shipped for London, consigned to C. & Co., the shipmaster signed a set of three bills of lading marked "First," "Second" and "Third," respectively, making the goods deliverable to C. & Co., or their assigns, freight payable in London, the one of the bills, being accomplished, the others to stand void. During the voyage C. & Co. indorsed the bill of lading marked "First" to a bank in consideration of a loan. Upon the arrival of the ship at London the goods were landed and placed in the custody of a dock company in their warehouses; the master lodging with them notice under the Merchant Shipping Act, 1862, s. 68, &c., to detain the cargo until the freight should be paid. C. & Co. then produced to the dock company the bill of lading marked "Second" unindorsed, and the dock company entered C. & Co. in their books as proprietors of the goods. The stop for freight being afterwards removed, the dock company bonâ fide and without notice or knowledge of the bank's claim, delivered the goods to other persons upon delivery orders signed by C. & Co.:—Held, that the dock company had not been guilty of a conversion, and that the bank could not maintain any action against them. *Fearon* v. *Bowers* (1 H. Bl. 364) reflected on. *Glyn, Mills & Co.* v. *East and West India Dock Co.*, 52 L. J., Q. B. 146; 7 App. Cas. 591; 47 L. T. 309; 31 W. R. 201; 4 Asp. M. C. 580—H. L. (E.)

Where A., being indebted to B., gave him for security a delivery order for goods in the hands of a wharfinger, which the wharfinger accepted; and afterwards A., being indebted to C., gave him another delivery order for the same goods, which was taken to the wharfinger, who said he could not transfer the goods, as he held them for B.; but if C. could get B.'s order, he would transfer them, and promised that he would not give up the goods without first letting C. know; and afterwards B., his debt remaining unsatisfied, gave a delivery order for the same goods to A.,

who gave notice of it to the wharfinger:—Held, that C. had no property upon which trover could be maintained against the wharfinger. *Melling* v. *Kelshaw*, 1 C. & J. 184; 1 Tyr. 109; 9 L. J. (o.s.) Ex. 45.

—— **Place of Deposit.**]—The defendant contracted to warehouse certain goods for the plaintiff at a particular place, but he warehoused a part of them at another place, where, without any negligence on his part, they were destroyed. In an action to recover as damages the value of the goods:—Held, that the damage was not too remote, and that the defendant, by his breach of contract, had rendered himself liable for the loss of the goods. *Lilley* v. *Dubleday*, 51 L. J., Q. B. 310; 7 Q. B. D. 510; 44 L. T. 814; 46 J. P. 708.

If the owner of property gives another person authority to deal with it in a particular way, and such person chooses to deal with it in another way, he must take the risk of the consequences, and is liable for its loss or injury, unless such loss or injury would have occurred in whichever way the property had been dealt with. *Ib.*

Goods sent out from Paris to London viâ Dunkirk, for G. N., Custom House, London-bridge. They were forwarded from Dunkirk, with a bill of lading, which made them deliverable to the defendant, who was the London agent to the Steam Shipping Company, "to hold at the disposal of G. N., Custom House, London-bridge." Upon the arrival of the goods the defendant paid the duty on them, and placed them in a warehouse, the owner of which afterwards removed them to another of his warehouses, where they were accidentally destroyed by fire. The defendant gave no notice to the owner of the goods of their arrival, and the jury found that the defendant was not authorised by the owner to warehouse the goods, and that he had not acted as a prudent man would have acted, for the best interest of the owner:—Held, that the defendant had not, under the circumstances, been guilty of a conversion. *Heald* v. *Carey*, 11 C. B. 977; 21 L. J., C. P. 97; 16 Jur. 197.

Where the owner of goods on board a vessel directed the captain not to land them on the wharf against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger, for the owner's use, under the idea of the owner having a lien thereon for the wharfage fees, because the vessel was unloaded against the wharf; the owner upon demand and denial could maintain trover against the captain, unless the latter could maintain the wharfinger's right. *Syeds* v. *Hay*, 4 Term Rep. 260; 2 R. R. 377.

Carriers.]—Trover will lie against a carrier by the consignor of goods, who has been defrauded of them by some person unknown, when the goods have been delivered to a person who knew what the parcel contained, but at a different place to that to which they were directed, as the property never passed out of the consignor. *Stephenson* v. *Hart*, 4 Bing. 476; 1 M. & P. 357; 6 L. J. (o.s.) C. P. 97; 29 R. R. 602.

If a carrier has goods to carry, and by mistake delivers them to a wrong person, this is such a tortious conversion as will support trover at the suit of the right owner. *Youl* v. *Harbottle*, Peake, 49.

If a carrier receives goods to be carried, he cannot retain the goods, and put the consignor of the goods upon proof of his title to them. *Anon.*, 3 Esp. 115.

Upon a contract to carry and deliver goods, the possession of the goods still remaining with the defendant, trover lies. *Dewell* v. *Moxon*, 1 Taunt. 391.

—— **Animal Accidentally Killed in Transit—Sale of Carcass.**]—One of the defendant's cattle sent by the plaintiffs' line through from Dublin to England having been accidentally killed in the sea transit, without any default of the plaintiffs, and the carcass not being claimed by the defendant's agent, who was present at the arrival of the steamer, the plaintiffs sold the carcass to the best advantage:—Held, that this did not amount to a conversion. *L. & N. W. Ry.* v. *Hughes*, 26 L. R. Ir. 165.

—— **Evidence.**]—If A. sends goods by B., a carrier, to be delivered to C., proof that B. asserted he had delivered the goods to C., whereas in truth C. had never received them, is not sufficient evidence of conversion to support trover against B. *Attersol* v. *Briant*, 1 Camp. 409.

—— **Of Quantity.**]—In an action for converting goods received, but not produced, by the defendant, slight evidence of the kind and quantity of such goods may properly be given effect to. *G. W. Ry.* v. *Gurton*, 1 F. & F. 359.

4. Practice.

a. Restoration of Goods and Chattels.

See Ord. XLVIII. r. 1, R. S. C. 1883.

Power of County Court to order Return of Chattel.]—A county court judge has jurisdiction to make an order for the delivery by the defendant of the specific chattel wrongfully detained, without giving him the option of paying its assessed value as an alternative. *Winfield* v. *Boothroyd*, 54 L. T. 574; 34 W. R. 501.

Discretion of Judge as to.]—The discretion of a judge to make an order for the delivery up of chattels detained, is subject to review by the court. *Chilton* v. *Carrington*, 15 C. B. 730; 3 C. L. R. 392; 24 L. J., C. P. 78; 1 Jur. (N.S.) 477; 3 W. R. 248.

Such an order cannot properly be made in a case where, by agreement of the parties, the jury is discharged from finding the value of the chattel. *Ib.*

Option of Parties.]—The goods may be brought into court, upon an affidavit that they are in the same plight and condition as when taken, except they are of a perishable nature, or cumbrous. *Watts* v. *Phipps*, Bull. N. P. 49. S. P., *Fisher* v. *Prince*, 3 Burr. 1363.

If the value of the thing is uncertain, or the plaintiff insists upon going for special damages, the court will not stay proceedings on delivery of the thing sued for, and costs. *Whitten* v. *Fuller*, 2 W. Bl. 902.

Where the value of the goods converted was not ascertained, the court refused to stay proceedings upon delivery of the goods to the plaintiff on payment of the value thereof. *Tucker* v. *Wright*, 3 Bing. 601; 11 Moore, 500; 4 L. J. (o.s.) C. P. 190.

In an action brought by the assignees of a bankrupt against the sheriff, to recover the value of furniture and fixtures sold under an execution, the court will not stay the proceedings on payment of costs, except where the defendant has restored the chattel alleged to be converted, and the plaintiff claims no special damage, or where, if the chattel is sold, there is no dispute as to the price; but the court will not interfere if the plaintiffs do not agree as to the amount. *Gibson* v. *Humphrey*, 1 C. & M. 544; 2 Tyr. 588; 2 L. J., Ex. 234.

In an action for a packet of letters, the defendant was allowed to stay the proceedings as to one of the letters, upon delivering it up and paying costs. *Earle* v. *Holderness*, 4 Bing. 462; 1 M. & P. 254; 6 L. J. (O.S.) C. P. 68.

Effect of Order of Restitution.]—*See ante*, col. 296.

Under Larceny Act.]—*See* CRIMINAL LAW (*Larceny*).

b. Damages.

Value of Goods.]—Under a count for conversion of fixtures by severing and removing them, the value of the fixtures in their severed state can only be recovered, and not the value of them when annexed to the freehold. *McGregor* v. *High*, 21 L. T. 803.

A wine merchant having obtained from a wine broker samples of wine then lying at a wharf of wharfingers, and which the broker had agreed to sell to the wine merchant at 14*s.* per dozen, sold the wine to the captain of a ship about to sail, at 24*s.* per dozen, to be delivered on board next day. The wine merchant obtained the delivery warrant from the broker, and claimed the wine from the wharfingers, who refused to deliver it. No other wine of the same brand and quality was to be had in the market, and the wine merchant was unable to carry out his contract with the captain of the ship, who sailed without the wine:—Held, that although the wharfingers had no notice of the bargain with the captain, yet the wine merchant was entitled to recover in an action of trover the actual value of the wine to him, which at the time of the conversion was 24*s.* per dozen, he having bonâ fide sold to the captain at that price. *France* v. *Gaudet*, 40 L. J., Q. B. 121; L. R. 6 Q. B. 199; 19 W. R. 622.

In trover for goods by assignees of a bankrupt, which had been purchased by him under an agreement, by which the purchase money was to be paid by instalments, and an assignment of the property was to be executed by the vendor, when the whole purchase money had been paid, with power for the vendor to re-enter in case of default in payment of the instalments, they are entitled to recover the full value of such goods against a mere wrongdoer, notwithstanding default had been made in payment of some of the instalments, and the vendor had to that extent an interest in the goods. *Turner* v. *Hardcastle*, 11 C. B. (N.S.) 683; 31 L. J., C. P. 193; 5 L. T. 748.

Where the plaintiff had been endeavouring to baffle his creditors by a merely ostensible transfer of goods to another, and the goods were seized upon premises in which the plaintiff's tenancy had expired:—Held, that the measure of damages was the value of the plaintiff's real and bonâ fide interest in the goods, and not the full value. *Cameron* v. *Wynch*, 2 Car. & K. 264. See *Brierly* v. *Kendall*, 17 Q. B. 937.

A. having bought some sheep on credit, left them in the custody of the vendor. Without any default on the part of A., the vendor resold the sheep:—Held, that the measure of damage was not the value of the sheep, but the loss A. sustained by not having the sheep delivered to him at the price agreed on. *Chinery* v. *Viall*, 5 H. & N. 288; 29 L. J., Ex. 180; 8 W. R. 629.

In an action for taking goods under process, upon a regular judgment, but in a place to which the process did not run, the plaintiff may recover the whole value of the goods, and not merely the amount of the damage which he has sustained by their being taken in a wrong place. *Sowell* v. *Champion*, 6 A. & E. 407; 2 N. & P. 627; W. W. & D. 667.

The plaintiff having purchased goods of the defendant, secretly absconded with the goods before he paid for them; the defendant followed him, and forcibly retook the goods:—Held, that in an action for taking them, the measure of damages was the value of the goods, and the defendant could not consider the debt due from the plaintiff to the defendant, or treat it as reduced by the taking. *Gillard* v. *Brittan*, 1 D. (N.S.) 424; 8 M. & W. 575; 11 L. J., Ex. 133.

Goods returned in Damaged Condition.]—In detinue, if the defendant pleads the return and acceptance of the goods after action brought, evidence on the part of the plaintiff to show their damaged state after the commencement of the action is admissible. *M'Grath* v. *Bourne*, Ir. R. 10 C. L. 160.

Nominal.]—A. deposited a dock warrant for brandies with B., as a security for a loan, which was to be repaid on the 29th of January, or, in default, the brandies were to be forfeited. On the 28th, B. agreed for the sale of the brandies to C., and on the 29th delivered to him the dock warrant, and C. took actual possession of the brandies on the 30th:—Held, that the proper measure of damages was the actual damage A. had sustained by the wrongful conversion, which, as there was no intention on his part to redeem the pledge, was merely nominal. *Johnson* v. *Stear*, 15 C. B. (N.S.) 330; 33 L. J., C. P. 130; 10 Jur. (N.S.) 99; 9 L. T. 538; 12 W. R. 347.

A sheriff, who held goods taken in execution, delivered them to the assignees of a bankrupt, after an action of trover had been commenced by them: the assignees accepted the goods without condition:—Held, that they could not recover more than nominal damages; at all events, not without alleging special damage in the declaration. *Moon* v. *Raphael*, 2 Scott, 489; 2 Bing. (N.C.) 310; 1 Hodges, 289; 5 L. J., C. P. 46.

Misdelivery.]—Trover will lie for the misdelivery of goods by a warehouseman, although such misdelivery has occurred by mistake only. *Devereux* v. *Barclay*, 3 B. & Ald. 702; 21 R. R. 45.

The defendants were in possession of plaintiffs' goods as bailees, under orders not to part with them except upon delivery orders signed by plaintiffs. The defendants parted with the goods upon the order of one G., who was plaintiffs' agent for the sale but not for the delivery of the

goods. Shortly afterwards plaintiffs sent a delivery order for the same goods to T., who indorsed it to G., who lodged it with defendants to cover the previous delivery. Afterwards plaintiffs, being unable to obtain the price of the goods from T., sued defendants for the conversion of the goods, and claimed the full value:—Held, by Bramwell L.J., and Thesiger, L.J., that there had been a conversion in respect of which plaintiffs were entitled to recover; but that what had occurred with respect to the delivery order was equivalent to a return of the goods by defendants to plaintiffs, and, therefore, under the circumstances of this case, the damages could only be nominal. By Baggallay, L.J., that plaintiffs were not entitled to even nominal damages. *Hiort* v. *L. & N. W. Ry.*, 48 L. J., Ex. 545; 4 Ex. D. 188; 40 L. T. 674; 27 W. R. 778—C. A.

The plaintiffs, being under contract to sell waggons, employed L. to make them according to sample at a certain price. L. then employed a waggon company to make them according to sample at a lower price. The company afterwards proposed to receive payment direct from the plaintiffs, who consented, and were authorised by L. to pay them. Some waggons were delivered by the waggon company to a railway company to the order of the plaintiffs. The plaintiffs sent a complaint to the waggon company that the waggons were unequal to sample, but did not reject them; and they informed L., and also the waggon company, that they would dispose of the waggons at the best price obtainable, and hold L. responsible for loss. L. rejected the waggons. The plaintiffs gave notice to the railway company not to deliver the waggons without their order, but the railway company nevertheless delivered them to the waggon company, who refused to give them up. In an action against both companies for conversion:—Held, that the arrangement for the advantage of the waggon company, that they should receive direct payment from the plaintiffs, had not created any relationship between them which would prevent the application of the ordinary rule as to the measure of damages in trover against mere strangers; and that the plaintiffs were, therefore, entitled to recover the full value of the goods at the time of the conversion, without deduction of the price. *Johnson* v. *Lancashire and Yorkshire Ry.*, 3 C. P. D. 499; 39 L. T. 448; 27 W. R. 459.

At what time.]—The measure of damages in an action for conversion of goods is not restricted to their value at the date of the conversion, even where no special damage is laid. *Johnson* v. *Hook*, 1 Cab. & E. 89; 31 W. R. 812.

The jury is not limited to find as damages the mere value of the property at the time of the conversion, but they may find as damages the value at a subsequent time, in their discretion. *Greening* v. *Wilkinson*, 1 Car. & P. 625; 28 R. R. 790.

In an action for the conversion of goods, of which the plaintiff has the immediate right of possession, the true measure of damages is the full value of the goods at the time of the conversion. *Edmondson* v. *Nuttall*, 17 C. B. (N.S.) 280; 34 L. J., C. P. 102; 13 W. R. 53.

The plaintiffs contracted with A. to build a vessel for them, and made advances from time to time in respect of her, and A. gave them as a security for the advances a bill of sale of the vessel. The defendant having converted the vessel before she was finished, and having finished her, the plaintiffs were held entitled to recover, as damages, the value of the vessel at the time of her conversion, but not her value at a subsequent time, nor, as special damage, the value of freight which the plaintiffs might have earned with her if A. had completed her and delivered her to them. *Read* v. *Fairbanks*, 13 C. B. 692; 1 C. L. R. 787; 22 L. J., C. P. 206; 17 Jur. 918.

Tools.]—The proper measure of damages is the value of the articles which the plaintiff proves the defendant has taken and kept; but if, for stonemasons' tools, the plaintiff proves that the defendant took and used some of the tools and returned them, this is a conversion, but one for which the jury ought to give small damages, and not the value of the tools so used. *Cook* v. *Hartle*, 8 Car. & P. 568.

Damages may be given in respect of special damage, besides the value of the goods converted, if special damage is laid in the declaration; as where, for carpenter's tools, special damage was laid in respect of the owner being hindered from working for the want of the use of his tools. *Bodley* v. *Reynolds*, 8 Q. B. 779; 15 L. J., Q. B. 219; 10 Jur. 310.

Bill of Exchange.]—In trover for a bill of exchange, the damages are to be calculated according to the amount of the principal and interest due upon the bill at the time of the conversion. *Mercer* v. *Jones*, 3 Camp. 477.

Fixtures.]—In an action of trover for goods, chattels, and fixtures where damages were assessed generally:—Held, that it must be intended after verdict that the jury had not awarded damages in respect of fixtures attached to the freehold. *Sheen* v. *Rickie*, 5 M. & W. 175; 7 D. P. C. 335; 8 L. J., Ex. 217; 3 Jur. 607.

Under a count in trover to recover damages for wrongfully removing fixtures under a distress the plaintiff is entitled to recover the value of fixtures removed from the premises and sold as chattels merely. *Clarke* v. *Holford*, 2 Car. & K. 540.

Unstamped Agreement.]—In trover for an unstamped memorandum, whereby the defendant agreed to guarantee to the plaintiff to pay for "half the amount of certain fixtures, say about 100*l.*" (which memorandum the defendant withheld from the plaintiff, having obliterated his own signature), the jury gave an unqualified verdict for 100*l.* A motion for a new trial, on the ground that the memorandum, being unstamped, was worthless, and therefore the damages excessive, and that the judge ought to have directed the jury to find a verdict in the alternative—to be reduced to nominal damages on the memorandum being given up, was refused. *M'Leod* v. *M'Ghie*, 2 Scott (N.R.) 604; 2 Man. & G. 326.

Insurance Policy.]—A. effected an insurance on the life of B., and, after an act of bankruptcy, assigned the policy to C., who was aware of A.'s circumstances at the time. On the death of B. it was discovered that his life was not insurable. On a memorial presented by A. to the company, they ordered half the sum for which

B.'s life was insured to be paid as a gratuity, which C. received, and the policy was then cancelled, and remained in the hands of their officer. In an action by the assignee of A. against C., to recover the value of the policy :—Held, that he was only entitled to the parchment on which the policy was written, and not to the sum paid by the company to C., as it was a mere gratuitous and voluntary payment. *Wills* v. *Wells*, 2 Moore, 247; 8 Taunt. 264.

c. Costs.

Partial Success.]—Where a declaration proceeds for a number of chattels, if the plaintiff succeeds in proving his right to a part only, the defendant is entitled to have the issue as to the residue found in his favour; but he is not entitled to any costs, unless he has been put to expense as to the residue so claimed in the declaration. *Nicholls* v. *Bastard*, 1 Tyr. & G. 156; 2 C. M. & R. 659; 1 Gale, 295; 5 L. J., Ex. 7.

Where a plaintiff succeeds as to part of his claim only, the defendant is entitled to have the issue entered distributively. *Williams* v. *G. W. Ry.*, 1 D. (N.S.) 16; 8 M. & W. 856; 10 L. J., Ex. 472.

Jurisdiction.]—In an action claiming the return of a picture or its value and damages for its detention, the plaintiff recovered a verdict of 10*l.*, being its value as assessed by the jury, and 1*s.* damages for its detention :—Held, that the action was founded on tort, within the County Courts Act, 1867, s. 5, and the plaintiff was entitled to his costs. *Bryant* v. *Herbert*, 47 L. J., C. P. 670; 3 C. P. D. 389; 39 L. T. 17; 26 W. R. 898—C. A.

d. Effect of Judgment.

As Satisfaction.]—A recovery in trover vests the property in the chattel in the defendant as against the plaintiff. *Cooper* v. *Shepherd*, 3 C. B. 266; 4 D. & L. 214; 15 L. J., C. P. 237; 10 Jur. 758.

Semble, that judgment recovered for the conversion of goods, vests the property in the goods in the defendant, by relation from the time of conversion. *Buckland* v. *Johnson*, 15 C. B. 145; 2 C. L. R. 784; 23 L. J., C. P. 204; 18 Jur. 775.

The property in goods, in respect of which judgment has been recovered in an action of detinue, remains in the creditor until execution is issued on the judgment. Therefore, in the liquidation of the affairs of the defendant before execution has issued, the plaintiff cannot prove for the value of the goods. *Scarth* v. *Scarth*, 44 L. J., Bk. 29; L. R. 10 Ch. 234; 31 L. T. 737; 23 W. R. 153.

Where a plaintiff in an action of detinue has recovered judgment, the property in the goods obtained by the wrongdoer remains, until the judgment is satisfied, in the plaintiff, and the bankruptcy of the defendant will not vest it in the trustee. *Drake, Ex parte, Ware, In re*, 46 L. J., Bk. 105; 5 Ch. D. 866; 36 L. T. 677; 25 W. R. 641—C. A.

Judgment against one or two or more joint wrongdoers is a bar to an action against the other for the same cause of action, although such judgment is unsatisfied, so that a judgment against a defendant in trover without satisfaction does not vest the property in the goods in him. *Brinsmead* v. *Harrison*, 41 L. J., C. P. 190; L. R. 7 C. P. 547; 27 L. T. 99; 20 W. R. 784—Ex. Ch.

Although, if the plaintiff obtains satisfaction, he cannot afterwards bring trover in respect of the same chattel against a party to whom the defendant has transferred it; yet, if he has not obtained satisfaction, he may do so. *Marston* v. *Phillips*, 9 L. T. 289; 12 W. R. 8.

Effect of Prior Hearing.]—To a declaration for the recovery of some harness, the defendant pleaded that the plaintiff had previously applied to a police magistrate within the metropolitan district under 2 & 3 Vict. c. 71, s. 40, to order the delivery up to him by the defendant of the harness alleged to be unlawfully detained, that the magistrate, after due inquiry made into the title to such harness, refused to make such order, and that thereupon the plaintiff brought the action to recover the harness :—Held, that the proceedings before the magistrate did not estop the plaintiff from bringing the action, and that the plea was bad. *Dover* v. *Child*, 45 L. J., Ex. 462; 1 Ex. D. 172; 34 L. T. 737; 24 W. R. 537.

J. S. H.

TRUCK ACT.

See MASTER AND SERVANT.

TRUST AND TRUSTEE.

[BY WM. A. G. WOODS.]

A. CREATION AND DECLARATION OF TRUSTS.

1. *Creation of Trusts (Statute of Frauds).*
   - *a.* In General, 318.
   - *b.* Person Entitled to Declare Trust, 323.
   - *c.* Secret Trusts in Fraud of the Statute, 324.
   - *d.* Resulting Trusts and Trusts by Operation of Law, 324.
   - *e.* Assignment of Trusts, 326.
2. *Declaration of Trusts.*
   - *a.* General Principles, 326.
   - *b.* Declaration of Intention without Transfer of Property, 334.
   - *c.* Declaration of Intention with Transfer to Proposed Trustee, 347.
   - *d.* Orders Addressed by Creditor to his Debtor or Depositee of Fund, 352.
   - *e.* Voluntary Covenants or Promises to Transfer or Assign, 354.
   - *f.* Assignment or Settlement by Legal Owner by Deed, 359.
   - *g.* Assignment or Settlement of Equitable Interest by Beneficial Owner, 366.
   - *h.* Evidence and Burden of Proof, 367.

B. CLASSIFICATION OF TRUSTS.

1. *Executed Trusts*, 370.

2. *Executory Trusts.*
   - *a.* General Principles and Distinction between Executory Trusts by Marriage Articles and Wills, 370.
   - *b.* What is an Executory Trust, 371.
   - *c.* Limitations to Issue or Heirs (Rule in Shelley's case).
     - i. Articles, 374.
     - ii. Devises, 386.
   - *d.* Express Directions to Settle in "Strict Settlement," 395.
   - *e.* Directions to Settle on a Female, 397.
   - *f.* Directions to Settle Personalty as Heirlooms or on the Trusts of Freeholds, 400.
   - *g.* Directions to Settle Property to go with a Title, 402.
   - *h.* Powers Inserted in the Settlement, 403.
   - *i.* Hotchpot Clause, 410.
   - *j.* Trustees to Preserve Contingent Remainders, 410.
3. *Legal and Illegal Trusts*, 412.
4. *Public or Charitable Trusts*, 414.
5. *Constructive Trusts.*
   - *a.* In General, 416.
   - *b.* Implied and Resulting Trusts.
     - i. In General, 422.
     - ii. Joint Purchases, 426.
     - iii. Purchases in Name of Stranger, 427.
     - iv. Failure of Gifts.
       - a. In General, 432.
       - b. Charitable Gifts, 433.
   - *c.* Renewal of Leases, 438.
6. *Trusts for Advancement and Maintenance.*
   - *a.* Advancement, 452.
   - *b.* Maintenance.
     - i. Persons entitled, 458.
     - ii. Lunatics, 459.
     - iii. Married Women or Widows. 461.
     - iv. Statutory Powers of Maintenance, 463.
     - v. Fund out of which Maintenance payable, 464.
     - vi. Duration and Cesser, 471.
     - vii. Surplus, 485.
     - viii. Discretion of Trustees, 491.
     - ix. Account against Trustees, 497.
7. *Discretionary Trusts and Powers in the Nature of Trusts.*
   - *a.* Who may Exercise Powers or Trusts, 500.
   - *b.* Jurisdiction of Court to Interfere with Discretion of Trustees, 501.
   - *c.* Exercise of Powers and Trusts by the Court, 509.

C. THE TRUSTEE.

1. *Appointment of Trustees by Settlor*, 514.
2. *Acceptance or Disclaimer by Trustees.*
   - *a.* Acceptance, 515.
   - *b.* Disclaimer, 517.
3. *Estate of Trustees.*
   - *a.* When Trustees take Legal Estate, 520.
   - *b.* Quantity of Estate of Trustees.
     - i. General Principles, 527.
     - ii. Direction to Pay Debts or Legacies, 530.
     - iii. Power or Trust for Sale, 535.
   - *c.* Devolution of Trust Estates.
     - i. Devise in General Terms, 536.
     - ii. Assignment or Specific Devise, 540.
     - iii. Under Statute, 542.
4. *Retirement and Removal of Trustees.*
   - *a.* Retiring Trustees.
     - i. In General, 543.
     - ii. Rights, 545.
     - iii. Liabilities of Retiring Trustees, 545.
   - *b.* Removal of Trustees, 548.
5. *Appointment of New Trustees.*
   - *a.* Under Powers in Settlement.
     - i. Who may Exercise Power, 551.
     - ii. Exercise of Power Pending Suit, 559.
     - iii. Duty in Exercise of Power, 561.
     - iv. Who may be Appointed New Trustees, 561.
     - v. Number of New Trustees, 563.
     - vi. Rights and Liabilities, 565.
   - *b.* Under Statutory Powers, 567.
   - *c.* Appointment by the Court.
     - i. In General, 570.
     - ii. Under the Trustee Acts, 1850 and 1852, 572.
     - iii. Under the Trustee Acts prior to 1850, 580.
     - iv. Persons Appointed New Trustees, 585.
     - v. Number of New Trustees, 589.
     - vi. Powers of New Trustees, 591.
     - vii. Separate Sets of Trustees, 594.
     - viii. Practice.
       - a. Present Practice, 595.
       - b. Under the Trustee Acts, 1850 and 1852...596.
       - c. Under the Trustee Acts prior to 1850...601.
     - ix. Costs, 603.
6. *Rights, Powers, Duties and Liabilities*
   - *a.* In General, 604.
   - *b.* Management.
     - i. In General, 607.
     - ii. Power to Mortgage, 616.
     - iii. Power of Leasing, 621.
     - iv. Renewed Leases, 623.
     - v. Power of Sale, 625.
     - vi. Payments to and Receipts by Trustees, 635.
     - vii. Preservation, Repair, and Improvement of Premises, 636.
     - viii. Allowance of Payments and Advances, 644.
     - ix. Notice of Assignments, 647.
     - x. Remuneration, 650.
     - xi. Application for Advice or Opinion of the Court.
       - a. Under the General Jurisdiction of the Court, 652.
       - b. Under the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 30, repealed by Trustee Act, 1893...654.
   - *c.* Investment of Trust Funds.
     - i. In General, 658.
     - ii. Discretion of Trustees, 662.

iii. Express Powers of Investment with Consent, 654.
iv. Advancement of Trust Funds to Husband.
a. Express Power, 667.
b. Concurrence of Wife, 669.
v. Purchase of Land, 673.
vi. Mortgages.
a. Freeholds, 680.
b. Leaseholds, 691.
c. Railway Mortgages or Debentures, 692.
d. Stock Mortgages, 692.
vii. Other Securities.
a. Loan on Personal Security, 693.
b. Exchequer Bills, 695.
c. Foreign Bonds or Securities, 696.
d. Shares of Public Companies, 698.
e. South Sea Stock, 701.
viii. Non-investment by Trustees in Specified Securities, 701.
ix. Improper Sale of Stock, 704.
x. Funds in Court and Investment with Sanction of Court, 705.
xi. Power to vary Investments, 712.

7. *Indemnity, Lien and Reimbursement.*
a. Indemnity Clause, 714.
b. Express Agreements by Cestuis que Trust to Indemnify Trustees, 717.
c. Right of Trustee in other Cases, 719.
d. Statutory Power of Court to Impound Interest of Beneficiary, 731.

8. *Release*, 733.

9. *Contribution from Co-Trustee*, 737.

10. *Solicitor-Trustee*, 742.

11. *Liabilities of Trustees for Breaches of Trust.*
a. Nature of Breach of Trust, 746.
b. Personal Liability of Trustees.
i. In General, 750.
ii. Trustees de facto, 756.
iii. Deceased Trustees, 758.
iv. Loss of Trust Property, 763.
v. Negligence in getting in Trust Property, 763.
vi. Payment of Trust Moneys to Persons not Entitled, 767.
Liability for Interest or Profits.
a. Interest, 771.
b. Rate of Interest, 773.
c. Compound Interest and Rests, 776.
d. Profits Accruing from Trust Property, 778.
viii. Title Deeds, 786.
c. Liability of Trustees for Acts of Co-Trustees.
i. In General, 787.
ii. Leaving Trust Funds under Sole Control of Co-Trustee, 789.
iii. Trustee Joining in Receipts, 795.

12. *Agents Employed by Trustees.*
a. Rights of Trustees in respect of Appointment, 795.
b. Liability of Trustees for Acts of Agents.
i. In General, 797.
ii. Bankers, 799.
iii. Brokers, 801.
iv. Solicitors, 802.
c. Personal Liability of Agents.
i. In General, 805.
ii. Accountants, 806.
iii. Stockbrokers, 807.
iv. Bankers, 807.
v. Solicitors, 810.

D. THE CESTUI QUE TRUST.

1. *Possession of Cestui que Trust*, 818.

2. *Alienation by and Transfer to Cestui que Trust*, 821.

3. *Dealings between Trustee and Cestui que Trust*, 825.

4. *Information as to Trust Fund*, 828.

5. *Production of Title-Deeds*, 828.

6. *Option as to Interest or Profits*, 829.

7. *Lien*, 829.

8. *Liability of Cestui que Trust for Loss of Trust Fund*, 831.

9. *Remedies for Breach of Trust.*
a. In General, 833.
b. Attachment, 835.
c. Receiver, 837.
d. Inquiries and Accounts.
i. Inquiries, 840.
ii. Accounts, 842.
iii. Wilful Default, 844.
iv. Practice, 847.
v. Acquiescence or Delay, 849.

E. ACTIONS BY AND AGAINST TRUSTEES.

1. *In General*, 862.

2. *Parties.*
a. Settlor or his Representatives, 866.
b. Cestuis que Trust, 868.
c. Trustees, 874.
d. Third Parties, 889.

3. *The Statute of Limitations*, 891.

F. FOLLOWING TRUST PROPERTY.

1. *Investments in the Name of or under the Control of Trustee.*
a. In General, 895.
b. Shuffling the Funds of Two different Settlements, 898.
c. Trust Money Invested in Land, 899.

2. *Trust Moneys in Hands of Bankers or other Agents*, 902.

3. *Relief against Purchasers*, 914.

G. PAYMENT INTO AND OUT OF COURT.

1. *Payment into Court.*
a. Voluntary Payment into Court, 922.
b. Order for Payment into Court, 923.
c. Under the Repealed Trustee Relief Acts, 930.
d. Effect of Payment into Court on Powers of Trustees, 934.
e. Costs of Payment into Court, 936.

2. *Administration of Fund and Payment Out.*
a. Jurisdiction of the Court, 943.

b. Persons to whom Payment will be Made, 946.
c. Practice, 951.
d. Costs of Payment Out, 956.

H. VESTING ORDERS, CONVEYANCES, AND TRANSFERS.

1. *Vesting Orders.*
a. Under the Trustee Act, 1893...961.
b. Under the Trustee Acts, 1850 and 1852.
i. In General, 962.
ii. Copyholds, 967.
iii. Leaseholds, 970.
iv. Mortgages, 972.
v. Stock and Choses in Action, 976.
vi. Sales, 981.
vii. Other Cases, 983.
c. Form of Vesting Order, 985.
d. Practice as to Vesting Order.
i. In General, 987.
ii. Lunacy, 990.
iii. Costs, 994.

2. *Conveyances and Transfers.*
a. Under the Trustee Acts, 1850 and 1852...997.
b. Under the Trustee Acts prior to 1850.
i. Conveyances under 7 Anne. c. 19...1001.
ii. Conveyances under 4 Geo. 2, c. 10...1004.
iii. Conveyances under 6 Geo. 4, c. 74...1005.
iv. Conveyances under 11 Geo. 4 & 1 Will. 4, c. 60...1005.
v. Transfer of Stock under 36 Geo. 3, c. 90, and Succeeding Statutes, 1015.

I. COSTS, CHARGES, AND EXPENSES.

1. *In General*, 1019.
2. *Rights of Co-trustees inter se*, 1024.
3. *Indemnity for Costs to Trustee by Cestui que Trust*, 1024.
4. *Trustees Acting in a Professional Character*, 1025.
5. *Where Settlement Set Aside*, 1030.
6. *Opinion of Counsel*, 1031.
7. *Unsubstantiated Charges of Breach of Trust or Fraud*, 1032.
8. *Misconduct and Breach of Trust.*
a. In General, 1033.
b. Wilful Misconduct, 1040.
c. Disclaimer or Refusal to Act, 1043.
9. *Trustee Refusing to Give Accounts or Information*, 1044.
10. *Trustee Refusing to Convey or Transfer the Trust Fund*, 1045.
11. *Separate Defences*, 1050.
12. *Fund Liable for Payment of Costs*, 1053.
13. *Taxation of Costs.*
a. As between Party and Party, 1058.
b. As between Solicitor and Client, 1060.
14. *Practice on Allowance of Costs*, 1062.

A. CREATION AND DECLARATION OF TRUSTS.

1. *Creation of Trusts (Statute of Frauds).*
a. In General, 318.
b. Person Entitled to Declare Trust, 323.
c. Secret Trusts in Fraud of the Statute, 324.
d. Resulting Trusts and Trusts by Operation of Law, 324.
e. Assignment of Trusts, 326.

2. *Declaration of Trusts.*
a. General Principles, 326.
b. Declaration of Intention without Transfer of Property, 334.
c. Declaration of Intention with Transfer to Proposed Trustee, 347.
d. Orders addressed by Creditor to his Debtor or Depositee of Fund, 352.
e. Voluntary Covenants or Promises to Transfer or Assign, 354.
f. Assignment or Settlement by Legal Owner by Deed, 359.
g. Assignment or Settlement of Equitable Interest by Beneficial Owner, 366.
h. Evidence and Burden of Proof, 367.

1. CREATION OF TRUSTS (STATUTE OF FRAUDS).

a. In General.

Effect of Statute on Use.]—The statute of frauds has only imposed a form in declaring the use; the control of the use remains as it was before the statute, the absolute will and declared intent of the owner. *Wright* v. *Cadogan (Lord)*, 2 Eden, 257.

Proof of Trust by Writing.]—Distinction between s. 4 of the statute of frauds, requiring the agreement to be in writing and signed by the party to be charged, and s. 7, requiring that the trust shall be manifested, not that it shall be constituted by writing. *Randall* v. *Morgan*, 12 Ves. 74; 8 R. R. 289.

All declarations of trust under the statute of frauds must be in writing. *Willis* v. *Willis*, 2 Atk. 71. S. P., *Davies* v. *Otty*, infra, col. 322.

When the court is called upon to establish or act upon a trust of lands, it must not only be manifested and proved by writing that there is a trust, signed by the person by law enabled to declare the trust, but it must also be manifested and proved by writing, signed as above, what the trust is. *Smith* v. *Matthews*, 3 De G. F. & J. 139; 30 L. J., Ch. 445; 7 Jur. (N.S.) 378; 4 L. T. 266; 9 W. R. 644. And see *Morton* v. *Tewart*, 2 Y. & C. C. C. 67; and *Dale* v. *Hamilton*, 5 Hare, 369; 2 Ph. 266; 16 L. J., Ch. 397; 11 Jur. 574.

A., being in possession of the office of clerk of the crown, &c., in the king's bench, in which

B. had also an estate for life, procured B. to surrender, and solicited a patent for himself and C., and took a note from C., promising to declare a trust for A. The patent afterwards was obtained; A. died in debt, and without calling for a declaration of this trust; this note was held to be a sufficient declaration of trust. *Bellamy* v. *Burrow*, Cas. t. Talbot, 97; 2 Eq. Cas. Abr. 745, 4.

A lease for years to A., but by parol agreed to be in trust for A. and B. jointly; B. pays a moiety of the rent. If this is within the statute of frauds, &c., quære. *Riddle* v. *Emerson*, 1 Vern. 108.

A declaration of uses by the founder of a charity, presumed from an entry in an ancient book, purporting to be such declaration, but without signature or date, the book being kept by the trustees for entering their proceedings, and containing an order by the trustees dated six years after creation of the trust, that the declaration of the founder be then entered as a discretion to the trustees. *Att.-Gen.* v. *Boultbee*, 2 Ves. 379; 2 R. R. 265.

The statute of frauds requires, not that a trust shall be created by writing, but that it shall be proved by writing; which may be subsequent to its commencement. Trust raised by implication from letters, and a paper referred to by them, and in the handwriting of the party though not signed or dated; and by operation of law from advances of money. When letters are to raise a trust, there must be demonstration, that they relate to the subject. The Master of the Rolls said, the court had gone too far in taking cases out of the statute of frauds on the ground of part performance of an agreement, and the relief ought to have been confined to compensation. On appeal, Lord Chancellor affirmed the decree at the rolls, and held further that the case was not within the statute of frauds: the question being, whether a partnership subsisted in the trade of a colliery: a question of fact to be tried by evidence, as upon an issue; the interest in the lease passing as an incident to the trade by operation of law; the evidence from books and papers was admitted; and an issue refused. *Forster* v. *Hale*, 3 Ves. 696; 5 Ves. 308; 4 R. R. 128.

Agreement before Marriage—Not signed by Party.]—Shortly before marriage M., the intended husband, signed and delivered to C., the intended wife, an agreement for the separate use by the latter of certain tenements held by her in fee. The agreement, however, was not signed by C. After the marriage she made a will devising the said property to the defendants, who upon her decease took possession of the same. In an action by the plaintiff, C.'s heir-at-law, to establish his title to and recover possession of the property:—Held, that the agreement not having been signed by C., it was by reason of s. 7 of the statute of frauds, void as a declaration of trust for separate use of the fee simple, M. having only an estate for the joint lives of himself and C., with a possible estate by curtesy, and that the plaintiff was, therefore, entitled to recover; the mere renunciation by M. of his marital rights in C.'s real property not being sufficient to clothe her with a testamentary power, or to constitute a valid declaration of trust of the fee. *Dye* v. *Dye*, 53 L. J., Q. B. 442; 13 Q. B. D. 147; 51 L. T. 145; 33 W. R. 2—C. A.

Will—Writing subscribed by Testator.]—Testator by his will in 1738, devised lands to defendants and their heirs, without declaring any trust on the face of the will; but he subscribed a writing, wherein he recommended defendants to see his will performed according to the humble request and the wonted and well disposed charitable disposition of (defendant) C., towards all men, and to bring the whole affair to its desired issue. Testator died, and his heir-at-law brought a bill to set aside his devise, as void by 9 Geo. II. c. 36. The Lord Chancellor said that the declaration of trust must be executed according to the statute of frauds, to bring it within the statute of mortmain, and held that the paper writing was not a sufficient declaration of trust within the statute, though in the case of a feoffment it might have been a good declaration of a use. *Adlington* v. *Cann*, 3 Atk. 141.

Foreign Land—Defence of Statute of Frauds.]—Sect. 7 of the statute of frauds may be relied on as a defence by a defendant against whom it is sought to prove and enforce in this country a trust of lands situate abroad. *Rochefoucauld* v. *Boustead*, 66 L. J., Ch. 74; [1897] 1 Ch. 196; 75 L. T. 502; 45 W. R. 272—C. A.

Parol Evidence to Avoid Fraud—Fraudulent Denial of Trust.]—It is fraud on the part of a person to whom land is conveyed as a trustee, and who knows it to have been so conveyed, to deny the trust and claim the land. Consequently, notwithstanding the statute of frauds, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed on trust, and that the grantee, knowing the facts, is denying the trust. *Bartlett* v. *Pickersgill* (1 Cox. 15; 1 Eden, 515) is inconsistent with the modern decisions on the subject, and must be treated as overruled. *Ib.*

Though there can be no parol declaration of a trust since 29 Car. 2, yet parol evidence is proper in avoidance of fraud. *Hutchins* v. *Lee*, 1 Atk. 448.

Leaseholds—Absolute Assignment—Object—Mortgage by Assignee—Verbal Agreement to Reassign.]—Where a leasehold house had been absolutely assigned by the Duchess of M. to the late Duke of M., and he had mortgaged it, the equity of redemption being reserved to him, parol evidence was admitted in the administration of the late duke's estate to show that the house was transferred to him simply for the purpose of enabling him to borrow money upon it, and that, subject to the mortgage created by him, it was intended that the house should continue to belong to the duchess, and that it should be reassigned to her. Inasmuch as the statute of frauds could not be used to cover a fraud, the duke could not have set up the statute so as to exclude such parol evidence if he had been called upon by the duchess to reassign the house, and his creditors were in no better position, and consequently the equity of redemption in the house belonged to the duchess. *Irnham* (*Lord*) v. *Child* (1 Bro. C. C. 92; 2 Dick. 554) distinguished. *Haigh* v. *Kaye* (infra) followed in preference to *Leman* v. *Whitley* (infra). *Marlborough* (*Duke*), *In re*, *Davis* v. *Whitehead*, 63 L. J., Ch. 471; [1894] 2 Ch. 133; 8 R. 242; 70 L. T. 314; 42 W. R. 456.

Conveyance in Fear of Adverse Decision.]—The statute of frauds is not available as a

defence to a suit to establish a trust where it would be fraud to deny the trust. *Haigh* v. *Kaye*, 41 L. J., Ch. 567; L. R. 7 Ch. 469; 26 L. T. 675; 20 W. R. 597.

The defence that the transaction under which the plaintiff claims was illegal, must be pleaded in distinct terms. *Ib.*

The plaintiff conveyed an estate to the defendant by a deed which purported to be executed on a sale. No money was in reality paid. The defendant, in a suit to obtain a reconveyance, stated in his answer that the conveyance was executed by the plaintiff in fear of an adverse decision in litigation then pending against him:—Held, that this was not, as pleaded, any defence. *Ib.*

The defendant admitted that the conveyance was upon a verbal understanding that the estate should be reconveyed when called for, unless in the meantime arrangements for a purchase by him should be completed. He alleged that such arrangement had been completed, and claimed to retain the estate, and he claimed the benefit of the Statute of Frauds as a defence to the case of trust set up by the plaintiff. The evidence did not support the allegation as to the arrangement for a sale being complete:—Held, that the Statute of Frauds afforded no defence. *Ib.* And see *Lincoln* v. *Wright*, 4 De G. & J. 16; 28 L. J., Ch. 705; 7 W. R. 350.

Conveyance to give Qualification as Bailiff.]—A., owner of estates in the Bedford Level, wishing to give his son a qualification as bailiff, for which, according to the Bedford Level Act, it is necessary to "have" 400 acres in the Level, wrote to the registrar of the Level, stating his wish, and asking him to find a qualification. The registrar selected out of A.'s land the smallest lot that exceeded 400 acres, and sent him a deed, by which he purported to convey it to the son in fee, in consideration of natural love and affection. This deed was executed by A., and registered. The son died soon after, without having ever heard of the transaction. It appeared that neither A. nor the registrar intended or considered the transaction to have the effect of making the son beneficial owner, nor intended any fraud or illegality. On a bill being filed by A. to establish his title to the land:—Held, that the letter written by A. to the registrar excluded any defence grounded on the Statute of Frauds. *Childers* v. *Childers*, 1 De G. & J. 482; 26 L. J., Ch. 743; 3 Jur. (N.S.) 1277; 5 W. R. 793.

Held, also, on the construction of the act, that a mere legal estate was a sufficient qualification, and that, therefore, there was nothing illegal in A.'s design, no intention to represent the son as beneficial owner appearing. *Ib.*

Held, that on the ground of trust, or of mistake, or on both grounds, the plaintiff was entitled to the relief sought. *Ib.*

Held, that this conclusion was not affected by the circumstance, that the legal estate was outstanding under a mortgage in fee not known to the registrar. *Ib.*

Semble, that even apart from the plaintiff's letter the Statute of Frauds would not have been a good defence. *Ib.*

Conveyance by Son to Father to Raise Money.]—A son conveys an estate to his father nominally as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage for the use of the son. The father died shortly afterwards, and before any money was raised, having, by a will subsequent to the conveyance, made a general devise of all his real estate. The case is within the Statute of Frauds, and parol evidence is not admissible to prove the trust, but the son has a lien on the estate as vendor for the apparent consideration, no part of which was paid. *Leman* v. *Whitley*, 4 Russ. 423; 6 L. J. (O.S.) Ch. 152.

Fraud in Heir.]—A., by will, gave lands to S., and, having afterwards purchased other lands, he on his deathbed desired B., his heir-at-law, not to hinder S. from enjoying the newly purchased lands, though he had not by any writing declared the trust for S. B. suffered S. to enjoy the lands eleven years, and then pretended he thought the after-purchased lands had passed by the will; declared, that this was out of the Statute of Frauds, and that B. letting S. enjoy it so long was an execution of the trust, and, though no express fraud was proved against B. (as in *Lester* v. *Foxcroft*, Colles, P. C. 108), yet the possession of eleven years was a strong presumption that he suffered it in execution of the testator's declaration. *Harris* v. *Horwell*, Gilb. Eq. R. 11.

Conveyance in Apprehension of Indictment for Bigamy.]—The plaintiff, apprehensive of being indicted for bigamy (which it turned out he was not liable to be), conveyed real property to the defendant, on a parol agreement to retransfer when the difficulty had passed. On a bill for a retransfer, the defendant denied the agreement, and insisted on the Statute of Frauds, the trust not being in writing:—Held, that this was a case of fraud, and the statute did not apply. *Davies* v. *Otty*, 35 Beav. 208; 5 N. R. 391; 34 L. J., Ch. 252; 12 L. T. 789; 13 W. R. 484. *And see* the same case on demurrer, 2 De G. J. & S. 238; 4 N. R. 256; 10 Jur. (N.S.) 506; 10 L. T. 632; 12 W. R. 896.

Assignment of Agreement for Lease.]—A plaint in the county court stated that the plaintiff assigned to the defendant the agreement for a lease of certain premises, but it was alleged that there was a parol agreement that part of the premises was to be held by the defendant in trust for the plaintiff. Evidence was given on both sides, but the judge, being of opinion that actual fraud had not been proved against the defendant, and there being no resulting trust in the assignment, decided that the Statute of Frauds was applicable, and dismissed the plaint, without coming to any distinct decision upon the evidence:—Held, that the judge ought to have decided that the Statute of Frauds had no application; and the court, upon a consideration of the evidence, decided that the plaintiff was entitled to relief, and reversed the decree. *Booth* v. *Turle*, L. R. 16 Eq. 182.

Part Performance—Evidence of real Consideration admissible.]—F., a mortgagee with power of sale, agreed with K., who was entitled to a reversionary interest in the lands comprised in the mortgage, not to sell without his consent; and afterwards proposed to make a lease for a term to W. at a fine; K. refused to consent, unless the lands were settled on his wife (who was the daughter of W.) and her children after the death

of W.; and this being acceded to, K. gave his written consent, and the lease was executed by W., upon which occasion the following document was signed by W. and K.: "It is agreed by W. and K. that the lease and lands of Largan, after death of W., shall be and become, through his love for her, the property of Mrs. K. in trust for her child or children by K. (if blessed with such), if not, to be for her sole use and benefit":—Held, first, that this was a declaration of trust by W. in favour of Mrs. K. and her children, and that, after W.'s death, his personal representative became a trustee for them. *Kelly* v. *Walsh*, 1 L. R., Ir. 275.

Held, secondly, that if it was not a valid declaration of trust, it was an agreement which should be specially performed, upon the ground that, although the consideration expressed was not valuable, yet the consent by K. was a part performance which took the case out of the Statute of Frauds, and that evidence of the real consideration was admissible. *Ib.*

b. Person Entitled to Declare Trust.

Beneficial Owner.]—Where lands are held in trust, the declaration of trust required by s. 7 of the Statute of Frauds to be signed "by the party who is by law enabled to declare such trust," must be signed by the beneficial owner, and not by the trustee who has the legal estate. *Tierney* v. *Wood*, 19 Beav. 330; 23 L. J., Ch. 895; 2 W. R. 577.

The legal fee in lands was vested in A. in trust for B. B. signed a document addressed to A., directing the lands and other property should, after his death, be held for the benefit of certain persons. The document was not attested:—Held, that this was an effectual declaration of trust, within s. 7 of the Statute of Frauds, by the beneficial owner, and not a testamentary instrument. *Ib.*

When the legal estate in land is vested in a trustee for an absolute beneficial owner, "the party who is by law enabled to declare a trust" of the land, within the meaning of s. 7 of the Statute of Frauds, is the beneficial owner only. *Kronheim* v. *Johnson*, 47 L. J., Ch. 132; 7 Ch. D. 60; 37 L. T. 751; 26 W. R. 142.

In pursuance of an arrangement by which a settlement should be made on an infant by his grandmother, K., a lease was taken by J. in his own name. Part of the arrangement was that the real transaction should be kept secret, and that the settlement should appear to be made by J. Accordingly a settlement was executed by J., by which the property was settled on the infant, but which, the solicitors not having been instructed as to the real nature of the transaction, contained an ultimate trust in favour of J. In an action by K. to have the property assigned to her:—Held, that the declaration of trust not being made by the beneficial owner was not valid within s. 7 of the Statute of Frauds. *Ib.*

Form of Declaration.]—K. had written a letter, signed with her initials, and in the same envelope was inclosed a postscript headed "supplement," written in the same hand, but on a separate paper and unsigned. The postscript began with the words, "I had quite omitted to tell you and Martin," and was alleged to contain a declaration of trust in favour of the infant:—Held, that the signature did not govern the postscript so as to make it valid as a declaration of trust within s. 7 of the Statute of Frauds. *Ib.*

c. Secret Trusts in Fraud of the Statute.

Devise—Paper writing signed by Testator.]—Testator by his will, in 1738, devised to defendants and their heirs, without declaring any trusts of the will, and soon afterwards died, and a paper writing signed by him was found, in which he recommended defendants to see his will performed according to the humble request, and the wonted and well-known charitable disposition of defendant C. towards all men, and to bring the whole affair to its desired issue:—Held, that this was not a sufficiently specific trust for charity to bring it within the Mortmain Act, 9 Geo. 2, c. 36; also, to bring it within that statute, the trust must be declared according to the Statute of Frauds, and that this was not a sufficient declaration of trust within the Statute of Frauds. *Adlington* v. *Cann*, 3 Atk. 141.

The Statute of Mortmain has not abrogated the Statute of Frauds, which, being made for the public good, ought normam imponere futuris. *Ib.* And see *Stickland* v. *Aldridge*, 9 Ves. 516; 7 R. R. 292.

The Statute of Frauds, though it does not govern the particular provisions of the Statute of Mortmain, yet it governs the construction of that act, as being a subsequent one. *Ib.*

See also CHARITY—WILL.

d. Resulting Trusts and Trusts by Operation of Law.

Copyholds.]—Resulting trusts of copyholds as well as of freeholds, are within the Statute of Frauds and Perjuries. *Withers* v. *Withers*, Amb. 152.

C. lent money upon mortgage of copyhold, but being infirm, &c., surrender was taken in name of D., who executed declaration of trust. C. after purchased equity of redemption, and second surrender was made in name of D. also, but without a declaration of trust:—Held, sufficient trust within the Statute of Frauds, without a second declaration of trust. *Acherley* v. *Acherley*, 7 Bro. P. C. 273.

Lease.]—A. agreed for beneficial lease of forty-one years; B. advanced money towards the fine, &c., and lease was taken in B.'s name without a declaration of trust:—Held, that B. was a trustee for A., and upon being repaid his advance with interest, should assign the lease to A., and account with him for the profits, and pay costs:—Held, also, that the trust being proved by letters of B.'s own handwriting, took the case out of Statute of Frauds. *O'Hara* v. *O'Neill*, 7 Bro. P. C. 227.

Mortgage.]—Mortgage in fee 700*l.* paid by A., but half of the money was B.'s, yet for want of a declaration in writing, B. was not admitted to read to the proof of it, so as to create a trust for him, being against the Statute of Frauds. *Newton* v. *Preston*, Pre. Ch. 103.

In Opposition to Will.]—Where a resulting trust is insisted on in opposition to the legal operation of a will, parol evidence may be admitted to rebut the equity. *Lake* v. *Lake*, Amb. 127.

By Operation of Law.]—Nothing is a resulting trust under the Statute of Frauds and Perjuries but what are called trusts by operation of law. *Lloyd* v. *Spillet*, 2 Atk. 150.

——New Lease.]—In 1865 A., by a post-nuptial settlement, in consideration of natural love and affection, assigned a lease for a term expiring in 1905 to trustees in trust for the benefit of his wife. In 1870, without disclosing the settlement, A. obtained a lease of the same premises for forty years in consideration of a premium of 9*l.* and the surrender of the old lease. The old lease, cancelled, and the new lease, were delivered by A. to his wife:—Held, that although there was no written declaration of trust of the new lease, such lease was "by operation of law" subject to the trusts of the settlement declared in respect of the old lease. *Lulham, In re, Brinton* v. *Lulham*, 53 L. T. 9; 33 W. R. 788—C. A. Affirming 53 L. J., Ch. 928.

Rebuttal as to part of Estate.]—Where land is purchased with the money of A., in the name of B., the resulting trust to A. may be rebutted as to part of the land, or part of the interest in the land. Where A. took a mortgage in the name of B., declaring that the principal sum should be for the benefit of B., and received the interest during his life, this being personal estate is not within the clause in the Statute of Frauds relating to resulting trusts, or the doctrine of resulting trusts under that statute, but the property after the death of A. will belong to B. by force of the parol declaration. *Benbow* v. *Townsend*, 1 Myl. & K. 506; 2 L. J., Ch. 215.

A son conveys an estate to his father nominally as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage for the use of the son. The father died shortly afterwards, and before any money was raised, having, by a will subsequent to the conveyance, made a general devise of all his real estate. The case is within the Statute of Frauds, and parol evidence is not admissible to prove the trust, but the son has a lien on the estate as vendor for the apparent consideration, no part of which was paid. *Leman* v. *Whitley*, 4 Russ. 423; 6 L. J. (O.S.) Ch. 152.

Conveyance for Object not Illegal.]—A plaintiff, believing that he was liable to be convicted for bigamy, conveyed his land to the defendant in consideration of 20*l.* It was proved by parol evidence that the deed was executed on the understanding that the defendant should hold the land at the plaintiff's disposal. The consideration was never paid, and the plaintiff remained in possession of the land, and partly paid off a mortgage upon it:—Held, that the transaction was not illegal, and that the plaintiff was entitled to a decree for a reconveyance of the land, the Statute of Frauds being excluded, both on the ground of fraud and of a resulting trust within s. 8. *Davies* v. *Otty*, 35 Beav. 208; 5 N. R. 391; 34 L. J., Ch. 252; 12 L. T. 789; 13 W. R. 484.

In 1857 R., being seised of freeholds, and being also a holder of shares in companies, which he then feared would involve him in heavy liabilities, conveyed the property to H. by deeds in the form of purchase deeds; but no money really passed. R. received the rents till his death intestate. H. then executed a deed of trust, declaring that the property had been conveyed to him in trust for R.'s wife. The wife received the rents till her death, and purported to dispose of the property by will in favour of her daughters:—Held, that the Statute of Frauds was not satisfied, and that, as no declaration of trust had been executed in the lifetime of R., there was a resulting trust in favour of R. at the time, and consequently that the heir-at-law was beneficially entitled to the property, and to have a reconveyance from H., and an account of rents and profits. *Rudkin* v. *Dolman*, 35 L. T. 791.

e. Assignment of Trusts.

By Cestui que trust.]—Sect. 9 of the Statute of Frauds refers to assignments by the cestui que trust. *Jerdein* v. *Bright*, 2 J. & H. 325; 30 L. J., Ch. 336; 4 L. T. 12; 9 W. R. 267.

The same solemnities are required by the statute to dispose of a trust or equitable interest in freehold lands, as of a legal estate in such lands, nor can a testator revoke a trust any more than he can devise it without these solemnities. *Adlington* v. *Cann*, 3 Atk. 141.

2. Declaration of Trusts.

a. General Principles.

Uses.]—Though a use or trust must arise out of the original feoffment to uses, yet they need not be specifically created at the time of execution of the deed. *Wright* v. *Cadogan* (*Lord*), 2 Eden, 256.

The Statute of Uses (27 Hen. 8, c. 10) was made to execute and bring the estate to the use; and after the statute, the cestui que use was seised of the estate at law as before he was of the use in equity: but the necessities of mankind, and reasonable occasions in families, obliged the judges to give way to uses notwithstanding. Contingent uses, springing uses, executory devises, and powers over uses, were foreign to the notions of the common law, and could not be let in upon the common law fees, but were let in by construction (by the judges themselves), upon uses after they became legal estates; yet the judges still adhered to the doctrine, that there could be no such thing as a use upon a use; but when the first use was declared, there it was executed, and must rest for that estate. *Hopkins* v. *Hopkins*, 1 Atk. 591.

Uses in equity and mere trusts stand on different foundations, and will not be governed by the same reasoning. *Id.*

Upon a trust in equity, no estate can be gained by disseisin, abatement, or intrusion, while the trustee continues in possession of the land, neither will equity suffer a merger of the trust estate; for uses and mere trusts stand on very different foundations, and are not governed by the same reasoning. All trusts are executory, and the court must follow the intent of the parties, as far as the rules of law will admit, howsoever improperly a will may be penned. *Id.*

Natural love and affection is very sufficient to create a use, and will amount to a covenant to stand seised, though no other consideration appear. *Lloyd* v. *Spillet*, 2 Atk. 149.

Uses were introduced during the contests between the houses of York and Lancaster, to avoid forfeitures, and were exactly what trusts are now. *Ib.*

Where there was an agreement to suffer a

recovery, and uses were declared by it, though it was suffered at a different time, yet if there was no subsequent declaration of uses it enured to those so declared. *Stapilton* v. *Stapilton*, 1 Atk. 7.

A., tenant for life, and R., his son and first tenant in tail, suffered a recovery and declared the uses to N., his heirs and assigns, until the payment of 4,000*l*., with interest, and then to the uses of a settlement of 1737, viz., to A. for life, remainder to his first and other sons in tail: —Held, that the declaration to the uses of the deed of 1737, though void as a limitation of the legal estate, was a good declaration of the trust estate. *Stoney* v. *Saunders*, Hay. & J. 519.

On a marriage settlement, lands were conveyed to and to the use of trustees and their heirs, to the use of the husband for life, remainder to the use of the wife for life, remainder to the first, &c., sons of the marriage: these limitations to the husband for life, &c., are trusts only, and not uses; and when the husband and wife levied a fine to a mortgagee to raise money, though the fine would have been a forfeiture of the wife's estate for her life had she had the legal estate, against which equity will not relieve, yet decreed that a trust estate was not forfeited by a fine. *Whetstone* (*Lady*) v. *Bury*, 2 P. Wms. 146; Pre. Ch. 591.

And see *Att.-Gen.* v. *Scott*, Cas. t. Talb. 138.

Where an estate was limited to A., to the use of A. in trust for B.:—Held, that A. took the legal estate, and that, although he took it by the common law, and not by force of the Statute of Uses, yet the second use could not be executed by the statute. *Doe* d. *Lloyd* v. *Passingham*, 6 B. & C. 305; 9 D. & R. 416; 5 L. J. (O.S.) K. B. 146; 30 R. R. 327.

Semble, by analogy to a use before the Statute of Uses, there cannot be an occupant of a trust. *Penny* v. *Allen*, 7 De G. M. & G. 409; 3 Jur. (N.S.) 273; 5 W. R. 303.

No case of a springing use ever introduced in the middle of a limitation, but it always comes in afterwards, and determines the first gift in fee; and whenever it happens to arise, it displaces the first gift, and changes the uses in favour of other persons. *Carwardine* v. *Carwardine*, 1 Eden, 34.

No instance where equity has considered an estate as not executed, at the same time that law would have considered it as executed. *Ib.*

Executory devise is in its nature equitable, and becomes legal estate only by application of the Statute of Uses, which executes every species of interest that a court of equity would before; and that has been extended to cases not in contemplation of the statute. *Perry* v. *Phelips*, 1 Ves. 255.

The Statute of Uses has executed the legal estate, and joined it to the use; the legal estate, therefore, must want to be executed by a conveyance to make it a trust in equity. *Bagshaw* v. *Spencer*, 2 Atk. 583.

If a purchaser for a valuable consideration has not the legal estate properly conveyed to him, though the consideration cannot create a use by way of covenant to stand seised, yet the vendor will be considered a trustee for the purchaser. *Pollexfen* v. *Moor*, 3 Atk. 273.

Where an act is to be done, as a conveyance made, the estate is a trust, not a use executed. *Mott* v. *Buxton*, 7 Ves. 201.

Where a trust is limited to a man and the heirs of his body, with remainder over, the court will not decree the trustees to convey to him an estate in fee, but an estate tail only. *Saunders* v. *Neril*, 2 Vern. 428.

Lands limited to A. in trust for a feme covert, and that A. should receive the rents and apply them as the feme whether sole or covert should direct. This is a trust, and not a use, executed by the statute. *S. C.*, 1 Vern. 415.

Copyholds.]—The Statute of Uses not applying to copyholds, on a devise of freeholds and copyholds together, the legal estate in the copyholds attaches that in the freeholds, and makes it vest in the first devisee. *Baker* v. *Parson*, 42 L. J., Ch. 228.

Requisites of a Trust.]—There are three requisites to constitute a trust, viz., sufficient words, a definite subject, and a certain object. *Cruwys* v. *Colman*, 9 Ves. 323; 7 R. R. 210.

A trust is, where there is such a confidence between parties that no action will lie, but is a case merely for the consideration of equity. *Sturt* v. *Mellish*, 2 Atk. 612.

Trusts may be constituted, not merely by direct declaration of trusts, but also by the constructive operation of the consequences following from the acts of parties. Thus equity will enforce the execution of a trust, not only against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of it. *Pooley* v. *Budd*, 14 Beav. 34.

A declaration of trust has, in a court of equity, the same effect as a transfer of the legal estate, or as the vesting of a legal interest has in a court of law. *Collinson* v. *Patrick*, 2 Keen, 123; 7 L. J., Ch. 83.

An instrument may be effectual as a declaration of trust, or tantamount to a declaration of trust, though it does not contain the word "confidence" or "trust," or the word "trustee." *Kekewich* v. *Manning*, 1 De G. M. & G. 176; 21 L. J., Ch. 577; 16 Jur. 625.

This court will under particular circumstances convert an imperfect gift into a trust, although not supported by valuable consideration. *Ib.*

Whatever rule there may be against volunteers, it does not apply to the case of a cestui que trust claiming against his trustee, for that which is considered a trust may be created gratuitously, and the absence of consideration for its creation is in general immaterial. *Ib.*

Where an instrument is in form a complete and an immediate assignment, and of such a nature as to give the assignee a right as between him and the assignor to take or receive the property comprised in it presently, it will, although voluntary, be supported in equity, and considered as a perfect declaration of trust of such of the property as was not assignable at law. *Richardson* v. *Richardson*, 36 L. J., Ch. 653; L. R. 3 Eq. 686; 15 W. R. 690.

In order to render a voluntary settlement valid and effectual, the settlor must do everything which, according to the nature of the property comprised in the settlement, is necessary to transfer the property, and render the settlement binding upon him; as by actually transferring the property to the persons for whom he intends to provide, or to trustees for the purposes of the settlement, or by declaring that he himself holds the property in trust for those purposes; and if the property is personal the trust may be declared either by writing or by parol; but there

is no equity to protect an imperfect gift. *Milroy* v. *Lord*, 4 De G. F. & J. 264; 31 L. J., Ch. 798; 8 Jur. (N.S.) 806; 7 L. T. 178.

If, however, the gift is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust. *Ib.*

Where an instrument set up as a declaration of trust, or of gift, shows that something more must be done, and is contemplated by the person said to have made the declaration of trust or gift to be done in order to perfect and complete it, the court will not give effect to the instrument as either a declaration of trust or a gift, but will regard it as merely a promise of a future bounty, having no direct or immediate operation. *Scales* v. *Maude*, 6 De G. M. & G. 43; 25 L. J., Ch. 433; 1 Jur. (N.S.) 1147; 4 W. R. 109.

The court, in order to give effect to voluntary settlements, requires, where the settlor is the legal owner, everything to have been done which is requisite to transfer the legal ownership; and where he is the equitable owner, clear and distinct evidence of a declaration of trust in favour of the donee. *Bentley* v. *Mackay*, 15 Beav. 12.

Some consols belonging beneficially to A. for life, with remainder to B., stood in the names of two trustees, of the survivor of whom B. was the representative. B. voluntarily assigned the stock to A., but no transfer was made. The court refused either to declare B. a trustee of the stock for A., or to compel her to transfer it. *Beech* v. *Keep*, 18 Beav. 285; 23 L. J., Ch. 539; 18 Jur. 971; 2 W. R. 316.

The distinction between an assignment for the benefit of a volunteer, and a declaration of trust in his favour, though very thin, yet pervades the cases. *Ib.*

It is immaterial by what form of conveyancing, whether by assignment, declaration, &c., the equity of a fund be conveyed. Any of such modes, if everything be done that can be done, and if the intention be clear, will convey the equitable interest in the fund. But a covenant to convey the fund in a certain contingency will not, when that contingency arises, be held to amount to a conveyance of the equitable right. A covenant by a settlor to transfer, convey, and assure property (if any) which he might thereafter acquire, if of a certain value, does not amount either to an imperfect declaration of trust, or to an incomplete assignment of the property (if any) which afterwards came to be acquired, upon which a court of equity will operate. *Wilkinson* v. *Wilkinson*, 4 Jur. (N.S.) 47.

Trust to take effect, according to the whole intent or not at all. *Mogg* v. *Hodges*, 2 Ves. sen. 54.

It has long been settled that the trustees and cestuis que trust under a voluntary settlement cannot compel the settlor to perform any further act than he has already done, to render such a settlement operative. *Dening* v. *Ware*, 22 Beav. 184; 4 W. R. 523.

A manor having been conveyed upon trust for certain persons, their heirs and assigns, being tenants of certain messuages, &c., an assignee of one of those messuages was held not to have a right to the benefit of those trusts, because none of the assurances by which the property was conveyed to him expressly mentioned them. *Hutchinson* v. *Morritt*, 3 Y. & C. 547.

When a trust is declared of land for the person entitled thereto, no party can avail himself of this trust without establishing aliunde that he is entitled thereto. *Walters* v. *Webb*, 18 W. R. 86.

It is immaterial for the purpose of establishing a trust of personal property, whether declared orally or in writing; the only question is as to the evidence of its existence. The fact of a person having acted upon the faith of the verbal instructions given to him is immaterial, the real consideration being what the party creating the trust has himself done in the matter. *Peckham* v. *Taylor*, 31 Beav. 250; 6 L. T. 487.

Declaration of Trust—Mistake of Title.]—A declaration of trust as to a sum of stock, proceeding upon a clear mistake of title as recited in the deed:—Held, not to affect the rights of the party really interested, even though he had executed the deed, no intention appearing on his part to part with his interest in or to deal otherwise with the stock than to join in declaring the trust thereof according to the then presumed state of title. *Ashurst* v. *Mill*, 18 L. J., Ch. 129; 12 Jur. 1035. Affirming 7 Hare, 502.

Executor—Mistake—Residuary Account.]—Where an executor had passed his residuary account, stating that a legacy was "retained in trust" out of the residue:—Held, that he was not entitled to show that he had since discovered that the account had proceeded on a mistake, and that there were not in fact assets for the legacy. *Brewster* v. *Prior*, 55 L. T. 771; 35 W. R. 251.

Money received by Consignee of Goods for Sale not impressed with Trust.]—When a person has goods consigned to him to sell, and he is bound, if he sells, to pay a fixed price to his employer at a fixed time after sale, but he may sell to his customers at any price and upon any credit he pleases, though he may be called an agent, yet the legal relation of principal and agent does not exist between him and his employer; on the contrary, the relation between him and his employer is that of purchaser and vendor, and a separate relation of vendor and purchaser exists between him and the persons to whom he sells, and the moneys which come to his hands by means of the sales which he effects are his own moneys, and are not impressed with any trust for his employer. *White, Ex parte, Nevill, In re*, 40 L. J., Bk. 73; L. R. 6 Ch. 397; 24 L. T. 45; 19 W. R. 488. Affirmed nom. *Towle* v. *White*, 29 L. T. 78; 21 W. R. 465—H. L. (E.)

Trust or Contract between Directors and Shareholders in Company.]—A company had been formed for the purpose of receiving money from depositors and investing it upon security. The defendants were directors of the company. The plaintiff deposited with the company the sum of 1,000*l.* upon the terms that it should remain in their hands for five years, that they should meanwhile pay him interest at the rate of 6 per cent., that by way of security they should transfer to him a mortgage made to them, and that if the mortgage should become ineffective before the expiration of the five years they would replace it by another. The mortgage, upon which the 1,000*l.* belonging to the plaintiff was secured, was paid off before the expiration of the five years, but the company did not replace it by another, and dealt with the proceeds as part of the funds of the company. The company ultimately went into liquidation, and the plaintiff then sued the defendants to re-

cover from them the sum of 1,000*l.* paid by him to the company, on the ground that it was lost to him by reason of the defendants' gross negligence. At the trial it was proposed to show that, at the time when the mortgage securing the plaintiff's 1,000*l.* was paid off, the company was insolvent; the judge rejected the evidence, directed the jury to find for the defendants, and entered judgment for them:—Held, per Bramwell and Brett, L.JJ. (Baggallay, L.J., dissenting), that the ruling of the judge at the trial was right, and that the judgment must be affirmed.—By Bramwell, L.J., that if a trust had been created between the plaintiff and the company, the defendants, as directors, could not be held personally responsible for a breach of it.—By Brett, L.J., that a contract, and not a trust, existed between the plaintiff and the company, and that the defendants could not be held liable as constructive trustees for aiding and abetting in the breach of a trust.—By Baggallay, L.J., that the relation of trustee and cestui que trust existed between the company and the plaintiff, that a breach of trust had been committed by the company, that the defendants were parties to the breach of trust, and that the evidence rejected at the trial ought to have been admitted, as it tended to show whether the defendants had derived any personal benefit from the breach of trust. *Wilson* v. *Bury* (*Lord*), 50 L. J., Q. B. 90; 5 Q. B. D. 518; 44 L. T. 454; 29 W. R. 269; 45 J. P. 420—C. A.

The directors of a limited company for several years presented to the general meetings of shareholders reports and balance-sheets in which various debts known by the directors to be bad were entered as assets, so that an apparent profit was shown though in fact there was none. The shareholders, relying on these documents, passed resolutions declaring dividends, which the directors accordingly paid. An order having been made to wind up the company, the liquidator applied, under s. 165 of the Companies Act, 1862, for an order on the directors to replace the amount of dividends thus paid out of capital:—Held, by Bacon, V.-C., and by the court of appeal, that, as regards each half-yearly dividend, the persons who were directors when it was paid were liable for the whole amount paid for the dividends of that half-year, and that *National Funds Assurance Co., In re* (48 L. J., Ch. 163; 10 Ch. D. 118), is in no way affected by *Coventry and Dixon's case* (14 Ch. D. 660). The order of Bacon, V.-C., declared them to be jointly liable, but this was varied on appeal by declaring them jointly and severally liable. *Exchange Banking Co., In re, Flitcroft's case*, 52 L. J., Ch. 217; 21 Ch. D. 519; 48 L. T. 86; 31 W. R. 174—C. A.

Held, also, that the claim was for a breach of trust, and that the Statute of Limitations could not be set up. *Ib.*

Charge or Trust.]—Every charge on an estate does not create a trust, although it imposes a burden; but it may create a trust, depending on the nature of the charge. If the gift is an express one, and if the person taking the estate is bound to give effect to the gift as a trustee, then it is an express trust. Where a testator gives an estate to one, subject to a charge, the person to pay the charge is the person who is liable to the burden, and this in the case of a charity impresses him with the character of trustee for the charity. *Charitable Donations Commissioners* v. *Wybrants*, 2 Jo. & Lat. 182; 7 Ir. Eq. R. 580.

Testator devised freeholds and copyholds to his son for life, and after his decease to his first and other sons, paying 10*l.* a year to M. C. for life:—Held, that the word "paying" created a charge and not a trust. *Hodge* v. *Churchward*, 16 Sim. 71.

Words indicative of Motive for Bequest.]—A testator devised lands to his son A. (if he should, within a limited time, in writing, accept the devise) charged with an annuity to the testator's son B., and he bequeathed to A., if he should accept the devise, a sum of money to assist him in paying off a mortgage charged on the lands devised. A. accepted the devise, and was paid the amount of the bequest:—Held, that B. had no equity to compel A. to apply the amount of the bequest in discharge of the mortgage. *Adams* v. *Lopdell*, 25 L. R. Ir. 311.

Condition or Trust.]—Testator gives to his son a public-house and stock in trade, on condition that he pay debts and a legacy. This is a condition and not a trust. If, therefore, the son accept the bequest, he is bound to pay the debts, although they amount to more than the value of the property. *Messenger* v. *Andrews*, 4 Russ. 479.

A testatrix, after giving several legacies, among others some for charitable purposes, proceeded as follows: "I give, devise, and bequeath to W. all my real estates, both freehold and copyhold, and all the residue of my personal estate and effects, to hold to him, W., his heirs, executors, administrators, and assigns, for ever, upon this express condition, that if my personal estate should be insufficient for the purpose, he or they do and shall, within twelve months after my decease, pay and discharge all and every the legacies hereinbefore bequeathed, and I feel confident that he will comply with my wish, it being my particular desire that all the legacies shall be paid. And I do hereby charge and make chargeable all my real and personal estate with the payment of the aforesaid legacies and bequests":—Held, that the words "upon express condition" did not create a condition for breach of which the heir might enter; but created a trust which W., taking the legal estate, would in equity be bound to perform. *Wright* v. *Wilkin*, 2 B. & S. 232; 31 L. J., Q. B. 196; 6 L. T. 221; 10 W. R. 403.

A testator left all his estate and property, real and personal, except such parts as were otherwise specifically devised, upon trust for the uses and purposes thereinafter mentioned. He gave his wife an annuity of 400*l.*, to be paid to her out of the profits of his trade, to be carried on by his sons L., J., and S. in trust for the benefit of his wife and children, as in his will directed, "as likewise out of all profits arising from all and every part of my property whatsoever." He left to L., J., and S., on their faithfully performing all matters therein directed, and carrying on his trade, the houses in which he carried it on, and all his stock-in-trade, which he ordered to be increased by the sale of certain lands. He left pecuniary legacies to his children, and house property and the chattel lands of S. to his wife for life, and after her death the houses to J. and S., and the lands of S. to L.; and he directed that all the bequests should "stand good to them, L., J., and S., only

on condition of paying, &c., the several legacies, and discharging with fidelity the different trusts by this will committed to them;" and that a schedule of all his property should be taken, and copies given to his wife and all his trustees and executors, and that the property therein contained should go to L., J., and S., on paying and discharging the legacies and trusts in his will, provided that if L., J., and S., or any of them, should refuse to carry on his business, such of them as should so refuse should be paid 5,000*l.* and no more:—Held, that L., J., and S. took the property left to them upon an express trust. *Foot* v. *Cuningham*, Ir. R. 11 Eq. 306. Reversed in part, nom. *Cunningham* v. *Foot*, 3 App. Cas. 974; 38 L. T. 889; 26 W. R. 859—H. L. (Ir.)

Little stress can be laid on the use, in a will making a gift to a charity, of the word "condition;" it may mean the same as "intent and purpose," and may be employed to create a trust and nothing more. *Att.-Gen.* v. *Wax Chandlers' Co.*, 42 L. J., Ch. 425; L. R. 6 H. L. 1; 28 L. T. 681; 21 W. R. 361. And see *Merchant Taylors' Co.* v. *Att.-Gen.*, 40 L. J., Ch. 545; L. R. 6 Ch. 512; 25 L. T. 109; 19 W. R. 641.

Houses were devised to a city company for the intent and purpose and upon the condition "that the company yearly distribute 4*l.* among the poor of parish A., 2*l.* among the poor of parish B., 35*s.* among the poorest members of the company, and 5*s.* between the master and wardens of the same company." The rest of the profits of the houses the testator willed should "be bestowed upon the reparations of the houses and tenements." If the company should neglect to do the things directed by his will, the testator willed that his next-of-kin should enter on and hold the houses for ever, upon the condition that he and his heirs should do the things. It was proved, that eight years before the date of the will, the rents out of which these payments were directed exceeded the amount of the payments by only 13*s.*; sixteen years after that date it was found by inquisition that the annual value of the property was 16*l.*, or more than double the amount of the payments. The rents having increased to an amount considerably larger than was necessary to meet the payments mentioned in the will:—Held, that this was not a gift upon condition, but upon trust, and as part of the rents was given for charitable purposes, the residue being directed to be applied in maintaining the property, the whole of the rent must be taken to be specifically dedicated to charitable purposes, and not to the purposes of the company, and therefore the whole increased rents must be devoted to charitable purposes. *Ib.*

A piece of land intermingled with the devised property, and which the corporation bought and built over, so that the two sites could not be distinguished by external marks, and the whole had been for many years treated as one property, was held to be exempt from the charitable trust, it not being proved that it was purchased out of proceeds of the devised property. *Ib.*

Bequest—Condition in Nature of a Trust.]—A bequest of a capital sum was made to the Royal National Lifeboat Institution on condition of its constructing and keeping up two lifeboats, and coupled with a gift over in the event of non-compliance with the condition:—Held, that the bequest was in the nature of a trust. *Richardson, In re, Shuldham* v. *Royal National Lifeboat Institution*, 56 L. J., Ch. 784; 57 L. T. 17; 35 W. R. 710.

Powers in the Nature of Trusts.]—*See* POWERS.

Precatory Trusts.]—*See* WILL.

Creation of Trusts by Reference.]—*See* WILL.

b. Declaration of Intention without Transfer of Property.

Memorandum—Voluntary Gift.]—A memorandum of a voluntary gift in this form, "I hereby give and make over to M. an Indian bond, value 1,000*l.*," was signed by S., and given by him to M. without handing over the bond. S. died, and the residuary legatees under his will claimed the bond:—Held, that the memorandum was a good declaration of trust in favour of M., and that he was entitled to the bond. *Morgan* v. *Malleson*, 39 L. J., Ch. 680; L. R. 10 Eq. 475; 23 L. T. 336; 18 W. R. 1125.

R. signed a memorandum containing these words: "I authorise my brother to claim as his own, after my death, 150*l.* out of the money lying in the bank at Carlisle, for the service rendered me during my lifetime." R. retained the possession of the document until his death:—Held, that the instrument was a valid declaration of trust, and that the fact of its remaining in R.'s possession up to the time of his death was immaterial. *Armstrong* v. *Timperon*, 24 L. T. 275; 19 W. R. 558.

F., a mortgagee with power of sale, agreed with K., who was entitled to a reversionary interest in the lands comprised in the mortgage, not to sell without his consent; and afterwards proposed to make a lease for a term to W. at a fine; K. refused to consent, unless the lands were settled on his wife (who was the daughter of W.) and her children after the death of W.; and this being acceded to, K. gave his written consent, and thereupon the lease was executed by W., and, upon the occasion of its execution, the following document was signed by W. and K.:—"It is agreed between W. and K. that the lease and lands of Largan, after death of W., shall be and become, through his love for her, the property of Mrs. K. in trust for her child or children by K. (if blessed with such), if not, to be for her sole use and benefit":—Held, first, that this was a declaration of trust by W. in favour of Mrs. K. and her children, and that, after W.'s death his personal representative became a trustee for them. *Kelly* v. *Walsh*, 1 L. R. Ir. 275.

Held, secondly, that if it was not a valid declaration of trust, it was an agreement which should be specifically performed, upon the ground that, although the consideration expressed was not valuable, yet the consent by K. was a part performance which took the case out of the Statute of Frauds, and that evidence of the real consideration was admissible. *Ib.*

D., who was possessed of leasehold business premises and stock in trade, shortly before his death purported to make a voluntary gift in favour of his grandson E., who was an infant and who assisted in the business, by the following memorandum, signed and indorsed on the lease:—"This deed and all thereto belonging I give to E. from this time forth, with all the stock-in-trade." The lease was then delivered to E.'s mother on his behalf:—Held, that there

was no valid declaration of trust of the property in favour of E. *Richards* v. *Delbridge*, 43 L. J., Ch. 459 ; L. R. 18 Eq. 11 ; 22 W. R. 584.

Some time before his death a testator informed his daughter's companion F. P. that he intended to give her a debenture bond for 1,000*l.* in the Manchester, Sheffield, and Lincolnshire Railway Company. Shortly afterwards he signed the following memorandum :—"I wish to communicate to my executors that I have to-day given to Miss F. P. my 1,000*l.* debenture bond of the Manchester, Sheffield, and Lincolnshire Railway Company ; but, as I shall require the annual dividends to meet my necessary expenses, I retain the document in my own possession for my lifetime, requesting you, on my decease, to hand it over to Miss F. P., and communicate to the secretary of the railway company at the Manchester office, relative to the transfer of the said bond being entered in their books. Given under my hand this 9th day of February, 1882. As witness my hand.—G. S. P.S.—You will find the bond in my deed-box attached to this memorandum." After the testator's death a certificate of debenture stock for 1,000*l.* in the Manchester, Sheffield, and Lincolnshire Railway Company was found with the memorandum in the deed-box :—Held, that the memorandum was an ineffectual attempt to assign the debenture stock, and did not amount to a good declaration of trust, and that F. P. had no interest in the debenture stock. *Shield, In re, Pethybridge* v. *Burrow*, 53 L. T. 5—C. A.

Deed declaring Trust Signed by Trustee—Money not Paid to Trustee.]—A married woman executed a voluntary settlement containing a recital that she had paid 2,000*l.* to the trustee, and declaring trusts of that sum. In point of fact she had not paid and never did pay any money to the trustee. The trustee also executed the deed :—Held, that neither the settlor nor the trustee incurred any obligation whatever in respect of the 2,000*l.* *Marler* v. *Tommas*, 43 L. J., Ch. 73 ; L. R. 17 Eq. 8 ; 22 W. R. 25.

Execution and Delivery to Cestui que Trust of Deed of Trust of Stock.]—Where a person beneficially entitled to the absolute interest in stock standing in his name deliberately and advisedly executes a deed, declaring himself a trustee of the stock for certain purposes to take effect immediately, and communicates and delivers the deed to the cestui que trust, this court will not decline to enforce the trusts against their author because he executed the deed voluntarily or without consideration. *Kekewich* v. *Manning*, 1 De G. M. & G. 176 ; 21 L. J., Ch. 577 ; 16 Jur. 625.

An instrument may be effectual as a declaration of trust, or tantamount to a declaration of trust, although it does not contain the word "confidence," the word "trust," or the word "trustee." *Ib.*

This court will, under particular circumstances, convert an imperfect gift into a trust, although not supported by valuable consideration. *Ib.*

Statement in Letters as to Effect of Deed of Appointment.]—By a marriage settlement property was settled after the decease of husband and wife upon trust for the children of the marriage as the husband and wife should jointly appoint, and, in default of appointment, to the survivor of husband and wife. There was no issue of the marriage. By a deed-poll the husband and wife appointed the property to the three daughters of the wife's sister. The wife survived, and after the death of her husband appointed a new trustee of the trust funds ; and in letters to her sister spoke of the deed as standing, and gave a precise statement of its purport and intended effect :—Held, that the wife had executed a valid declaration of trust in favour of the three daughters of her sister. *Bennett's Settlement Trusts, In re*, 17 L. T. 438 ; 16 W. R. 331.

Indorsement on Envelope containing Bonds.]—An illiterate woman having wrongfully possessed herself of bonds belonging to the estate of a testator, whose executor the plaintiff was, was ordered to repay the proceeds of the sale of the bonds, although there was much doubt as to the equitable jurisdiction of the court in such a case. *Inglis* v. *Pasco*, 27 L. T. 818.

It was alleged by the defendant that the testator, by whom she had several illegitimate children, had shown her an envelope containing the bonds and bearing an indorsement to the effect that they were to be delivered to her as the property of her and her children. The envelope was lost, and the testator had always retained possession of the bonds :—Held, that there was some foundation of truth in the story of the plaintiff, though uncorroborated, and that such an indorsement would have created a trust for her and her children, which, though a slight equity, might give the court jurisdiction. *Ib.*

Papers of a Testamentary Character—Donor not having absolutely parted with his Interest in Property.]—In order to give validity to a declaration of trust of property, it is necessary that the donor or grantor should have absolutely parted with his interest in the property, and have effectually put such interest beyond his own reach. *Warriner* v. *Rogers*, 42 L. J., Ch. 581 ; L. R. 16 Eq. 340 ; 28 L. T. 863 ; 21 W. R. 766.

An unmarried lady, possessed of large property, being under obligations to her servant, called him one day into her room and showed him a box which, having opened it and put a note inside, she locked and handed to him, telling him to take it into his possession, that it would be of service to him some day, but that he must not open it till after her death. She herself kept the key. She afterwards made her will, whereby she gave the residue of her real and personal estate to a stranger in blood. After her death the box was opened, and found to contain a paper writing, dated and signed by the testatrix, and addressed to the servant, to the effect that the contents of the box were a deed of gift to him of certain real and personal estate therein specified and described. In the box were also found title deeds relating to an estate, M., not mentioned in the paper writing, and some other papers, but nothing answering the description of a deed of gift. After the testatrix's death there was found by the servant, in an outhouse, to which the testatrix and he alone had access, another paper writing, dated the day after the date of the former paper, and also signed by the testatrix, and addressed to the servant, to the effect that the title deeds of the real property mentioned in the former paper were to be found in a particular repository, to be handed over to him "free, and all expenses to be paid out of the bulk, and writings of M." :—Held, that these papers were of a testamentary character, and did not amount to

a valid declaration of trust in favour of the servant. *Ib.* And see *Towers* v. *Hogan*, post, col. 342.

A testatrix, who had lent 300*l.* to S. on his promissory note, payable on demand, directed him, after her death, to pay the interest to her sister for her life, and afterwards to divide the principal among her sister's children, which S. agreed to do. She died without having demanded payment of the note, which was found, uncancelled, among her papers at her death:—Held, that as she had not parted with her legal title to the money, the direction did not create a trust. *Caplen, In re, Bulbeck* v. *Silvester*, 45 L. J., Ch. 280.

Expressions in Letter—To Solicitor.]—B., in 1842, transferred to three persons a debenture, without any declaration of trust other than an expression in a letter written by him to his solicitor shortly before the transfer, in which the three persons were named as trustees, and the trusts of a proposed settlement of the debenture were stated to be "for my niece C. M. and her children":—Held, that a valid trust was declared by the letter in favour of C. M. for life, and afterwards of her children as joint tenants. *Bellasis' Trusts, In re*, L. R. 12 Eq. 218; 24 L. T. 466; 19 W. R. 699.

The transferees of the debenture were already trustees of a will, which contained limitations for the benefit not only of C. M. and her children, but of the issue of deceased children, and from contemporaneous entries in a solicitor's book it appeared that, after the date of the letter, B. said he had made up his mind to transfer to the same three persons, "without stating any trust or condition;" also that B. was advised to take a letter from them that they held the debenture upon the same trusts as the will; but no trace of any such letter appeared. The trustees paid the income to C. M. during her life, and upon her death transferred the fund into court. There were issue of deceased children of C. M.:—Held, that a trust for the issue of the deceased children had not been sufficiently declared. *Ib.*

—— **To Daughter.**]—A father, who was the owner of a share in a colliery, on the 11th of February, 1865, wrote to his daughter as follows:—"I have another present to make shortly, one share of Ryhope colliery . . . and you may now consider that you have this yourself from 2nd January to receive dividends upon. I am also giving to Sarah one, the same." On the 17th he attended a meeting of shareholders in the colliery, and signed the following entry in the minute book:—"That Mr. N.'s" (his own) "proposition of transferring two of his shares to the parties undernamed be agreed to, viz." (the daughter and her sister). This signature was not sufficient, according to the regulations of the deed of partnership, to pass the property in the shares. On the 25th February he again wrote to his daughter:—"I have arranged and made all right with the shares for you and Sarah, and dividends will be sent from 2nd January." On the 4th of March the testator wrote to her:—"Next meeting (private) we will be enabled to make another dividend, when you and Sarah will be informed." On the 16th of March he sent her a cheque for the first dividend, with a letter thus:—"Herewith I enclose cheque for 37*l.* 10*s.*, which you can receive at the bank . . . . first dividend, made this day." On the 18th of March he again wrote to her as follows:—"I have yours in reply to the receipt of the dividend—long may you live to enjoy it;" and in the same letter, after referring to the meeting of the 17th of January, he further said:—"Well, when I got in, I openly at once asked the question in the presence of" (four persons whom he named), "I was about to give to my two daughters one share each, and which is the way to do it? They were all pleased. It was entered in the minutes of the book":—Held, that these expressions in letters, signature of minute, and gift of dividend, did not amount to a declaration by the testator, nor to proof of an intention and determination on his part, that he would hold the shares for his daughter, but that the testator, having the desire and intention that she should, from and after the 11th February, 1865, have the shares as her property, failed to fulfil that desire, and complete that intention. *Heartley* v. *Nicholson*, 44 L. J., Ch. 277; L. R. 19 Eq. 233; 31 L. T. 822; 23 W. R. 374.

Entry in Memorandum-book.]—A testator entered in a memorandum-book, and signed a memorandum, that he had decided to invest the future proceeds of an annuity which had been absolutely assigned to him by his second son F., and that he intended to leave the proceeds at his death to F.'s daughter. An account, also in the testator's handwriting, was found, of the investments of the annuity, "from the period that I determined thus to appropriate this money." On his deathbed he referred his eldest son to the account-book, and said that he wished the accumulations to be given to the daughter of F., and the annuity at his death to revert to F. The annuity and accumulations were undisposed of by the will:—Held, that there was no declaration of trust, and that the annuity and accumulations went to the next-of-kin. *Glover, In re*, 2 J. & H. 186.

Entry in Ledger.]—An entry made in a ledger in the following words:—"N.B.—As I gave R. J. Adams only, say, about 2,000*l.* when he commenced business in partnership with E. J. Bristowe (3,000*l.* being his own money, as received for sale of farm, &c.), I am due him, to make him equal to what I gave James Adams, the sum of 3,000*l.*, therefore I credit R. J. Adams interest on this at five per cent. annually, 150*l.*"—does not constitute a valid declaration of trust. *Adams* v. *Lopdell*, 25 L. R. Ir. 311.

Delivery of Promissory Note to Third Person on Condition.]—A testatrix made her will in 1873, and thereby bequeathed a legacy of 150*l.* to E. H., who was living with her as a domestic servant. In August, 1887, the testatrix handed to C., her solicitor (whom she had appointed one of her executors), a promissory note for 200*l.*, signed by herself and payable on demand to E. H., telling C. not to mention the note to any one but E. H., but to retain it till the death of the testatrix, and then to give it to E. H., if she should remain in the service of the testatrix until her death. E. H. was informed of the note soon after it had been handed to C. The testatrix had previously told E. H. that, if she should continue in her service until her death, she would leave in the care of C. a present for her, beyond what she might leave to her in her will. E. H. remained in the service of the testatrix until the death of the latter, and the promissory note continued in

the possession of C. The testatrix died in 1881. She had never revoked the direction which she had given to C. about the note:—Held, that C. was constituted a trustee of the note, that he might after the death of the testatrix hand it over to E. H. if she had fulfilled the prescribed condition, and that, as the testatrix had never revoked the direction which she had given to C., E. H. was entitled to prove for the amount of the note in the administration of the estate of the testatrix. *Richards, In re, Shenstone* v. *Brock*, 56 L. J., Ch. 923; 36 Ch. D. 541; 57 L. T. 249; 36 W. R. 118.

Gift of Furniture and Articles to Wife by Letters—Subsequent Will of Husband.]—A husband, by three letters written and signed by him and handed to his wife, gave her furniture and other articles for her sole and absolute use. He afterwards made his will, bequeathing certain legacies and making other dispositions of his property, and giving the residue of it to trustees in trust for his wife for life, with remainder to six nieces absolutely. The furniture and other articles were at the time of the husband's death in the house which had been occupied by him and his wife, and the whole had been used by them in the ordinary way:—Held, that there was no declaration of trust, but that the furniture, &c., formed part of the husband's estate. *Baddeley* v. *Baddeley*, and *Fox* v. *Hawks* (post, col. 362) observed upon, and *Milroy* v. *Lord* (supra, col. 328) followed. *Breton's Estate, In re, Breton* v. *Woolven*, 50 L. J. Ch. 369; 17 Ch. D. 416; 44 L. T. 337; 29 W. R. 777.

Gift by Wife to Husband—Non-acceptance—Release.]—By the marriage settlement of A. and B. it was provided among other things that, out of Bank of Ireland stock belonging to B. (the wife), an amount equal to 10,000*l.* should be transferred into their joint names in trust for B. for her sole and separate use. A. and B. lived together during the marriage from 1874 to 1887 (when A., the husband, died), and the income of the 10,000*l.* was received by A. The capital was realised by A. in his lifetime and applied to his own use. The evidence showed that B. wished to give the 10,000*l.* to A., but he refused it, and always spoke of the sum as B.'s 10,000*l.* In 1888 B. made an affidavit verifying a schedule of his debts, and stated that he had no other debts. The schedule did not include the 10,000*l.* B. had no independent advice. By his will, made on November 3, 1884, A. gave a legacy of 10,000*l.* to B. together with the use during her life of all property of which he should be possessed at his death. Then he gave a series of legacies. B. took out a summons to determine certain points under the will, and claimed to prove as a creditor against the estate for 10,000*l.*, being moneys belonging to her for her separate use:—Held, that A. was trustee of the 10,000*l.* for B.'s separate use, and the mere transfer of the 10,000*l.* could not destroy the separate trust unless clear evidence was produced by A. that it was intended with B.'s assent to be destroyed.—Held, that B.'s affidavit as to A.'s debts only showed that she was not then aware that she could claim as creditor, but was no release.—Held, further, that there was no evidence of acceptance by A. of the gift from B., and that the evidence was not sufficiently cogent to destroy the trust; therefore B. was entitled to rank as creditor against A.'s estate for 10,000*l.* with interest at four per cent. since his death. *Blake, In re, Blake* v. *Power*, 60 L. T. 663; 37 W. R. 441.

Bank Debentures.]—A father who had been in pecuniary difficulties, and was indebted to his son, effected a policy on his own life, in the names of the son and another person, as trustees for the daughters of the father, and paid the premiums. The son accepted the trust, and on the father's death, some years afterwards, he, with the sanction of his co-trustee, received the policy moneys and purchased with them debentures of a banking company, of which he was a director, and to which he was indebted. The company was wound up, and the son became bankrupt. The same person was appointed official manager of the company, and assignee under the son's bankruptcy. On the daughters claiming to be creditors of the company to the amount of the debentures:—Held, first, that, notwithstanding the state of the accounts between the father and the son, the trust for the daughters ought to be assumed, for the purpose of the application, to have been well created. *Boyd, Ex parte, Royal Bank of Australia, In re*, 1 De G. & J. 223; 26 L. J., Ch. 737; 3 Jur. (N.S.) 897; 5 W. R. 634.

Held, secondly, that the trust was not determined by the receipt of the money, and the investment in the debentures. *Ib.*

Held, thirdly, that the right of the daughters to the debentures was not affected by the state of the accounts between the bankrupt and the company. *Ib.*

Held, fourthly, that, there appearing no probability of this apparent state of things, on the existing evidence, being altered by further investigation, the official manager was not entitled to have an issue or further inquiry directed. *Ib.*

Incomplete Alienation of Stock.]—A defendant executing a voluntary assignment of a reversionary interest in a sum of stock, without making any transfer of the fund, will not be compelled either to transfer the fund, or to do any act to render the assignment available. *Beech* v. *Keep*, 18 Beav. 285; 23 L. J., Ch. 539; 18 Jur. 971; 2 W. R. 316.

Promissory Notes.]—A husband allowed his wife, who had a separate estate, to keep a separate banking account, and to draw cheques in her own name. He was in the habit of borrowing money of her, and, at the end of the year, of giving her a promissory note for the whole balance due to her. The husband died:—Held, that the promissory note might be construed as a valid declaration of trust. *Murray* v. *Glasse*, 1 Eq. R. 541; 23 L. J., Ch. 126; 17 Jur. 816.

A., having lent B. 1,000*l.*, without taking any security for it, states to C. and his family that the money had been held by him (A.) in trust for C. Afterwards B. becoming embarrassed in his circumstances, and unlikely to repay the money, A., at the urgent solicitations of C., gives the latter his promissory note for the amount. Subsequently B. dies insolvent, and without having repaid the money. Then A. dies. In a suit for the administration of A.'s assets (there being no evidence to rebut the trust):—Held, that C. may prove the note against A.'s estate as a valuable security. *Burkitt* v. *Ransom*, 2 Coll. C. C. 395; 15 L. J., Ch. 174; 10 Jur. 193.

Imperfect Gift—Voluntary Declaration of Trust.]—A parol declaration of trust in favour of

a volunteer may be valid, and may be enforced in equity. The dictum in *Scales* v. *Maude* (infra), that a declaration of trust in favour of a volunteer is invalid, is not good law. *Jones* v. *Lock*, 35 L. J., Ch. 117; L. R. 1 Ch. 25; 11 Jur. (N.S.) 913; 13 L. T. 514; 14 W. R. 149.

—— **Cheque.**]—The father of a child, nine months old, put into its hands a cheque for 900*l.*, saying, in the presence of his wife and of the nurse, "I give this to baby; it is for himself, and I am going to put it away for him." He then took it back, saying again that he was going to put it away for him. About the same time he told his solicitor that he intended to add 100*l.* to the 900*l.*, and invest it for the benefit of his son. The father died suddenly a few days afterwards, without having made any provision for the child, and the cheque was found in his possession:—Held, that there was no complete gift of the cheque to the infant, and no valid declaration of trust in his favour. *Ib.*

Letters by Mortgagee Cancelling Mortgage at Death.]—Letters written by a mortgagee to the mortgagor and persons interested under him, containing the expressions, "I now give this gift, to become due at my death, unconnected with my will;" "I hereby request my executors to cancel the mortgage deed, etc.;" "I again direct and promise that my executors shall comply with my former request; that is, to cancel all deeds and papers I may have chargeable on the R. estate":—Held, not to operate either as a declaration of trust or as a valid gift. *Scales* v. *Maude*, 6 De G. M. & G. 43; 25 L. J., Ch. 433; 1 Jur. (N.S.) 1147; 3 W. R. 527.

Semble, the letters were testamentary, and could have no effect until proved in the ecclesiastical court. *Ib.*

Expressions in Conversation.]—A mother entitled to a considerable property, under the will of a relation, in a conversation with the executor of that relation expressed an intention to make a settlement of part of that property, which was standing in his name, upon her daughter; and requested the executor to instruct her solicitor to prepare such a settlement. On the prepared settlement being brought to her for execution, she had changed her mind and refused to sign it:—Held, that her intention expressed in the conversation with the executor of her relation, did not amount to a declaration of trust, although the property was personal estate. *Bayley* v. *Boulcott*, 4 Russ. 345.

Indorsement on Wrapper of Bonds.]—T. was possessed of certain bonds, found in a box at his house after his death; there was an indorsement on the wrapper enclosing them that five of them were the property of H. D., and this was signed by T. The key of the box was kept by H. D., who had also the general custody of T.'s property, and she by her answer alleged that the bonds were placed in her custody to the intent that she might have the beneficial interest in them. Upon the question whether T. was a trustee of the bonds for H. D., and whether the custody of them was a delivery of them by virtue of the indorsement, and constituted a gift inter vivos:—Held, that he was not a trustee, and that there was no sufficient delivery, and no sufficient gift inter vivos. *Trimmer* v. *Danby*, 25 L. J., Ch. 424; 4 W. R. 399.

—— **On Receipt.**]—A. lent B. 100*l.* in October, 1843, on which occasion B. wrote and signed the following document: "Received of A. for the use of C. 100*l.*, to be paid to her at A.'s death, but the interest, at 4*l.* per cent., to be paid to A." Underneath was written, "I approve the above," which was signed by A. This document was given to C. The money was not paid to A. in her lifetime. In June 1845 A. died:—Held, that B. was a trustee for C. of 100*l.* at the death of A. *Moore* v. *Darton*, 4 De G. & Sm. 517; 20 L. J., Ch. 626.

Memoranda in Favour of Charity—Invalid Declaration of Trust—Abortive Instruments.]—A testator about eight years before his death, which occurred in 1889, called on H., a friend of his, and stated that he was about to dispose of his property in case of his death, and that after making provision for his relations, he should give certain bonds to H. and another friend C. to distribute amongst different charitable institutions, and asked H. to assist him in making out a list. The testator and H. and C. subsequently met together, and a memorandum was written by C. at the dictation of the testator, to the effect that the testator had handed over to H. and C. the securities named on the other side of the paper, to be given by them to the various charitable institutions specified. The testator signed this memorandum, and his signature was witnessed by an independent witness, and the securities, which were all payable to bearer, were handed over and placed by C. in a safe. The testator, however, received the interest on the securities, and also withdrew some of the securities, and at the various interviews with C. varied the names of the charitable institutions and the amounts payable to them, and the memorandum was accordingly altered or in part re-written in pencil. Some short time before the testator's death, C., at the testator's instance, wrote another memorandum as a final expression of the testator's wishes concerning the securities which were remaining, but did not ask the testator to sign such memorandum, being of opinion that it was highly probable that after so many changes the testator would withdraw the remaining securities, and the whole thing would end. Neither C. nor H. made any claim to the securities, but the charitable institutions contended that the memoranda operated as a declaration of trust:—Held, that there was no valid declaration of trust; that the memoranda were imperfect testamentary documents of an informal character, and therefore, that the property which the memoranda purported to affect passed to the executors as part of the property belonging to the testator at his death. *Smith, In re, Champ* v. *Marshallsay*, 64 L. T. 13.

"Last Will and Letter"—Testamentary Disposition.]—A paper writing in the form of a letter, and commencing "My dear C.—This is my will and letter to you," contained the expression, "I have invested this . . . . to save you the trouble and expense of taking out administration, and I leave my plate and the family plate to Mrs. Towers." The existence of the document was never communicated to the beneficiaries:—Held, that the language and the circumstances connected with it indicated an intention that it should operate as a testamentary disposition, and that it was not a declaration of trust. *Towers* v. *Hogan*, 23 L. R. Ir. 53.

Direction to Transfer Fund—Retaining Control.]—Expressions in letters under which a testator was held to have constituted himself a trustee of a fund for the benefit of his children then existing, reserving to himself at the same time the control quâ trustee over the fund, but no further control over it as owner. *Vandenberg* v. *Palmer*, 4 K. & J. 204.

A. V., a merchant in China, directed his correspondents in London to transfer 1,000*l.* from his tea account, and employ it in exchange transactions for the benefit of his children. In subsequent letters he wrote to the same correspondents that "he had declined giving any opinion as to the reinvestment of the fund, as he considered he had no further control over it, as it belonged to his children, and that he had appropriated it to them, and his correspondents were to consider it as theirs." The correspondents accordingly opened a separate account, headed, "A. V., Esq., exchange account on account of children," previously informing him of their intention so to do:—Held, that by the first letter a trust was well created in favour of the children, although the fund was still so far in the control of A. V. as to be liable to his drawing, and notwithstanding A. V., in one of the letters, had desired his correspondents to consider it as subject to the order of his executors in the event of his death. *Ib.*

Correspondence.]—A person, who occupied a large farm under a lease, and who had by the outlay of capital considerably increased its value, having fallen into difficulties, the lease was surrendered by the trustees, to whom he had assigned it and his effects, to his landlord. His wife's brother then applied to the landlord to become tenant for the remainder of the lease upon the same terms—"with the view," as he stated in the application, "to benefit his sister and her unfortunate family;" and with that view, as the landlord stated in the correspondence and also in his evidence, the lease was granted, and he was allowed for the same purpose, contrary to the usual practice of the same landlord, to have a co-lessee, who was the actual occupier, and also to sublet a part, by which means he derived a clear 100*l.* a year above the rent, which was paid by the co-lessee:—Held, in a suit against the executor of the brother, that by means of the letters (which were a sufficient writing within the Statute of Frauds) and the circumstances, there was a trust as to this 100*l.* a year for the wife of the original tenant and her children as joint tenants. *Morton* v. *Tewart*, 2 Y. & C. C. C. 67.

A. and B., partners, being indebted to C. and D., the plaintiffs, A. by letter proposed to assign a claim which A. and B. had upon the estate of P., then the subject of a suit in Chancery. Certain properties of P., having been sold under a decree, were purchased by A. in his own name, but, as he alleged in letters to C., in trust for C. and D. A., having shortly afterwards committed an act of bankruptcy, executed deeds declaring that he held his trust for C. and D. His assignee having obtained a judgment in ejectment against part of the premises, a bill was filed praying that he should be restrained from executing an *habere;* that he should be declared a trustee for the plaintiffs as to all the premises; and that he should be directed to convey to them:—Held, that the trust was clearly established, and that the plaintiffs were entitled to the conveyance sought. *Johnson* v. *Perrin*, Hayes, 322.

A letter written by the trustee to the solicitor of a party who had advanced money for the purposes of the trust, stating that he (the trustee) would exercise all or any of the powers reposed in him by the trust-deed, for the purpose of securing the sum so advanced, will not give such creditor a *locus standi* in equity to enforce those trusts for his own benefit. *La Touche* v. *Lucan* (*Earl*), 7 Cl. & F. 772; 2 Dr. & War. 432—H. L. (Ir.). S. C., nom. *Lucan* (*Earl*) v. *La Touche*, 2 Dr. & War. 271.

—— **Husband and Wife—Separate Use.**]—E., a partner in the firm of S., E., & Co., previously to April, 1854, advanced to the firm moneys, some of which were standing in the books to the credit of an account intituled "E.'s Trustee Account," and others to his private account. M. & C. had in that month sums belonging to them standing in the books of the firm to their credit. On the 4th April, 1854, E. transferred 2,700*l.* from his trustee account to M. & C.'s account, by entries in the books of the firm, and on the same day S., E., & Co. signed a promissory note for that amount, which bore interest at 5*l.* per cent., and gave it to E., who placed it in an envelope, upon which he wrote, "This note of hand stands to the credit of M. & F. in the books of S., E., & Co., and is to be the property of Mrs. E." E., in the presence of Mrs. E., told M. that he had a security from his firm for his wife's money; that the note of hand securing it was in the joint names of her and her sister C., and that they were to recollect that it was his wife's money, and not theirs. E., in September, 1854, without the knowledge or consent of Mrs. E., or of M. & C., transferred the sum from M. & C.'s account to his own "trustee account," and at the same time wrote across the above memorandum "The within amount of 2,700*l.* is transferred to E.'s trustee account, but it is to be considered the private property of Mrs. E." E., by will, dated in 1853, after bequeathing an annuity to his wife of 1,000*l.*, gave the residue of his estate to his niece. No reference was made to the 2,700*l.* E. died in 1856, and at his decease only the sum of 2,661*l.* 18*s.* 6*d.* was standing to the credit of his "trustee account" in the partnership books. On a bill filed by Mrs. E., the court declared that a valid trust had been created for her sole and separate use, and that she was entitled to the 2,700*l.*, with interest at 5*l.* per cent. from the death of her husband. *Evans* v. *Jennings*, 4 Jur. (N.S.) 551; 6 W. R. 616.

Declaration of Wife on Separate Examination.]—The consent of a married woman had been given before commissioners, for the transfer and payment to her husband of stock and cash standing in court to her separate account:—Held, that this did not amount to a declaration of trust, and that it was competent to her, at any time before the transfer had been completed, to retract her consent. *Penfold* v. *Mould*, 36 L. J., Ch. 981; L. R. 4 Eq. 562; 17 L. T. 59; 15 W. R. 1196.

Direction to Firm.]—A direction was given by C. to the firm of which he was the head, that an annual reserve of interest upon certain mortgaged

estates should be placed to an account entitled "C., for himself, M., and S."—the same to be subject to his control alone, and in the absence of other instructions from him to be considered applicable towards liquidating the account in respect of the mortgaged estates, for which C., M., and S., as proprietors, were responsible. Upon a sale of the mortgaged estates after M.'s death more than sufficient was produced to pay the debt due from the three proprietors. Subsequently to the sale, C. and S. having received each one-third of the reserved interest fund, C. directed the remaining third to be remitted to his agents, "subject to my orders, my intention being to hand it over to the family of the late M. in such manner as I may think proper." C. died without taking any further steps as to this remaining third:—Held, that the fund had not been so permanently impressed with a trust in favour, as to one-third, of M. during his lifetime, that he, or his executors after his death, could have called for a transfer; and that the subsequent declaration by C. of an intention to hand it over to M.'s family did not constitute a complete and binding declaration of trust in their favour, to which the court would give effect. *Forbes* v. *Forbes*, 3 Jur. (N.S.) 1206; 6 W. R. 92.

Direction to Bankers.]—A sum of 2,000*l.* was, by the direction of H. O., carried by her bankers to an account in the joint names of herself, as trustee for the plaintiffs, and the plaintiffs; the bankers gave a promissory note for the amount payable in fourteen days with interest at 2½ per cent. to H. O., trustee for the persons therein named. After the death of H. O., her executors received from the bankers the sum secured by the promissory note:—Held, that this amounted to a complete declaration of trust, and that the executor was a trustee for the plaintiffs, in whose favour the trust was declared. *Wheatley* v. *Purr*, 1 Keen, 551; 6 L. J., Ch. 195; 1 Jur. 133. See *Hornby* v. *Hunter*, 1 Russ. 89.

Admissions.]—Where the owner of an estate charged with an annuity in favour of the lunatic, had acknowledged that she had in hand certain arrears of the annuity, which she was ready to pay to any person on his behalf who could give a good receipt for it:—Held, that this was a declaration of trust, which entitled the curator to sue in equity for those arrears. *Scott* v. *Bentley*, 1 K. & J. 281; 24 L. J., Ch. 244; 1 Jur. (N.S.) 394; 3 Eq. R. 428; 3 W. R. 280.

A testator bequeathed 2,000*l.* on certain trusts, and he empowered his executor, who was also his residuary legatee, to retain the amount in his hands uninvested, he paying interest thereon. After his death, the executor being satisfied that the testator intended to bequeath 3,000*l.* and not 2,000*l.*, promised to make it up to 3,000*l.*; he made no investment, but continued to pay interest on the 3,000*l.* to his death:—Held, that there was a complete voluntary trust as to the additional 1,000*l.* which the court would enforce. *Gee* v. *Liddell*, 35 Beav. 621.

Undertaking by Purchaser of Chattel that Third Person's Interest should be preserved.]—B., by words of present gift, gave to the defendant, and the defendant accepted, one undivided fourth part of a horse. B., who remained in possession of the horse, being about to execute a bill of sale of certain property, including the horse, in favour of the plaintiff, mentioned the interest of the defendant in the horse; the plaintiff thereupon undertook that the defendant's interest should be "all right," and the bill of sale was executed:—Held, that the plaintiff was a trustee for the defendant of one fourth of the horse. *Cochrane* v. *Moore*, 59 L. J., Q. B. 377; 25 Q. B. D. 57; 63 L. T. 153; 38 W. R. 588; 54 J. P. 804—C. A.

Bombay Civil Fund—Express Trust.]—The Bombay civil fund was formed to provide retiring pensions for civil servants, and annuities and portions for their widows and children. The fund was constituted by the subscriptions of the members, and by a grant from the government. It was managed by a committee, the members of which resided in Bombay, and by the rules the property of the fund was vested in the committee of managers as trustees. In fact, however, the funds were always in the hands of the government as a floating debt due to the association. A suit having been instituted by the representatives of the widow of a member of the association, against the trustees of the fund and the secretary of state for India, claiming payment of an annuity which they alleged ought to have been paid to her in her lifetime:—Held, that they were not mere trustees for the association, but trustees properly so called, and that the members of the fund were the beneficiaries, so that the defence of the Statute of Limitations could not be set up against a claimant on the fund, merely on account of lapse of time. *Edwards* v. *Warden*, 45 L. J., Ch. 713; 1 App. Cas. 281; 35 L. T. 174—H. L. (E.)

Specific Appropriation—Equitable Assignment.]—A writing opening a credit for a particular sum cannot, of itself, constitute an equitable assignment or specific appropriation of that sum so as to create a trust. It is a mere statement that the person writing it will act as a paymaster to the person to whom it is written, up to a certain amount, on his performing the conditions set forth in it. *Morgan* v. *Lariviere*, 44 L. J., Ch. 457; L. R. 7 H. L. 423; 32 L. T. 41; 23 W. R. 537.

L. entered into a contract (dated the 30th of November, 1870) with the French minister of war, represented by J., his delegate at London, to supply 20,000,000 of ball cartridges of a certain quality, the whole to be supplied by the 10th of January, 1871. Time was to be considered of the essence of the contract. L. desired some arrangements to be made as to payment. M. & Co., who acted in London as financial agents for the French government, wrote to L. a letter dated the 1st of December, 1870, in these terms: "We are instructed by J. to advise you that a special credit for 40,000*l.* has been opened with us in your favour, and that it will be paid to you rateably as the goods are delivered, upon receipt of certificate of reception issued by the French ambassador or by J." The goods were not delivered according to the contract:—Held, that this letter did not constitute M. & Co. trustees for L. as to the sum named, nor constitute an equitable assignment as of a fund in their hands, and that consequently this was not a matter for the exercise of the jurisdiction of the Court of Chancery. *Ib.*

Agreement by Vendor to Company to pay Interest.]—By an agreement for the sale of a

colliery to a trustee for a company in formation, the vendor agreed to pay to the company during two years from the date of its incorporation, such a sum as, together with the net profits of the company, should be equal to interest at five per cent. per annum on the paid-up capital of the company. This agreement was stated and adopted in the articles of association. Dividends were payable twice a year. After the expiration of the second year, but before the deficiency of dividend for the fourth half-year had been paid, the company went into voluntary liquidation, and the vendor afterwards paid to the individual shareholders the amount necessary to make their fourth half-yearly dividend equal to five per cent. :—Held, that the agreement created a trust for the individual shareholders, and that the liquidator could not claim the amount so paid by the vendor as part of the assets of the company. *South Llanharran Colliery Co., In re, Jegon, Ex parte*, 12 Ch. D. 503; 41 L. T. 567; 28 W. R. 194—C. A.

And see GIFT — HUSBAND AND WIFE — SETTLEMENT.

c. Declaration of Intention with Transfer to Proposed Trustee.

General Rule.]—If property is vested in a trustee under a voluntary instrument, the court will operate on that property, and compel the trustee to execute the trust; but where property is not so vested, the court will not act against the author of the trust. *Walrond* v. *Walrond*, John. 18; 28 L. J., Ch. 97; 4 Jur. (N.S.) 1099; 7 W. R. 33.

Grant of Booty by Royal Warrant to Secretary of State "in Trust."]—Her Majesty by royal warrant "granted" booty of war to the secretary of state for India in council "in trust" to distribute amongst the persons found entitled to share it by the decree of the judge of the Court of Admiralty, to whom the matter had been referred by the sovereign for that purpose, with a direction that doubts should finally be determined by the secretary of state unless her Majesty should otherwise order. An action having been brought against the secretary of state for India in council by K., on behalf of himself and all the other parties entitled, alleging that a portion only of the fund had been distributed, and claiming an account and the distribution of the residue :—Held, that the warrant did not operate as a transfer of property or create a trust; and that the defendant, being merely the agent of the sovereign to distribute the fund, was not liable to account to any of the parties found entitled. *Kinloch* v. *Secretary of State for India*, 51 L. J., Ch. 885; 7 App. Cas. 619; 47 L. T. 133; 30 W. R. 845—H. L. (E.)

Promissory Note.]—A person voluntarily gave his promissory note to trustees for his natural child, and deposited with them the title deeds for the purpose of carrying into effect his intention as to the promissory note :—Held, that a valid trust had been created. *Arthur* v. *Clarkson*, 35 Beav. 458; 14 W. R. 754.

On 13 November, 1857, C., being in his last illness, made payable to his brother G., whom he afterwards appointed one of his executors, a promissory note for 500*l.*, and at the same time stated that he was desirous of making some provision, otherwise than by will, for the plaintiff. C. on 16 November made his will, and directed his executors to convert the residue of his estate into money. G., after the death of C., mentioned that he had left 500*l.* for the benefit of the plaintiff, and he made several quarterly payments to her in respect thereof, and took her receipts, and then discontinued the payments, on the ground that he was not in law or equity bound to make them :—Held, that G. was a trustee of the note for the plaintiff, and that in the administration of the estate to C. the plaintiff might have liberty to prove for the amount. *Lloyd* v. *Chune*, 2 Giff. 441; 6 Jur. (N.S.) 1365; 3 L. T. 366.

A., being about to leave this country, indorsed a promissory note due to B., and directed B. to recover the sum thereby secured and hold the same until A. should write for it; but in case A. should die before the amount was recovered, then to hold the amount in trust for M. It was subsequently arranged between A. and B. that B. should retain, out of the sum secured by the note, a debt due from A. to B. A. died before the note was paid to B. :—Held, that no irrevocable trust was created in favour of M. *Maguire* v. *Dodd*, 9 Ir. Ch. R. 452.

Held, also, that A.'s personal representative was entitled to recover at law, but not in equity, from B. the amount recovered by B., on foot of the note, subject to a deduction for the debt due by A. to B. *Ib.*

Money Given with Verbal Instructions.]—It is immaterial for the purpose of establishing a trust of personal property, whether declared orally or in writing; the only question is as to the evidence of its existence. The fact of a person having acted upon the faith of the verbal instructions given to him is immaterial, the real consideration being what the party creating the trust has himself done in the matter. *Peckham* v. *Taylor*, 6 L. T. 487.

A lady refused to make a will, but told D. that she wished to dispose of all her property in her lifetime in a manner, which she stated to him. She gave him some money to carry out her instructions, and executed a power of attorney for the sale by him of stock belonging to her. D. in her lifetime distributed a part of the money given to him; but she died intestate before the stock was sold. After her death other moneys came to the hands of D., and there was also money in the possession of P. belonging to the deceased. Upon a bill filed to obtain a declaration whether a valid trust had been created of the whole, or any, or what part of the intestate's property, or in the alternative for the administration of her estate, in accordance with the above principles :—Held, that there was a valid trust of so much of the property as she gave to D. in her lifetime; but not as to the rest. *Ib.*

A testatrix gave to A. and B., in trust for the benefit of C., her sister, a sum of 2,000*l.* 3*l.* per cent. consols. She afterwards expressed to B., whom she also appointed her executrix, an intention that C. should have a further sum of 2,000*l.* consols, but she did not alter her will. A. died in her lifetime; after her death B., the surviving trustee and executrix, sold 2,000*l.* consols, and invested the produce in her name in the 3*l.* per cent. reduced, and shortly afterwards she invested a further sum of 2,000*l.* 3*l.* per cent. reduced in her name; she was proved to have declared frequently her intention of carrying out the testatrix's intention :—Held, that the second

sum of stock was duly impressed with a trust in favour of C. *Gray* v. *Gray*, 2 Sim. (N.S.) 273; 21 L. J., Ch. 745.

The reputed parent of an illegitimate child placed a sum of money in a bank, in the name of the uncle of the child, and stated at the time to a clerk at the bank that he intended the money for the child:—Held, on a claim by the child after the parent's decease, that the trust had been well declared by parol. *Petty* v. *Petty*, 22 L. J., Ch. 1065; 17 Jur. 646.

Advancement of Adopted Child.]—M. was adopted by C., her deceased mother's first cousin, and lived with her twelve years. C. then wrote to T., informing him of her intention to invest 1,800*l.* on mortgage in his name, saying, "It is, after six months of my decease, dear M.'s property." The next day she instructed her solicitors, by letter, to prepare the mortgage, inclosing a cheque for the amount, on the counterfoil of which she wrote, "In trust for M." Twelve days after, she had an interview with T., of which she entered this memorandum in her diary, "T. came, and agreed to take charge of 1,800*l.* for dear M.":—Held, that these several documents, in the handwriting of C., combined with the relationship and adoption of M., constituted a complete and final declaration of trust in favour of M., which could not admit of any parol variation by T.'s present recollections of what passed at the interview. *Cane's Trusts, In re*, 36 L. J., Ch. 744; 17 L. T. 112.

Money to pay Dividends in Hands of Agents for Foreign Government.]—A foreign government issued a public loan under a decree and an agreement providing for a mortgage to the defendants of certain estates on behalf of bondholders. The defendants received instructions to pay coupons for interest falling due on the 1st of June, less five per cent. tax, pursuant to a decree of the government which was to take effect subject to the promulgation of a decree modifying the law of liquidation. The defendants having received from the government a sum of money to meet the half-yearly interest less five per cent., advertised that they would make such payments. Subsequently the defendants received 10,000*l.*, being the amount of the five per cent., from the commissioners of the government who managed the mortgaged estates, but it did not appear that such commissioners were authorised to remit such sum. The defendants, however, issued a further advertisement that the coupons would be paid in full. Finally, they issued an advertisement that in accordance with directions of the government the coupons would be paid less five per cent., notwithstanding that the amount required to pay the same in full had been duly remitted to them by the commissioners. After such last advertisement the decree modifying the law of liquidation was passed. The plaintiff, a bondholder, brought this action claiming payment of his coupon in full by the agents pursuant to the second advertisement:—Held, that the 10,000*l.* was not remitted to the agents by persons who had authority to do so on behalf of the government, and that therefore it was not impressed with a trust in favour of the bondholders. *Henderson* v. *Rothschild*, 56 L. J., Ch. 471; 56 L. T. 98; 35 W. R. 485—C. A. Affirming 33 Ch. D. 459.

Account opened in Bank by Partner.]—A partner in a bank opened an account in one of the books of the firm, which was headed as follows: "Dr. Mrs. L. S. (the name of his wife), for the education of Bryan, Lavinia, Herman, and Robert S. (the names of his infant children), Cr.," and he caused an accountable receipt to be signed by his co-partner, on behalf of the firm, purporting to be for 800*l.*, received from his wife for the education of his children, and that sum to be placed to the credit of the account so opened, and his private account with the bank was debited with it:—Held, that the transaction was a complete and irrevocable declaration of trust in favour of the children. *Stapleton* v. *Stapleton*, 14 Sim. 186.

Assignment of Policy.]—A person, being at the time indebted, effects a policy of assurance on his own life. By deed he assigns the policy, and all benefit thereof, to a third party, by way of mortgage, and causes the mortgagee to write to him a letter, declaring that, after payment of the mortgage debt and interest, he held the surplus upon trust for M., a third party. The mortgagor then writes a letter to M., explaining this arrangement for her benefit, and inclosing the mortgagee's letter, declaring the trust of the surplus:—Held, that this would be primâ facie a good trust for M.; but, semble, it would be void against creditors of the insured party whose debts were due at the time of the declaration of trust. Form of order. *Magawley's Trusts, In re*, 5 De G. & Sm. 1; 15 Jur. 1005.

Transfer on Non-Fulfilment of Trust.]—A testator gave 12,000*l.* to trustees, with the whole or such part as they should think fit of that sum to purchase an advowson, and nominate to it such persons as they should think proper. Subject to this trust, the advowson was to be held in trust for A. until he should have a benefice worth a clear 1,000*l.* a year, or died. Until the advowson was purchased the fund was to accumulate, and at the end of twenty-one years, or on the death of A., or on his being presented to a benefice worth a clear 1,000*l.* a year, the fund, or so much of it as had not been employed in the purchase, was to belong to A. absolutely. The fund had been accumulating for about twelve years. No advowson had been purchased but the trustees were not desirous to be relieved of their trust:—Held, that under such circumstances A. was not entitled to have an immediate transfer to him of the fund. *Gott* v. *Nairne*, 3 Ch. D. 278; 35 L. T. 209.

Revocation of Trust.]—A. invests, in name of trustees, stock as security to B. against certain payments. Stock remains for a long time uncalled upon. A. cannot have it re-invested in himself, but dividends ordered in future to be paid to A. *Linton* v. *Hyde*, 2 Madd. 94.

Deposit with Trustees—To abide Law Suit.]—C. filed a bill against A. and B., alleging that a sum of money was deposited in a bank by C. in the names of A. and B., in pursuance of an agreement in writing, upon trust to pay the same according to the result of an action at law to be brought for its recovery by A. against C. and to be duly and diligently prosecuted; and also alleging that such action, although it had been commenced, had not been duly and diligently prosecuted; and praying for an order that the money deposited in the bank should be paid to him. A. demurred to the bill for want of equity,

and submitted that until the result of the action was known, the plaintiff was not a cestui que trust; but the demurrer was overruled. *Portugal (King)* v. *Russell*, 3 Giff. 287; 31 L. J., Ch. 34; 7 Jur. (N.S.) 1143; 5 L. T. 277; 10 W. R. 36.

—— **To pay Creditors.**]—Where money is placed in the hands of an agent with a direction or upon trust to pay debts, that is a voluntary act, and as such revocable; and if creditors filed a bill under such circumstances, a demurrer would lie. But if there is an agreement between the party directing the payment and the party directed to pay it is not revocable, but becomes a trust; and a demurrer to a bill filed by a creditor, alleging such agreement and trust, overruled. *Lawrence* v. *Campbell*, 7 W. R. 170.

—— **For Bondholders—Concession Revoked.**]—Where money has been subscribed by bondholders for a particular purpose (such as the construction of a railroad) and part of that money has been placed in the hands of trustees for the bondholders, the duty of such trustees being to pay portions of the money as portions of the intended railroad are constructed, if no such railroad nor any portion of it is constructed, and its construction becomes impracticable, the bondholders are entitled to demand from the trustees repayment of what remains in their hands. *National Bolivian Navigation Co.* v. *Wilson*, 5 App. Cas. 176; 43 L. T. 60—H. L. (E.)

Trust for Accumulation—Trust for benefit of Mortgagees.] — By a voluntary settlement certain freehold estates were settled, subject to the mortgages subsisting thereon, to the use of the settlor for life, with remainder to the use of trustees for 500 years, and subject thereto in strict settlement. And the trusts of the term were declared to be that the trustees should during the period of twenty-one years from the death of the settlor receive out of the rents of the estate the annual sum of 1,000*l.* and accumulate it at compound interest, and should at the expiration of that period, or from time to time during that period, as they might think fit, apply the accumulated fund in satisfaction of the mortgages then charged on the estate, and should pay the surplus of the rents to the person entitled to the immediate reversion of the estate. Seven years after the death of the settlor the first tenant in tail in possession barred the entail and acquired the fee simple subject to the mortgages; and he then claimed the right to stop the accumulations and to receive the accumulated fund and the whole future rents of the estate:—Held, that the mortgagees were cestuis que trust under the deed equally with the owner of the estate, and that he could not stop the accumulations or receive the accumulated fund without their consent. The doctrine of *Garrard* v. *Lauderdale* (2 Russ. & M. 451) does not apply to provisions for creditors which do not come into operation till after the death of the settlor. *Fitzgerald's Settled Estates, In re*, 57 L. J., Ch. 594; 37 Ch. D. 18; 57 L. T. 706; 36 W. R. 385—C. A. And see *Priestley* v. *Ellis*, 66 L. J., Ch. 240; [1897] 1 Ch. 489; 76 L. T. 187; 45 W. R. 442.

Agreement by one Creditor to Postpone his Debt to that of Another—Deed of Assignment by Debtor—Postponed Creditor a Trustee of his Dividend for the Other.]—In order to induce the plaintiffs, bankers, to allow to W., one of their customers, an overdraft not exceeding 800*l.*, the defendant, who was himself a creditor of W. for 1,000*l.* secured by promissory note, signed an agreement by which he undertook that "the amount due to me shall not be recoverable until the amount due to you on the overdraft shall have been paid." Plaintiffs thereupon allowed W. the said overdraft. W. executed a deed of assignment of all his property to trustees for the benefit of his creditors, and the plaintiffs and the defendant both sent in their claims, which were admitted to the full amount. The trustees having announced a first dividend of 3*s.* 4*d.* in the pound, plaintiffs claimed under the agreement to be paid the amount of dividend otherwise due to the defendant:—Held, that the plaintiffs were entitled to the money under the agreement, which had the effect of making the defendant a trustee for the plaintiffs of any money received by him out of W.'s estate, and that the plaintiffs had not lost their rights under the agreement by having come in under the deed of assignment. *Berwick* v. *Matthews*, 66 L. T. 564; 40 W. R. 527.

See also BANKRUPTCY (CREDITORS' TRUST DEEDS)—SETTLEMENT.

d. Orders Addressed by Creditor to his Debtor or Depositee of Fund.

Parol Communication to Debtor.]—Where, on a debt becoming payable, the creditor, by parol communication through a third person, desired the debtor, the defendant, to hold it in trust for the plaintiff, which he consented to do, and paid over a part, an injunction was granted to restrain the payment by the defendant to the administrator of the creditor in a suit for establishing the trust; sed quære, if sufficient to create a trust. *M'Fadden* v. *Jenkins*, 1 Hare, 458; 11 L. J., Ch. 281; 6 Jur. 501. Affirmed on appeal, and trust, though voluntary, held binding on creditor's estate. 1 Ph. 153; 12 L. J., Ch. 146; 7 Jur. 27. And see *Wheatley* v. *Purr*, supra, col. 344.

—— **Retention of Title Deeds by Donor.**]—A testator who had bequeathed two legacies of 50*l.* and 200*l.*, afterwards, in order to avoid legacy duty, revoked the legacies, and verbally instructed F., who owed him 300*l.* secured by a deposit of title deeds, to pay similar sums to the legatees, adding that one of the donees was to "hold the writings." F. accepted the trust, but the deeds remained in the custody of the donor:—Held, notwithstanding the retention of the deeds by the donor, that a valid trust was effectually created in favour of the donees. *Parker* v. *Stones*, 38 L. J., Ch. 46; 19 L. T. 259.

Direction by Holder of Promissory Note to Pay to Third Party.]—A testator, who had lent 300*l.* to S. on his promissory note, payable on demand, directed him, after her death, to pay the interest to her sister for life, and afterwards to divide the principal among her sister's children, which S. agreed to do. She died without having demanded payment of the note, which was found, uncancelled, among her papers at her death:—Held, that as she had not parted with her legal title to the money, the direction did not create a trust. *Caplen, In re, Bulbeck* v. *Silvester*, 45 L. J., Ch. 280.

A creditor directed his debtor to transfer the debt in the debtor's books to the joint account of himself, the creditor, and his wife, stating that he wished her to have it after his death, and he cancelled the debtor's promissory note which he held for the amount of the debt, and took a new one in the joint names of himself and his wife. The wife survived:—Held, that there had been a trust created in her favour, and that she was entitled as survivor to the note. *Gosling* v. *Gosling*, 3 Drew. 335.

Cheque with Verbal Directions.]—Where the testatrix, having by will given to the defendant a legacy of 100*l.*, afterwards gave a cheque on her bankers in favour of J. C. for 150*l.*, with verbal directions to apply so much of it as, with the legacy, would purchase a share in a railway company, which she wished to give instead of the legacy, but that she did not wish to alter her will; afterwards the amount of the cheque was credited to J. C., and the account of the testatrix was thereby overdrawn to that amount; in a suit for administration:—Held, that no trust was created by the transaction in favour of the legatee in the sum of 150*l.* *Hughes* v. *Stubbs*, 1 Hare, 476; 6 Jur. 831.

Memorandum signed by Creditor and directed to Debtor.]—A creditor by memorandum in writing, without power of revocation, directed her debtor to pay part of his debt by instalments to herself, and to invest part of the residue, by like instalments, for the benefit of certain volunteers, payable to them after her decease. By a second memorandum the creditor directed her debtor to continue the payment of the debt, by similar instalments to herself, and not to accumulate any portion of it for the cestuis que trust. Both memorandums were written by the debtor, and signed by the creditor, without notice to the cestuis que trust, and part of the residue settled by the first memorandum was paid to the creditor by the debtor according to the directions on the second memorandum:—Held, that the first memorandum constituted a complete declaration of trust in favour of the cestuis que trust, and was irrevocable by the settlor. *Paterson* v. *Murphy*, 11 Hare, 88; 22 L. J., Ch. 882; 17 Jur. 298.

Letter addressed to Banker.]—Where A., having certain funds standing to his credit at his bankers, by letter directed them to carry some parts of such funds to the account of certain persons as trustees for his wife, and, after her decease, for his son, and other parts thereof to the account of certain persons as trustees for his son; and such sums were accordingly carried over by the bankers to the account of such persons in their books, and the dividends were from time to time carried to the same accounts, but the testator never communicated the facts to the trustees, and there was some evidence that the testator had directed the transfer under an impression that he should be able by that means to evade the legacy duty, and that he had shown an intention to exercise some acts of ownership over the funds: the court held, that the appropriations were void, and that the testator might at any time have revoked them. *Gaskell* v. *Gaskell*, 2 Y. & J. 502.

Order on Depositee to Invest.]—A lady drew a cheque for 500*l.* upon her son-in-law (who was not a banker, but who had moneys of hers in his hands), in favour of her daughter Jane, his wife. Afterwards she told him to hold the money in trust for Jane during her life, and afterwards for the children of Jane. The lady died shortly afterwards, and the money was claimed on behalf of the wife and children:—Held, that the objects of the gifts were not sufficiently ascertained, and that the 500*l.* must be treated as assets of the deceased. *Hughes* v. *Stubbs*, 11 Jur. (N.S.) 913; 13 L. T. 492.

Where a son had in his possession moneys belonging to his mother, and she, in her last illness, drew an order upon the son in favour of his wife and retained it in her custody, but subsequently handed it to him and directed him to invest the amount for the benefit of his wife and children, and the son, after the mother's death, made the investment in the joint names of himself and his wife:—Held, that a valid trust was constituted by the mother in favour of the son's wife and children. *Roberts* v. *Roberts*, 12 Jur. (N.S.) 971; 15 L. T. 260; 15 W. R. 117.

Engagement by Mortgagee to Relinquish Mortgage at Death.]—Letters by a mortgagee to defendants beneficially interested in the equity of redemption, promising that her executors should cancel the mortgage, and containing words of gift:—Held, to be no defence to a suit of foreclosure by the executors of the mortgagee. *Scales* v. *Maude*, 6 De G. M. & G. 43; 25 L. J., Ch. 433; 1 Jur. (N.S.) 1147; 3 W. R. 527.

A., being legatee of a residue in trust for his daughters, mixed up with it 1,100*l.* of his own, and, upon an account being rendered to his daughters, directed his solicitors in writing to include such 1,000*l.* as part of the trust fund:—Held, that a trust was created as to the 1,000*l.* *Thorp* v. *Owen*, 5 Beav. 224; 11 L. J., Ch. 129.

See also ASSIGNMENT (EQUITABLE ASSIGNMENT).

e. Voluntary Covenants or Promises to Transfer or Assign.

Bond to Settle Property.]—Mother gave bond to son conditioned to surrender copyhold to him, for which she was heiress:—Held, that she became trustee for son. *Alison's case*, 9 Mod. 62.

A bond voluntarily given after marriage, to settle a jointure, decreed in specie, because under hand and seal, though voluntary. *Beard* v. *Nutthall*, 1 Vern. 427.

A voluntary bond by the husband after marriage, to settle a jointure, which he settled accordingly; he died, and the jointress was evicted; the wife, as administratrix, retained as much as her dower fell short of the value of the jointure. *Ib.*

A wife in extremis, and having just been delivered of a child, appointed by will real property to her husband in fee. After her death the husband gave a bond to trustees conditioned for securing 3,000*l.* to the infant; which bond recited that he had, upon the execution of the will, given his wife an assurance that he would make provision for the child:—Held, that the 3,000*l.* was a lien on the estate. *Atkins, Ex parte, London & Southampton Ry. Act, In re*, 2 Y. & C. 536; 1 Jur. 332.

Covenant by Husband to Settle on Wife.]—By a post-nuptial settlement executed in 1814, after

reciting that S., the husband, had before marriage agreed to settle 1,000*l.*, and had paid that sum to G., G. covenanted that he would stand possessed of the money upon trust, with the approbation of S., to invest it in the names of S. and G., and trusts were declared of the fund for the benefit of the husband and wife successively for life, with remainder to the children of the marriage. By the same deed S. covenanted with G. to pay to him a further sum of 1,000*l.* to be held upon the same trusts as the first-mentioned 1,000*l.* Neither of the two sums was, in fact, ever paid. S. survived his wife, and died in 1868. In a suit instituted for the administration of the estate of S. the children of the marriage claimed to rank as creditors for both sums:—Held, that, as to the first-mentioned sum, S. had constituted himself a trustee of the settlement, and that his estate was liable for the amount; but that the claim to the other sum rested upon a mere legal obligation which was barred by the statute of limitations. *Stone* v. *Stone*, 39 L. J., Ch. 196; L. R. 5 Ch. 74; 22 L. T. 182; 18 W. R 225.

Voluntary Contract in Favour of Mother and Children.]—A voluntary contract in favour of a mother and her children:—Held, to be executory only as related to the children, and executed as to the mother, and therefore enforced for the benefit of the mother absolutely. *Burrows* v. *Greenwood*, 4 Y. & C. 251.

By the contract for sale it was agreed that 600*l.*, part of the purchase-money, should be paid after the vendor's death to such uses as she should direct for the benefit of J. B. and her children. By the conveyance that sum was made payable to the executors, &c., of the vendor, or as she should appoint by her will; she appointed it to J. B. absolutely:—Held, that the settlement, being executory only as to the children, could not be enforced, and that J. B. took absolutely. *Ib.*

Covenant to Pay Annuity for Benefit of Widow of Deceased Partner.]—Articles of partnership between two solicitors provided that the partnership should be for the term of ten years from the 1st of May, 1875, if both the partners should so long live. The partnership was also made determinable by notice. There was a further provision that from the determination of the partnership the retiring partner, his executors or administrators, or the executors or administrators of the deceased partner, should be entitled to receive out of the net profits of the partnership business, during so much (if any) of the term of five years from the 1st of May, 1880, as should remain after the determination of the partnership, the yearly sum of 350*l.*, and during so much (if any) of the term of five years from the 1st of May, 1885, as either the retiring partner, or a widow of the retiring or deceased partner, should be living, the yearly sum of 250*l.*, any sum which might under this provision for the time being become payable to the executors or administrators of a deceased partner to be applied in such manner as such partner should by deed or will direct for the benefit of his widow and children, and in default of such direction to be paid to such widow, if living, for her own benefit. It was further provided that the annuity should, so far as legally might be, be constituted a charge on the net profits of the business. One of the partners died in 1883, leaving a widow, but without having given any direction as to the application of the annuity. By his will he appointed his widow his universal legatee and sole executrix. He died insolvent, and an action was brought by a creditor to administer his estate:—Held, that the annuity did not form part of the testator's estate, but that by the articles a trust of it was created in favour of the widow, and that she was entitled to it free from the claims of the testator's creditors. *Flavell, In re, Murray* v. *Flavell*, 53 L. J., Ch. 185; 25 Ch. D. 89; 49 L. T. 690; 32 W. R. 102—C. A.

Covenant to Transfer Money to Natural Daughters.]—A father, who had four natural daughters and a legitimate son, entered into an agreement with his son, evidenced by certain deeds, whereby the father covenanted to transfer the sum of 20,000*l.* to a trustee, for the benefit of his four natural daughters, and the son covenanted to pay the debts of the father. The son paid some of the father's debts, and died before the covenant on the part of the father was performed, having by his will given the whole of his property to his father, who became the son's personal representative. A demurrer to a bill filed by one of the natural daughters, and praying to have the agreement executed against the estates of the father and son, was allowed. *Colyear* v. *Mulgrave (Countess)*, 2 Keen, 87; 5 L. J., Ch. 335.

Covenant to Surrender Copyholds.]—By a voluntary settlement the settlor assigned a mortgage, and purported to convey copyholds; he also covenanted for quiet enjoyment and for further assurance. He died without having surrendered the copyholds:—Held, that the court would not render its assistance to compel the voluntary settlement to be perfected. *Dening* v. *Ware*, 22 Beav. 184.

It has long been settled that the trustees and cestuis que trust under a voluntary settlement cannot compel the settlor to perform any further act than he has already done, to render such a settlement operative. *Ib.*

A father having, by a voluntary settlement, conveyed certain freehold, and covenanted to surrender certain copyhold estates to trustees, in trust for the benefit of his daughters, afterwards devised part of the same estates to his widow, who, after his death, was admitted to some of the copyholds. A suit having been instituted by the daughters to have the trusts of the settlement carried into effect and to compel the widow to surrender the copyholds to which she had been admitted, a decree was made for carrying into effect the trusts, as far as they related to the freeholds, the plaintiff's title to them being complete: but as to the copyholds, the bill was dismissed with costs. *Jefferys* v. *Jefferys*, Cr. & Ph. 138.

Agreement to Execute Settlement on Future Event.]—Where a father, being the heir of a lunatic, who might be induced to make a disposition of his estate injurious to him, was in embarrassed circumstances, and incapable of bearing the expenses of suing out a commission, agreed, in consideration of his son's prosecuting it, that in the event of the lunacy being established, and the estate descending unto him, he would execute a settlement in favour of his son and issue, regard being had to the ages and relative situation of the parties, and to the

benefits secured by the issuing of the commission, there was some, and not very inadequate consideration. *Persse* v. *Persse*, 7 Cl. & F. 279; West, 110; 4 Jur. 358—H. L. (Ir.)

Agreement parol by a feme whilst sole, that if she died without issue, she would leave her heir-at-law the land or 500*l*. Agreement decreed to be executed. *Goilmere* v. *Battison*, 1 Vern. 48. And see *Maynard* v. *Mosely*, 1 Ch. Rep. 233, where such an agreement, after an estate tail, was decreed.

False Recital of Payment of Money to Trustee—Promise to Trustee to Pay.]—A trustee executed a settlement declaring trusts of 2,000*l*. belonging to the settlor (a married woman), which sum was thereby untruly recited to be in his hands, upon the faith of a promise by her to pay to him the sum out of her separate estate. The sum was never paid:—Held, that neither the trustee of the settlement, nor a volunteer under it, could enforce the promise. *Marler* v. *Tommas*, 43 L. J., Ch. 73; L. R. 17 Eq. 8.

Promise by Executor to Pay Legacy of Increased Amount.]—A testator bequeathed 2,000*l*. on certain trusts, and he empowered his executor, who was also his residuary legatee, to retain the amount in his hands uninvested, he paying interest thereon. After his death, the executor being satisfied that the testator intended to bequeath 3,000*l*. and not 2,000*l*., promised to make it up to 3,000*l*.; he made no investment, but continued to pay interest on the 3,000*l*. to his death:—Held, that there was a complete voluntary trust as to the additional 1,000*l*. which the court would enforce. *Gee* v. *Liddell*, 35 Beav. 621.

Covenant to Settle future Property if of a certain Value.]—A covenant by a settlor to transfer, convey, and assure property (if any) which he might thereafter acquire, if of a certain value, does not amount either to an imperfect declaration of trust, or to an incomplete assignment of the property (if any) which afterwards came to be acquired, upon which a court of equity will operate. *Wilkinson* v. *Wilkinson*, 4 Jur. (N.S.) 47.

A., by a post-nuptial settlement, in consideration of natural love and affection, and for divers other good causes and considerations, covenanted to transfer, and convey, and assure all property to which he might thereafter become entitled "at any time or times, by gift, descent, succession, or otherwise, from or through his mother," if of a certain amount in value at any one time, to trustees upon the trusts of the settlement. At the date of the settlement he was entitled to interests in remainder, subject to his mother's life interest. Afterwards he became entitled in reversion to another fund, subject to a life interest given to his mother; and, lastly, his mother died, leaving him property by will:—Held, that none of all these funds were in equity affected by the trusts of the settlement by virtue of the covenant. *Ib.*

It is immaterial by what form of conveyancing, whether by assignment, declaration, &c., the equity of a fund be conveyed. Any of such modes, if everything be done that can be done, and if the intention be clear, will convey the equitable interest in the fund. But a covenant to convey the fund in a certain contingency will not, whatever contingency arises, be held to amount to a conveyance of the equitable right. *Ib.*

Agreement to Execute a future Settlement.]—A. B. and C. D. were married at Malta. Shortly after their marriage a paper was sent out from England by the advisers of C. D., the wife, headed as "proposals for a settlement upon the intended marriage of A. B. and C. D.," and containing certain terms upon which C. D.'s fortune was to be settled; amongst others, that if no child of the marriage, the property to be disposed of by C. D. by will: if no disposition by her will, to go to her next-of-kin. This paper was signed by A. B. and C. D., but nothing further done by way of settlement. Soon after the marriage C. D. died intestate, without having had a child:—Held, that A. B., who had taken out administration to C. D., and possessed himself of her property, in which was included a reversionary interest, was entitled to it for his own benefit, no declaration of trust in favour of the next-of-kin having been created by this agreement to execute a future instrument. *Pownall* v. *Anderson*, 4 W. R. 407.

Promise to give and devise among Brothers and Sisters.]—A., having nine children, by his will gave all his property to one of them, who, at the funeral, said he would divide the property equally between his brothers and sisters and himself, and that the whole should be sold, that it might not be said he had taken any more than the others. He subsequently acted in respect of a portion of the property according to the intention thus expressed; and with the assent of the other children, and at a valuation approved by them, he became the purchaser of a house and premises, part of the estate:—Held, with regard to the property which remained undivided, that the expressions of the devisee were no more than a promise to give and devise it amongst the brothers and sisters, and that as to such promise it was nudum pactum, and did not amount to a declaration of trust in their favour. *Dipple* v. *Corles*, 11 Hare, 183.

Voluntary Conveyance—Subsequent Acts—Valuable Consideration.]—A. devised his real estate to trustees to the use of his wife for life, with remainder to his son for life, with remainders over. A. afterwards gave the H. estate to his son, and signed a memorandum as follows: "H., together with my other freehold estates, are left in my will to my wife; but it is her wish, and I hereby join in presenting the same to our son for the purpose of furnishing him with a dwelling-house." The son took possession of the H. estate, and with the approbation of his father expended money on the erection of a dwelling-house thereon. Upon his death:—Held, that the son was entitled to have a conveyance to himself of the fee simple of the H. estate. *Dillwyn* v. *Llewellyn*, 4 De G. F. & J. 517; 31 L. J., Ch. 658; 10 W. R. 742.

Verbal Promise to Leave Property by Will.]—An intestate induced a woman to serve him as his housekeeper without wages for many years, and to give up other prospects of establishment in life by a verbal promise to make a will leaving her a life estate in land, and afterwards signed a will, not duly attested, by which he left her the life estate:—Held, that there was no contract, and that even if there had been, and although

the woman had wholly performed her part by serving till the intestate's death without wages, yet her service was not unequivocally and in its own nature referable to any contract, and was not such a part performance as to take the case out of the operation of the Statute of Frauds, s. 4; and that she could not maintain an action against the heir for a declaration that she was entitled to a life estate in the land. *Loffus* v. *Maw* (infra) disapproved. *Maddison* v. *Alderson*, 52 L. J., Q. B. 737; 8 App. Cas., 467; 49 L. T. 303; 31 W. R. 820—H. L. (E.)

Where a testator in advanced years and ill-health induced his niece to reside with him as his housekeeper on the verbal representation that he would leave her property by his will, which he accordingly caused to be prepared and executed, but subsequently by a codicil revoked, the court directed the trusts of the will to be performed. *Loffus* v. *Maw*, 3 Giff. 592; 32 L. J., Ch. 49; 8 Jur. (N.S.) 607; 6 L. T. 346; 10 W. R. 513.

A gift made by a revocable instrument in pursuance of a verbal representation, whereby the donee is influenced, and on the faith of which he confers a benefit on the donor, becomes irrevocable. *Ib.*

See also SPECIFIC PERFORMANCE.

f. Assignment or Settlement by Legal Owner by Deed.

Voluntary Deed.]—Voluntary deeds good against representatives, if they amount to a complete conveyance or transfer. *Att.-Gen.* v. *Whorwood*, 1 Ves. Sen. 535.

The court, in order to give effect to voluntary settlements, requires, where the settlor is the legal owner, everything to have been done which is requisite to transfer the legal ownership; and where he is the equitable owner, clear and distinct evidence of a declaration of trust in favour of the donee. *Bentley* v. *Mackay*, 15 Beav. 12.

Voluntary Conveyance and Deposit of Shares to Replace Trust Funds—Revocable Mandate.]—A debtor, two days before his bankruptcy, with a view to shield and exonerate himself from liability in respect of certain breaches of trust, executed a conveyance of certain real estate of which he was sole owner in fee to a trustee upon trust to raise 4,200*l.* and apply the same in making good the breaches of trust of which he was guilty in respect of trust estates mentioned in the schedule to the deed. The conveyance, which contained a power to the trustee to appoint new trustees, and charged the premises with the 4,200*l.* directed to be raised, was made without any pressure being put upon the debtor either by his co-trustees or by the cestuis que trust, and without communication with either of them:—Held, that the conveyance was not a revocable appointment, but created the relation of trustee and cestui que trust between the trustee and the beneficiaries under the scheduled trust estates. *New's Trustee* v. *Hunting*, 66 L. J., Q. B. 554; [1897] 2 Q. B. 19; 76 L. T. 742; 45 W. R. 577; 4 Manson, 103—C. A.

Defective Limitation to Trustees.]—Where, in a voluntary deed containing a clear declaration of trust of real estate, and professing to operate by appointment to trustees in exercise of a power, the limitation and conveyance were to the trustees, their executors, administrators, and assigns, omitting the word "heirs":—Held, that the real estate was impressed with the trust, and the court declared the heir-at-law of the settlor a trustee for the cestui que trust. *Dilrow* v. *Bone*, 3 Giff. 533; 31 L. J., Ch. 417; 8 Jur. (N.S.) 276; 6 L. T. 71; 10 W. R. 437.

Scotch Disposition—Rents Accruing before Vesting.]—G., by trust deed, disponed his lands at his death to trustees, to convey to his first and other sons in succession, and the heirs male of their bodies respectively, and in default of such issue to the first son of either of his daughters, who should first attain the age of twenty-one years, and his heirs; but in case his daughters should both die, and have no such son of either of them, to convey to G. and R., his nephews. The residue of his real estate he gave to the same trustees to sell, for the use of his daughters; and he assigned and disponed to the same trustees, for the use of his heirs and substitutes, &c., in the order in the deed mentioned, the charters, &c., and rents, "for now and all time coming":—Held, that the rents accruing between the death of the disponer, and the event on which the lands were to vest in a son of the daughter, belonged not to the daughters as heirs portioners, nor as disponed to them under the residuary clause of the deed, but were to be held in trust for the parties who should become entitled under the dispositions of the deed. *Graham* v. *Templer*, 3 Bligh (N.S.) 381—H. L. (Sc.)

Promissory Notes not Endorsed.]—Where an instrument is in form a complete and an immediate assignment, and of such a nature as to give the assignee a right as between him and the assignor to take or receive the property comprised in it presently, it will, although voluntary, be supported in equity, and considered as a perfect declaration of trust of such of the property as was not assignable at law. *Richardson* v. *Richardson*, 36 L. J., Ch. 653; L. R. 3 Eq. 686; 15 W. R. 690.

E., by a voluntary deed, in 1858, assigned certain specific property, and "all other the personal estate, whatsoever and wheresoever, of her, E., to R. absolutely"; and appointed him, his executors, administrators, and assigns her attorney and attorneys in her name, but for the sole benefit of R., to sue for and recover the assigned premises, and to do and execute all such acts and deeds as should be necessary for deriving the full benefit of the assignment. At the date of the assignment, E. was possessed of certain promissory notes, given to her to secure the repayment of advances made by her. These were not specifically mentioned in the deed. Upon R.'s death, in 1864, these notes were found in his possession, but not indorsed to him. There was no evidence as to any delivery of the notes by E. to R.:—Held, that the property in the notes passed by the deed to R., on the principle that the deed of assignment operated as a complete declaration of trust by E. of all her property in favour of R. *Ib.*

Assignment with Power of Attorney to Trustees to receive Mortgage and other Debts.]—A voluntary deed, purporting to assign mortgage moneys, notes of hand, and household effects upon certain trusts, with a power of attorney to trustees:—Held, to be valid. *Parnell* v. *Hingston*, 3 Sm. & G. 337; 2 Jur. (N.S.) 854; 4 W. R. 794.

Aliter, in cases where there is no actual assignment by deed, and no sufficient declaration of trust. *Ib.*

—— **To Transfer Bank Shares.**]—M. executed a voluntary deed purporting to assign fifty of his shares in a bank to L., to be held by him upon certain trusts for the benefit of the plaintiffs. The shares were transferable only by an entry in the books of the bank; but no such transfer was ever made. L. held at the time a general power of attorney authorising him to transfer M.'s shares, and M., after the execution of the settlement, gave him a further power of attorney, authorising him to receive the dividends on his shares in the bank. M. lived three years after the execution of the deed, during which period the dividends on the shares were received by L., and remitted by him to the plaintiffs, sometimes directly, and sometimes through M.:—Held, that it was not the intention of the settlor to constitute himself a trustee of the shares, but to vest the trust in L.; there was no valid trust of the shares created in the settlor. *Milroy* v. *Lord*, 4 De G. F. & J. 264; 31 L. J., Ch. 798; 8 Jur. (N.S.) 806; 7 L. T. 178.

Held, also, that no valid trust of the shares was created in L.; for although he held a power of attorney under which he might have vested the shares in himself, he did not do so, and was not bound to do so without directions from the settlor, since he held the power only as agent for the settlor, and that, therefore, the disposition of the shares failed, as being an imperfect voluntary gift. *Ib.*

Agreement by Deed to set apart Profits to answer Annuity.]—A testator by his will gave his property in a certain newspaper in trust, out of the residue of the profits thereof to pay an annuity to his daughter for life. By a deed, to which the daughter was not a party, made upon the introduction of a new partner, it was agreed that a certain proportion of the profits should be annually set apart with a view to forming a capital fund of 1,000*l.* for the purpose of answering the said annuity, whereby the partnership property would be cleared of the same; and certain sums were so set apart accordingly:—Held, that the relationship of trustee and cestui que trust was created by the deed, and that the daughter was entitled to the 1,000*l.* *Burton* v. *Jackson*, 2 Jur. (N.S.) 224; 4 W. R. 271.

Declaration of Trust of Lease by Bankrupt.]—A lease was granted to W., who afterwards committed an act of bankruptcy, and then executed a deed, stating that his name had been used in the lease in trust for R., and declaring a trust accordingly; a bill was filed on behalf of the creditors of W. under the commission, claiming the lease as part of his estate; and the court directed an issue to try whether W.'s name was used in the lease as a trustee for R.:—Held, that the issue was properly directed. The jury having found a verdict in the affirmative:—Held, that the declaration of trust was valid, though executed after bankruptcy, and that the lease did not pass to W.'s assignees. *Gardner* v. *Rowe*, 5 Russ. 258; 7 L. J. (O.S.) Ch. 2; *see* 29 R. R. 17. Affirming 2 Sim. & S. 346; 3 L. J. (O.S.) Ch. 220.

Assignment on Apprehension of Conviction.]—A. being in prison on a charge of felony, in order o avoid a forfeiture of his property in the event of a conviction executed a voluntary deed, assigning his personal estate to B., his brother, absolutely. He was tried, found not guilty, on the ground of insanity, and ordered to be imprisoned as a lunatic during her majesty's pleasure:—Held, that the deed, being without consideration, and executed by an insane person, under a misapprehension, was inoperative, and that B.'s representatives took nothing under it. *Manning* v. *Gill*, 41 L. J., Ch. 736; L. R. 13 Eq. 485; 26 L. T. 14; 20 W. R. 357; 12 Cox C. C. 274.

Assignment of Policy by Husband to Wife.]—In an action by the assignee of a policy of life insurance to recover the amount insured, the statement of defence alleged that the plaintiff was, at the date of the assignment, the wife of the assignor, and it set out the assignment in terms, viz. a deed poll, whereby the assignor (the deceased upon whose life the policy had been effected) in consideration of love and affection, and in order to make a provision for his wife (the plaintiff) after his death, assigned the policy to the plaintiff, her executors, administrators and assigns. The personal representative of the deceased assignor was not made a party to the action:—Held, upon demurrer to the statement of defence, that the deed poll being inoperative as an assignment between husband and wife, and no trust in favour of the plaintiff having been created either by interposition of a trustee or by declaration of trust, the plaintiff was not entitled to maintain the action. *Meek* v. *Kettlewell* (1 Hare, 464), *Milroy* v. *Lord* (supra), and *Richards* v. *Delbridge* (L. R. 10 Eq. 11), followed and applied. *Baddeley* v. *Baddeley* (infra) distinguished. *Hayes* v. *Alliance British and Foreign Life and Fire Assurance Company*, 8 Ir. L. R. 149.

Grant of Freeholds to Wife.]—A., being seised in fee of a house, executed a deed poll, whereby he voluntarily granted it to his wife as her sole and absolute property for ever:—Held, that this was an imperfect voluntary gift, and that the relation of trustee and cestui que trust had not thereby been created, and that a court of equity would not interfere to assist either party. *Price* v. *Price*, 14 Beav. 598; 21 L. J., Ch. 53. Affirmed, 1 De G. M. & G. 308.

Assignment of Leaseholds by Husband to Wife "as her separate Estate."]—A husband, being about to leave England for a residence in India, executed an assignment by deed to his wife, who was to remain in England, of a leasehold dwelling-house, "to hold the same unto" the wife, "her executors, administrators and assigns, as her separate estate." No trustees were appointed; the husband and wife being the only parties to the deed. The title deeds were allowed to remain in the possession of the wife:—Held, that the deed of assignment operated as a valid declaration of trust in favour of the wife. *Fox* v. *Hawks*, 49 L. J., Ch. 579; 13 Ch. D. 822; 42 L. T. 622; 28 W. R. 656.

The wife, having parted with possession of the deeds (all but the assignment) to an agent, in order to raise a sum of 200*l.* upon them for the wife, and having asked for a return of the deeds without success, the agent, by forging the name of the husband to a mortgage deed and other instruments, raised a sum of 1,200*l.* which he appropriated to his own use:—Held, that there was no negligence on the part of the wife so as

to bar her title to relief against the mortgagees. *Ib.*

B. by a deed poll, after reciting his intention to settle certain freehold and leasehold ground rents upon his wife, continued as follows:—"I do hereby settle, assign, transfer, and set over unto her, my said wife, as though she were a single woman," the said property:—Held, that though the deed purporting to be an assignment from husband to wife was invalid as an assignment, yet it contained a sufficient declaration of trust in favour of the wife; and she was declared entitled to the property absolutely. *Baddeley* v. *Baddeley*, 48 L. J., Ch. 36; 9 Ch. D. 113; 38 L. T. 906; 26 W. R. 850.

And see *Breton's Estate, In re*, *Breton* v. *Woollren*, 50 L. J., Ch. 369; 17 Ch. D. 416; 44 L. T. 337; 29 W. R. 777, ante, col. 339.

Appointment by Deeds of Receiver and Trustee.]—Sir G. B. granted to six persons annuities, payable out of his life interest in an estate. He then executed a deed, called a receivership deed, to which the six annuitants and B. and R. were parties, by which he appointed B. and R. receivers of the rents; and it was declared that they should hold the rents in trust to pay the annuities, and then to pay the surplus to Sir G. B. or his assigns. The receivers accepted the trust. By another deed Sir G. B. conveyed his life estate to a trustee on trusts for securing the six annuities, and subject thereto in trust for himself. He afterwards granted annuities to three other persons, and by a deed called a deed of direction, to which the three annuitants were parties, he directed the receivers and the trustee to pay the three annuitants out of the rents. Notice of this deed was immediately served on the receivers and the trustee:—Held, that the deed of direction made the receivers and the trustee express trustees for the three annuitants, subject to the rights of the six annuitants. *Knight* v. *Bowyer*, 2 De G. & J. 421; 27 L. J., Ch. 520; 4 Jur. (N.S.) 569; 6 W. R. 565.

Deed of Family Arrangement.]—A person died intestate in America, leaving real and personal estate in New York. At a meeting of the next of kin in Ireland, one of them, A., who was a naturalised American citizen, asserted that, as such, he was by the law of New York entitled to the whole of the produce of the real estate. This was disputed by the others; and an agreement was entered into by A., that if they would contribute to the expense of sending B. and C. to America to recover the property, he would relinquish his exclusive claim and allow it to be dividend equally. The others did contribute, and B. and C. went to America, where a suit was pending in relation to the property. B., who was himself one of the next of kin, wrote to A., saying that if he entertained his notion as to his exclusive claim, he, B., would have the case tried; but asking him if he still adhered to the original arrangement, to have a proper deed sent out to B. and C. Thereupon A. executed a deed reciting the pendency of the American suit, and his being a naturalised American, and declaring that, should the American court declare him entitled in consequence to all or a larger portion of the property, he would not insist on his full claim, but consented to accept an equal division with the other next of kin, and he thereby gave authority to B. and C. to give full effect to his declaration. B. and C., on receipt of this instrument, suffered the American court to make a decree in favour of A. A. subsequently revoked the instrument:—Held, that the instrument, irrespective of any question of consideration, operated as a completely constituted and valid declaration of trust in favour of all the next of kin, irrevocable by A. *Miller* v. *Harrison*, Ir. R. 5 Eq. 324.

Held, also, that if it was merely to be looked upon as a promise or unfulfilled intention, it was clothed with valuable consideration, and was binding. *Ib.*

Assignment of Stock and Cash.]—P., in April, 1837, bequeathed the residue of his estate to trustees, to sell and convert the same, and to stand possessed thereof in trust for his daughters C., J., and E., in equal shares, as tenants in common, for their sole and separate use. On the 31st July following P. executed an indenture, whereby he assigned to trustees all his estates, except such part as had been devised, stock standing in his name, and cash in the hands of bankers, upon trust, after his decease, to settle the same for the benefit of his daughters, C., J., and E., during their lives, in equal shares, for their separate use, and without power of anticipation; and after the decease of each, for the benefit of her children, but subject to trusts in the nature of cross remainders between C., J., and E., and their respective child or children, in case they or either of them should die without leaving any child who should attain a vested interest. P. died on the 12th August, 1837, at which time the consols were standing in his name, and the balance in the hands of the bankers amounted to more than the sum mentioned by him. On petition presented by E., praying that it might be declared that the consols and cash were not validly settled by the deed of 1837:—Held, that the trusts of the voluntary settlement were binding upon the sums in question. *Airey* v. *Hall*, 3 Sm. & G. 315; 2 Jur. (N.S.) 658; 4 W. R. 587.

Conveyance of Freeholds and Covenant to Surrender Copyholds.]—A father having, by a voluntary settlement, conveyed certain freehold, and covenanted to surrender certain copyhold, estates to trustees, in trust for the benefit of his daughters, afterwards devised part of the same estates to his widow, who, after his death, was admitted to some of the copyholds. A suit having been instituted by the daughters to have the trusts of the settlement carried into effect, and to compel the widow to surrender the copyholds to which she had been admitted, a decree was made for carrying into effect the trusts, as far as they related to the freeholds, the plaintiff's title to them being complete; but as to the copyholds, the bill was dismissed with costs. *Jefferys* v. *Jefferys*, Cr. & Ph. 138.

Settlement of Personalty.]—H. by a voluntary settlement of personalty, assigned to trustees certain particulars of property, described in the schedule to the deed, upon the trusts therein mentioned. He then covenanted to perfect all assignments and transfers, and do all necessary acts where they had not been done; and afterwards it was declared, that until such full and complete transfer and vesting could be effected, he should stand possessed thereof upon the trusts, &c., thereinbefore declared. The particulars of the schedule comprised: first, stock standing in the

testator's own name, and which had not been transferred; secondly, a sum of 29,400*l.* standing in the name of other trustees, under an old settlement, to the beneficial interest in which the testator was solely entitled; thirdly, certain securities, principally foreign, which passed by delivery from hand to hand, without any written transfer; fourthly, railway shares and debentures, &c., requiring a particular transfer by deed; and, fifthly, mortgage securities, and the moneys secured thereon, and a beneficial lease of a mansion. The bonds, shares, title deeds, &c., representing the particulars under the third, fourth, and fifth of these heads had been, shortly before the execution of the settlement, delivered to one of the persons named trustees of the settlement. The settlor died before anything more was done:—Held, that all the particulars passed by the deed, and therefore none of them formed any part of his personal estate at the time of his decease. *Donaldson* v. *Donaldson*, Kay, 711; 23 L. J., Ch. 788; 1 Jur. (N.S.) 10; 2 W. R. 691.

A. B. voluntarily assigned to trustees bonds and promissory notes amounting to 600*l.*, in trust for himself and his wife and children, and he handed over the securities. The trustee gave no notice to the debtors. A. B. received 200*l.*, part of the 600*l.* (the securities for which had been returned to him), and the remainder was lost by the insolvency of the debtors. A. B. invested the 200*l.* with other moneys of his own on freeholds, and by writing acknowledged the 200*l.* to be trust property. He afterwards deposited the title deeds with the trustees as a security for the whole 600*l.*:—Held, that the equitable mortgage was valid to the extent of 200*l.*, but no further. *James* v. *Bydder*, 4 Beav. 600; 6 Jur. 1076.

Settlement of Interest in Mortgage.]—A. was entitled to 5,000*l.* charged on a freehold. It was secured by the legal estate vested in her, but no one was personally liable to pay it. A. executed a voluntary settlement, by which she assigned the money to trustees, and gave them a power of attorney to recover it; but she retained the legal estate:—Held, that as the money could only be recovered upon a reconveyance of the legal estate to the owner which the trustees were unable to procure, the voluntary settlement was incomplete, and could not be enforced against the settlor, or her estate. *Woodford* v. *Charnley*, 28 Beav. 96.

Family Settlement—Trust for Payment of Debts.]—A. and B., father and son, executed deeds for the settlement of some of their family estates, and for payment of the debts of A. Estates were conveyed to trustees, with a power to sell, on the consent in writing of A. and B., or the survivor, and to apply the produce in payment of debts therein specified. A. was indebted to D., as trustee for an infirmary, and A. and B. had given joint and separate warrants of attorney to secure the debt. Separate judgments had been entered up against A. and B. The amount of the sums thus due was stated in the deed. D. had some legal interest in the estates themselves; he was a party to the deed, and executed it:—Held, that the deed created a trust in favour of the infirmary of which D. was a trustee. *Montefiore* v. *Browne*, 7 H. L. Cas. 241.

—— **Non-communication to Creditors—Death of Settlor—Charge on Estate—Revocation.**]—By a deed of settlement of an estate, made as part of a family arrangement, a father and son appointed the estate, after a life interest therein to the father, to the use of trustees, upon trust, with the consent of the settlors, and after their deaths at the discretion of the trustees, to sell the same or any part, and apply the proceeds, and the rents and profits until sale, in payment of all the debts of the father; and upon further trust to convey the unsold part to the uses of a settlement of even date, under which the father was tenant for life with remainder to the son for life, with remainder to his first and other sons in tail. The creditors were not parties to the deed, nor was it communicated to them. After the father's death part of the estate was sold and the proceeds applied in payment of all the debts of the father except one due to his sister: and the unsold portion was subsequently reconveyed to the uses of the settlement of even date. After the death of the son the executors of the only unpaid creditor claimed payment of her debt as against the owner of the settled estate:—Held, that the case fell within the authority of *Synnot* v. *Simpson* (5 H. L. Cas. 121), and not *Garrard* v. *Lauderdale* (*Lord*) (3 Sim. 1; 2 Russ. & M. 451); and that as there was a trust created by the deed in favour of the creditors which became irrevocable on the death of the father, the estate was liable to satisfy the debt. *Priestley* v. *Ellis*, 66 L. J., Ch. 240; [1897] 1 Ch. 489; 76 L. T. 187; 45 W. R. 442.

g. Assignment or Settlement of Equitable Interest by Beneficial Owner.

General Principles.]—A trustee cannot prevent the cestui que trust from making an effectual gift of his interest in the trust property, or any part of it. *Kekewich* v. *Manning*, 1 De G. M. & G. 176; 21 L. J., Ch. 577; 16 Jur. 625.

Whatever rule there may be against volunteers, it does not apply to the case of a cestui que trust claiming against his trustee, for that which is considered a trust may be created gratuitously, and the absence of consideration for its creation is in general immaterial. *Ib.*

The court, in order to give effect to voluntary settlements, requires, where the settlor is the legal owner, everything to have been done which is requisite to transfer the legal ownership; and where he is the equitable owner, clear and distinct evidence of a declaration of trust in favour of the donee. *Bentley* v. *Mackay*, 15 Beav. 12.

A father being entitled, during the life of his son, to the dividends on funds standing in the names of himself and three other trustees, directed two of the trustees to pay over the dividends for the future to his son. They acted on the direction, and the testator afterwards recognised the gift:—Held, that there was a valid and effectual voluntary settlement, which this court would give effect to. *Ib.*

A person, who was entitled to certain stock standing in the names of two trustees, gave instructions to his attorney to prepare a settlement of it for the benefit of A., B. and C., and to procure from the trustees a transfer for the purposes of the settlement. The settlement was prepared, and a power of attorney for the transfer of the stock executed by both the trustees, but

the intended settlor died without having seen the settlement, and before the stock was actually transferred:—Held, that no trust of the stock was constituted for A., B. and C. *Coningham* v. *Plunkett*, 2 Y. & C. C. C. 245.

Assignment of Land held under Building Agreement.]—A., by a voluntary settlement, assigned land, held by him under an agreement for a building lease, to trustees, upon trust for himself for life, with remainder for his children and grandchildren. Shortly afterwards A. obtained a lease of the land, but he did not assign the legal estate to the trustees. There was no evidence that A. could have obtained the lease at the time when he executed the settlement:—Held, that the settlement was complete, and that the cestuis que trust were entitled to have it enforced against a person in possession of the legal estate, who derived his title through A.'s will. *Gilbert* v. *Overton*, 4 N. R. 420; 2 H. & M. 110; 33 L. J., Ch. 683; 10 Jur. (N.S.) 721; 10 L. T. 900; 12 W. R. 1141.

Semble, where the cestuis que trust convey their beneficial interest in a portion of the property to a purchaser, the purchaser may file a bill against the trustee for a conveyance of the legal estate, without making the cestuis que trust, who sold to him, parties to the suit. *Goodson* v. *Ellisson*, 3 Russ. 583; 27 R. R. 127.

Voluntary Assignment with Notice to Trustees.]—If the beneficial owner of stock standing in the name of trustees assign it in favour of a volunteer, and notice is given to the trustees, who act upon it, equity will enforce the performance of the trust in favour of the volunteer. *Bridge* v. *Bridge*, 16 Beav. 315; 22 L. J., Ch. 189; 16 Jur. 1031; 1 W. R. 4.

Voluntary settlement of an equitable interest in real estate held ineffectual, the legal estate not having passed to the trustees thereof. *Ib.*

The plaintiff being entitled to shares in companies, foreign bonds, consols, cash, and real estate, which were vested in the trustees of his uncle's will, executed a voluntary deed, whereby he granted the realty to A. and B. to the use of himself and A. and B., upon trust to sell, and he directed that the produce and the bonds, &c., should thenceforth be considered vested in him and A. and B. on certain trusts for volunteers:—Held, that the deed was valid as to the shares and bonds, which had been transferred to the plaintiff and A. and B., but ineffectual as to foreign bonds, stock, and cash, of which there had been no transfer, and no acceptance of the trust by the trustees of the uncle's will, in whom they were vested, and ineffectual also as to the realty, the legal estate not having passed. *Ib.*

A. having a vested interest in a portion of a trust fund subject to the life of B. therein, executes a voluntary deed of assignment of her expectant interest in reversion to C., and gives notice to D., the trustee of the fund:—Held, that although the assignment of this reversionary interest was purely voluntary, the instrument operated as an actual assignment transferring the equitable right from A. to C., and not as a mere agreement or executory instrument. *Voyle* v. *Hughes*, 2 Sm. & G. 18; 23 L. J., Ch. 238; 18 Jur. 341; 2 Eq. Rep. 42; 2 W. R. 143.

—— **Without Notice to Trustees.**]—M., who, in the event of surviving her daughter, and of that daughter dying without issue, would, as next of kin, be entitled to a fund which was vested in trustees, executed a voluntary assignment of her interest in the fund to the husband of the daughter, and declared the trusts of the assignment as to part for the benefit of M. herself, and as to another part for the daughter's husband absolutely. No notice of the assignment was given to the trustees. The daughter afterwards died without issue, and the husband filed his bill against the trustees and M. to compel performance of the trust:—Held, that the voluntary assignment did not create a trust which a court of equity would enforce, and the bill was dismissed. *Meek* v. *Kettlewell*, 1 Hare, 464; 11 L. J., Ch. 293; 6 Jur. 550. Affirmed, 1 Ph. 342; 13 L. J., Ch. 28; 7 Jur. 1120.

A., by voluntary deed, two days before his death, transferred to trustees all his personal property not effectually vested in them, to be held upon certain trusts, with a declaration by A. that, in the meantime and until the trust premises should be duly transferred to, and vested in, the trustees, he would thenceforth stand possessed of and interested in such property upon the trusts already declared. Part of the property was vested in the trustees of A.'s marriage settlement, in trust for him absolutely. As to this portion no transfer was made previous to A.'s death, and no notice had been given to the trustees in whom it was vested:—Held, that the assignment was effectual to pass the property, there having been a complete declaration of trust, which the court would execute in favour of the donees. *Donaldson* v. *Donaldson*, Kay, 711; 23 L. J., Ch. 788; 1 Jur. (N.S.) 10; 2 W. R. 691.

—— **Voluntary Assignment of Equitable Reversion.**]—On a voluntary assignment of an equitable reversion, there being no power in the assignor to deal with the legal interest, notice to the trustees is not necessary to the validity of the assignment. An unmarried woman, the owner, subject to a settlement, of a reversionary equitable interest in a sum of stock, assigned it by deed to volunteers. No one except her solicitor, who was also the solicitor to the trustees of the settlement, was informed of the assignment. She kept the deed in her possession, and afterwards destroyed it, and subsequently dealt with the fund by will:—Held, that the assignees were entitled to the fund as against the beneficiaries under the will. *Way's Trusts, In re*, 2 De G. J. & S. 365; 5 N. R. 67; 34 L. J., Ch. 49; 10 Jur. (N.S.) 1166; 11 L. T. 495; 13 W. R. 149.

Direction by Deed to Trustee to Pay.]—A direction given by deed by a cestui que trust to her trustee to pay a certain portion of the interest of the trust fund to A., with a covenant to indemnify the trustee for such payment:—Held, to constitute an irrevocable trust, which was not affected by the fund being brought into court. *Rycroft* v. *Christy*, 3 Beav. 238; 4 Jur. 599.

h. Evidence and Burden of Proof.

Parol Evidence.]—Parol evidence not admissible to raise an equity, that a pension granted by the crown to the defendant was in trust for the plaintiff, against the oath of the defendant in his answer. *Fordyce* v. *Willis*, 3 Bro. C. C. 577.

Parol evidence admissible of declaration of

devisee, to prove her only a trustee. *Strode* v. *Winchester*, Dick. 397.

Where a person sets up a case of declaration of trust, the onus probandi is upon him, and the evidence must be clear and distinct: the court must determine according to the evidence on both sides, having special regard to the consideration on whom the burden of proof lies. *Roberts* v. *Roberts*, 12 Jur. (N.S.) 971; 15 L. T. 260; 15 W. R. 117.

And see *Inglis* v. *Pascoe*, 27 L. T. 818.

Sole Testimony of Plaintiffs—Lapse of Time.]—T. having certain gas shares, wished to give them to his sister, but was alleged to have abstained from making a will, because his father promised that she should have them. T. died, and the father, as his administrator, possessed the shares and died, having bequeathed them to his second wife, who refused to hand them over to the daughter and her husband. They filed a bill, nineteen years after she came of age, alleging a trust and constant recognition by the father of the daughter's right, but the allegation rested on their evidence alone, and the bill was dismissed with costs. *Poole* v. *Foxwell*, 11 L. T. 441; 13 W. R. 199.

Secondary Evidence.—The court refused to admit secondary evidence of a declaration of trust, there being strong circumstantial evidence to show that the original document was not stamped. *Rose* v. *Clarke*, 1 Y. & C. C. C. 534.

And see, supra, 1. a.

B. CLASSIFICATION OF TRUSTS.

1. *Executed Trusts*, 370.
2. *Executory Trusts.*
   - *a.* General Principles and Distinction between Executory Trusts by Marriage Articles and Wills, 370.
   - *b.* What is an Executory Trust, 372.
   - *c.* Limitations to Issue or Heirs (Rule in Shelley's case).
     - i. Articles, 374.
     - ii. Devises, 386.
   - *d.* Express Directions to Settle in "Strict Settlement," 395.
   - *e.* Directions to Settle on a Female, 397.
   - *f.* Directions to Settle Personalty as Heirlooms or on the Trusts of Freeholds, 400.
   - *g.* Directions to Settle Property to go with a Title, 402.
   - *h.* Powers Inserted in the Settlement, 403.
   - *i.* Hotchpot Clause, 410.
   - *j.* Trustees to Preserve Contingent Remainders, 410.
3. *Legal and Illegal Trusts*, 412.
4. *Public or Charitable Trusts*, 414.
5. *Constructive Trusts.*
   - *a.* In General, 416.
   - *b.* Implied and Resulting Trusts.
     - i. In General, 422.
     - ii. Joint Purchases, 426.
     - iii. Purchase in Name of Stranger, 427.
     - iv. Failure of Gifts.
       - a. In General, 432.
       - b. Charitable Gifts, 433.
   - *c.* Renewal of Leases, 438.
6. *Trusts for Advancement and Maintenance.*
   - *a.* Advancement, 452.
   - *b.* Maintenance.
     - i. Persons Entitled, 458.
     - ii. Lunatics, 459.
     - iii. Married Women or Widows, 461.
     - iv. Statutory Powers of Maintenance, 463.
     - v. Fund out of which Maintenance payable, 464.
     - vi. Duration and Cesser, 471.
     - vii. Surplus, 485.
     - viii. Discretion of Trustees, 491.
     - ix. Account against Trustees, 497.
7. *Discretionary Trusts and Powers in the Nature of Trusts.*
   - *a.* Who may Exercise Powers or Trusts, 500.
   - *b.* Jurisdiction of Court to interfere with Discretion of Trustees, 501.
   - *c.* Exercise of Powers and Trusts by the Court, 509.

1. EXECUTED TRUSTS.

Distinction between Trusts Executory and Executed.]—In the latter the court of chancery follows the law. *Jervoise* v. *Northumberland* (*Duke*), 1 J. & W. 559; 21 R. R. 229.

Devise of copyhold estates, the legal estate being outstanding. "To my son R. W. G., to be entailed upon his male heirs, and failing such, to pass to his next brother, and so on from brother to brother, allowing 2,500*l.* to be raised upon the the estates for female children each." Whether a trust executed or executory, and if the latter, whether an estate tail in R. W. G. Quære. *Ib.*

And see *Egerton* v. *Brownlow* (*Earl*), 4 H. L. Cas. 1; 23 L. J., Ch. 348; 18 Jur. 71.

A bond debt being assigned to trustees on trust for such persons as A., a feme covert, should appoint, and, in default, for her separate use, she appointed it to a creditor of her husband, to secure an existing debt. No other consideration appeared on the face of the deed:—Held, that this was an "executed trust" in favour of the creditor, which the court would effectuate, notwithstanding the apparent want of consideration. *Collinson* v. *Patrick*, 2 Keen, 123; 7 L. J., Ch. 83.

2. EXECUTORY TRUSTS.

a. General Principles and Distinction between Executory Trusts in Marriage Articles and Wills.

Control of Court.]—A trust to be carried into execution by the court, must be of such a nature that it can be under the control of the court. *Ommanney* v. *Butcher*, Turn. & R. 270; 24 R. R. 42.

The court will not decree a partial performance of articles: but when some parts appear unreasonable they always dismiss the bill. *Goring* v. *Nash*, 3 Atk. 189.

Equity exercises a power to modify and control the ordinary sense of language used in marriage articles, so as to give effect to the real intention; but its interference has always been supported by a necessary implication, resulting from the context of the articles. If it were to assume a power to control the contract from presumptions dehors the instrument, it would be making, instead of expounding, the agreements of the parties. *M'Guire* v. *Scully*, Beat. 378.

S. C., in court below, nom. *Maguire* v. *Scully*, 2 Hog. 113.

Agreement for Partition.] — Conveyance to trustees, in trust to sell and purchase other estates to be settled. Those entitled under the limitations directed of the estates to be purchased, have equitable interests co-extensive until a sale; therefore, a specific performance was decreed of an agreement for partition against an objection to a title under a fine by a person who would have been tenant in tail of the estates to be purchased; the effect being an election to keep the estate, binding the trustees, though it may be questionable whether they could take upon themselves to convey in fee to a person entitled to an estate tail only. *Pearson* v. *Lane*, 17 Ves. 101.

Covenant in Articles of Freedom from Incumbrances.]—In articles there was to be a covenant in the conveyance that the lands were free from incumbrance. This is not a covenant that the lands are free; and if any incumbrance is discovered between the execution of the articles and of the conveyance, whereof the party had no notice, that shall be discharged before the sealing of the conveyance, as the concealment of it would be a fraud, though, against all incumbrances discovered afterwards, there is only the party's own covenant to protect a purchaser. *Vane* v. *Bernard* (*Lord*), Gilb. Eq. R. 6.

Intention of Testator.]—In executory trusts the court considers the intention of the testator, and acts according to it. In executed trusts the court follows the law. *Jervoise* v. *Northumberland* (*Duke*), 1 J. & W. 570; 21 R. R. 229. S. P., *Lecky* v. *Knox*, 1 Ball & B. 215.

No difference between marriage articles and executory trusts in wills, except that the former afford primâ facie evidence of intent which does not belong to the latter. *Ib.*

The general intent of a testator in creating an executory trust for a settlement of his property, not any strictly technical meaning attached to the words he has used, is to govern the preparation of the settlement. *Sackville-West* v. *Holmesdale* (*Viscount*), L. R. 4 H. L. 543; 39 L. J., Ch. 505.

The manner of executing an executory trust must be guided by the object of the author of the trust, provided such object is one which can be legally effectuated. *Ib.*

There is no difference between the construction to be put on an executory trust created by marriage articles and on an executory trust created by a will, except so far as the former, by its very nature, furnishes more emphatically the means of ascertaining the intention of those who created the trust. *Ib.*

The only difference between an executory trust raised by a voluntary settlement, or a will, and such a trust raised by an ante-nuptial settlement, is, that in the latter the object of the settlement supplies an intention to create a strict settlement, and that in the former such an intention must appear on the face of the instrument. *Rochfort or Rochford* v. *Fitzmaurice*, 2 Dr. & War. 1; 4 Ir. Eq. R. 375; 1 Con. & L. 158.

Articles not construed in same manner as formal dispositions. *Taggart* v. *Taggart*, 1 Sch. & Lef. 84; 9 R. R. 19.

——Distinction between Marriage Articles and Wills.]—Distinction between marriage articles and wills; all the parties to the former considered purchasers to effectuate their intention; none of the parties mentioned in the latter are so, as the testator's intention is alone to be considered. *Stratford* v. *Powell*, 1 Ball & B. 25.

No distinction between executory trusts by marriage articles and will, except the inference from the object of the former, to provide for the issue, that the father should not have the power to defeat it; therefore, estate for life, with remainder to the heirs of the body, a strict settlement in the one case, an estate tail in the other unless clearly not meant in their technical sense. *Blackburn* v. *Stables*, 2 V. & B. 367; 13 R. R. 120. *But see* 1 J. & W. 571.

Direction by Court of Conveyance of Gavelkind Lands.]—Where trust is executory, and to be carried into execution by the court of equity, it will direct a conveyance of lands, notwithstanding they are gavelkind, according to the rule of common law. *Roberts* v. *Dixwell*, 1 Atk. 608.

Practice on Reference to Master to approve Settlement.]—Where it is referred to the master to approve of a settlement in pursuance of an executory trust, the court does not usually insert in the order declarations as to the interests which the parties are thereafter to take, but merely directs the master to approve of a settlement in conformity with the will, articles, or other directions upon which it is to be founded. *Williams* v. *Teale*, 6 Hare, 254.

Direction to accumulate Money and Purchase Land—Costs of Investment.]—Under a direction by will to accumulate and lay out a certain sum of money in the purchase of land to be settled to uses thereby declared, the costs of the investment are to be paid out of the particular sum directed to be invested. *Gwyther* v. *Allen*, 1 Hare, 505.

Foreign Marriage Articles.]—The court will put a construction upon foreign marriage articles without requiring a settlement to be executed, even though such construction involves the removal of the entire fund from the settlement. *Byam* v. *Byam*, 19 Beav. 58; 24 L. J., Ch. 209; 1 Jur. (N.S.) 79; 3 W. R. 95.

b. What is an Executory Trust.

Definition.]—Definition of an executory trust as distinguished from a trust executed according to the sense of a court of equity. Per Lord St. Leonards. *Egerton* v. *Brownlow*, 4 H. L. Cas. 1; 23 L. J., Ch. 348; 18 Jur. 71.

Executory trust defined, and the principles laid down upon which courts of equity act in executory trusts. *Boswell* v. *Dillon*, Drew. 291; 6 Ir. Eq. R. 389.

A testator devised his property to trustees, and the will contained the following passages, amongst others: "The said sum I will shall be taken from my real, freehold, and personal property; the residue to be divided between them by my said trustees, share and share alike, at such time, and in such manner, as to my said trustees shall seem most expedient, subject to this limitation," &c.; shares of sons, in certain events, were to go to survivors, "subject, however, to such jointure as my said sons, or any of them, may settle on any wife," &c.; premises were devised to the son carrying on the testator's business, "at such reasonable rent as my trustees shall think proper." "I further will my trustees shall lend out at interest" certain sums

bequeathed in the way prescribed; a small annuity was given to W. B., "to be paid to him by my said trustees out of the issues," &c. A codicil bequeathed other property, "to be divided equally among," &c., "agreeable to the real intention of my will":—Held, that the provisions of this will did not constitute executory trusts. *Ib.*

Devise of copyhold estates, the legal estates being outstanding, "to my son R. W. G., to be entailed upon his male heirs, and failing such to pass to his next brother, and so on from brother to brother, allowing 2,500*l.* to be raised upon the estates for female children each." Whether a trust executed or executory, and, if the latter, whether an estate tail in R. W. G., quære. The point too doubtful to compel a purchaser to take the title. *Jervoise* v. *Northumberland (Duke)*, 1 J. & W. 559; 21 R. R. 229.

Executory Settlement—Tenancy in Common.]—By a deed it was agreed and declared that A., his executors, administrators, and assigns, should raise out of certain hereditaments 800*l.*, and should invest the same in the names of trustees at interest upon government or real securities "upon trusts to be declared for the benefit of R., for her life, with remainder to her children, and as to R. and for her separate use, and with all the powers for changing the security, and for maintenance, and other powers and trusts which are usually inserted in a money settlement of the like nature." No subsequent declaration of trust of the 800*l.* was ever made:—Held, that the deed was executory only, and that the settlement so directed ought to have limited the 800*l.*, after the death of R., amongst her children as tenants in common, and not as joint tenants. *Mayn* v. *Mayn*, L. R. 5 Eq. 150; 17 L. T. 439.

Positive Settlement.]—Where an instrument, executed previously to a marriage under the name of articles of agreement, appears on the face of it finally to declare the intention of the parties, and does not point to a future instrument as necessary to complete the contract, it will not be treated as executory, though, in order to give full effect to its provisions, a future act may remain to be done after its execution. *De Havilland* v. *De Saumarez*, 14 W. R. 118.

A testator directed 6,000*l.* to be settled on the marriage of his daughter, and then went on to give it to trustees, with a separate life interest to his daughter; after her death for her children, on their attaining twenty-one, if the mother should be then dead; but if not, then not till after her decease; and if no child should live to attain a vested interest, then to fall into his residue. And he gave his residue to A. for life, remainder to B.:—Held, first, that the testator had made a positive settlement, and the court could not add to it in any way. *Fullerton* v. *Martin*, 1 Dr. & Sm. 31; 29 L. J., Ch. 469; 6 Jur. (N.S.) 265; 1 L. T. 31; 8 W. R. 289.

Held, secondly, that the income undisposed of after the wife's death fell into the residue. *Ib.*

Held, thirdly, that it was undisposed of income merely, and passed as such to the tenant for life of the residue. *Ib.*

Words of a settlement held not to constitute an executory trust, but merely to amount to the gift of an equitable estate, by directing the property to be held in trust for the persons designated. *Doncaster* v. *Doncaster*, 3 K. & J. 26; 2 Jur. (N.S.) 1066.

A testator left shares of his property to his daughters "to be settled on themselves at their marriage." One of the daughters attained twenty-one, and applied to have her share paid to her absolutely:—Held, that she was absolutely entitled to her share, and that there was no trust for settlement. *Magrath* v. *Morehead*, 41 L. J., Ch. 120; L. R. 12 Eq. 491; 24 L. T. 868.

A testator devised his real and personal estate to trustees, and gave life estates therein to several persons, namely, A., B. &c., and after their deaths he directed the trustees to pay the income to M. and N. during their respective lives, share and share alike, and in case either of them should, after the deaths of A., B., &c., depart this life without leaving issue male of his body, in trust, to pay the whole income to the survivor for life: and he directed that if M. should, after the deaths of A., B., &c., die before N., leaving issue male, then the trustees should convey a moiety of the real estate to the use of the first and other sons of M. in tail male, with remainder to N. for life, with remainder to his first and other sons in tail, and in default to the testator's right heirs, and lay out a moiety of the personal estate in land, and convey the same to trustees to the like uses. The testator made a similar disposition mutatis mutandis of the other moiety, in case of the death of N., after the deaths of A., B. &c., leaving issue male; and he provided that, in case M. and N. should die without leaving issue male, or if such issue male should die without any issue male, the trustees should convey the property to such person as should at the death of the survivor of M. and N. be the right heir of the testator:—Held, that the trusts on which the question arose were not executory so as to alter the construction as arising on an executed trust. *Franks* v. *Price*, 3 Beav. 182; 9 L. J., Ch. 383. And see *S. C.* at law, 5 Bing. (N.C.) 37; 6 Scott, 710.

A will contained a direction to trustees to convey to the testator's son in strict settlement, if he should marry, followed by a declaration that if the son should die unmarried, or without lawful issue, the property should be limited and devolve upon A. for life, remainder to A.'s eldest son for life, remainder to his issue male, and on failure of such issue to A.'s other sons in succession, the eldest of such sons and his heirs male always to be preferred:—Held, that the trusts in favour of A. and her sons were not executory; and that the testator's son, having died unmarried, and A. having died subsequently, her eldest son was entitled in tail male. *Nelley, In re*, 26 W. R. 88.

By a contract for sale it was agreed that 600*l.*, part of the purchase money, should be paid after the vendor's death to such uses as she should direct, for the benefit of J. B. and her children. By the conveyance, that sum was made payable to the executors, &c., of the vendor, or as she should appoint by her will; she appointed it to J. B. absolutely:—Held, that the settlement, being executory only as to the children, could not be enforced, and that J. B. took absolutely. *Burrows* v. *Greenwood*, 4 Y. & C. 251; 5 Jur. 384.

c. Limitations to Issue or Heirs (Rule in Shelley's Case).

i. *Articles.*

Marriage Articles—Estate Tail at Law.]—On articles on marriage to settle lands on him-

self for life, remainder to the heirs of his body by his intended wife, with a covenant to make the settlement within two years, or in default thereof to stand seised to the same uses; though this be an estate tail at law, yet equity will turn it into a strict settlement. *Trevor* v. *Trevor*, 1 P. Wms. 622; 10 Mod. 436. Affirmed, 5 Bro. P. C. 122.

On marriage, the husband executes a deed-poll, whereby he purports to settle all his real and personal estate on the wife, and the heirs of her body by him begotten, obliging her to give each of her children by him begotten 1,000*l.* a-piece at twenty-one, and to divide the residue equally amongst them at her death. This gives an estate for life only to the wife, with remainder in fee to the children as tenants in common. These marriage articles so far tied up the property of the settlor that a real estate purchased by him in his lifetime, with part of his personal estate, shall be considered as personal estate and be disposed of accordingly. *Lowther* v. *Westmoreland*, 1 Cox, 64.

Where, on a marriage agreement, the husband entered into a bond to surrender his copyhold to the use of himself for life; remainder to his wife for life; remainder to the heirs of their two bodies; remainder to the heirs of the husband:—Decreed, a surrender to the use of the husband for life; remainder to the first and other sons of the marriage in tail general; remainder to the daughters in tail general, in order, by making the issue purchasers, to secure them from being defeated. *Nandike* v. *Wilkes*, Gilb. Eq. R. 114.

In marriage articles to settle lands on the husband for life, remainder to the heirs male of his body, a court of equity will decree a conveyance to be made in strict settlement, according to the intent of the parties, viz. to the husband for life, remainder to the first and every other son in tail, &c., and not direct an estate tail to the husband, according to the legal operation of the words. *Collins* v. *Plummer*, 1 P. Wms. 106; *Seale* v. *Seale*, id. 291.

Articles construed against the words for the sake of the intent, as where the wife's portion was to be laid out in land, to be settled on husband and wife, and the heirs of their bodies, and if not laid out in land during their joint lives, and the wife should die first, that the money should go to the wife's brother and sister: wife dies first leaving issue, and the money is not laid out in a purchase; yet the issue, and not the wife's brother and sister, shall have it, equity supplying the words, "if the wife die without issue." *Kentish* v. *Newman*, 1 P. Wms. 234.

Strict Settlement—Power of Barring Entail.]—The rule that a limitation to the heirs of the body in articles shall be carried into execution by a strict settlement, does not prevail where the concurrence of both parties would be necessary to bar the entail. *Brudenell* v. *Elwes*, 7 Ves. 390; 6 R. R. 310.

Marriage articles to settle estates to the use of husband for life, remainder to the wife for her life, remainder to the use of the heirs of the body of the wife by the husband. The court refused to decree a strict settlement upon them, since the power of barring the entail was not in the husband alone. As to the distinctions where a court of equity will or will not rectify settlements made in pursuance of articles, &c., by decreeing a strict settlement. Election as to copyholds. *Highway* v. *Banner*, 1 Bro. C. C. 584.

One devises his lands for payment of his debts, and then to A. for life, with power to make leases, &c.; remainder to the heirs male of the body of A.; though this be but the devise of a trust, and executory, and expressed to be to A. for life, yet it is an estate tail in A., barrable by a fine and recovery. Secus, in a case of marriage articles to settle an estate on A. for life, remainder to the heirs male of his body, this being an agreement to do a future act, and in which the issue are particularly considered and looked upon as purchasers. *Bale* v. *Coleman*, 1 P. Wms. 142.

Marriage articles not decreed in strict settlement, where, by a difference in the penning the parties intended to leave part in the father's power. *Howel* v. *Howel*, 2 Ves. Sen. 358.

—— **Acquiescence.**]—Bill for a strict settlement, after long acquiescence by plaintiff's ancestor, and when impossible to bar the remainder, dismissed. *Parker* v. *Philips*, 1 Ves. sen. 330.

Mortgage of Estate subsequent to Articles.]—By marriage articles a husband covenanted, in consideration of his wife's portion, to settle an estate to his own use, and after his decease to the use of his heirs on the body of his intended wife, and for want of such issue to his own right heirs for ever. The articles did not express any further intention of providing for the children of the marriage, and made a provision for the intended wife, in lieu of dower. No settlement was executed, and the husband mortgaged the estate and at the same time delivered the articles to the mortgagee:—Held, on his death, that under the articles he was entitled to a life estate only, and that the mortgagee took with notice, and could not therefore hold as against the issue of the marriage. *Davies* v. *Davies*, 4 Beav. 54.

Difference between Limitation to Heirs of Body and Heirs Female of Body.]—In marriage articles there is a diversity between a limitation to the heirs of the body of a man, and to the heirs female of the body of a man, and the sons more favoured than daughters. *Powell* v. *Price*, 2 P. Wms. 539.

Remainder to Issue of Bodies of Husband and Wife.]—A limitation in marriage articles to the husband for life, to the wife for life, remainder to the issue of their two bodies, will be carried into strict settlement. *Villiers* v. *Villiers*, 2 Atk. 73.

By marriage articles, it was agreed that 3,000*l.* should be laid out in land and settled on husband and wife for their lives, remainder to such issue, &c., as they should appoint, and in default of appointment to the issue of their bodies. On the death of the husband without appointment:—Held, the land should be settled in strict settlement, viz. on wife for life, remainder to the first and other sons in tail, remainder to daughters in tail, remainder to right heirs of husband. *Dod* v. *Dod*, Amb. 274.

Where there is an ambiguity in expressions of settlement regarding issue, the presumptions are made in favour of the children. *Perfect* v. *Curzon (Lord)*, 5 Madd. 442.

Upon the words "issue of the marriage," the courts, on a bill for carrying articles into execution, have frequently directed the settlement to all the issue, to the first and other sons, and for default of such issue to the daughters, with proper remainders. In this case the court

determined in favour of the daughter. *Hart* v. *Middlehurst*, 3 Atk. 371.

By articles made previously to a marriage, lands were covenanted to be conveyed to the use of the husband and wife for their lives, with remainder to the use of the issue of the husband and wife, their heirs and assigns, for ever. There were a son and two daughters of the marriage, and each of them had two children :—Held, that the son would take an estate tail, with remainder to the daughters, and that the grandchildren took nothing. *Phillips* v. *James*, 3 De G. J. & S. 72 ; 11 Jur. (N.S.) 660 ; 12 L. T. 685 ; 13 W. R. 934.

Articles, on marriage, to settle lands on husband and wife for lives, remainder to heirs male of body of wife by husband, remainder to his heirs male by second wife, remainder to heirs female by marriage. Settlement is made before marriage, and said to be in pursuance of articles, whereby lands are limited to husband for life, without waste, and with power of making leases, remainder to first, &c., sons of marriage in tail male ; remainder to first, &c., sons in tail by second marriage ; remainder to heirs of body of husband. There are two daughters ; husband suffers recovery, and devises to sister. Daughters may compel reconveyance. *West* v. *Erisey*, 1 Comyn 412 ; 2 P. Wms. 349 ; 2 Eq. Cas. Abr. 39, pl. 2. *S. C.*, on appeal, 1 Bro. P. C. 225.

By marriage articles, it was agreed that the interest of the amount of a policy of assurance, effected on the husband's life, should be applied, first, in payment of an annuity to the wife, and that the remainder of the interest should be paid among the issue of the marriage, in such shares as the husband and wife, or the survivor of them, should by deed or will appoint ; and in default of appointment, share and share alike ; and that the principal, after the death of the wife, should remain to the use of the issue of the marriage, in such manner and in such shares and proportions to and amongst the issue, as the husband and wife, or the survivor of them, should by deed or will appoint, and for want of such appointment, share and share alike. The articles contained a covenant to execute all acts necessary to carry them into execution. The husband survived the wife ; but by a codicil to his will, made in 1854, and in her lifetime, he willed and devised that whatever property he should die possessed of, or be entitled to, either freehold or otherwise, after the payment of his debts and funeral expenses, should be equally divided amongst his sons and daughters which he then had or might have by his marriage ; and that on the death of either of his sons or daughters by his marriage, before they arrived at twenty-one, the share or shares of him or her should be equally divided amongst the survivors. And he declared it to be his will and desire that, in the event of his being entitled to any property not named in his will, which contained an exclusive, and therefore invalid, appointment of the principal of the policy, his wife should be his residuary legatee :—Held, that the will and codicil did not amount to a valid execution of the power. *Cronin* v. *Roche*, 8 Ir. Ch. R. 103.

Held, also, that if a settlement had been executed, it should have contained a clause that, in the event of any of the children dying under age and unmarried, the share of the child so dying should go to the survivors. *Ib.*

By the second clause of marriage articles, it was agreed that a sum should be settled on the wife (not stating how), and the husband renounced his marital right over it during the coverture. The fourth clause provided that in case of her death, leaving issue, it should belong to the husband and children successively ; the fifth gave her a power of appointment, if she died without issue ; and the sixth provided that the income should, "in all cases, belong to the husband during his life." There was no express life estate given to the wife :—Held, first, that the sixth clause being repugnant with the second clause, the husband's life interest was postponed until the death of his wife ; and, secondly, that the wife, by implication, took an immediate life estate to her separate use. *Byam* v. *Byam*, 19 Beav. 58 ; 24 L. J., Ch. 209 ; 1 Jur. (N.S.) 79 ; 3 W. R. 95.

A., on the marriage of his son, articles to settle a jointure on the wife and her issue ; but no provision is made for the son during his life. The father has the portion, and the wife dies without issue. Whether the son is entitled to an estate in the lands, quære. *West* v. *Delaware*, 1 Vern. 198.

A marriage settlement reformed after a lapse of thirty-five years, by giving the lady an absolute interest in the trust funds (her husband being dead and without issue), the evidence clearly establishing that such was the intention of the parties to the settlement. *Wolterbeek* v. *Barrow*, 23 Beav. 423 ; 3 Jur. (N.S.) 804.

T. H. by marriage articles covenanted to provide 30,000*l.* for an eldest son ; and in case there should be issue of the marriage, an only son and an only daughter living at the time of his decease, to provide 10,000*l.* for such only daughter, to be paid to her at twenty-one or day of marriage ; but in case there should be other issue of the marriage living at the time of his decease, besides one son and one daughter, then 20,000*l.* for all and every the child and children of the marriage, other than an only son, to be paid and payable to such child or children, and at such time as T. H. should appoint, and in default of appointment to such child or children, share and share alike amongst them, if more than one, at twenty-one or day of marriage ; there were living at the decease of T. H., one son and two daughters ; one of the daughters died under age and unmarried :—Held, that the other daughter who attained twenty-one, being the survivor of a class, was entitled to the entire sum of 20,000*l.* provided for that class. *Hynes* v. *Redington*, Ll. & G. t. Plunk. 33 ; 1 Jo. & Lat. 589 ; 7 Ir. Eq. R. 405.

By settlement on the marriage of A. with C., in case there was no issue male, and there should be daughters living at the death of the father, who should attain twenty-one or be married, then such daughters should have 2,000*l.* apiece ; there were three daughters and no sons ; defendant, one of the daughters, married D., and previous to her marriage covenanted to assign (with D.'s consent) 500*l.* to trustees in trust, after the death of D. and the defendant, to pay it amongst the children of the bodies of the defendant and D. ; and that D. should, after the marriage, assign to the trustees all the money and securities for it, then due and belonging to defendant. A. died in 1744 ; D. in 1745, intestate, to whom defendant administered, and received the 2,000*l.* :—Held, that the children, who were a son and daughter, have a right to the portion, which was decreed to be secured for

their benefit, though under the articles the real estate was in the mother's power, and vested in her in tail; yet in equity it is to be carried into strict settlement to the wife for life, then to the first, &c., sons in tail, and, in default of issue male, to daughters. *Bash* v. *Dalway*, 3 Atk. 530.

Articles between father and son; in consideration of 1*l.* and of the son's intended marriage, the father granted him an annuity charged on land; after the father's death, the son, his heirs, executors, administrators, and assigns to pay annuities to his sisters and their heirs; if one of them should marry without consent, her annuity to return to the son, who was also to pay an annuity to his father's widow during viduity, and several sums of money to the other children; if the son should happen to die without issue, his wife to be paid a jointure out of the lands; if he should happen to leave issue male, the estate to devolve to said issue male; and if he should happen to die without issue, the entire property to be divided equally between the eldest sons of his sisters; on the death of the father, the land to be given up to the son. The son died after the father, leaving a daughter, his only issue. To a bill to raise the arrears of an annuity for lives, granted after the execution of the articles by the father and son, a demurrer by the daughter, because they had not such an estate as enabled them to grant the annuity, overruled; as no limitations in favour of the female issue of the son could be imposed, for the articles, having expressed the intention to provide for the issue male, raised a negative implication against females being the object of the marriage provision. It is only where the contract has expressed an intention to provide for issue generally, that females are included in the provision. *M'Guire* v. *Scully*, Beat. 370. *S. C.* in court below, nom. *Maguire* v. *Scully*, 2 Hog. 113.

—— **Exercise of Power of Appointment.**]—In marriage articles in 1802 (which were to be, but never were, followed by a formal settlement), two separate estates, one belonging to the intended husband, the other to the intended wife, were included. Both were vested in trustees, in trust to permit the husband and wife to receive the profits during life, and (as to her portion), should she survive her husband, "to such of her issue male by her husband as she may, by her last will and testament, notwithstanding her coverture, direct, limit, or appoint," and in case of no appointment, to the "issue male" of the husband and wife, and in case of no issue male, then to go amongst her daughters, "and in case of failure of issue male or female, then to go to such person or persons" as she should appoint. There were two children of the marriage, a son and a daughter. The wife survived the husband many years, and made a will, which, reciting the power reserved to her by the articles, appointed the property to her grandson, the son of her daughter, describing him as "issue male" of her marriage:—Held, that the articles were executory; that if in accordance with them a settlement had been executed, the estate would have been put in strict settlement; and that the power reserved by them was not well exercised; the grandson, the son of a daughter, not coming within the description of "issue male" therein contained. The lady married again, and on the settlement on this marriage, the surviving trustee of the articles granted, released and confirmed to the trustees under the second settlement, "all his right" to "the use and behoof of" the widow as under the articles." *Lambert* v. *Peyton*, 8 H. L. Cas. 1.

Held, also, that setting up a claim to the estate under the appointment by her, the grandson could not, as an objection to a suit to compel him to convey the estate in specific performance of the marriage articles, insist that the legal estate was not in him: nor could he object to the decree that it dealt only with the property over which the wife had assumed to exercise a power of appointment, and not with the whole property included in the marriage articles. *Ib.*

Before marriage, a husband executes a bond to trustees, the condition of which binds him to settle the property of the wife on her and her issue, in such manner as the trustees, in their discretion should think proper. After the marriage a settlement is made, by which part of the property is to be applied in payment of his debts, and for his furtherance in life; another part is settled on the wife for life, remainder to the issue of the marriage, and, in case there should not be any such issue, to the husband absolutely; and a third part of the property is given to the wife for life, and, after her decease, in case there should be no issue of the marriage, as she should appoint:—Held, that this settlement was not according to the condition of the bond, and did not bind the rights of the wife. *Webb* v. *Kelly*, 3 L. J. (o.s.) Ch. 172.

By executory articles for valuable consideration, made between A. and his wife and sons, it was agreed, after the death of A., his estates should be limited to and settled upon B. (his eldest son) and his issue, with remainder, in the event of B. dying in the lifetime of A. without lawful issue, to each of the other sons of A. in succession, according to their seniority, with an ultimate remainder to the right heirs of A. B. survived A., and had issue:—Held, in a suit to carry these articles into execution, that B. was entitled to an estate tail in possession, with remainder to him in fee. *Dillon* v. *Blake*, 16 Ir. Ch. R. 24.

—— **No Settlement Executed.**]—By marriage articles, the husband agreed to settle out of the lands of K., in favour of A., his daughter by a former marriage, a jointure on his intended wife, the remainder of the lands on the issue male begotten on the wife, and in failure of issue male on the issue female; and in case A. should survive, and the lands of K. should not be made good, that then the lands of K., which were not settled on the former marriage, should be subject to the jointure, and be settled on the eldest son of the marriage, and, in failure of the said son, on the daughters of the said marriage. There was no male issue of the marriage, but female issue, B., C., and D.:—Held, that the lands of K. should be settled on them as tenants in common in tail. No settlement was executed, and the lands descended to A., B., C. and D., subject to the trusts of the articles, in 1763, when B., C. and D. went into possession. In 1783 they levied a fine, and conveyed to a purchaser for value, and covenanted that they were seised in fee. There were several subsequent conveyances for value. In 1847 the lands were contracted to be sold:—Held, in a suit for specific performance against the purchaser, that the legal title of A. and her heirs to one-fourth of the lands was barred by the statute

of limitations, as a court of law would not notice the executory trusts of the articles, and the several conveyances operated as disseisins. Semble, the equitable title of the heir of A., on failure of issue of B., C. and D., was also barred; but:—Held, that as a fine created no discontinuance in equity, the title was too doubtful to be forced on the purchaser. A conveyance of all her estate, &c., was obtained from the devisee of the heir-at-law of A., and was held to put an end to the objection; for although the reversion belonged to the heir of the settlor he must trace title through the daughters, and all their right was extinguished by this conveyance and the fine. *Stewart* v. *Conyngham* (*Marquis*), 1 Ir. Ch. R. 534.

M. being entitled to an estate in fee, expectant upon the death of her father without other issue; by articles executed previous to her intermarriage with G. P. W. it was agreed that her estate should be settled to her separate use "if she should ever become entitled thereto," and on her issue; and that in case M. should die in the lifetime of G. P. W., he should receive the rents for his life, provided M. should ever become entitled thereto as aforesaid, but not otherwise; and G. P. W. covenanted to execute these limitations within six months after the celebration of the marriage. M. died before her father, who never had other issue, and did not execute the covenant:—Held, that under the articles, G. P. W. took an estate for life, although M. never became entitled to the possession, and that the breach of covenant did not affect the life estate. *Wallace* v. *Wallace*, 2 Dr. & War. 452; 1 Con. & L. 491.

"Issue" Construed as "Children."]—A. being seised for life of certain lands, and B. in remainder in fee simple therein; by articles executed in 1771, previously to the marriage of B. with L. N., to which articles A. was a party, it was agreed that A. and B. should, within six months after the marriage, settle and assure the said lands, so as to secure a jointure for L. N., "and so that immediately after the death of the said B. (subject, however, to the provisions made for jointure), the said lands should go to and be vested in the issue of the said B. by the said L. N.; and that such issue should also be entitled to a further sum of 1,000*l.* to be charged upon all the estate, real and personal, of the said B., but in such shares and proportions as B., by deed or will attested by three witnesses, should direct or appoint, and, failing such appointment, then in equal shares":—Held, that the word "issue" meant "children," and that the articles were to be carried into execution by giving all the children estates in common in fee. *Thompson* v. *Simpson*, 1 Dr. & War. 459.

But when the articles are very ambiguous, and there has been a great lapse of time, the court will be slow to put a construction upon them, which would affect the rights of a purchaser, which it would have adopted without hesitation as between the parties themselves. *Id.* 491.

By articles executed in consideration of marriage and the fortune of the wife, it was agreed that the trustees of a money fund, after the decease of the husband, should pay the residue of the interest, and also the principal sum (subject to an annuity by way of jointure for the wife) to the issue of the marriage, in such shares and proportions, or to any one or more of them, in exclusion of the others of them, as the husband should by deed or will appoint; and in default of appointment, to all the issue in equal shares, to such of said issue as should be sons at twenty-one, and to such of them as should be daughters at twenty-one or marriage; and that power should be given to pay, towards the advancement of any of said issue, any sum not exceeding one-half of the principal sum belonging to such child respectively; and in case there should be no issue, or all such issue should die in the lifetime of the husband, then, that the entire of the trust funds subject to the jointure should vest and be assigned, and go to the husband, his heirs, executors, &c., absolutely, for his and their sole use and benefit. And it was further agreed, that a regular deed of settlement should be executed, which should contain the several clauses and covenants in such cases usual and proper:—Held, first, that the word "issue," in the articles, was to be read "children"; secondly, that the settlement ought to contain clauses vesting the shares of the sons in them at twenty-one; and of the daughters, in them at twenty-one or marriage: and also clauses of survivorship and accruer of the shares of sons dying under twenty-one, and of daughters dying under that age without having been married, in favour of the surviving or other children; thirdly, that the husband was entitled to the fund, either in the event of his surviving all his children, or of no child attaining a vested interest therein; and that the settlement ought to contain clauses accordingly. *Roche* v. *Roche*, 2 Jo. & Lat. 561.

By articles relating to leases pur autre vie, and for years, and to money, it was agreed that said leases for lives and for years should be conveyed to trustees, in trust (after successive life estates to D. and J.), "after the decease of J., to the issue of J. and A., in such shares and proportions as the said J. should appoint, and for want of such appointment to go to such children equally, share and share alike; and for default of such issue, to the heirs, executors, and administrators of said J. during said leases: the money or the lands agreed to be purchased therewith to go to the issue of said J. and A., in such shares and proportions, &c.; and for want of such appointment to be equally divided among such children, share and share alike; and if no children of said marriage, or all should die before twenty-one," then a power to dispose of said money:—Held, that "issue" is to be construed "children," and that the issue of J. and A. took the absolute interest in the chattel property, and a quasi fee in the freehold property; that a quasi estate tail cannot be barred by will, semble. *Campbell* v. *Sandys*, 1 Sch. & Lef. 281; 9 R. R. 33. S. P. *Williams* v. *Jekyl*, 2 Ves. Sen. 681.

Annuities to Children.]—Rights of children under marriage articles to annuities charged on certain leaseholds for lives and a term of years. *Richardson* v. *Nixon*, 2 Jo. & Lat. 250; 7 Ir. Eq. R. 620.

Children "Suitably Provided for."]—In 1858, on the marriage of A., the eldest son of F., it was agreed by the marriage articles, to which A. and F. were parties, that certain lands, and all the stock, crops, &c., thereon, should be held by F. and A. until out of the profits they should have "suitably provided" for certain younger children of F. After the death of F., one of the children instituted a suit against A. and the executor of F. to have the trust carried into execution:—

Held, that the suit was maintainable; that the term "suitably provided for" was not too uncertain to be given effect to by the court, and that performance of the agreement should be enforced. *Brenan* v. *Brenan*, Ir. R. 2 Eq. 266.

Tenant in Tail—Covenant to Suffer Recovery not Carried Out.]—Settlement by lease and release (the settlor being tenant in tail, and covenanting to suffer a recovery which was never suffered):—Held, ineffectual to carry out intentions in favour of younger children, as against the remainderman in tail. *Stanhouse* v. *Gaskell*, 17 Jur. 157; 1 W. R. 77.

Children as Purchasers.]—When it is agreed by articles that, after an estate for life in the father, the estate is to go to the children in remainder, they take as purchasers. *Cordwell* v. *Mackrill*, Amb. 517; 2 Eden, 344.

Where marriage articles limited a joint estate to the intended husband and wife, and after the death of the survivor to the use of the heirs of the body begotten on the wife, and the settlement after marriage pursued the words of the articles: husband and wife levy a fine, and first mortgage, and then agree to sell. The articles not being produced, the court would not decree them to be carried into execution by a strict settlement against the purchaser, who had notice of them. *Ib.*

Settlement Executed after Marriage—Previous Articles.]—Where marriage settlement is executed after marriage, in pursuance of articles previous to marriage, and limitations are to husband for life, to wife for life, and heirs of husband by wife, it is executory, and will be carried into strict settlement by court. Secus, if executed after marriage, without previous articles. *Glanville* v. *Payne*, 2 Atk. 29; Barnard. 18.

Covenant by Father to Secure to his Daughter and her Children a Share of his Real Estate.]—A., having seven daughters and no son, by articles entered into on the marriage of his daughter B., covenanted to secure "to her and her children by C. (her intended husband), a share of his real estate, equal to that of any other of his daughters." A. died without having made any settlement:—Held, that B. was entitled to an estate for life, remainder to her first and other sons in tail, remainder to her daughters in tail. *Hamilton* v. *Cathcart*, Wall. Lyn. 282.

Post-nuptial Articles—Estate for Life only.]—By post-nuptial articles, J. F., having then two living sons, H. and T., and one daughter, M., covenanted with trustees to settle certain lands of which he was seised in fee as counsel should direct, to the use of J. F. for life, remainder to trustees to preserve, &c.; remainder to the use of H., and to permit him to take the rents and profits for his life; remainder to the heir male of the body of H., and to permit him to take the rents and profits for his life; remainder to the use of T., and to permit him to take the rents and profits for his life; remainder to the issue male of T., with remainders to the unborn sons of J. F. in tail male in strict settlement, with remainders over:—Held, that H. took an estate for life only. *Rochfort* v. *Fitzmaurice*, 2 Dr. & War. 1; 4 Ir. Eq. R. 375. *S. C.*, nom. *Rochford* v. *Fitzmaurice*, 1 Con. & L. 158.

Semble, that a limitation to trustees to preserve contingent remainders, not confined to the lifetime of a tenant for life, will not be cut down to that life if there are contingent remainders which may require protection during a longer period. *Ib.*

By post-nuptial articles of 1760, J. covenanted, in pursuance of articles before marriage, and for other valuable considerations, to settle his estate to the use of himself for life; remainder to trustees, to preserve, &c., and after decease of J. (subject to a jointure), to the use of H., his son, and his assigns for life; and after his decease, "to the heirs male of his body": in default of such issue "to T., a second son, and his assigns for life; and after his decease, to his issue male; remainder to the third, fourth, and other sons and the heirs male of their respective bodies; remainders over." Power to J., H., T., or any of the issue male of J. who should become seised under the limitations, to make leases for three lives or thirty-one years. Power to H., &c., when seised to jointure not exceeding 150*l.* per annum:—Held, that H. took an estate for his life only. *Brennan* v. *Fitzmaurice*, 2 Ir. Eq. R. 113.

Articles before marriage to settle were so expressed, that the husband would have had an estate tail; a settlement copying the very words of the articles was reformed, estate for life only being intended. *Randall* v. *Willis*, 5 Ves. 275; 5 R. R. 40.

Articles before marriage for settling real estates of the husband and also all and singular his personal estate of what nature or kind soever: a proper execution would be by a covenant, that real estate, that should be purchased with the personal, should with respect to the objects of the settlement be considered personal: the settlement, therefore, made after marriage, containing no such covenant, and being in other respects a defective execution, real estates purchased by the husband according to the evidence, in order to defeat the right of his wife, were decreed to be conveyed by his devisee according to the articles. A gift by him in his life, in consideration of service was not disputed; but under the particular circumstances attending the marriage, and in the case of an infant, the court appeared to question its validity. *Id.* 262.

Issue Taking as Tenants in Common.]—On articles previously to the marriage of W. with R., the father of W. "bound the whole of the farm, &c., as a marriage portion to his son W., along with R.; the one-half of said farm to be the right, title, and interest of the issue, whether son or daughter, if begotten on the body of R. by W." The issue take as tenants in common. *Taggart* v. *Taggart*, 1 Sch. & Lef. 84; 2 R. R. 19. And see *Thompson* v. *Simpson*, supra, col. 381.

By a deed it was agreed and declared that A., his executors, administrators, and assigns, should raise out of certain hereditaments 800*l.*, and should invest the same in the names of trustees at interest upon government or real securities "upon trusts to be declared for the benefit of R., for her life, with remainder to her children, and as to R. to and for her separate use, and with all the powers for changing the security, and for maintenance, and other powers and trusts which are usually inserted in a money settlement of the like nature." No subsequent declaration of trust of the 800*l.* was ever made:—Held, that the deed was executory only, and that the settlement so directed ought to have limited the 800*l.*, after the death of R., amongst

her children as tenants in common, and not as joint tenants. *Mayn* v. *Mayn*, L. R. 5 Eq. 150; 17 L. T. 439.

Settlement in Pursuance of Articles—Limitation to Children—Rectification.]—Ante-nuptial articles were signed for the wife's personal estates being vested in trustees, "the trusts of the income being for the benefit of the husband and wife during their lives, and the trusts of the capital being for and amongst the children according to the appointment of the husband and wife, or the survivor of them; and in default of appointment, to the children equally; and in the event of there being no children, and of the husband being the survivor, the trust property to be at his absolute disposal." After the marriage a settlement was executed which limited the income to the husband and wife, during their joint lives, and to the survivor of them during his or her life, and then gave the capital to the children absolutely as tenants in common; but if there was no child, and the husband survived the wife, then to the husband. There was only one child of the marriage, and he died at the age of six months, in the lifetime of the parents. The husband died in the lifetime of the wife:—Held, that the capital of the fund and the arrears of income at the death of the husband belonged to the wife, for that the court would have carried the articles into effect by giving the wife the first life estate to her separate use, and by making the shares of sons contingent on their attaining twenty-one, and of daughters on their attaining twenty-one or marrying, or by inserting clauses of survivorship and accruer on the death of sons under twenty-one and of daughters under that age and unmarried, so that the husband would have had no title as next of kin of his deceased infant child, and that the settlement must be rectified accordingly. *Cogan* v. *Duffield*, 45 L. J., Ch. 307; 2 Ch. D. 44; 34 L. T. 593; 24 W. R. 905.

Marriage articles carried into execution, by limiting estates in strict settlement to A. and B. respectively, with cross-remainders between B. and the issue of A., with power to A. to appoint both estates among his children. The will of A. referring to the estate, but not to the power, declared a good execution of the power, to the extent of limiting estates tail to the children; the excess reformed to effectuate the general intention of the articles. *Dillon* v. *Dillon*, 1 Ball & B. 77. *See* 14 R. R. 241, n.

Marriage articles for settling lands varied by decreeing the estate to one for life, with remainder in tail to his issue instead of an estate tail to him. *Griffith* v. *Buckle*, 2 Vern. 13.

Marriage settlement rectified by a strict settlement agreeably to the ordinary course, notwithstanding it agreed with the articles verbatim, and both made before marriage, the plaintiff having however taken a benefit under the will which he disputed:—Held, to have made his election, and decreed to give up part of the settlement estate in satisfaction. *Roberts* v. *Kingsly*, 1 Ves. Sen. 238.

A marriage settlement, purporting to be made in pursuance of articles recited in it, conveyed an estate to A. and his wife, and the heirs of their bodies:—Held, that they became tenants in tail special, and that a court of law could not construe the deed as rendering them tenants for life, with remainder to their issue in tail, even if that might have been the construction to be put upon the articles by a court of equity. *Doe* d. *Daniel* v. *Woodroffe*, 10 M. & W. 608; 12 L. J., Ex. 147. Affirmed, nom. *Woodroffe* v. *Doe* d. *Daniel*, 15 M. & W. 769; 15 L. J., Ex. 356; 7 Jur. 959; 2 H. L. Cas. 811; 18 L. J., Ex. 498; 13 Jur. 1013.

ii. *Devises.*

Principle of Construction.]—The only difference between the construction of executory trusts in a marriage settlement and a voluntary settlement or will is, that in the former the nature of the instrument affords a presumption that the intention is for a strict settlement, whereas in the latter case that intention must appear on the face of the instrument. *Rochford* v. *Fitzmaurice*, 1 Con. & L. 158. *S. C.*, nom. *Rochfort* v. *Fitzmaurice*, 2 Dr. & War. 1; 4 Ir. Eq. R. 375.

Trusts when Executory and when Not.]—Devise in trust for a son of the testator's nephew A., at the age of twenty-four; if he have no son, to A., son of the testator's great-nephew B.; but if neither have a son, then to a son of the testator's great-niece's daughter, taking his name, whoever should take not to be put in possession of any part of the testator's effects until twenty-four, nor the executors to give up their trust till a proper entail be made to the heir male by him: is an executory trust in tail for an only son of A. in ventre at the testator's death; and not void for uncertainty, nor too remote. *Blackburn* v. *Stables*, 2 V. & B. 367; 13 R. R. 120.

Remainder to Issue.]—A. devises lands to his sisters B. and C., and their heirs and assigns, upon trust, that until his granddaughter D. should marry or die, to receive the profits, and thereout to pay her 100*l.* a year for her maintenance; the residue to pay debts and legacies. After payment thereof, in trust for said D., and upon further trust, that, if she lived, to marry a Protestant, and at time of such marriage be twenty-one, or upwards, or if under that age, such marriage be with the consent of the said B., then to convey, with all convenient speed, after such marriage, to the use of said D. for life, sans waste, voluntary waste in houses excepted; remainder to her husband for life; remainder to the issue of her body, with remainders over; and upon further trust, that if D. die unmarried, then to the use of B. for life; remainder to the son of his other granddaughter E., in tail; remainder to the defendant C., remainder to his first and other sons; remainder to A.'s right heirs; and upon further trust, that if D. marry not according to will, then upon such marriage to convey to trustees, as to one moiety to the use of D. for life; then to trustees to preserve contingent remainders; remainder to her first and every other son, being Protestant, with remainders over; and as to other moiety, to the son of his daughter E., in like manner. A. dies, D. attains her full age; and upon a treaty of marriage with F., applies to B. and C. for a conveyance to herself for life; remainder to her intended husband for life; remainder to the issue of her body: B. executes such conveyance, but C. refuses; D. suffers a recovery of the whole to use of herself in fee, and then marries F., who made a considerable settlement upon her; she covenants to settle

her estate upon husband and wife; remainder to first, &c., sons in tail; remainder to survivor of husband and wife in fee. They bring a bill to compel C. to convey, &c. Decreed (not an estate tail to D.) but an estate for life sans waste, ut supra, as being intent of A., upon the will, with remainders over in strict settlement. *Glenorchy (Lord)* v. *Bosville*, Cas. t. Talb. 4.

"To one for life, and to the heirs of his body," has been always held to be an estate tail; but where it is "to one for life, and after his death to the issue of his body," there is no instance where it has been so construed. *Meure* v. *Meure*, 2 Atk. 265.

One devises his lands for payment of his debts, and then to A. for life, with power to make leases, &c., remainder to the heirs male of the body of A.; though this be but the devise of a trust, and executory, and expressed to be to A. for life, yet it is an estate tail in A., barable by a fine and recovery: secus, in case of marriage articles to settle an estate on A. for life, remainder to the heirs male of his body, this being an agreement to do a future act, and in which the issue are particularly considered, and looked upon as purchasers. *Bale* v. *Coleman*, 1 P. Wms. 142.

Money to be laid out in Lands.]—A. devised 10,000*l.* to trustees in trust to be laid out in lands, and to be settled on B. for life without impeachment of waste, remainder to trustees and their heirs for the life of B. to support contingent remainders, with a power to B. to make a jointure, remainder to the heirs of the body of B., remainders over; and by the same will devises lands to B. to the same uses, and dies, leaving C. executor; B. sues C., the executor, for the deeds relating to the lands that are in his hands, and to have the money laid out in lands and settled. Decreed that B. had but one estate for life in the lands, and so not entitled to the deeds, but that they were to be brought into court, and that the lands to be bought with the money were to be settled on B. for his life only, remainder to his first, &c., son. But on appeal, B. was decreed to have an estate tail in the lands devised, and consequently to be entitled to the deeds relating thereto; though, as to the lands to be purchased, that being executory, and in the power of the court, B. was to be but tenant for life, with remainder to his first, &c., son. *Papillon* v. *Voice*, 2 P. Wms. 471; 2 W. Kelyng, 27; Fitzg. 38; 1 Eq. Cas. Abr. 185, pl. 30.

One devises all his money in the government funds, to be laid out in the purchase of land of 300*l.* or 400*l.* per annum, to be settled on the eldest son, and the heirs male of his body, remainder to the second son, and the heirs male of his body, &c., and devises the rest of his personal estate to his eldest son, and the heirs male of his body; remainder to his second son, &c. The personal estate cannot be entailed; but the whole vests in the eldest son. *Seale* v. *Seale*, 1 P. Wms. 290; Pre. Ch. 421; Gilb. Eq. R. 105.

Money was to be laid out in land to be settled to the husband for life, remainder to raise portions for younger children; the money was afterwards invested by direction of the husband in S. S. annuities; afterwards, by will, he devised generally all his manors, &c., to certain uses: the money in the funds must be laid out in land. *Hickman* v. *Bacon*, 4 Bro. C. C. 333.

Money devised to be laid out in land, and settled on the children of J. S.; land is purchased and settled on them and their heirs, and one dies. Decreed the land should not survive. *Saunders* v. *Browne*, 2 Vern. 46; 3 Ch. R. 214.

Settlement to Contain no Power to Bar Entail.]—A. devises lands to trustees to pay debts and legacies, and then to settle the remainder on her son B., and the heirs of his body, with remainders over, and directs that special care should be taken in the settlement that it should never be in the power of her son to dock the entail. Decreed, the son should be only tenant for life, without impeachment of waste, and should not have an estate tail conveyed to him. *Leonard* v. *Sussex*, 2 Vern. 526.

Property to descend Unincumbered.] — A devise subject to the life interest of the testator's widow, upon trust to convey, assign, and assure freehold property "unto and to the use of my son T., and the heirs of his body lawfully issuing, but in such manner and form, nevertheless, and subject to such limitations and restrictions, as that if T. shall happen to die without leaving lawful issue, then that the property may after his death descend unincumbered unto and belong to my daughter R her heirs, executors, administrators, and assigns," is an executory trust to be executed by a conveyance to the use of T. during his life with remainder to his first and other sons and daughters as purchasers in tail, with remainder to R. in fee. *Thompson* v. *Fisher*, L. R. 10 Eq. 207; 18 W. R. 860.

Dying without Issue.]—A testator directed that an estate should be purchased by his executors, and that such estate should be made hereditary, and settled upon his constituted heir. He then appointed his nephew his heir and successor, and desired that the estate should be settled upon him, and should descend to his heirs and successors in the direct male line: and in case of his nephew dying without issue, the estate to devolve upon his brother, his heirs and successors in the direct male line:—Held, that the nephew was not to take as tenant in tail in possession, but that the estate was to be settled upon him for life, with remainder to his sons in tail male, and afterwards to the next taker and his sons in like manner. *Shelton* v. *Watson*, 16 Sim. 543; 18 L. J., Ch. 223; 13 Jur. 203.

A trust created by will to purchase land, to be added and closely entailed to testator's family estate, in the possession of T. B.; testator declaring that his object was to have a head to the family, and that if T. B. should die without male issue, or dispose of the family estate, the residue of his fortune should go to A., or his nearest relative in the male line; how to be executed. *Woolmore* v. *Burrows*, 1 Sim. 512.

Death Leaving no Heirs of Body.]—Testator devised his estate to A. in case his daughter should die leaving no heirs of her body:—Held, a gift to the daughter for life, with contingent remainder to such heir of her body as should be living at the time of her death. *Read* v. *Snell*, 2 Atk. 646.

"Leaving" is a participle of the present tense, and relates to the time of the daughter's dying. *Ib.*

No weight has been laid on the want of the words "for life" when the intention of the testator has otherwise appeared, especially in

the case of a trust executory, for then a court of equity is bound to see a settlement made agreeably to the intention of the testator. *Ib.*

Trust for A. and the Heirs of his body—As Counsel should advise.]—Devise to trustees of money to be laid out in land, and to be settled as counsel should advise, in trust for A., and the heirs male of his body, to take in succession and priority, and the interest of the money till laid out, to be paid to A., his sons, and issue. A. shall have but an estate for life, with remainder to the first and other sons in tail, &c. *White* v. *Carter*, Amb. 670. Affirmed, 2 Eden, 366.

Testator devised his estates to trustees, "upon trust, as counsel should advise, to convey, settle, and assure the said premises to or for the use of or in trust for his daughter J. for her life, and after her death then on the heirs of her body, &c." The court directed the estates to be settled upon J. for her life, with remainder to her first and other sons in tail general, with remainder to her daughters in tail general, &c. The limitations being to both sons and daughters in tail general, there is no necessity for a subsequent limitation to J. and the heirs of her body. *Bastard* v. *Proby*, 2 Cox, 6.

Separate Use and Gift Over.]—A., by will, directed his trustees to convey his freehold lands to his daughter, P., and so as that she alone should receive the rents, and so as her husband should not intermeddle therewith; and from and after her decease, in trust for the heirs of the body of the said P. for ever:—Held, that this was an executory trust, and that the wife took an estate for life only; therefore the husband could not have courtesy; sed secus, if it had been an estate tail. Lord Hardwicke said in this case, that the devise being to the wife's separate use, would not bar the husband; for here is a sort of seisin in the wife. And though Coke says, that to make a tenancy by the curtesy, there ought to be an inchoate right to the husband in the wife's lifetime, he does not say he should be seised of the rents and profits. *Roberts* v. *Dixwell*, 1 Atk. 607.

Testator gave one-third of his residue to his niece, which he desired might be settled by his executors, on her, for her separate use, for her life, but to devolve to her issue at her death, and, failing issue, then to revert to his nephew. The court directed the third to be settled in trust for the niece, for her separate use for life, and after her death in trust for her issue then living, and if there should be no such issue then in trust for the nephew. *Stonor* v. *Curwen*, 5 Sim. 264.

Advice to settle upon Devisee and issue male.]—A testator devised some copyhold estate to his son Thomas, and "advised him to settle it upon himself, and his issue male by his lawful wife, and for want of such issue upon Edward and his lawful issue":—Held, first, that these words created a trust; and, secondly, that Thomas was entitled to a life estate only. *Parker* v. *Bolton*, 5 L. J., Ch. 98.

Joint Tenancy turned into Tenancy in Common.]—In an executory trust a court of equity is sometimes obliged to depart from the words of a will, in order to direct a conveyance to be made, which will answer the intention of the testator. *Synge* v. *Hales*, 2 Ball & B. 507.

A devise after the death of the survivor of testator's daughters, to all and every the child and children of his daughter S., who should be living at the time of her death, and to the heirs of such child or children, for ever, equally, share and share alike, afterwards revoked by a codicil, reciting the devise, and in lieu of it directing the trustees, upon the death of the survivor of his daughters, to convey the lands charged with 1,000*l.* for a granddaughter to the two sons of his daughter S. and their heirs; the 1,000*l.* to be paid by the grandsons as soon as they became entitled to the possession of the estate. The grandsons take as tenants in common. *Id.* 499.

Devise to trustees, as soon as his three daughters attained their respective ages of twenty-one, to convey to them and the heirs of their bodies as joint tenants, this is not a joint estate, but to be construed as near as may be; so that the conveyance must be at twenty-one respectively, with cross remainders. *Marryat* v. *Townly*, 1 Ves. Sen. 102.

Residuary Devise—Trust to Entail.] — A testator who was seised in fee of three estates, devised one of them, called the Tempo Estate, to his daughter Letitia for life, with remainder to her issue in tail, and, in default of such issue, to his nephew Robert James, for life, with remainder to his issue in tail, with several remainders over, but leaving the ultimate reversion in fee undisposed of. He then devised the two remaining estates to his other daughters in strict settlement, but made no disposition of the ultimate reversions in fee. The testator was also seised of divers freehold lands, and was possessed of considerable personal property, and after devising various parts of his freehold lands to the different persons, and bequeathing some pecuniary legacies, he concluded with these words: "I leave and bequeath the rest, residue, and remainder of my properties, both freehold and personal, of whatsoever nature and kind I may die possessed of, to my brother Robert; and if my said brother Robert shall survive me, I request and desire that he shall convert all the personal property into fee simple property, and at his decease leave the same entailed on his son Robert James, in the same manner as I have myself entailed the Tempo Estate":—Held, that the freehold estates which passed under the residuary devise, as well as the residuary personal property, are within the trust to entail contained in the residuary devise. Held, also, that this trust was to be executed by giving a life estate to Robert James, with remainder to his sons and daughters in tail, according to the limitations of the Tempo Estate. *Tennent* v. *Tennent*, 1 Dr. 161; 1 Jo. & Lat. 379; 7 Ir. Eq. R. 361.

"Issue" including Children and Grandchildren.]—It does not follow, because the word "issue" in one part of the will means children only, that it should have that meaning also in another part; and where, after a bequest to A. and B. and their issue, in the sense of children, the residue was given to A. and B. equally, and to be divided between them, with benefit of survivorship, upon the death of either under twenty-one; not to be subject to the control of their husbands, but to be held in trust for them and their issue respectively until they attained twenty-one, if unmarried, or if married until a proper settlement could be made upon them and their issue, so that they should receive the dividends exclusively of their husbands, and if they both died under twenty-one, and without issue, then

over; both attained twenty-one, and one of them died leaving children and grandchildren:—Held, that both the children and grandchildren were entitled to her share per capita as tenants in common. *Head* v. *Randall*, 2 Y. & C. C. C. 231; 7 Jur. 298.

A testator directed his property to be divided between his children at twenty-five, share and share alike, and all moneys inherited by his daughters to be placed in the hands of trustees, to be settled on them for the sole use of themselves and their lawful issue:—Held, that "strict settlement" was not intended by these words, but the money inherited was to be settled upon the daughters and their lawful issue, which would have the effect of giving to the daughters an absolute interest. *Samuel* v. *Samuel*, 14 L. J., Ch. 222.

Vague Direction to Settle "On Marriage."]—A father directed his property to be divided into nine shares, and gave one share and a half to each of his two daughters, "to be settled on themselves at their marriage." At his death the two daughters were infants. The two daughters having attained twenty-one, and being unmarried:—Held, that they were entitled to their shares absolutely, and that there was no trust for a settlement which the court could execute. *Magrath* v. *Morehead*, 41 L. J., Ch. 120; L. R., 12 Eq. 491; 24 L. T. 868.

Direction to take Testator's Name.]—A testator directed his estates and house property to be settled on his son, D., and his heirs male; and should he have no heirs male, then the property to go to his grandson, B., on his taking the name of D., in addition to his own, within twelve months after his succession: and in the event of his having no heirs male, then the estate to go to his brother and his heirs male, he taking the name of D.:—Held, that an executory trust was created, which the court directed to be carried out by a settlement, with limitations to the several devisees for life, and remainders to their sons in tail, successively. *Duncan* v. *Bluett*, Ir. R. 4 Eq. 469; 19 W. R. 41.

Testator directed his estates to be settled on G. R. for life, with remainder to his issue in tail male in strict settlement, upon condition that all persons from time to time to come into possession of the estates should take and use the name and arms of T.:—Held, that the estates ought to be settled on G. R. for life, with remainder to his sons successively in tail male, with remainder to his daughters as tenants in common, with cross-remainders in tail male: and that the proviso to be inserted in the settlement, as to taking the name and arms and for giving over the estates on default, ought to be so expressed as to take away the estates from the defaulting party and his descendants only; that is, if a grandson of G. R. were the defaulting party, the consequence ought not to extend to the grandson's brothers. *Trevor* v. *Trevor*, 13 Sim. 108; 11 L. J., Ch. 417; 6 Jur. 863. Affirmed. 1 H. L. Cas. 239.

Testator made two wills, one of his estates in Sussex, and the other of his estates in Bedfordshire. By the latter he devised those estates to trustees in trust to settle them on G. R., who was heir to the barony of D., for life, with remainder to his issue in tail male in strict settlement; "Upon the like condition to that I have made my will of my Sussex estates, so far as the change of circumstances will permit, that the said estates shall go over to the party next entitled, on the person for the time being possessed becoming entitled to the barony of D.":—Held, regard being had to the will of the Sussex estates, that the succession of a child or any male issue of a child of G. R. to the barony ought not to exclude that child or his issue male from the enjoyment of the Bedfordshire estates, unless some other child or the issue male of some child of G. R. were in existence to whom those estates might go over. *Ib.*

Devise after Life Interests to Convey "in due Course of Entail."]—A testator devised to trustees, to the use of eight persons successively for life, and afterwards in trust to convey to all the sons and daughters of the eight who should be then living, and the heirs of their bodies "respectively in a due course of entail;" and he empowered his sister to cut down the estates of children "thereafter born of the eight to life estates." The plaintiff was a child of one of the eight born at the date of the will:—Held, that though the trust was executory, she was tenant in tail, and not tenant for life. *Randall* v. *Daniel*, 24 Beav. 193.

Settlement whereby real estate was conveyed in consideration of natural love and affection to trustees and their heirs, to the use of such persons as the settlor should appoint, and in default to the use of settlor for life, with certain intermediate uses, and then upon trust to convey the property to all and every other the sons and daughters of G., and to all and every other the sons and daughters of S., and so on of six other persons in succession, who should be then living, and to the heirs male and female of his, her, and their body and bodies respectively, in a course of entail; the sons and daughters of G. and the heirs of his, her, and their body and bodies respectively, to take and be preferred before all the other persons last above named; with a similar clause for S. and each of the other six persons named, the sons of all and every the persons last named, and the heirs of his and their body and bodies to take before the daughters and the heirs of her and their bodies. The settlor then by his will devised other lands to trustees to the use of certain persons for life, and after the termination thereof upon trust to convey the estate to all the sons and daughters of eight persons and the heirs of their bodies respectively in a due course of entail, with power to one of the tenants for life to cut down the estates of children thereafter to be born, to life estates. Upon the above settlement it was held that the daughters of G. took in priority to the sons of S.; and that a daughter of G., who at the death of the last tenant for life was the only child of G., took an estate tail in the devised estate. *Ib.*

Held, also, that in construing the will, there being no ambiguity upon it, the settlement must not be looked at for the purpose of construing the will. *Ib.*

"Family."]—A testator directed that upon the death of his wife, to whom he gave a life interest in all his property, both real and personal, his nephew, whom he named, should be heir to all his property not otherwise disposed of; but added, that as he had had little intercourse with his nephew, and was apprehensive that his habits might require some control, whatever portion of the property might be possessed by him was to be secured by the executors for the benefit of his family:—Held, that the real estate was to be settled on the nephew for life, with

remainder to his sons successively in tail male, with remainder to his daughters as tenants in common in fee, and the personal estate upon the nephew for life, with remainder to all his children as joint tenants, with a proviso, that in the event of all the children dying under twenty-one, and daughters unmarried, or if sons, without issue, the personalty should be held in trust for the nephew absolutely. *White* v. *Briggs*, 2 Ph. 583; 17 L. J., Ch. 196.

Family Arrangements—Erroneous Decree—Re-hearing.]—A will directed real estate to be settled to uses which did not exhaust the fee. In a suit to carry out the trusts of the will, to which the persons beneficially interested, who were an infant and a married woman, and the trustees of the will, were parties, the court approved of a settlement purporting to be made in accordance with the will, the uses of which did exhaust the fee:—Held, first, that the decree approving the settlement was erroneous. *Head* v. *Godlee*, Johns. 536; 29 L. J., Ch. 633; 6 Jur. (N.S.) 495; 8 W. R. 141.

But secondly, semble, that in a suit by persons claiming under one of the beneficiaries against persons claiming under the other beneficiary through the medium of the uses in excess of the limitations directed by the will, the court was bound by the former decree until set aside upon a re-hearing. *Ib.*

Directions to settle on Descendants of Mother of Devisee in Fee.]—Devise to A. in fee, with directions to settle on descendants of his mother for their several lives, &c., A. may limit an inheritance to effectuate the general intent. *Godolphin* v. *Godolphin*, 1 Ves. Sen. 21.

Direction to Settle with Power to Beneficiaries to Lease.]—A testator by his will directed the trustees therein appointed, to call in a certain sum of money to which he was entitled, and invest the same in the purchase of freehold estates in lands or hereditaments, of a clear estate of inheritance for the use of his son A. for his natural life, and after his death to the use of his first and other sons, according to seniority of age and priority of birth; and in case the said A. should happen to die without issue male, then in trust for his second son B. and the heirs male of his body, according to seniority of age and priority of birth; and desired that his said sons, and the several persons who should be in possession of such estates, should have a power to make leases not exceeding three lives or thirty-one years, at the full improved value:—Held, that A. was entitled to an estate tail in the lands to be purchased. *Herbert* v. *Blunden*, 1 Dr. & War. 78.

Power to raise Moneys for Portions.]—L. by his will devised his manors to trustees upon trust, to convey the same to his son J., for life, with remainder to trustees to preserve contingent remainders; with remainder to the second and other younger sons of J., in tail male. There was no limitation to the first son of J.; but the declaration of the trust of the term contained a provision to raise money for the daughters, on failure of issue male of the body of J. The will also provided, that in case J. should have any children, other than and besides an eldest or only son, then J. might raise money for the portion of younger sons or daughters:—Held, that the true construction of the will was, that the first son should have an estate tail male in reversion, after the death of his father. *Langston* v. *Pole*, Tam. 119: 7 L. J. (O.S.) Ch. 185; 31 R. R. 74. *S. C.* at law, 5 Bing, 228; 2 M. & P. 490; 7 L. J. (O.S.) C. P. 1.

Direction to convey Lands to Right Heirs of Tenant for Life.]—Under an executory trust in a will to settle lands, to be purchased with certain funds, upon A. for life, and afterwards according to her appointment, and, in default of appointment, to convey to the right heirs of A., with a similar trust as to the residue of the fund not laid out in the purchase of land; the trust, in default of appointment, being for the executors or administrators of A., it was held, that, as A. took an absolute interest in the money under the last trust, in default of appointment, the direction to convey the lands to her right heirs must be construed as words of limitation, and not to vest any estate in her heirs as purchasers. *Webb* v. *Shaftesbury* (*Earl*), 3 Myl. & K. 590.

Direction to Settle if Daughter married a Professional Man.]—Testator directed that if his daughter should marry a professional gentleman, or a man embarked in trade or business, and not possessed of landed property whereon to charge a suitable provision for her, certain trust funds should be settled upon her for life, and, after her decease, the principal to the issue of her marriage; but if she should marry a gentleman possessed of landed estate and he should make a suitable provision for her, and settle his estate on the issue of the marriage, that the trust fund should be paid to her husband. The daughter married a country gentleman not possessed of any landed estate, and not a professional gentleman, or embarked in any trade or business. He afterwards purchased a landed estate, and offered to make a settlement of it upon being paid his wife's fortune; but it was held, that the trust fund should be settled according to the directions in the will; and that the husband was not entitled to a life interest therein. *Briscoe* v. *Briscoe*, 1 Jo. & Lat. 334; 7 Ir. Eq. R. 123.

Gift in Succession or to a Class as Tenants in Common—Cross Remainders.]—Testator directed his trustees to purchase lands in the counties of N. and D. to be settled, on the death of the eldest son of J. S. without issue (which happened), to the use of every son of J. S. then living, or who should be born in the testator's lifetime, and the assigns of such son during his life, with remainder to trustees to preserve contingent remainders; but to permit such son and his assigns to receive the rents during his life, and after his death to the use of such son's first and every other son successively in tail male, and on failure of such issue to the use of the testator's right heirs:—Held, that the younger sons of S. took as tenants in common for life, with remainder as to each son's share to his first and other sons in tail male, with cross remainders over. *Surtees* v. *Surtees*, L. R. 12 Eq. 400; 25 L. T. 288; 19 W. R. 1043.

Testatrix by her will gave 500*l.* to each of her two nieces to be settled as she should thereinafter describe, and directed that the provision therein made for her nieces should not be subject to the control of any husbands they might marry, but should remain vested in her executors in trust until a proper settlement was made. And by a codicil she directed that if either of her nieces should die without leaving issue, the legacy given to her should devolve to the other niece and her children, with a gift over if both should die

without issue:—Held, that this was an executory trust, and that the nieces took life interests with remainder to their children and cross remainders between them. *Holloway* v. *Collier*, 1 W. R. 266.

A testator empowered his trustees to purchase freeholds, "to the amount of 1,500*l.* of his personal estate, for the use of A. during life, and then to be divided among his issue, if any":—Held, that this was executory, and that A. took for life, with remainder to his children as tenants in common in tail, with cross remainders between them in tail, with an ultimate reversion in fee to A. *Hadwen* v. *Hadwen*, 23 Beav. 551.

d. Express Directions to settle in "Strict Settlement."

General Rule.]—When the general intent is to make a strict settlement, it shall prevail, though some of the limitations may seem contingent; but where the intent to create an estate tail is not plain, but doubtful, the court will lay hold of anything, rather than put it in the power of a person on a remote contingency to bar all subsequent remainders. *Lethieullier* v. *Tracy*, 3 Atk. 781, 797; Amb. 204. *And see* 3 Ken. 40.

Proviso that if any of the tenants for life, in a devise and executory trust to convey in strict settlement, shall become possessed of the family estate, the devise or limitation directed shall thereupon cease and become void and not take effect; and the person next in remainder, under the said limitations or directions, thereupon become entitled to the possession. The first tenant in tail is entitled under the proviso, notwithstanding the descent of the other estate upon his father for life. *Stanley* v. *Stanley*, 16 Ves. 491.

Direction to trustees to correct any defect or incorrect expression in the will, and to form the settlement, from what appears to them to be the testator's real meaning, does not authorise them to change the limitations. *Ib.*

Devise in strict settlement, with power to the tenants for life to jointure, on condition that two-thirds of the portion should, upon such marriage, be settled, one-third upon the eldest son of the marriage, and one other third upon the younger children. Upon the intention that the settlement should be conformable to the limitations of the real estate, a trust for the father for life was established, and the interest of the eldest son was not to be devested, except by his death under twenty-one, without issue male. *Burrell* v. *Crutchley*, 15 Ves. 544.

In an executory trust to be effected by the court, it is sufficient if it can satisfy itself of the testator's intention to carry it into execution; therefore, where testator gave his real estate in A., to a devisee in strict settlement, and ordered other estates to be sold, and converted into personalty, and the produce, with the residue of his property, to be laid out in land in A., contiguous and convenient to his estate in A., and by strong expressions (though without direct words) showed he intended it to go to the same uses, it was decreed so to be. *Browne* v. *De Last*, 4 Bro. C. C. 527.

Devise to Heir-at-law and his Issue.]—Devise to the heir-at-law and his issue male in strict settlement, remainder in trust to be sold, and the money to be distributed among certain persons, or the survivors or survivor of them, and that the share of one should, previous to her marriage, be settled upon her for life, and after her death upon her issue, in default of issue upon her right heirs; the produce of the sale is to be considered as personal estate, and vests in the survivors at the death of the tenant for life, without issue male. A settlement in trust for the husband for life, then for the wife for life, then for the children as they should appoint; in default of appointment, equally; if no children, according to their joint appointment: in default thereof, to the husband, his executors, &c. is a sufficient execution of the direction in the will. *Brograve* v. *Winder*, 2 Ves. 634. *See* 20 R. R. 261.

Devise of Lands in Trust for One and his Heirs in Strict Entail.]—If lands are devised in trust to be settled on A. and his heirs, in strict entail, the lands ought to be settled on A. for life, and on the persons designated as his heirs, in succession. Testator devised lands, subject to an annuity to his wife, to his son for life, with remainder to the son's first and other sons in tail, with remainder, subject to another annuity, to his wife, to his grandson, and the grandson's first and other sons in like manner, with remainders over; and he gave his residuary personal estate to his son. The son died without issue; and, thereupon, the testator, by a codicil, charged the lands with three further annuities, one for his wife, another for his daughter, and the third for her husband: and gave his residuary personal estate to his wife. He afterwards made two other codicils, but they were not duly attested. He then made a fourth, which was duly attested, "revoking several of the dispositions, heretofore made by me in my said will and codicils, of all my freehold, copyhold, and personal estate of every kind; and, instead of such devise, disposition, and bequest thereof, I do give all my freehold, copyhold, and personal estate of every kind, and wheresoever situate, unto my daughter, for her life; and, after the determination of that estate, unto my grandson and his heirs in strict entail as in my will directed." He then directed that his grandson, who was an infant, should not be put in possession of his estates until he attained thirty-one; and that, in the interval, the rents should be accumulated for the benefit of his grandson and heirs; "and, in failure of issue of my said grandson, I order that my said estates and effects shall go and descend as is by my said will directed." The testator then confirmed the several annuities and donations bequeathed in his will and former codicils, and gave another annuity to his wife; thereby, in all other respects but what was above mentioned, ratifying and confirming his will and codicils:—Held, that the grandson took, not an estate tail, but only an estate for life in the lands. *Graves* v. *Hicks*, 11 Sim. 536; 10 L. J., Ch. 185; 5 Jur. 674. And see *S. C.* at law, nom. *Doe* d. *Hearle* v. *Hicks*, 8 Bing. 475; 1 Cl. & F. 20; 6 Bligh (N.S.) 37; 1 M. & Sc. 759 H. L.—(E.)

Tenant for Life punishable for Waste.]—When an executory trust for the settlement of freehold estates in strict settlement directs, either expressly or by reference to the trusts of other property, that certain persons shall take life estates, the use of the words "in strict settlement" does not make the tenants for life dispunishable for waste. *Stanley* v. *Colthurst*, 39 L. J., Ch. 650; L. R. 10 Eq. 259; 18 W. R. 969; 23 L. T. 761.

Form of Settlement.]—Directions as to the proper settlement to be made where property was directed by will to be "settled strictly." *Loch* v. *Bagley*, L. R. 4 Eq. 122; 15 W. R. 1103.

Bill for Strict Settlement Dismissed—Acquiescence.]—Bill for a strict settlement, after long acquiescence by plaintiff's ancestor, and when impossible to bar the remainder, dismissed. *Parker* v. *Philips*, 1 Ves. Sen. 530.

e. Directions to Settle on a Female.

Legacy to Married Woman to be Settled on her in Italy.]—A legacy given to a married woman, to be settled on her in Italy, was ordered to be paid to a banker in Italy, on his giving security that it should be settled, according to the law of Italy, on the wife, for her separate use. *Brown* v. *Tatnall*, 6 L. J., Ch. 371.

Children.]—Bequest of the testator's property to his wife to bring up and educate his children, and when they should come of age, to settle on them what she should deem prudent, reserving to herself a sufficient maintenance; and, at her death, the property remaining to be equally divided amongst his children; with a gift to trustees for the children, in case of the marriage of his widow:—Held, that the widow took a life interest in the property, with a power to settle or appoint the same on or to the children of the testator, but not on or to his grandchildren; and that the children took vested interests in the property at the testator's death, liable to be divested by such appointment. *Kennerley* v. *Kennerley*, 10 Hare, 160; 16 Jur. 649.

Where a precatory trust has been created by will in favour of "children," simpliciter, the trustee may, in executing the trust, limit the shares of daughters to their separate use. *Willis* v. *Kymer*, 47 L. J., Ch. 90; 7 Ch. D. 181; 38 L. T. 207.

Daughters' Shares—To be Settled on Themselves Strictly.]—Where a testator directed that his daughters' shares under his will should be "settled upon themselves strictly":—Held, that the income of each daughter's share should, during the joint lives of herself and her husband, be paid to her for life for her separate use, without power of anticipation; and if she died first, then her share should go as she should by will appoint, and in default of appointment to her next-of-kin, exclusively of her husband; and if she survived, then to her absolutely. *Loch* v. *Bagley*, L. R. 4 Eq. 122; 15 W. R. 1103.

—— **To be Settled on Marriage.**]—A father directed his property to be divided into nine shares, and gave one and a half share to each of his two daughters, "to be settled on themselves at their marriage." At his death the two daughters were infants. The two daughters having attained twenty-one, and being unmarried:—Held, that they were entitled to their shares absolutely, and that there was no trust for a settlement which the court could execute. *Magrath* v. *Morehead*, 41 L. J., Ch. 120; L. R. 12 Eq. 491; 24 L. T. 868.

A testator gave to his daughter 15,000*l.*, to be kept in trust by his executors till she should attain the age of twenty-one or marry with consent, whichever might first happen, when this sum was to be settled on his daughter, but, failing her attaining twenty-one or having issue by such marriage, then the money to devolve upon others. The daughter attained the age of twenty-one, without having been married:—Held, that she was entitled to the legacy absolutely, without any settlement being made. *Arnold* v. *Arnold*, 16 Sim. 404; 18 L. J., Ch. 90.

—— **Marriage under Age without Consent of Trustees.**]—J. T. by his will gave all his property to trustees in trust for his three daughters equally, to be paid to them as they respectively attained twenty-one, or married with the consent of the trustees. Provided that, if they married with such consent under age, the trustees at their discretion might pay the share to such daughter so marrying, or settle it upon her or her issue, with a gift over. One of the daughters having married under age and without consent, the question was, whether her share could be settled, the trustees being willing to settle it:—Held, that there was nothing in the will to authorise a settlement, and nothing could be done until she attained twenty-one. *Taylor* v. *Austen*, 1 Drew. 459; 1 W. R. 252.

Bequest—Fund "to be Settled."]—A testator bequeathed, as follows: "To my daughter A., wife of M. W., I bequeath 10,000*l.* This amount to be settled upon her for her life, and to be invested for her in good securities in the names of two or more trustees. At her death 8,000*l.* of the above sum to be divided equally amongst her children, and the remaining 2,000*l.* to be given to her husband if living; if deceased, then the whole amount is to be equally divided amongst her children." The daughter and her husband and child applied for the sanction of the court to a settlement of the legacy:—Held, that a settlement ought to be directed, treating the directions in the will as instructions for a settlement. *Parrott, In re, Walter* v. *Parrott*, 33 Ch. D. 274; 55 L. T. 132; 34 W. R. 553—C. A.

—— **To be Paid or Settled by Executors on Infant attaining Twenty-one Years.**]—Testator gave 5,000*l.* stock to a female infant, to be paid or transferred to or settled on her, by his executors, by such deed or instrument in writing as they should think most prudent and proper on her attaining twenty-one. The infant married in the testator's lifetime, and afterwards attained twenty-one. The court ordered the stock to be transferred to her on her sole receipt. *Laing* v. *Laing*, 10 Sim. 315; 9 L. J., Ch. 48; 3 Jur. 1119.

A father gave the residue of his estate in trust for all his children, who, being sons, should attain twenty-one, or being daughters should attain that age or marry, and if any of his children should die before attaining a vested interest, leaving issue, their shares to go to their children with a proviso that, notwithstanding the trusts aforesaid, on the marriage of any daughter a moiety of her share should be held in trust for such daughter for life, and afterwards for her children:—Held, that the daughters who had attained twenty-one, and had not married, were entitled to the whole of their shares absolutely. *Dowling's Trusts, In re*, L. R. 14 Eq. 463.

—— **To be Paid upon Marriage and to be Settled on Feme Sole.**]—Bequest of 2,000*l.*, for the benefit of a feme sole, "to be paid upon her marriage, and to be settled upon her by her settlement," the interest to be paid to her in the meantime; and, in case she should not marry before attaining the age of thirty-five years, the principal sum to be paid to herself. The legatee

married under the age of thirty-five years, and applied for payment of a sum of money in court, which represented the legacy:—Held, that a settlement should be made of the legacy upon the legatee and her children. *Duckett* v. *Thompson*, 11 L. R., Ir. 424.

Restraint on Anticipation—Articles for Settlement.]—Where articles for a settlement directed the property to be conveyed on trust to pay the income to the wife, or such person as she should appoint, during her life, for her own absolute use and benefit, free from marital control and liability:—Held, that in the settlement a restraint against anticipation should not be inserted. *Symonds* v. *Wilkes*, 11 Jur. (N.S.) 659; 12 L. T. 598; 13 W. R. 1026.

—— **Legacy to Married Woman Judicially Separated from Husband.**]—A testator by his will dated July 2, 1870, gave a legacy to a married woman for her separate use without power of anticipation, and directed that "for the purpose of securing to her the separate enjoyment without power of anticipation against any husband for the time being, the trustee should settle the legacy in such manner as would carry out the said purpose." Previously to the date of the will the legatee had been judicially separated from her husband, and had ever since lived apart from him:—Held, that she was entitled to have the legacy paid to her. *Munt* v. *Glynes*, 41 L. J., Ch. 639; 27 L. T. 366; 20 W. R. 823.

—— **Form of Settlement where Direction to hold Fund free from Husband's Control.**]—Form of settlement directed by the court, where a testator had directed his trustees to hold a fund in trust for his daughters, to be settled on them and their issue free from their husbands' control during the life of such daughters. *Stanley* v. *Jackman*, 23 Beav. 450; 5 W. R. 302.

Form of settlement directed by the court, where a testator directed personalty to be settled on his daughters, independent of their coverture. *Eustace* v. *Robinson*, 7 L. R., Ir. 83.

A father gave real and personal property to trustees for his daughter, and directed that, if she should marry, it should be so settled that she might enjoy the income during her life for her separate use:—Held, that the trust for the separate use during life, being merely executory, should be carried into execution with a restraint upon anticipation. *Dunnill's Trusts, In re*, Ir. R., 6 Eq. 322.

A testator, by his will, gave real and personal property to his daughter A. absolutely; but by a codicil made subsequent to her marriage, he directed that "it should be settled to the exclusion of her present or any future husband, that the same might belong to her during her life, and be secured for the benefit of her children, equally, after death, so that the issue of any such child dying in her lifetime might take his or her parent's share;" and in default of such children or other issue over:—Held, that the property must be settled in trust for A. for life, to her separate use without power of anticipation; and, after her decease, upon trust for such of her children as should survive her, and for the issue living at her death of such of her children as should not survive her equally as tenants in common, the issue to take per stirpes, but inter se equally as tenants in common. That there should be limitations, in the nature of cross-remainders, in favour of such of the children and issue as should survive A. in respect of the share of any child dying in her lifetime without leaving issue, and in respect of the share of any issue of any child similarly dying. That the realty should be settled as realty: and (as the testator, by simply directing a settlement, must have intended) with powers of leasing and sale and exchange, and with a receipt clause; and that the settlement should contain provisions for maintenance, education, and advancement, and a power to appoint new trustees. *Turner* v. *Sargent*, 17 Beav. 515; 2 W. R. 50.

—— **Impeachment of Waste.**]—A grandfather devised his residuary real estate to trustees for his granddaughter in fee at twenty-one or marriage, and directed that if she should marry under twenty-one his trustees should settle the real estate on her for life for her separate use, without power of anticipation, with remainder to her children as tenants in common in tail, and he authorised his trustees to give a life estate to his granddaughter's husband, to commence after her death, and to be either with or without impeachment of waste:—Held, that the life estate given to the granddaughter must not be without impeachment of waste: such an estate being inconsistent with the restraint on anticipation. *Clive* v. *Clive*, 41 L. J., Ch. 386; L. R. 7 Ch. 433; 26 L. T. 409; 20 W. R. 477.

f. Directions to Settle Personalty as Heirlooms or on the Trusts of Freeholds.

Family Jewels.]—A testatrix bequeathed jewels to S. "to go and be held as heirlooms by him and by his eldest son on his decease, and to go and descend to the eldest son of such eldest son, and so on to the eldest son of his descendants, as far as the rules of law or equity would permit," and she requested him to do all in his power, by his will or otherwise, to give effect to that her wish:—Held, that these words created an executory trust in S., and that the jewels must be settled on him for life, with remainder to his eldest son for life, with remainder to the eldest son of such eldest son, but to be divested in case of his death in his father's life, or after his father's death under twenty-one; but that, subject to these limitations, the beneficial interest in the jewels remained in him. *Shelley* v. *Shelley*, 37 L. J., Ch. 357; L. R. 6 Eq. 540; 16 W. R. 1036.

Family jewels may be settled as heirlooms independently of any real estate. *Ib.*

"To select and set aside Collection."]—A testatrix bequeathed certain legacies to A. C., sixth Earl of E., and as to all her household furniture, paintings, books, china, and the whole contents of her house, she bequeathed the same to her trustees and executors upon trust that they should in the first place select and set aside a collection of the best paintings, statuary, and china for the said Earl of E., and his successors, to be held and settled as heirlooms, and to go with the title:—Held, that the gift was a clear direction to settle, and created an executory trust, and a settlement was directed (to be settled in chambers) giving a life interest to the sixth Earl, with remainder to the next heir to the earldom for his life. *Johnston, In re*, *Cockerell* v. *Essex* (*Earl*), 53 L. J., Ch. 645; 26 Ch. D. 538; 52 L. T. 44; 32 W. R. 684.

Leaseholds.]—Covenant in marriage settle-

ment, to settle leasehold estates in trust for such persons, and such or the like estates, ends, intent, and purposes, as far as the law would allow, as declared concerning real estates limited to the first and other sons in tail male, with several remainders; the court, in executing the covenant, declared that no person should be entitled to the absolute property unless he should attain twenty-one, or die under that age, leaving issue male. *Newcastle (Duke)* v. *Lincoln (Countess)*, 3 Ves. 387. *But see* the variations in this decree, *id.* 398 n., and 12 Ves. 218, on appeal.

Other Personal Estate.]—If a testator directs his real estate to be settled on his son, his heir apparent, for life, with remainder to the first and other sons of his son in tail, with remainder to A. for life, with remainder to his first and other sons in tail, with remainders to other persons and their sons in like manner, and, ultimately, on his right heirs, and his personal estate to be settled on the same persons, in the same order and succession, and for the same estates and interests, so far as the nature of the property and the rules of law and equity will admit of, the court, if a suit is instituted immediately after the testator's death for the purpose of having a settlement made, will order the ultimate limitation of the personal and real estate to be made to the person who is the testator's heir. *Boydell* v. *Golightly*, 14 Sim. 328; 9 Jur. 2.

A settlement, on marriage, of real estate, upon trust for the intended wife for life, remainder to the husband for life, and, after the death of the survivor, "in trust for and to be released and conveyed unto" the children, as the parents or the survivor should appoint; in default, "in trust for and to be released and conveyed unto" the children, as tenants in common in tail; and in default of issue, if the wife should survive the husband, "in trust for and to be released and conveyed unto" the wife, "her heirs and assigns for ever." By the same deed personal property was assigned to the trustees, upon trust to pay the income and principal, "to such person and persons, for such uses, ends, intents, and purposes, and in such manner and form, and subject to the same powers, provisoes, contingencies, declarations, and agreements, as were expressed concerning the payment by the trustees of the rents and profits of the real estate, and concerning their release and conveyance of the same, or as near thereto as circumstances and the nature of the case would admit":—Held, that this trust of the personalty was not rendered executory by reference to the direction to release and convey the real estate, such direction being merely superadded to a distinct declaration of trust of such real estate. *Doncaster* v. *Doncaster*, 3 K. & J. 26; 2 Jur. (N.S.) 1066.

This construction was not altered by a proviso immediately following the limitation of the personal estate, that the ultimate limitation in favour of the heirs of the wife should, with respect to the personal estate, be construed to be for her next-of-kin; the meaning of such proviso being only, that if, by the failure of the preceding limitations, the real estate should at any time become vested in possession in the heirs of the wife, the personalty, which was settled upon corresponding trusts, should belong to her next-of-kin. *Ib.*

There was only one child of the marriage, who died an infant in the lifetime of his father. On the death of the father:—Held, that such child took an absolute interest in the personalty, subject to open and let in other children, if any. *Ib.*

—— **Share of Real Estate under Will devised in Trust for Sale.**]—Part of the personal property consisted of a share of real estate under a will, by which it had been devised in trust for sale; and the settlement contained a power for the trustees, with the consent of the husband and wife, and with the concurrence of the persons entitled to other shares of this property, to elect to take it as real estate, and to hold it upon the trusts of the other real estate contained in the settlement:—Held, that this power did not alter the construction of the limitations of the personal estate; but that, when the settled personal estate became the absolute property of the child, the power could no longer be exercised. *Ib.*

Executed Settlements.]—*See* SETTLEMENT.

g. Directions to settle Property to go with a Title.

Barony in Fee.—Form of Settlement.]—Estates settled so as to go along with a barony in fee. Form of settlement approved of by the court, in pursuance of a direction contained in a deed executed by the late Lord Le Despencer, that his estates should, so far as the law would allow, be strictly settled, after his death, so as to go along with the baronial dignity of Le Despencer (which was a barony in fee), and be held and enjoyed by the person for the time being possessed of the same dignity, for the support thereof, so long as the person possessed of the same dignity should be a lineal descendant of the late lord, but with a provision that in case the dignity should, at any time or times within the limits prescribed by law for strict settlements, be suspended or in abeyance, the rents and profits of the same estates should, during the continuance of every such suspension or abeyance, be equally divided amongst the co-heirs per stirpes of the person or persons respectively by reason of whose death or deaths without issue male, such suspension or abeyance should be, for the time being, occasioned. The court approved of a settlement in which the latter object was secured by a proviso, subject to be defeated by a recovery, and not as suggested by the court at the first hearing, by a term of 1,000 years, prior in limitation to all the other uses; and the court also declined to appoint a protector of the settlement, by reason of his irresponsibility if appointed. *Bankes* v. *Le Despencer*, 11 Sim. 508; 12 L. J., Ch. 293; 7 Jur. 210.

Estate to be attached to Title as closely as possible.]—A., having a power of revocation and new appointment over an estate, of which B., his heir, was tenant in tail, by his will directed the estate "to be attached to his title as closely as possible":—Held, that the estate of B., and those of all other tenants in tail in esse at A.'s death (living in the line of the title), were abridged to estates for life only. *Dorchester (Lord)* v. *Effingham (Earl)* 2 Beav. 180, n.

Course of Entail to correspond as far as might be practicable with newly created Peerage.]—Property was by a codicil directed to be settled "in a course of entail to correspond as far as may be practicable" with the

limitations of a newly created peerage contained in letters patent, which limitations were to a countess for life, remainder to her second son and the heirs male of his body, remainder to her third and other younger sons and the heirs male of their respective bodies successively: —Held, that a strict settlement of the property ought to be directed corresponding in order of succession with the limitations of the peerage, but limiting the estates of the second and other younger sons of the countess, being lives in esse at the death of the testatrix, to estates for their respectives lives, with remainder to their first and other sons in tail male, mainly on the ground that the object was to endow the title, and that a peerage being inalienable, such limitations would best correspond in effect with the limitations of the peerage. *Sackville-West* v. *Holmesdale* (*Viscount*), 39 L. J., Ch. 505; L. R. 4 H. L. 543.

The codicil, by which the settlement was directed, referred to a will thereby revoked, limiting a different course of entail, and containing powers of jointuring and charging portions, and making the estates for life unimpeachable for waste. The codicil only directed that the settlement should "contain such powers, provisoes, declarations, and agreements, as the trustees therein named should consider proper, or their counsel should advise": —Held, that the will ought to be the model of the settlement, and that the estates of tenants for life should be without impeachment of waste, and that the settlement should contain powers of jointuring and charging portions to the limits contained in the revoked devise. *Ib.*

The vice-chancellor subsequently held that clauses postponing the vesting of portions until the death of the person creating them, and providing for the cesser of jointures and portions charged on the estates upon the person charging them succeeding to the earldom of D., ought not to be inserted in the settlement. *Holmesdale* (*Viscount*) v. *Sackville-West*, 40 L. J., Ch. 795; L. R. 12 Eq. 280.

Executed Settlements.]—*See* SETTLEMENT.

h. Powers inserted in the Settlement.

Powers of Appointment—Amongst children.]—A testator left to his daughter Jane the sum of 2,000*l.*, to be settled on her when she married, or to be paid to her on her attaining twenty-one; should she die not leaving issue, the 2,000*l.* to fall into the residue of his estate. Jane married in her father's lifetime. The court directed the legacy to be settled in trust for her separate use for life, remainder for her children living at her death, according to her appointment; in default of appointment, for her sons at twenty-one, and her daughters at that age or on marriage; remainder for her next-of-kin; and if she had no child living at her death, the legacy to become part of the testator's residue. *Young* v. *Mackintosh*, 13 Sim. 445; 7 Jur. 383.

In settling a fund in pursuance of a will by which the fund was bequeathed to a man until marriage and then to be settled on his wife and children, the court inserted a power for the husband and wife jointly by deed, and for the survivor by deed or will, to appoint among the children. Observations on *Oliver* v. *Oliver* (infra). *Gowan, In re, Gowan* v. *Gowan*, 50 L. J., Ch. 248; 17 Ch. D. 778.

Form of judgment settling a fund. *Ib.*

An order of the court making a settlement should bear the usual settlement stamp. *Ib.*

In a settlement of a wife's property made in pursuance of her equity an exclusive power of appointment by deed or will among her children ought to be given to her in priority to the limitations in favour of the children; and the like power was inserted in a case where the husband had, by post-nuptial deed, covenanted to settle the property on trusts not including such a power. *Oliver* v. *Oliver*, 48 L. J., Ch. 630; 10 Ch. D. 765; 27 W. R. 657.

A testator bequeathed as follows: — "To my daughter A., wife of M. W., I bequeath 10,000*l.* This amount to be settled upon her for her life, and to be invested for her in good securities in the names of two or more trustees. At her death 8,000*l.* of the above sum to be divided equally amongst her children, and the remaining 2,000*l.* to be given to her husband if living; if deceased, then the whole amount to be equally divided amongst her children." The daughter and her husband and child applied for the sanction of the court to a settlement of the legacy:—Held, that, a settlement ought to be directed, treating the directions in the will as instructions for a will:—Held, further, that the settlement ought to be framed so as to make the fund divisible only among children who, being sons, should attain the age of twenty-one, or, being daughters, attain that age or marry, and that it ought to contain the usual powers of maintenance and advancement, and a power of appointment by the daughter in default of children, with the usual limitations to herself or her next-of-kin in default of appointment, but not any power of appointment among the children, as such a power would be inconsistent with the directions for equal division. *Oliver* v. *Oliver* (supra), distinguished. *Parrott, In re, Walter* v. *Parrott*, 33 Ch. D. 274; 55 L. T. 132; 34 W. R. 553—C. A.

—— **In default of Issue.**]—A father directed a fund, given to his daughter, to be settled "upon her and her issue," so that "the same might not be liable or subject to the debts, control, or engagements of any husband" whom she might happen to marry during her lifetime:—Held, that the settlement ought to give the daughter a power of appointment by will, in default of issue. *Stanley* v. *Jackman*, 23 Beav. 450; 5 W. R. 302.

Form of settlement in such a case. *Ib.*

—— **Life Estate to Husband.**]—Where a testator had directed, that, in the event of the marriage of his daughter, a portion of his property should be secured to her and the issue of her marriage by a settlement or some other good assurance, in such manner as his trustees or trustee for the time being might think fit, the court, on an application to which the surviving trustee was a party, approved of a power in the settlement made on the marriage of a daughter enabling her to appoint by will a life estate in the property to her husband. *Charlton* v. *Rendall*, 11 Hare, 296.

Successive Powers of Appointment.]—Upon the marriage of H. T. with L. N., he covenanted to convey certain lands upon

trust, that the same should go and be vested in the issue of H. T. by L. N., and that such issue should also be entitled to a further sum of 1,000*l.* to be charged on all other the real and personal estates of H. T. not therein comprised, but in such shares and proportions as H. T. should by deed or will appoint, and in default thereof as L. N., in case she survived H. T., should by deed or will appoint, and failing such direction in equal shares:—Held, that a court of equity would execute the articles by giving successive powers of appointment to H. T. and L. N., and in default of appointment a limitation to the children of the marriage as tenants in common in fee. *Thompson* v. *Simpson*, 1 Dr. & War. 459.

Powers of Appointment of New Trustees.]—A lady being entitled to a sum, payable at a future time, out of her father's estates, it was agreed, by articles on her marriage, that in the settlement to be made in pursuance thereof a power should be inserted for her father in his lifetime, or his executors within six months after the sum should be payable, to invest that sum in the names of trustees to be appointed for the purpose, and for the trustees, with the consent of the husband and wife, or the survivor, or of their own authority, as the case should happen, to change the securities, the trusts of the fund being for the husband for his life, then to the wife for her life, then to the children. No settlement was executed, and the father and the husband died before the fund was invested, leaving the wife surviving and four children:—Held, that the wife had no power to appoint a trustee to receive the funds. *Brasier* v. *Hudson*, 9 Sim. 11.

Where a marriage was contracted abroad, by articles stipulating that the funds settled should, "under the laws of England, be regulated, made binding, and carried into full and complete effect;" on a subsequent bill filed for carrying the articles into effect:—Held, that power to appoint new trustees, as often as should be necessary, was a proper power to be inserted in the settlement. *Sampayo* v. *Gould*, 12 Sim. 426; 11 L. J., Ch. 121.

Court will not order a clause to enable trustees to appoint others to be inserted in a conveyance, there being no provision to that effect in trust deed. *Bayley* v. *Mansell*, 4 Madd. 226.

Testator directed his real estates to be settled on certain persons in strict settlement, and that there should be inserted in the settlement so to be made powers of leasing, sale, partition, and exchange. "And my will is that, in such intended settlement shall be inserted all such other proper and reasonable powers, as are usually inserted in settlements of the like nature":—Held, that a power to appoint new trustees was a proper and reasonable power to be inserted in the settlement. *Lindow* v. *Fleetwood*, 6 Sim. 152. And see *Turner* v. *Sargent*, infra.

Powers to Jointure or Charge Portions.]—Will directed settlement to be made of real estate on A., and his first and other sons in tail with power of jointuring, leasing, sale, and exchange, and all other clauses, powers, and provisions usually inserted in settlements of same kind:—Held, these last words did not give power to charge with portions. *Higginson* v. *Barneby*, 2 Sim. & S. 616; 25 R. R. 256.

A power was reserved, in articles before marriage, to husband and wife to alter and vary the provisions and terms of the articles, in such manner as to them should seem fit, previous to the execution of the settlement:—Held, not to authorise the insertion in the settlement of a power enabling the husband to jointure a future wife, or to charge portions for younger children of a future marriage. *Bedford* (*Duke*) v. *Abercorn* (*Marquis*), 1 Myl. & Cr. 312; 5 L. J., Ch. 230.

Testator directed a settlement to be made of his estates, and a power to be inserted in it enabling the tenant for life to jointure any wife or wives, at one or several times to the extent of one-fifth part of the then ordinary annual rental of the estates:—Held, that the settlement ought to authorise the tenant for life to charge the estates with a clear yearly rent-charge not exceeding one-fifth of the yearly rent of the estates payable at the time of creating the charge. *Trevor* v. *Trevor*, 1 H. L. Cas. 239. Affirming 13 Sim. 108; 11 L. J., Ch. 417; 6 Jur. 863.

A covenant in marriage articles to settle an estate, after the payment of an annuity to the intended wife, "upon his issue" by the intended wife, must be construed as a covenant for strict settlement, and excludes the husband from creating charges in favour of younger children. *Grier* v. *Grier*, L. R. 5 H. L. 688. Affirming, Ir. R. 6 Eq. 1.

By articles of marriage it was recited that the intended husband had received 600*l.* from his intended wife, and he covenanted to settle upon her his lands, with the ordinary powers of distress and entry, and to settle the remainder of his lands "upon his issue by" his intended wife. There were several children of the marriage. Some years after the marriage he executed a deed by which he charged on his land various sums of money in favour of younger children, devising the lands themselves to his eldest son and his other sons successively in tail male:—Held, that this deed creating these charges was void, for that the covenant in the articles gave him no power to charge the lands for the benefit of the younger children, and must be interpreted to mean that he would settle the lands in the ordinary form of strict settlement. *Ib.*

A lady devised freehold estates to trustees for her sister E. for life, with remainder in strict settlement to her sons, excluding the second, and with powers of jointuring and charging portions. By letters patent, subsequent to the will, a barony was created and limited to E. for life, with remainder to her second son R. and the heirs male of his body, and in default of such issue to the third and younger sons of E. and the heirs male of their bodies respectively and successively. The patent contained a shifting clause, by which if any person taking thereunder should succeed to the earldom of D., and there should then or thereafter be a younger son or heir male of a younger son of E., then the succession to the barony was to devolve upon the son of E. or the heir who would be next entitled to succeed thereto if the person succeeding to the earldom of D. was dead without issue. By a subsequent codicil, the testatrix devised her estates to trustees on trust, to settle the same in a course of entail corresponding as nearly as might be with the limitations of the barony, and the provisoes affecting the same contained in the patent, and with all such powers, provisoes, declarations, and agreements as the trustees should think proper or their counsel advise. The house of lords after E.'s death

declared that the estates ought to be limited in strict settlement to the second son for life, with remainder to his first and other sons in tail male, with remainder to the third and other younger sons of E. and the heirs male of their bodies respectively and successively in tail male, and that the settlement should contain a shifting clause similar to that in the letters patent:—Held, that clauses postponing the vesting of portions until the death of the person creating them, and providing for the cesser of jointures and portions charged on the estates upon the person charging them succeeding to the earldom of D., ought not to be inserted in the settlement. *Holmesdale (Viscount)* v. *Sackville-West*, 40 L. J., Ch. 795; L. R. 12 Eq. 280.

A testator, by his will, gave real and personal property to his daughter A., absolutely; but by a codicil made subsequent to her marriage, he directed that "it should be settled to the exclusion of her present or any future husband, that the same might belong to her during her life, and be secured for the benefit of her children, equally, after her death, so that the issue of any such child dying in her lifetime might take his or her parent's share;" and in default of such children or other issue, over:—Held, that the property must be settled in trust for A. for life, to her separate use; without power of anticipation; and, after her decease, upon trust for such of her children as should survive her, and for the issue living at her death of such of her children as should not survive her equally as tenants in common, the issue to take per stirpes, but inter se equally as tenants in common. That there should be limitations, in the nature of cross-remainders, in favour of such of the children and issue as should survive A. in respect of the share of any issue of any child similarly dying. That the realty should be settled as realty; and (as the testator, by simply directing a settlement, must have intended) with powers of leasing and sale and exchange, and with a receipt clause; and that the settlement should contain provisions for maintenance, education, and advancement, and a power to appoint new trustees. *Turner* v. *Sargent*, 17 Beav. 515; 2 W. R. 50.

Powers of Leasing.]—Articles for settlement on ward of court, with a power of leasing for twenty-one years, and other usual powers, &c., do not authorise the introduction of a power granting building leases for long terms. *Pearse* v. *Baron*, Jacob, 158.

In a settlement of personal property, the parties covenanted to settle all future acquired property upon the same trusts and subject to the same powers, or as near thereto as the nature and tenure of the property would admit of:—Held, that this authorised the insertion of a power to grant mining leases in the settlement of subsequently acquiring freeholds, the prior owner having granted such leases, though the mines had never been effectually worked under them. *Scott* v. *Steward*, 27 Beav. 367.

A reference was made to the master, to inquire whether certain proposed powers of leasing were usual in that part of Ireland in which the estates were situated, and whether any circumstances connected with the property rendered such powers expedient, and to the interest of all parties; with liberty to state special circumstances. *Bedford (Duke)* v. *Abercorn (Marquis)*, 1 Myl. & Cr. 312; 5 L. J., Ch. 230.

Powers of Sale and Exchange.]—A stipulation was made, in articles before marriage, that the intended settlement, which related to estates in Ireland, should contain all the covenants, provisions, and conditions usually contained in marriage settlements made in England:—Held, to authorise the insertion of a power of sale and exchange under which lands in England might be taken in exchange for lands in Ireland. *Ib.*

By marriage articles, it was agreed that estates should be settled in strict settlement, and that there should be contained in the settlement powers to the husband to charge the estates, by way of mortgage, with a certain sum, and also to charge the estates with another sum for younger children, and to create terms for raising those sums, and likewise all other powers, &c., usually inserted in settlements of the like nature, and which should be proper for effecting any of the purposes aforesaid:—Held, that a power of sale and exchange might be introduced into the settlement. *Hill* v. *Hill*, 6 Sim. 136.

A will directing a settlement of estates, and that there should be inserted all proper powers for making leases, and otherwise according to circumstances, to and for the tenants for life, to be exercised by them when qualified, and when not by the trustees, does not authorise the insertion of a power of sale and exchange. *Horne* v. *Barton*, Jacob, 437.

Powers of sale and exchange inserted in a settlement under clause in articles for all usual powers. *Peake* v. *Penlington*, 2 V. & B. 311.

A will, directing settlement of estates, and that there should be inserted all proper powers for making leases, and otherwise, according to circumstances, for the tenants for life, to be exercised by them when qualified, and when not by the trustees, does not authorise the insertion of a power of sale and exchange to the trustees, to be exercised with the consent of the tenant for life. Whether the will authorises the introduction of a power of sale and exchange of any description, quære. *Brewster* v. *Angell*, 1 J. & W. 625.

A testator having, by his will, devised his freehold and copyhold estates in trust for his son in strict settlement, with remainder to his nephew; and having given by his first codicil a special power of sale over a part of his estates, to be exercised at the request of his son, in favour of his nephew; and by his second codicil a general power of sale over "all or any part of his estates," to be exercised at the discretion of his trustees, the conveyance by the trustees must contain both the particular and the general power of sale. *Green* v. *Wigglesworth*, 1 Swanst. 234; 1 Wils. Ch. 313.

A testator, who made his will in 1810, and died in 1820, directed by his will that his daughters' shares in his property (which consisted of realty and personalty) should be so settled that, if they married, one-half of their fortune should be settled on them and their children, exclusive of their husbands:—Held, that this direction authorised the insertion in the settlement of a power of sale and exchange of that moiety of a daughter's share in the testator's real estate which was to be settled on her and her children. *Wise* v. *Piper*, 49 L. J., Ch. 611; 13 Ch. D. 848; 41 L. T. 794; 28 W. R. 442.

Turner v. *Sargent*, supra, followed. *Ib.*

Wheate v. *Hall*, infra, distinguished. *Ib.*

Purchaser not compelled to take a doubtful

title, viz. by executing a power of sale, introduced under a direction by a decree, establishing a will, to the master to approve a proper settlement: the will not authorising the insertion of such a power; nor could it be sustained under a power by a former settlement; which, if not extinct by the failure of the limitations, and the union of the estate for life with the reversion, could not be duly applied to purposes clearly foreign to its original object, and, though purchasers are not put to exercise a very nice and critical judgment with regard to the purposes for which powers are created, it could never be intended to refer to a perfectly new set of limitations, in a new settlement, at a long subsequent period, under a disposition by the will of the owner of the fee, to be exercised, not for any purpose in the least degree connected with the settlement, but avowedly as an expedient to supply the want of a valid power in that settlement, and enable those whom he had made only tenants for life to dispose of the estate. *Wheate* v. *Hall*, 17 Ves. 80.

Implication of Powers of Sale.]—*See* POWERS.

Power to Cut Timber.]—Testator devised F. (a well-timbered estate) to defendant in fee, and directed him to settle it on himself for life, with divers remainders over, and directed that such settlement should contain such powers of jointuring, &c. as defendant should direct, and all other usual and proper provisions for giving effect to his intentions therein expressed, and all such other powers and provisions as counsel should advise:—Held, that the successive tenants for life ought not to be made dispunishable for waste, but power should be inserted in the settlement for trustees to cut timber in a due course of management for the benefit of all parties interested. *Davenport* v. *Davenport*, 3 N. R. 26; 1 H. & M. 775; 12 W. R. 6.

Power of Revocation.]—A., before marriage, covenants to settle lands, in consideration of 2,000*l.* portion, on himself for life, remainder to the first and other sons in tail, remainder to the daughters in tail, remainder to himself in fee, with a power of revocation reserved to the wife's father, then beyond sea. The marriage is had, and a daughter born, and the husband, being taken sick, devises 1,500*l.* to his daughter, and, if his wife (being enceinte) should have a posthumous daughter, she to have 500*l.* of the 1,500*l.*, and if either should die before twenty-one, or marriage, the survivor to have the whole; and gives all his lands to his wife and her heirs, and the surplus of his personal estate, after debts paid, to his wife, her executors, &c. and makes his wife executrix; then another daughter is born, and the husband dies without any alteration of his will, or any settlement made:—Decreed, that a settlement be made, with a power of revocation to the father, and the legacies be likewise paid the children, the youngest daughter being a posthumous child, within the intent of the will. *Jaggard* v. *Jaggard*, Pre. Ch. 175.

Power to Change Securities.]—A marriage contract in the Portuguese language, between British subjects resident in Lisbon, expressed that the parties were desirous it should be regulated, made binding, and carried into full and complete effect according to the laws of England; some years afterwards the parties, who were then resident in England, filed a bill, praying that a settlement in strict conformity with the contract, and containing all the covenants, clauses, powers, &c. usually inserted in marriage settlements and deemed necessary, and at the same time consistent with the substance of the contract, might be executed under a decree of the court:—Held (nothwithstanding the contract provided that the settled moneys should be invested, as they had been, in the English and French funds), that a power to change those securities for any other of the government stock or funds of England or France or for real securities in Great Britain or Ireland, was a proper power to be inserted in the settlement. *Sampayo* v. *Gould*, 12 Sim. 426; 11 L. J., Ch. 121.

Powers of Maintenance, Education and Advancement.]—See *Turner* v. *Sargent*, supra; and *Parrott, In re, Walter* v. *Parrott*, 33 Ch. D. 274; 55 L. T. 132; 34 W. R. 553—C. A. Supra, col. 404.

i. Hotchpot Clause.

Absence of Words Indicating Intention to Introduce Clause.]—The court of chancery will not insert a hotchpot clause in executory marriage articles in the absence of any words therein indicating the intention of the parties to introduce such clause. *Lees* v. *Lees*, Ir. R. 5 Eq. 549.

j. Trustees to Preserve Contingent Remainders.

Money to be laid out in Land—No Trustees to Preserve Contingent Remainders.]—Where testator directed that money should be laid out in lands to be conveyed after the expiration of a term to the use of B. for life, and his first and other sons in tail male, remainder to several others successively for life, with like limitations; remainder to his own right heirs, and there were no trustees to preserve contingent remainders; decreed, that such trustees should be inserted in the conveyances, to be settled by the master, of the lands purchased with the money. *Baskerville* v. *Baskerville*, 2 Atk. 279.

Lord Hardwicke said, in the directions he gave in this case, that he adhered to the rules of conveyancing laid down by the great men before the Restoration, and during the Usurpation. *Ib.*

Testator directs his executors to invest personal estate in the purchase of real estates, which, when purchased, he devises to A., to him and the male heirs of his body for ever, and if A. should die without issue male, then he devised the same to the heir male of the body of B., after in tail to A.: the court will insert a limitation to trustees to preserve contingent remainders. *Harrison* v. *Naylor*, 2 Cox, 248; 3 Bro. C. C. 108.

Devise of Real Estate—Bill for Conveyance of Estate according to Will.]—A devised his estate to trustees, in trust for H., and E., his wife, for their lives, and life of longest liver; remainder to first son of E. for ninety-nine years, if he should so long live; remainder to heirs male of body of such first son; remainder to all and every the sons of said E. for ninety years, if every such son respectively should so long live; remainder to heirs male of every of them, to take not jointly, but successively, one after other, according to births of each, sons to take term of ninety-nine years, with immediate

remainder to his said heirs male. On bill brought for conveyance of this estate according to testator's will, it was decreed that in such conveyance, where any part of the estate was limited in use to plaintiff for ninety-nine years, if he should so long live, there should be a limitation over to trustees and their heirs, during his life, to preserve contingent uses in remainder, and then to first and other sons of plaintiff successively. *Stamford* (*Earl*) v. *Hobart*, 3 Bro. P. C. 31.

Order for Strict Settlement.]—Upon a trust in equity, no estate can be gained by disseisin, abatement, or intrusion, while the trustee continues in possession of the land, neither will equity suffer a merger of the trust estate; for uses and mere trusts stand on very different foundations, and are not governed by the same reasoning. All trusts are executory, and the court must follow the intent of the parties, as far as the rules of law will admit, howsoever improperly a will may be penned; therefore, if a testator intended a strict settlement the court will direct it; and where the court make use of the words "strict settlement" in an order, it implies a direction to the master to have trustees to preserve contingent remainders inserted, and, whether a conveyance be directed or not, the court must decree one, when asked at the proper time. *Hopkins* v. *Hopkins*, 1 Atk. 593; 1 Ves. Sen. 268; Cas. t. Talb. 644. And see *Cholmondeley* (*Lord*) v. *Clinton* (*Lord*), 2 Mer. 173, 358; 16 R. R. 167; 2 J. & W. 18; 22 R. R. 84, where the report of this case is corrected from an MS. note.

Semble, that a limitation to trustees to preserve contingent remainders, not confined to the lifetime of a tenant for life, will not be cut down to that life if there are contingent remainders which may require protection during a longer period. *Rochford* v. *Fitzmaurice*, 1 Con. & L. 158. *S. C.*, nom. *Rochfort* v. *Fitzmaurice*, 2 Dr. & War. 1; 4 Ir. Eq. R. 375.

Devise of Freeholds and Copyholds.]—Devise of freehold and copyhold surrendered to the use of the will to trustees, and the survivor and his heirs, in trust to pay debts and legacies, an annuity to the testator's son, and for other purposes; then on the marriage, or attaining twenty-one, of his granddaughter, to convey to her for life, remainder to trustees, &c. remainder to her first and other sons in tail male, remainder to her daughters in tail general, remainder to such persons, for such estates, and subject to such charges and conditions, as he should by any deed or instrument, with two or more witnesses, appoint. The next day, by deed poll with two witnesses, reciting his will, and that he had reserved a power of disposing of his estate farther, he directed his trustees, immediately after the death of his granddaughter, and failure of her issue, to convey all his real estate to the first and other sons of his son in tail male, then to his daughters in tail general, then to the right heirs of the survivor of his trustees, his heirs, and assigns for ever. No conveyance was made. The granddaughter died without issue; then the son died without issue, leaving one trustee surviving. Under the will alone, the trustees have a mere legal estate, and all the equitable interest beyond the express dispositions would result to the son as heir; but the deed was considered as a codicil sufficiently executed to pass copyhold, but not freehold. The last limitation is a contingent remainder to the heir of the surviving trustee, and a conveyance was directed with an insertion of trustees to support that remainder as to the copyhold; the rents and profits of the copyhold during the life of the trustee, and all the freehold, to go to the heir of the testator. *Habergham* v. *Vincent*, 2 Ves. 204; 4 Bro. C. C. 353; S. P., 4 R. R. 455, 461.

Contingent Remainders—In General and Duties of Trustees.]—*See* VESTED, CONTINGENT AND FUTURE INTERESTS.

3. LEGAL AND ILLEGAL TRUSTS.

Illegal Trusts.]—Although, where a trust has been created for an illegal purpose the court will not in general interfere, it will do so where the illegal purpose fails to take effect. *Symes* v. *Hughes*, 39 L. J., Ch. 304; L. R. 9 Eq. 475; 22 L. T. 462.

The court will not assist a party in recovering an estate conveyed by him for an illegal purpose, such as to enable a grantee to vote at an election, or seat in parliament. *Groves* v. *Groves*, 3 Y. & J. 163.

—— **Pleading.**]—The plaintiff conveyed an estate to the defendant by a deed, in which the conveyance was expressed to be absolute in consideration of a sum of money paid by the defendant; but no purchase-money actually passed, and the plaintiff alleged that he conveyed the estate to the defendant as a trustee for him. The defendant, in his answer, admitted that he gave no consideration for the estate, but stated that the plaintiff made the conveyance fearing that an adverse decision would be made against him in a suit pending in chancery; and that it was understood that the defendant should account to the plaintiff for the rents until he could make arrangements for paying the purchase-money, and if no such arrangements could be made that he should reconvey the estate. The defendant claimed to hold the estate discharged from any trust, and claimed the benefit of the statute of frauds:—Held, first, that there was no sufficient averment that the transaction was an illegal one. *Haigh* v. *Kaye*, 41 L. J., Ch. 567; L. R. 7 Ch. 469; 26 L. T. 675; 20 W. R. 597.

Held, secondly, that the statute of frauds could not be pleaded in answer to the claim; and that, as the evidence did not establish the existence of any such agreement as was alleged by the defendant, he must reconvey the estate. *Ib.*

Public Policy — Gift to Unborn Illegitimate Child.]—By the law of England a trust for illegitimate children to be begotten cannot be supported. *Hamilton* v. *Waring*, 2 Bligh, 209.

E. T. assigned by deed to J. T. (her reputed husband) and another a policy of assurance on her life upon trust, to stand possessed of the policy moneys for the use of A. and B., being the two children then living of the said E. T., and for all and every other, the child or children of the said E. T. thereafter to be born, and as might be living at her death, in equal shares. E. T. and J. T. were not lawfully married, and a third child, C., was born after the execution of the deed:—Held, that the gift by the mother to her unborn illegitimate child was void as contrary to public policy, and that C. took no

share of the policy moneys. *Thompson* v. *Thomas*, 27 L. R., Ir. 457.

Will — Trust not communicated till after Testator's Death.]—A testator cannot by imposing a trust upon his devisee or legatee, the object of which he does not communicate to him, enable himself to evade the statute of wills by declaring those objects in an unattested paper found after his death. In order to make such a trust binding, it is essential that it should be communicated to the devisee or legatee during the testator's lifetime, and that he should accept that particular trust. *Boyes, In re, Boyes* v. *Carritt*, 53 L. J., Ch. 654; 26 Ch. D. 531; 50 L. T. 581; 32 W. R. 630.

The testator, by his will, made shortly before going abroad, gave all his property to C., his sole executor, who was a solicitor, and drew the will. In an action in the probate division, C. admitted that he was only a trustee of the property, and said that the intention of the testator was that he should hold upon certain trusts of which he would inform him when he arrived abroad. No direction was given to C. by the testator during his lifetime, but after his death two letters were found among his papers addressed to C., and naming a person whom he wished to be the object of his bounty:—Held, that C. was a trustee for the next of kin of the testator. *Ib.*

Bequest of 200*l.* to A. and B. "to spend as I" (the testatrix) "shall, by word of mouth, direct during my lifetime." The testatrix verbally informed A. that she wished to leave "something to J., and something to the Lord's work," and suggested C. and D. as persons to whom she proposed to give the last-mentioned bequest. After the testatrix's death A. found a letter in her handwriting, which, after reciting the bequest in the will of the 200*l.*, proceeded as follows:—"I would ask you to give or send 100*l.* to J.; the second I wish sent for the Lord's work, 50*l.* to C., and 50*l.* to D.; I would ask them to lay it out:"—Held, that no valid trust was created affecting any portion of the 200*l.* *King's Estate, In re*, 21 L. R., Ir. 273.

Bequest for Keep of a Mare.]—Bequest by a testator of 50*l.* per annum, to his executor, to be paid for the keep of a mare, with a direction that the executor should consider himself bound in honour to fulfil this wish, and see that she be well provided for:—Held, that the trust in favour of the mare ought to be performed, and that the executor was entitled to the surplus not required for the mare's keep. *Pettingall* v. *Pettingall*, 11 L. J., Ch. 176.

Contrary to Particular Statutes.]—*See* ACCUMULATION — BANKRUPTCY — CHARITY — CRIMINAL LAW—GAME.

For Creditors.]—*See* BANKRUPTCY (CREDITORS' TRUST DEEDS).

For Charitable Objects or Superstitious Uses.]—*See* CHARITY.

For Aliens and Rights of Crown.]—*See* INTERNATIONAL LAW.

For Separate Use of a Married Woman.]—*See* HUSBAND AND WIFE.

Rule against Perpetuities.]—*See* PERPETUITY.

4. PUBLIC OR CHARITABLE TRUSTS.

Jurisdiction — Parliamentary Grant.]—The court has no jurisdiction to take account of money voted by parliament for the general expenses of a branch of the executive. *Grenville Murray* v. *Clarendon* (*Earl*), 39 L. J., Ch. 221.

It is clear that a suit may be maintained against a public officer having in his hands money issued by government for the use of an individual, for the recovery of such money, but where government had ordered the money to be withheld, the question is only between government and the individual or his assignees, and the court has no jurisdiction. *Priddy* v. *Rose*, 3 Mer. 102; 17 R. R. 24.

Money raised on Parish Rates.]—Commissioners were authorised by an act of parliament to raise money on the security of the assignment of parish rates. Interest on the debentures was to be paid pari passu, and the debentures were to be paid off by ballot:—Held, that the relation of trustee and cestui que trust was constituted by the act, and that the holders of the debentures were entitled to sue for an account of the moneys received by the trustees, and of their payments; and that they were not bound to proceed on their bonds at law. *Fletcher* v. *Gibbon*, 23 Beav. 212.

Bombay Civil Fund.]—The Bombay civil fund was formed to provide retiring pensions for civil servants, and annuities and portions for their widows and children. The fund was constituted by the subscriptions of the members, and by a grant from the government. It was managed by a committee, the members of which resided in Bombay, and by the rules the property of the fund was vested in the committee of managers as trustees. In fact, however, the funds were always in the hands of the government as a floating debt due to the association. A suit having been instituted by the representatives of the widow of a member of the association, against the trustees of the fund and the secretary of state for India, claiming payment of an annuity which they alleged ought to have been paid to her in her lifetime:—Held, that they were not mere trustees for the association, but trustees properly so called, and that the members of the fund were the beneficiaries, so that the defence of the statute of limitations could not be set up against a claimant on the fund, merely on account of lapse of time. *Edwards* v. *Warden*, 45 L. J., Ch. 713; 1 App. Cas. 281; 35 L. T. 174—H. L. (E.) Reversing, 22 W. R. 669.

Foreign Sovereign—Interest in Fund in Court.]—If a trust fund is in the court of chancery, that court may proceed to administer it, even although a foreign sovereign may be interested in it, and may not think fit to come before the court in a suit relating to it. *Morgan* v. *Lariviere*, 44 L. J., Ch. 457; L. R. 7 H. L. 423; 32 L. T. 41; 23 W. R. 537.

The Irish Society.]—The Irish society held to be trustees for public purposes; and though accountable to the crown and the city of London for any neglect, &c., they were not so to the companies of London, notwithstanding the latter were, after providing for the public objects, entitled to the surplus revenues of the estates vested in the former. *Skinners' Co.* v.

Irish Society, 7 Beav. 593. Affirmed, 12 Cl. & F. 425; 9 Jur. 1043—H. L. (E.) And see *S. C.*, 1 Myl. & Cr. 162.

Collegiate Body.]—A collegiate body compellable to execute a trust as a private person, and though the bill not brought recently. *Green* v. *Rutherforth*, 1 Ves. Sen. 468.

Power of Majority—Cestuis Que Trust.]—Where office of justice or profits is in trust, the acts of majority of the cestuis que trust may bind the rest. *Younger* v. *Welham*, 3 Swanst. 180; 19 R. R. 196.

—— **Trustees of Baptist Chapel.**]—Where a general trust of a public nature is created, it is essential to the purposes of the trusts that a majority of the trustees should have the power, both at law and in equity, of binding the minority. *Perry* v. *Shipway*, 4 De G. & J. 353; 28 L. J., Ch. 660; 5 Jur. (N.S.) 1015; 7 W. R. 574. S. P., *Wilkinson* v. *Malin*, 2 C. & J. 636; 2 Tyrw. 544; 1 L. J., Ex. 234; *Cooper* v. *Gordon*, 38 L. J., Ch. 489; L. R. 8 Eq. 249; 20 L. T. 732; 17 W. R. 908.

Trustees under Bridge Act—Notice of Meetings.]—A bridge act, provided that sixteen persons therein named, "and all other parties" who possessed a certain property qualification, "shall be, and they are hereby appointed, the trustees for carrying this act into execution." It also provided for the holding and calling of meetings, but contained no expressed power of adjournment. It gave the trustees power to assess at meetings called for the purpose, but no assessment was to be valid unless notice of the intention of making it, and of the time at which it was intended to be made, should be given to all persons to be charged therewith. The word "trustees" was defined in the interpretation clause "the trustees acting by virtue of this act." The trustees named in the act were alone summoned to the meetings. K., who by his qualification was a trustee, but had never acted, and whose name was not inserted in the act, brought an action to set aside the assessment and proceedings, on the ground that the meetings had not been duly called, and that one of the assessments was made at an adjourned meeting, without any fresh notice to the parties to be charged:—Held, that he never having acted as a trustee, was not entitled to require the statutable notice. *Kerr* v. *Wilkie*, 6 Jur. (N.S.) 383; 2 L. T. 501; 8 W. R. 286.

Held, also, that where notice of a meeting had been properly given, there was no necessity for notice of its bonâ fide adjournment. *Ib.*

Select Vestry.]—The commissioners for building and enlarging churches having pursuant to the statutes, 58 Geo. 3, c. 45 and 59 Geo. 3, c. 30, appointed twenty-six persons to be a select vestry, for the care and management of a church, and all matters relating thereto:—Held, that, in order to constitute a good assembly of the select vestry so appointed, there must be present a majority of the number (viz. fourteen) named in the appointment; and, therefore, that a rate for the repair of the church, made at a meeting where there was not such a majority, was illegal, and that payment of such a rate could not be enforced in the ecclesiastical court. *Blacket* v. *Blizard*, 9 B. & C. 851; 4 M. & Ry. 641; 8 L. J. (O.S.) M. C. 103.

—— **Charitable or Religious Trusts.**]—*See* CHARITY—ECCLESIASTICAL LAW.

See also ARMY AND NAVY—BANKRUPTCY—BUILDING SOCIETY—CLUBS—CORPORATION—FRIENDLY SOCIETY—METROPOLIS—POLICE—PUBLIC OFFICER.

5. CONSTRUCTIVE TRUSTS.

a. In General.

What is a Constructive Trust.]—Constructive trustees, how constituted, and liabilities of. *Watson, Ex parte, Acraman, In re*, 7 Jur. 1001.

Trusts may be constituted, not merely by direct declaration of trust, but also by the constructive operation of the consequences flowing from the acts of parties. Thus equity will enforce the execution of a trust, not only against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of it. *Pooley* v. *Budd*, 14 Beav. 34.

A., who sold 500 tons of iron stacked on his wharf to B., in consideration of a bill accepted by a third party, gave an acknowledgment engaging to deliver it to the bearer, he (A.) "having been paid for the same." B. mortgaged the iron, and, the bill having been dishonoured, A. refused to deliver the iron. The mortgagee proceeded in equity to make A. responsible for the iron:—Held, that A. had no ownership or property in the iron so stacked, and was a trustee, and therefore a demurrer for want of equity was overruled. *Ib.*

Where trustees acquire a benefit as ostensible owners of trust property, that benefit cannot be retained by them, but must be surrendered to those who are beneficially interested. *Aberdeen Town Council* v. *Aberdeen University*, 2 App. Cas. 544—H. L. (Sc.)

Surviving Partner.]—A trust may well be created in the absence of any expression importing confidence; and in the case before the court the obligation on the surviving partner created by the partnership articles, with reference to the legal interest in the partnership, did not in substance differ from a trust, and it was therefore held that the articles of partnership created a trust attaching on the property. *Page* v. *Cox*, 10 Hare. 163.

Heir at Law.]—Real estate having been applied, for a century and a half, upon trusts specified by will, which named no trustee, the court assumed the will to have created an express trust in the heir at law. *Gore's Charities, In re*, 2 Con. & L. 411; 4 Dr. & War. 270.

Vendor under Contract for Sale.]—Vendor under contract for purchase dying before conveyance, vendor is trustee for him. *Dorrel's Case*, 3 Salk. 85.

If a purchaser for a valuable consideration has not the legal estate properly conveyed to him, though the consideration cannot create a use by way of covenant to stand seised, yet the vendor will be considered a trustee for the purchaser. *Pollexfen* v. *Moore*, 3 Atk. 273.

Purchasers in Equal Moieties.]—Where two purchase in equal moieties between them, and one has abatement in price, &c. made to him, he shall account as to it to the other. *Carter* v *Horne*, 1 Eq. Cas. Abr. 7.

Two persons article that whatever J. S. shall leave to either of them, shall be equally divided between both; such agreement good, and shall be carried into execution by this court; also, if after this, one of them contrives that J. S. shall lease part of his estate to a third person in trust for him, this is within the articles. *Beckley* v. *Newland*, 2 P. Wms. 182.

Attorney.]—An attorney is bound to give sufficient advice to his client; and if any advantage of property come to him by his ignorance, or the neglect of his duty, he shall be trustee thereof for the benefit of the person who would be entitled thereto, if the attorney had known and done his duty. *Bulkley* v. *Wilford*, 2 Cl. & F. 177; 8 Bligh (N.S.) 111—H. L. (E.)

—— **Solicitor of Trustees in Possession of Trust Funds.**]—See *Soar* v. *Ashwell*, infra; *Cowper* v. *Stoneham*, 3 R. 242; 68 L. T. 18; and *Brinsden* v. *Williams*, 63 L. J., Ch. 713; [1894] 3 Ch. 185; 8 R. 574; 71 L. T. 177; 42 W. R. 700.

—— **Implied Authority of Member of Firm.**]—See *Mara* v. *Browne*, 65 L. J., Ch. 225; [1896] 1 Ch. 199; 73 L. T. 638; 44 W. R. 330—C. A.

Mortgagee and Purchaser.]—Where a man enters into a treaty with a mortgagee for the purchase of his interest, but, finding he has not the legal estate, procures it to be conveyed to himself without the privity of the mortgagee, equity will consider such person as a trustee for the mortgagee. *Howes* v. *Wadham*, Ridgw. 199.

Mortgagor and Mortgagee.]—The position that the mortgagee is a trustee for the mortgagor, to be received with considerable qualifications. *Cholmondeley* v. *Clinton*, 2 Mer. 362; 2 J. & W. 182; 22 R. R. 84. Affirmed 4 Bligh, 1; 22 R. R. 83.

If mortgagor and mortgagee deposit deeds with A., A. is a trustee for mortgagor before condition broken, and for mortgagee afterwards. *Anon.*, 2 Eq. Cas. Abr. 284.

A. and his wife, being assignees of a lease, mortgage to B.; A. becomes insolvent, and, the title not being good, C., who had the real title, in compassion to A.'s wife, makes a lease in trust for her. Decreed, the trustees to make a new mortgage to B. *Seabourne* v. *Powell*, 2 Vern. 11.

Trustee of Charity.]—A scheme, made in 1855 provided that no person should act as trustee of the charity, who should hold or occupy any part of the charity property. At that time one of the trustees held a small piece of charity land, under a twenty-one years lease granted in 1847 by public tender:—Held, that he must either give up the lease or the trusteeship. *Foord* v. *Baker*, 27 Beav. 193.

Guardian and Ward.]—A placed his son, who was much addicted to intemperance, under the care of B., a relation by marriage, and at his death left his son an annuity of 500*l*. The son resided with B. for several years after his father's death and until a few months before his own death. B. always accompanied him when he went to receive his annuity from his father's executors, and he as soon as he received it handed it over to B. to keep for him; and B. from time to time gave him small sums and paid his bills:—Held, that B. was accountable in a court of equity for what he had received from the son. *Terry* v. *Wacher*, 15 Sim. 447.

—— **Express or Constructive Trust.**]—Where a statement of claim alleges that A. as trustee and guardian of B. took possession of lands, this constitutes (at most) a constructive trust and not an express trust, and such possession having been taken in 1771, the statement of claim was on motion ordered to be struck out as disclosing no reasonable cause of action, and the action was dismissed as frivolous and vexatious, and leave to appeal was refused. Lord Cairns' definition of an express trust in *Cunningham* v. *Foot* (3 App. Cas. 984; 38 L. T. 889; 26 W. R. 858—H. L. (Ir.), ante, col. 332), applied. Bowen, L.J.'s dictum in *Soar* v. *Ashwell* ([1893] 2 Q. B. 390; 69 L. T. 585; 42 W. R. 165; 4 R. 602) followed. *Life Association of Scotland* v. *Siddal* (3 De. G. F. & J. 58; 4 L. T. 311; 9 W. R. 541) explained. *Price* v. *Phillips*, 13 R. 191.

—— **Persons assisting Executrix in carrying on Testator's Business in Breach of Trust.**]—See *Barney, In re, Barney* v. *Barney*, 61 L. J., Ch. 585; [1892] 2 Ch. 265; 67 L. T. 23; 40 W. R. 637.

Vendor of Shares.]—The plaintiff, through his brokers, purchased ten shares in a company on the stock exchange from the defendant. A transfer was duly executed and left for registration. Before it was registered, an issue of new shares in respect of original ones was made, within fourteen days, for shareholders to accept or refuse. The defendant, whose name was still on the register for the ten shares sold to the plaintiff, applied for ten new shares in respect of them, and they were allotted to him. The plaintiff did not become aware of the issue of the new shares till after the expiration of the fourteen days, and he then applied to the defendant to hand over to him the ten new shares, which the defendant refused to do:—Held, that the defendant was a trustee of the ten new shares for the plaintiff. *Stewart* v. *Lupton*, 22 W. R. 855.

Tenant for Life.]—A tenant for life of an estate under settlement agreed, in consideration of 3,000*l*., to withdraw his opposition to a bill in parliament by a railway company, authorising the construction of a line of railway through the estate. The bill passed and the money was paid, but the act was allowed to expire. Subsequently the company obtained another act for construction of a similar line, and took part of the settled estate:—Held, that the 3,000*l*. must be treated as having been received for the benefit of the tenant for life, and those entitled to the estate in remainder. *Pole* v. *De la Pole*, 2 Dr. & Sm. 420; 6 N. R. 19; 34 L. J., Ch. 586; 11 Jur. (N.S.) 477; 12 L. T. 337; 13 W. R. 648.

The possessor of lands, encroachments on the Forest of Dean, devised the same to his wife for life, with remainder to his sons. The statute 20 Car. s. 2, c. 3, had enacted that all titles obtained by encroachment after the passing of the act should be void. The statute 1 & 2 Vict. c. 42, enabled "holders" of certain encroachments so made to acquire the fee. The wife obtained a conveyance of the fee in such encroachments:—Held, that she had acquired the fee, not for her own benefit only, but for the benefit of all parties interested under her husband's will. *Yem* v. *Edwards*, 3 K. & J. 564; 26 L. J., Ch. 590; 3 Jur. (N.S.) 462; 5 W. R. 552. Affirmed, 1 De G. & J. 598; 27 L. J., Ch. 23; 4 Jur. (N.S.) 647; 6 W. R. 20.

Consignees for Sale.]—The foreign agent of a

mercantile house in London, dealing in African produce, was appointed executor of A., a merchant at Sierra Leone, with directions to sell the testator's property, and place the proceeds in the Bank of England. The agent accordingly wrote to his principals in London, advising them of consignments which he should make to them of some of A.'s property, and directing them to place the proceeds to his credit as executor of A. The consignments were made, and the merchants placed the proceeds to a separate account, namely, that of A.'s estate:—Held, that the goods were specifically and not generally consigned, and that the produce of the consignments was trust money in the hands of the merchants, which, upon a motion in a suit filed against them by the representative of A. for an account, they were bound to pay into court. *Leigh* v. *Macaulay*, 1 Y. & C. 260; 4 L. J., Ex. Eq. 37.

Assignee of Legacy to Pay Debt.]—C. assigned to H. his interest in a fund in court by way of trust for sale, to secure what was due from C. to H. Before the execution of the deed H. bought up a debt owing by C. for half its amount, of which transaction C. was cognisant:—Held, that the relation of trustee and cestui que trust did not exist between H. and C. in respect of the debt which H. had so purchased; but that H. was a creditor of C. for the whole amount of such debt, and not merely in respect of the amount which H. had actually paid. *Crompton* v. *Huber*, 1 Jur. (N.S.) 465; 3 W. R. 347.

Assignee of Judgment Debt.]—A. sued B., a debtor of his intestate, upon a bond debt, and obtained a decree against him for the amount. B. appealed from this decree to the sudder court. By a deed of arrangement entered into by A. and C., after the commencement of the suit, C. became entitled to a six-anna share of the debt. Pending the appeal to the sudder court, A. entered into a compromise with B., postponing the payment of the amount recovered by the decree, for three years, and foregoing altogether interest upon the principal. This was done without the privity or consent of C. B. failed to pay the amount within the stipulated time, and proceedings were taken by A. against him, but he had not realised the amount of the decree. In a suit by C. against A. to make him chargeable for the six-anna share in the decree, the sudder court held that A. was chargeable to C. for such share, with interest. Upon appeal, such decree reversed; the judicial committee holding, that A. must be treated as a trustee for C., and that in the absence of fraud upon the cestui que trust in executing the compromise, or that it was not beneficial for all parties, he was responsible only to C. for such amount of the debt as had been recovered, or without his wilful default might have been recovered. *Doorga Persad Roy Chowdry* v. *Tarra Persad Roy Chowdry*, 4 Moore, Ind. App. 452.

Assignees under Partnership Deed.]—P. bequeathed all his property, right, and interest in and to a public newspaper, and all the benefit and advantage thereof unto three trustees, in trust to carry on and conduct the same, and, after paying certain expenses, out of the residue to pay an annuity to his daughter B. for life, for her separate use, and restrained from alienation. The testator died in 1831, and in 1832 the parties entitled to the newspaper property subject to the annuity entered into a partnership with Z., whereby it was provided, that after payment of certain expenses, the clear profits should be applied in the first place in the payment of the annuity; and for clearing the partnership of the annuity, and for making some provision for the children of B., a reserve of 200*l.* a year for five years should be made, and retained by the trustees, who should be at liberty to settle the same as they should think proper for answering the annuity, and for the benefit of B.'s child or children. Entries were, as alleged, made in the books of the partners relating to the partnership deed. B. was not a party to this deed. The annuity was paid half-yearly during the lives of and after the deaths of the trustees. The property became vested in other parties, who subsequently, as alleged, disputed the validity of the partnership deed, and stated that an arrangement had been come to between the surviving trustees and Z., whereby they put an end to the arrangements effected by the deed, and divided the annuity among certain parties:—Held, on a bill filed by B. and her children, that the partnership deed, having dealt with the property charged with the annuity, had created such a trust in favour of B. and her children as the court would give effect to; and the annuity was ordered to be raised for their benefit. *Burton* v. *Jackson*, 2 Jur. (N.S.) 224; 4 W. R. 271.

Inspectorship Deed—Trusts as to Partnership Assets and Separate Assets of Partners—Trust as to Separate Assets, whether Express or Constructive.]—By an inspectorship deed, executed in 1833, the debtors, who were partners, covenanted to collect and get in the partnership assets, and to pay the moneys received into the banking-house of the firm and apply them, so far as the same would extend, in satisfaction of the debts due to their creditors named in the deed: and each of them further covenanted to collect and get in the assets belonging to his separate estate and apply them in payment of his separate debts, and pay the surplus (there being none in the event which happened) into the banking house of the firm, to be applied for the benefit of the creditors of the firm according to the first covenant above-mentioned. A claim having been made by a creditor of the firm to funds which subsequently accrued standing to the credit of the account of the legal personal representative of the last surviving partner for distribution among certain persons as part of the separate assets:—Held, on the construction of the deed, that there was no express trust thereby constituted as regarded the separate assets of the partners, and that the period fixed by the statute of limitations having expired, the claim was barred. *Trevor* v. *Hutchins*, 7 L. T. 183, 636—C. A.

Money Advanced to Man during Cohabitation.]—Where a man lived with a woman in the character of her husband, and obtained money from her that he might invest it, the court refused, without positive proof, to declare he was not a trustee, or to permit him, after eleven years, to claim the money and the investments as his own, or to say that it was a loan, and plead the statute of limitations in bar of the suit. *James* v. *Holmes*, 31 L. J., Ch. 567; 8 Jur. (N.S.) 732; 6 L. T. 589; 10 W. R. 634.

Upon a balance of testimony weight will be

given to the character in which parties stand to one another. *Ib.*

Landlord and Tenant—Agreement to Pay Tenant's Debt.]—W., landlord to P., having the power to distrain for rent in arrear, and having distrained for part, and being a creditor of P. for money lent, as well as for rent in arrear, upon P.'s representing to him that he is also indebted to G. to the amount of about 900*l.*, for which he is in fear of arrest, and about to leave the country, undertakes that, if P. will give up to him the farm and execute an assignment of all his property, he will pay G.'s debt in the first instance out of the proceeds, and apply the residue in satisfaction of his own demand, and pay the surplus (if any) to P., who executes a bill of sale to W. accordingly on the faith of such undertaking. Upon the bill of G. and P., this agreement was enforced against W. to the extent of 900*l.*, the alleged amount of G.'s debt, but no further, the actual debt having proved to exceed that amount; and not prevented from having effect, either by the circumstance that P.'s property fell short of the estimated amount, or of P.'s being at the time indebted to other persons besides G. and W., which formed no part of the consideration for the agreement, although noticed in W.'s undertaking as having been represented otherwise. The engagement to pay G. in the first instance not being made directly to G., but through the medium of P., by whom also the consideration was furnished, P. was held, in a court of equity, to be a trustee for G. But, quære, if the plaintiffs could recover at law upon such agreement. *Gregory* v. *Williams*, 3 Mer. 582; 17 R. R. 136.

Legacy Revoked by Misrepresentations to the Testator.]—A testator, by false and fraudulent misrepresentations respecting the character of the plaintiff, was induced by a clause in a codicil to his will to revoke a bequest before made to the plaintiff, and the result of this revocation was to benefit the party making the misrepresentations. The ecclesiastical court granted probate to this codicil, though opposed by the plaintiff, refusing to allow any case to be gone into affecting merely a part of the codicil:—Held, that, under the circumstances, the court of chancery had no jurisdiction to declare the party, by whose means revocation was obtained, a trustee for the plaintiff. *Allen* v. *M'Pherson*, 1 H. L. Cas. 191; 11 Jur. 785.

Liability of Third Persons Parties to a Breach of Trust.]—*See* post, F.

Secret Profits and Commissions Paid to Agents and Servants.]—*See* PRINCIPAL AND AGENT.

Personal Liability of Agents Employed by Trustees.]—*See* post, C. 12. c.

Profit on Trust.]—*See* post, C. 11. b. vii. and cross references there.

Lien of Vendor.]—*See* VENDOR AND PURCHASER.

Right to Renewed Leases.]—*See* ante, 5. c.

Devolution of by General Devise.]—*See* post, C. 3. c.

See also ESTATE—FRAUD AND MISREPRESENTATION—SOLICITOR—WILL.

b. Implied and Resulting Trusts.

i. *In General.*

Nature of Presumptive Trusts.]—Trust by implication, without the word "trusts." *King* v. *Denison*, 1 V. & B. 273; 12 R. R. 227.

Nature of presumptive trusts. *Cook* v. *Fountain*, 3 Swanst. 491.

Trusts never implied or presumed without necessity. *Id.* 592.

No Declaration of Trusts.]—If, in voluntary deeds and wills, there is no declaration of trusts of term, it results to donor; but secus if "for valuable consideration," and in nature of a contract for the benefit of the wife and issue. *Brown* v. *Jones*, 1 Atk. 190.

A., tenant for life, in case she should so long continue unmarried; in case of her marriage, to her in fee; in case of her decease unmarried, to her sister B. in fee. A. and B., and the husband of B., join in a sale by fine. The purchase-money was laid out in funds in names of trustees, without any declaration of trust or agreement as to the application: nor was any notice of this fund taken in the wills of B. and her husband. B., being the survivor, made a general disposition of all her personal estate in favour of A. A., though still unmarried, held absolutely entitled to the stock. *Seawen* v. *Blunt*, 7 Ves. 294.

By a settlement executed on the marriage of B. and C., reciting that B. (the wife) was entitled to the lands of X., under a will, and was entitled under the will to a part of the lands of Y., as having survived her sister, and of the lands of Z., in remainder, and as also entitled to 600*l.*; that it had been agreed that the properties before mentioned should be vested in a trustee upon certain trusts, i.e., in the first place, to secure a jointure for her, B. conveyed the lands of X. and Y. to the use, as to X., of C. for life; remainder to the use of B. for life; remainder for the issue of the marriage; and it was agreed that B. was to have all the property that C. might have or be entitled to during her life, and that C. would not sell or mortgage any of the properties during the life of B. without her consent and approbation first had and obtained under her signature:—Held, first, that there was a resulting trust as to the lands of Y., for B. and C., in her right; and, secondly, that C. was entitled to the lands of Z. for life, with remainder to B. for life. *Elliott* v. *Kempston*, 15 Ir. Ch. R. 120.

Grant of Next Avoidance.]—A grant of the next avoidance to one without his privity:—Held, a resulting trust for the grantor, no other trust being declared. *Norfolk* v. *Browne*, Pre. Ch. 80.

Trust Void for Remoteness.]—A trustee is not entitled to retain for his own use a sum of money bequeathed to him in trust, under circumstances which rendered the trust void for remoteness. A trust differs from a charge in this—that where a man has an estate subject to a charge, if the charge fail he has the benefit of it; but a trust once declared, although unlawful or impossible, excludes the notion of a beneficial interest being intended in the trustee. The subject matter of the trust in question to fall into the residue. *Joy* v. *Aspinwall*, 18 Jur. 284.

Assignment of Property of Convict.]—A person

being in prison on the charge of felony assigned real estate, which was in the hands of trustees, to his brother. He was acquitted on the ground of insanity. His brother accumulated the income except a small portion which he spent for the benefit of the convict. After the brother's death it was held that he was trustee for the convict. *Manning* v. *Gill*, 41 L. J., Ch. 736; L. R. 13 Eq. 485; 26 L. T. 14; 20 W. R. 357.

Grant of Lease in Trust.]—A. grants a lease to B., which is intended to be in trust for A., and B. declares a trust accordingly. B. afterwards surrenders the lease to A., who makes a new lease to C. without a declaration of trust:—Held, that C. was entitled to full benefit, and that no trust existed for A. *Pilkington* v. *Bayley*, 7 Bro. P. C. 383.

Payment in Name of Another with his Money.]—Payment made in the name of A. with his money raises a trust, but it is an equity which may be rebutted by evidence. *Graham* v. *Graham*, 1 Ves. 275.

Grant of Common by Lord of Manor.]—Where lord of manor by feoffment grants certain parcels of common, &c., to trustees, for the benefit of themselves and the rest of tenants of manor, in lieu of and recompense for their several claims of common in all the rest of the common lands, &c., in the manor, the whole interest passes from the lord, and there is no resulting trust for him as to the ownership of the soil. *Irwin* v. *Simpson*, 7 Bro. P. C. 306.

Express Trust by Parol.]—A mortgagee assigns over his mortgage to S., and declares a trust by parol to other persons; J. acknowledges the trust: there being an express trust declared, though by parol only, shall prevent a resulting trust to the assignee. *Bellasis* v. *Compton*, 2 Vern. 294.

Father and Son—Settlement—No Trust Declared of Surplus.]—By a deed between a father and son, reciting that the father was desirous of settling the property therein comprised, so as to make the same provision for himself during his life, and for his wife, and her children by him, after his decease, he released and assigned the same and every part thereof to the son, upon the trusts therein mentioned concerning the same. The father proceeded to declare the trusts as to part of his property in favour of his wife and daughter, and a niece, but no trust was declared as to the surplus:—Held, that the surplus did not result to the grantor, but belonged to the son, and, the father having been maintained by the son for fifteen years, a bill filed after the father's death, by his representative, was dismissed with costs as to that part of it which sought an account of interest. *Cook* v. *Hutchinson*, 1 Keen, 42.

Conveyance by Father jointly Seised with Others to Son.]—A., jointly seised with two others, conveys his third part to the use of himself for life: remainder to his wife for life, remainder to his son in fee, and at the same time makes his will and gives the same lands to his son in tail, charged with his debts. The son not a trustee for the father in the settlement; otherwise it would have been, if the entire fee had been conveyed to the son. *Baylis* v. *Newton*, 2 Vern. 28.

Refusal of Creditors to Accept in Full Discharge Money Covenanted to be Advanced.]—Where the plaintiff, being entitled to the residuary estate of his father, filed a bill against his mother, the executrix, for an account, &c., and she, by arrangement with him, by deed covenanted to settle a yearly sum on him and his family, and to advance a sum for the benefit of his creditors, if they would accept it in full discharge; the latter having refused:—Held, that no resulting trust arose in favour of the son, as to the sum so to have been advanced to the consenting creditors. *Sherwood* v. *Walker*, 6 Beav. 401; 7 Jur. 293. Affirmed 13 L. J., Ch. 258; 8 Jur. 229.

Husband and Wife—Joint Banking Account.]—A testator, who was in failing health, opened a new banking account in the joint names of himself and wife, authorising the bank to cash cheques drawn by either of them, and telling the bank manager that the balance of the account would belong to the survivor of himself and his wife. Cheques were thenceforward drawn by the wife only, and were applied by her in payment of household and other expenses, the husband paying in sums of money from time to time to the credit of the account. At the time of his death there was a large sum standing to the credit of the account, which the wife claimed to be entitled to for her own use:—Held, that the evidence of circumstances was not sufficient to rebut the presumption of a resulting trust in favour of the testator. *Marshal* v. *Crutwell*, 44 L. J., Ch. 504; L. R. 20 Eq. 328.

Proceeds of Sale of Real Property remaining Subject to Trusts of Settlement.]—Under a settlement, real estate was limited to such uses as A. and B. should by deed jointly appoint, and subject thereto to the use of A. for life, with remainder to the use of B. for life, with remainder to the first and other sons of B. in tail, with divers remainders over; and there was a power of sale vested in four trustees, and exercisable at the request of A. and B. and the survivor of them. By a deed (which contained a recital that A. and B. were desirous of selling part of the settled property, and, with a view to facilitate the sale and conveyance thereof to the respective purchasers, had agreed to execute the deed), A. and B., in exercise of the joint power of appointment, appointed part of the settled property to trustees upon trust for sale; and it was declared that the trustees should stand possessed of the proceeds upon the trusts intended to be declared by a deed of even date. No deed declaring the trusts was ever executed, and there was evidence to show that the deed of appointment was executed with the view of avoiding the trouble and expense of an application to the trustees to exercise the power of sale:—Held, that the disposition of the proceeds of sale was a question of intention; and that both on the terms of the deed of appointment (independently of the evidence) and also having regard to the evidence, the proceeds of sale remained subject to the trusts of the settlement. *Biddulph* v. *Williams*, 1 Ch. D. 203.

Mortgage—Power of Sale—Trust of Surplus Sale Moneys.]—By a marriage settlement land belonging to the husband was conveyed, for making a provision for the wife and the issue of the marriage, to such uses as the husband and wife should by deed jointly appoint, remainder

to the use of the husband for life, remainder to the use of the wife for life, remainder to uses in favour of the children of the marriage, with ultimate remainder to the use of the heirs and assigns of the husband. A right of entry was given to the trustees in the event of the death of the parents during the minority of the children. There was no settlement of any money, and no power of sale. The husband and wife exercised their joint power of appointment, and mortgaged the property comprised in the settlement. There was a proviso for redemption which provided that, on payment of the mortgage debt, the mortgagee should reconvey the property to the uses of the settlement. The mortgage contained a power of sale which provided that the mortgagee should pay over the surplus proceeds of the sale to the husband, "his heirs, executors, administrators and assigns." The husband died and the mortgagee exercised his power of sale, and after payment of the mortgage debt, interest, and expenses, had a surplus in his hands:—Held, that there was no resulting trust of the surplus, and that the husband's legal personal representative was entitled to the fund, and not his heir-at-law. *Jones* v. *Davies*, 47 L. J., Ch. 654; 8 Ch. D. 205; 38 L. T. 710; 26 W. R. 554.

Effects of Statute of Frauds.]—*See* ante, A. 1.

Mortgages of Wife's Property.]—*See* HUSBAND AND WIFE.

Joint Mortgages.]—*See* MORTGAGE.

Failure of Heirs or Cestuis que Trust—Beneficial Interest of Trustee.]—*See* CROWN; WILL.

Title of Residuary Devisee or Legatee to Undisposed-of Interests.]—*See* WILL.

Gift of Residue to Executor. Rights of Next of kin.]—*See* EXECUTOR AND ADMINISTRATOR.

Lapse of Legacies charged upon Land and Surplus beyond the Charge.]—*See* WILL.

On Failure of Purposes for which Conversion is Directed.]—*See* CONVERSION.

To Heir in Real Estate not beneficially Disposed of by Will.]—*See* WILL.

To Heir on Failure of Particular Estates. Acceleration of Remainders.]—*See* WILL.

Failure of Limitations in Marriage and other Settlements.]—*See* SETTLEMENT.

Surplus Unappointed or Passing in Default of Appointment.]—*See* POWERS.

Trusts for Undefined or Indefinite Objects (Precatory Trusts).]—*See* WILL.

Surplus under Trusts for Maintenance.]—*See* post, 6. a. vii.

Surplus under Trusts for Accumulation.]—*See* ACCUMULATION.

Trusts. Whether Express or Implied under the Statute of Limitations.]—*See* LIMITATIONS, STATUTE OF.

ii. *Joint Purchases.*

Joint Advance—Purchase in Name of one.]—Resulting trust by a joint advance upon a purchase in the name of one. *Wray* v. *Steele*, 2 V. & B. 388; 13 R. R. 124.

—— **Parol Evidence.**]—On a purchase by two contributing equally to the cost of it, parol evidence of surrounding circumstances and of subsequent dealings is, notwithstanding the statute of frauds, admissible to prove an intention to hold it severally. But, semble, parol evidence of statements of intention is not admissible. *Harrison* v. *Barton*, 1 J. & H. 287; 30 L. J., Ch. 213; 7 Jur. (N.S.) 519; 3 L. T. 614; 9 W. R. 177.

—— **Stock Standing in Joint Names.**]—Stock purchased in the joint names of two sisters, and a balance to their joint account at their bankers:—Held, under the circumstances, to belong to them as tenants in common, notwithstanding they had contributed equally, the court looking to the source whence the funds were derived, viz., rents of land, of which the two were tenants in common. *Robinson* v. *Preston*, 4 K. & J. 585; 27 L. J., Ch. 395; 4 Jur. (N.S.) 186.

The rule as to the investment of moneys in the names of two or more persons in the purchase of property is this: if invested in unequal shares, the purchasers remain tenants in common of the purchased property; if in equal shares, and the matter on the face of it purports to be a joint tenancy, it is considered to be a joint tenancy, and no equity is supposed to intervene by which it can be reduced to a tenancy in common. *Ib.* And see *Aveling* v. *Knipe*, 19 Ves. 441.

Renewal of Lease by Testator in Names of his Brother and himself, paying the Fine.]—Testator on renewal of a lease takes it in the names of his brother and himself, paying the fine, and receiving the profits himself:—Held, not to be assets, but vested in the brother beneficially upon the ground of intention, though proved but by one witness. *Maddison* v. *Andrew*, 1 Ves. Sen. 58.

Personal Office or Employment Purchased with Partnership Funds.]—Where a personal office or employment is purchased with the partnership funds for the benefit of the partnership, the partner in whose name it is purchased is not necessarily a trustee for the profits of the office for the other partners, after the term of the partnership has expired. *Clark* v. *Richards*, 1 Y. & C. 351; 4 L. J., Ex. Eq. 49.

Transfer of Stock into Joint Names—Proof of Gift.]—Transfer of stock of intestate into name of himself jointly with that of husband of one of his two nieces, accompanied with proof of his having said in his lifetime that it was his intention to give husband stock at his death in consideration of affection, &c., and that he had transferred it for that purpose (if not repelled by counter testimony):—Held, to be sufficient proof of gift of such stock, and no trust; and the court will not continue injunction granted to restrain husband, who had administered, from disposing of it. *George* v. *Howard*, 7 Price, 646; 21 R. R. 775. And see *Wheeler* v. *Smith*, 1 Giff. 300; 29 L. J., Ch. 194; 6 Jur. (N.S.) 62; 1 L. T. 430; 8 W. R. 173.

Presumption of Intention to Advance—Reputed Wife.]—H. married in 1840 the sister of a deceased wife. He afterwards invested parts of the savings of his income in consols in their joint names. It did not appear that the reputed wife had at the time of performing the ceremony of marriage any property of her own. In 1845 H. died, leaving his reputed wife surviving:—Held, that she was a trustee of the stock, and that it formed part of the estate of H. *Soar* v. *Foster*, 4 K. & J. 152; 4 Jur. (N.S.) 406; 6 W. R. 265.

No intention of advancement in cases of a purchase in joint names will be presumed, except in the case of a lawful wife, or a person to whom the purchaser stands in loco parentis. *Ib.*

In all other cases the onus of proving the intention to advance is thrown on the person claiming the advancement, and such a circumstance as the performance of the ceremony of marriage, where the parties knew it to be inoperative, will not be regarded. *Ib.*

Transfer to Save Legacy Duty.]—D., having expressed a wish to save her sister legacy duty, in her lifetime transferred stock into the names of herself and sister, whom she made her universal legatee, the husband of the sister being a witness to the will. On bill filed for a declaration that the testatrix died intestate, and that the stock formed no part of her personal estate:—Held, that the bequest by the will was void, and that the stock formed no part of the personal estate, but the sister was entitled to the beneficial interest in it. *Deacon* v. *Colquhoun*, 2 Drew. 21; 23 L. J., Ch. 16; 2 Eq. R. 319; 2 W. R. 67.

Transfer to Evade the Savings Bank Act.]—A testator, under s. 33 of the Savings Bank Act, 9 Geo. 4, c. 92, made deposits in the names of himself and his sisters; but he did not communicate to them the fact of such deposits being made:—Held, that a trust was not thereby created for the benefit of the sisters, the testator's object being, in the opinion of the court, merely to evade the provisions of the act. *Field* v. *Lonsdale*, 13 Beav. 78; 19 L. J., Ch. 560; 14 Jur. 995.

Purchase in Name of Wife or Child, and by Persons in loco parentis.]—*See* HUSBAND AND WIFE—INFANT—PORTION.

Purchase by Partners.]—*See* PARTNERSHIP.

iii. *Purchases in Name of Stranger.*

General Rule.]—Trusts by implication arise where one party pays the purchase money, and the conveyance is taken in the name of another; but the rule is not so large as to extend to every voluntary conveyance. *Young* v. *Peachy*, 2 Atk. 256.

When an estate is purchased in the name of one person, and the money is paid by another, he has a resulting trust; or where it is declared only as to part, and nothing said as to the rest, what remains undisposed of results to the heir-at-law. *Lloyd* v. *Spillett*, 2 Atk. 150; Barnard. 388; 2 Eq. Cas. Abr. 745, pl. 13. S. P., *Lane* v. *Dighton*, Amb. 411.

In no other instance has the court declared resulting trusts by operation of the law, unless in cases of fraud, and where transactions have been carried on malâ fide. *Ib.*

The heir-at-law does not want an express intention to take by will, though it is otherwise with regard to a deed. *Ib.*

Though, in the purchase deed, the consideration money is mentioned to be paid by the purchaser, and there is no express declaration of a trust, yet upon the circumstances of the case decreed a trust, though to the disappointment of the purchaser's will and of his creditors. *Plymouth (Earl)* v. *Hickman*, 2 Vern. 167.

Conveyance to B. of an estate, the money being paid by A.; B. is a trustee, and C., taking from B. with notice, is also a trustee. *Mackreth* v. *Symmons*, 15 Ves. 350; 10 R. R. 85.

Presumption Rebutted by Evidence.]—Where land is purchased with the money of A., in the name of B., the resulting trust to A. may be rebutted as to part of the land or part of the interest in the land. Where A. took a mortgage in the name of B., declaring that the principal sum should be for the benefit of B., and received the interest during his life, this being personal estate is not within the clause in the statute of frauds relating to resulting trusts, or the doctrine of resulting trusts under the statute; but the property after the death of A. will belong to B. by force of the parol declaration. *Benbow* v. *Townsend*, 1 Myl. & K. 506; 2 L. J., Ch. 215.

A purchase by A. in name of B., a stranger in blood, is a trust for A., unless presumption is repelled by evidence. *Rider* v. *Kidder*, 10 Ves. 360.

The person in whose name South Sea stock is entered in the company's book, is with regard to them the proprietor. *Stockdale* v. *South Sea Co.*, 2 Atk. 141.

Parol evidence cannot be admitted to show that a party, having agreed for the purchase of an estate in his own name, had in fact purchased it on behalf of another person. *Bartlett* v. *Pickersgill*, 1 Cox. 15; 1 Eden. 515; 1 R. R. 1; *and see* 20 R. R. 294, n. But see *Rochefoucauld* v. *Boustead*, 66 L. J., Ch. 74; [1897] 1 Ch. 196; 75 L. T. 502; 45 W. R. 272; ante, col. 320.

Purchase by A., and receipt in his name; evidence admitted to prove trust for B. *Knight* v. *Pechey*, Dick. 327.

He who pays purchase-money has a resulting trust, but he must clearly prove payments. *Willis* v. *Willis*, 2 Atk. 71. S. P., *Gascoigne* v. *Thwing*, 1 Vern. 366.

Parol evidence admitted to show a trust from the mean circumstances of the pretended owner of the real estate. *Ib.*

A. purchases an estate in the name of B., and suffers him to execute lease thereof, and gives receipt for rents in the name of B., but no declaration of trust was executed by B. Bill by A.'s heir for conveyance and account dismissed. *Delane* v. *Delane*, 7 Bro. P. C. 279.

N. took a lease of land in the name of his sister M. from S. He subsequently, in June, 1860, agreed to purchase the land from S. It was afterwards discovered that proceedings in the landed estates court were necessary to establish the title of S., and a new agreement between N. and S. was prepared. N. had this draft agreement altered by substituting the name of M. for his own, and M., when directed to do so, signed the agreement as also did S., in October, 1860. During the proceedings in the landed estates court N. died intestate. The purchase was subsequently completed: a conveyance was made to M., and she, as administratrix of N., was allowed credit for the purchase-money out of the assets

of N. In his lifetime he acted as master and absolute owner of the property, and had spoken of it as purchased by him for M., and as intended by him for her benefit :—Held, that there was no evidence sufficient to rebut a resulting trust ; but that M. was the agent of N. authorised by parol, with a right to be indemnified inconsistent with any beneficial interest belonging to her. *Nicholson* v. *Mulligan*, Ir R 3 Eq. 308 ; 17 W.R. 659.

Held, also, that her representative capacity, reconciling the two agreements, excepted the case from the operation of the doctrine admitting evidence to rebut a resulting trust. *Ib.*

A., a freeman of London, purchases in the name of B., but no trust declared ; A. dies, and B. gives a declaration of trust : this is good against the custom. *Ambrose* v. *Ambrose*, 1 P. Wms. 321.

Purchase of Reversion by Lessee—Conveyance to another Person without Declaration of Trust.]—A., being in possession of lands for a long term of years, contracts for the purchase of the reversion and inheritance, but to prevent merger of the term takes conveyance to B. absolutely and without declarations of trust from B. The title deeds remain throughout in the custody of A. and those claiming under him. B. held to be a trustee only for A. *Lever* v. *Andrews*, 7 Bro. P. C. 288.

Lease taken in Name of Person Advancing Money to Pay Fine.]—A. agrees for a beneficial lease of forty-one years, B. advances money towards paying the fine, &c., and lease is taken in B.'s name without any declaration of trust :—Held, that B. was a trustee for A., and, upon being repaid the money advanced, with interest, should assign the lease to A., account with him for the profits, and pay his costs. Held, also, that the trust, being proved by letters of B.'s own handwriting, this case was not within the statute of frauds. *O'Hara* v. *O'Neill*, 7 Bro. P. C. 227 ; 2 Eq. Cas. Abr. 745, pl. 9.

Lease to One in Trust for Person Paying Fine.]—C. proposed to A. that A. should take out a lease of certain lands in his own name, but in trust for C., to which A. verbally consented, and C. paid the fine for the lease, which was afterwards executed by A. A difference having arisen as to the terms of the agreement between A. and C. :—Held, that it lay on C. to sustain his view beyond all doubt, or be bound by the offer made by A. in his answer. Before the bill was filed A. had repudiated the trust, but having admitted it by his answer upon terms :—Held, entitled to his costs from the filing of the answer. *Chartres* v. *Ainsworth*, 1 Hay. & J. 68.

Declaration of Trust of Lease by Nominal Lessee after Bankruptcy.]—A lease was granted to W., who afterwards committed an act of bankruptcy; and then executed a deed, stating that his name had been used in the lease in trust for R., and declaring the trust accordingly. A bill was filed on behalf of the creditors of W. under the commission, claiming the lease as part of his estate ; and the court directed an issue to try whether W.'s name was used in the lease as a trustee for R. :—Held, that the issue was properly directed. The jury having found a verdict in the affirmative :—Held, that the declaration of trust was valid, though executed after bankruptcy, and that the lease did not pass to W.'s assignees. *Gardner* v. *Rowe*, 5 Russ. 258 ; 7 L. J. (o.s.) Ch. 2. Affirming 2 Sim. & S. 346 ; 3 L. J. (o.s.) Ch. 220 ; 25 R. R. 214.

Shares Purchased in Name of Bankrupt.]—By the rules of a joint-stock company, only principals could become subscribers. The petitioner purchased forty shares in the name of the bankrupt, who verbally declared that he held them as a trustee for the petitioner, and the certificates of the shares were kept in the possession of the petitioner ; but no notice was given to the company of the trust, nor did the bankrupt sign a written declaration of trust until seven days before the fiat was issued :—Held, that the shares were in the order and disposition of the bankrupt as reputed owner, and passed to his assignees. *Ord, Ex parte*, 1 Deac. 166 ; 2 Mont. & Ayr. 724 ; 4 L. J., Bk. 84.

Purchase in Name of Son of Land Covenanted to be Settled.]—A. by marriage articles covenanted that all lands he should afterwards purchase in the parish of K. should be to the uses of the articles. He purchased lands in K. and took a conveyance in fee in the name of his youngest son ; but there was no declaration of trust :—Held, that youngest son was a trustee as to the lands for the parties entitled under the settlement. *Blake* v. *Blake*, 7 Bro. P. C. 241.

Mortgage to Secure to Mortgagee Money advanced to Purchase Estate.]—In 1805 A. B. purchased an estate with the money of C. D., and executed a mortgage to secure the amount. A. B. was evicted, and he died in 1812 ; C. D. died in 1816. The same individuals represented both A. B. and C. D., and in 1845 they established, under the covenant for title, a claim against the vendor's estate, for the amount of the purchase-money. The residuary legatees of C. D. filed a bill in 1846 against the representatives to recover the amount. The court thought that there was so much probability, at least, of their ultimately establishing their equity, that it overruled a demurrer to the bill, leaving the question open at the hearing. *Norman* v. *Stiby*, 9 Beav. 560.

Surrenderee of Customary Freeholds not Devisable Admitted.]—A., seised of freehold estates, and of customary freeholds, which were not devisable, made a voluntary surrender of the latter to B. in fee, in trust, as B. admitted for A., and after his death for the purposes of his will ; but B. executed no declaration of trust. A. made a general devise of all his real estates, and after A.'s death B. was admitted :—Held, that he was a trustee for the devisees, and not for A.'s customary heir. *Wilson* v. *Dent*, 3 Sim. 385.

Copyholds—Custom as to Grant in Reversion to Tenant for Life in Name of Another.]—Custom of manor, that, if tenant for life of copyholds obtains a grant in reversion, in the name of a third person, unless a trust is mentioned on the rolls of the manor, such third person should be beneficially entitled thereto, and not as trustee :—Held, good. *Edwards* v. *Fidel*, 3 Madd. 237.

A. buys a copyhold estate for his own, and two lives in the manor of M., where the custom was, that whoever purchases in it, the estate shall go in succession, and by his will devises all his estate, real and personal, to his wife :—Held, that though the legal interest be ac-

cording to the custom of the manor, yet A. has an equitable interest from being the sole purchaser, and it shall be construed as a trust for him, he having advanced the money. *Smith* v. *Baker*, 1 Atk. 385.

—— **Grant for Three Lives.**]—Where in a grant of a copyhold for three lives, viz., to the husband and wife and a third person, the fine was mentioned to be paid by the husband and wife, this, there being no full evidence to the contrary, made the third person only a trustee for the husband and wife and the survivor of them. *Benger* v. *Drew*, 1 P. Wms. 781 ; 2 Eq. Cas. Abr. 739, pl. 5.

In a manor the custom was to grant for three lives successively ; A., being the last life in an old copy, obtained a fresh grant to B. and C. ; A. paying the whole fine, B. and C. were held trustees for A. *Withers* v. *Withers*, Amb. 151.

—— **Purchase of Equity of Redemption by Mortgagee—Surrender in Name of Another.**]—C. lends money upon mortgage of copyhold, but being infirm, &c., surrender, &c., is taken in name of D., who executes a declaration of trust. C. afterwards purchases the equity of redemption, and second surrender is made in the name also of D., but without a declaration of trust :—Held, sufficient trust within the statute of frauds without a second declaration of trust. *Acherley* v. *Acherley*, 7 Bro. P. C. 273.

When Advancement Presumed.]—Purchase in the name of another is a trust for the party who pays the consideration, except by a parent in the name of his child, which is presumed an advancement ; the presumption capable of being rebutted, but does not give way to slight circumstances. *Finch* v. *Finch*, 15 Ves. 43 ; 10 R. R. 12.

—— **Purchase in Name of Brother by Elder Brother.**]—Where one claimed as an advancement shares purchased in his name by an elder brother, and also alleged a gift of them seven years after the purchase, and stated his belief they were intended to be ultimately for his benefit :—Held, no advancement. *Forrest* v. *Forrest*, 5 N. R. 299 ; 34 L. J., Ch. 428 ; 11 Jur. (N.S.) 317 ; 11 L. T. 763 ; 13 W. R. 380.

Purchase by Married Woman in Name of Niece.]—A married woman, out of the savings of her separate estate, purchased stock in the name of a niece, and told the niece by letter that it was her intention that the stock should be for the niece herself, but took from the niece a power of attorney to receive the dividends, and sell the stock :—Held, that on the death of the aunt the niece was entitled to the stock. *Beecher* v. *Major*, 11 Jur. (N.S.) 537 ; 12 L. T. 562. Affirmed, 6 N. R. 370 ; 13 L. T. 554 ; 13 W. R. 1054—L. C.

Money Standing in Name of Married Woman Claimed after her Decease by her Mother—Evidence.]—Money which was standing in the funds in the name of a married woman was claimed, after her decease and that of her husband, by her mother, as having been invested by her while separated from her husband in her daughter's name. The only evidence of the trust was the affidavit of the mother, and proof that the dividends had been received by her with the assent of the daughter and her husband :—Held, that the claim of the mother was established. *Down* v. *Ellis*, 35 Beav. 578.

Grandmother Purchasing Annuity in Grandchild's Name — Bond by Child's Father to Repay Purchase Money.]—Grandmother buys an annuity in 14*l.* per cents. for 100*l.*, in the grandchild's name. Child's father gives the grandmother a bond to repay the 100*l.* if the child dies before the grandmother, who receives the income and keeps the talley, the grandchild making no claim : this no trust for the grandchild. *Lloyd* v. *Read*, 1 P. Wms. 607.

See also ESTATE—GIFT.

iv. *Failure of Gifts.*

a. In General.

Voluntary Conveyance of Realty.]—There is no resulting trust to the donor in the case of a voluntary conveyance of real estate made in order to qualify the donee to act as a justice of the peace. *Crichton* v. *Crichton*, 65 L. J., Ch. 13 ; [1895] 2 Ch. 853 ; 13 R. 770 ; 73 L. T. 556 ; 44 W. R. 203 ; 59 J. P. 792.

Voluntary Assignment—Death of Beneficiary—Residuary Trust.]—T., who was contingently entitled to a prospective share in certain property, voluntarily assigned it, in 1880, to trustees upon trust (among other trusts) to pay a sum of 500*l.* to one K., and as to the residue upon other trusts. T. became entitled to her share of the property in 1894, and by a letter, in 1895, directed that a portion of it should be transferred to the trustees of the voluntary assignment of 1880. K. died in 1888, intestate, and the question now arose as to his 500*l.*, which was claimed (1) by his personal representative and (2) by the settlor as upon a resulting trust :—Held, (1) that a person dead at the date of the execution of a deed could take no benefit under it, and the confirmation of the deed by the letter of 1895 only set up such trusts as were then subsisting, and had no retrospective effect ; and (2) that the 500*l.* belonged to T., the settlor, by way of resulting trust. *Tilt, In re, Lampet* v. *Kennedy*, 74 L. T. 163.

Power of Appointment—Infant Appointor—Death of Infant while still under Age — Failure of Ultimate Limitation.]—An infant had a life interest and a general power of appointment under her mother's will. She made a settlement in exercise of the power, with the sanction of the court, under the Infants' Settlement Act, 1855. She died while still an infant, and the ultimate limitation in the settlement, which was in favour of the infant's next of kin, according to the statutes of distribution, failed by reason of the infant's illegitimacy :—Held, that there was a resulting trust in favour of the infant herself, and that the property appointed passed to her surviving husband, who was her administrator, and not to the persons entitled under the mother's will in default of exercise of the power of appointment. *Scott, In re, Scott* v. *Hunbury*, 60 L. J., Ch. 461 ; [1891] 1 Ch. 298 ; 63 L. T. 800 ; 39 W. R. 264.

Settlement—Reference to Non-Existing Deed.]—By a voluntary settlement executed on 2nd December, 1873, certain property was

settled upon trust for W. during his life, with remainder to his children. And it was declared that if there should be no children of the said W. who should take a vested interest in the trust property, the trustees were to stand possessed of the trust property in trust for J. and her child and children "subject to the like trusts . . . . declared of . . . . certain trust property settled, comprised in, and assured by a certain indenture bearing even date with these presents, and made between Charles Wilcock and Mary, his wife, of the one part and the said Thomas Charles Wilcock of the other part." No such indenture was ever executed. At the time, however, when the settlement was prepared an indenture was prepared and engrossed by which certain property was settled upon trust for J. for life, with remainder to her children. This indenture, however, was never executed, but instead thereof a deed was prepared conveying the property to J. absolutely. This deed was executed on the same day as the settlement, but it was not made between the same parties. W. died without leaving a child:—Held, that no trusts were sufficiently declared either for J. or for J. and her children. Consequently there was a resulting trust for the benefit of the settlor. *Wilcock, In re, Wilcock* v. *Johnson*, 62 L. T. 317.

Assignment in Favour of Creditors—Surplus.]—By a deed of assignment executed by a firm in favour of their creditors, after a recital of the inability of the firm to pay their debts in full, the business was assigned to trustees, upon trust either to carry on or sell the same, and, after payment of costs, to pay and divide the residue of the profits and proceeds of sale unto and among all and singular the creditors in rateable proportions, according to the amount of their respective debts, subject nevertheless to the provisions thereinafter contained, and the creditors granted a release of the debts. The deed contained a provision empowering the trustees to pay off or make arrangements with creditors under 30*l*. The profits of the business were more than sufficient to pay the creditors in full:—Held, that there was no resulting trust of the surplus for the assignors. *Smith* v. *Cooke*, 60 L. J., Ch. 607; [1891] A. C. 297; 65 L. T. 1; 40 W. R. 67—H. L. (E.)

See also WILL.

b. Charitable Gifts.

Rents before Devise carried into Effect.]—Upon a devise to a charitable use, the heir has no right to the rents and profits accrued before the devise is carried into effect. *Att.-Gen.* v. *Bowyer*, 3 Ves. 714; 4 R. R. 132.

Devise upon a future contingency, and no intermediate disposition of the rents and profits, is a resulting trust for the heir. *Ib.* 725.

Devise on happening of a Particular Event.]—When lands are given to charity purposes on the happening of a particular event, there is a resulting trust in the meanwhile; but where real estate was vested in A. in trust, out of the rents, to keep it ready for the reception of plague patients during their sickness, but no longer, and for a burying-place for them, and for no other use:—Held, first, that this was a present gift to charitable purposes, and not merely a gift contingent upon the re-appearance of the plague; and, secondly, that there was no resulting trust in the meanwhile for the donor or his heirs, though the plague had not re-appeared for more than 180 years. *Att.-Gen.* v. *Craven* (*Earl*). 21 Beav. 392; 25 L. J., Ch. 291; 2 Jur. (N.S.), 296; 4 W. R. 340.

Devise of Copyhold on Condition to Pay Sum to Charity.]—Devise of copyhold land in fee, on condition to pay 1,000*l*. to charity. Testator having left no next of kin, nor any customary heir, and gift of charity being void, devisee held entitled to 1,000*l*., and not the crown or lord of manor. *Henchman* v. *Att.-Gen.*, 3 Myl. & K. 485. Reversing 2 Sim. & S. 498.

Money charged on Real Estate for Charity.]—Money charged upon a real estate for a charity void by the statute of mortmain shall sink in favour of the specific devisee, not go to the heir-at-law or residuary legatee. Secus, when it is an exception out of the devise. *Wright* v. *Row*, 1 Bro. C. C. 61. S. P., *Baker* v. *Hall*, 12 Ves. 497; 8 R. R. 366.

Specific Devise.]—A testator gave all his real and personal estate to his executors; then mentioned a specific house, 71, Queen's Road, Bayswater, which he gave to the inhabitants of B., to found a charity, directed the executors to call a meeting of the inhabitants, to appoint trustees to carry his scheme into execution, named his godson, W., to be one of the trustees, leaving to the inhabitants to choose as many more as they pleased: and then said, in the event of the inhabitants not being willing to carry out the scheme, "I will that all my property so given to the charity shall absolutely belong to my godson." He afterwards made some pecuniary gifts, and devised leasehold and freehold houses for life to different persons; each house, on the death of the devisee, being given to the "residuary legatee or legatees" for the charity. As to one freehold house alone, 4, Douglas Place, there was a gift of it to W. for life, then to the trustees of the charity; but should there be no charity established, then to W. absolutely. The gifts to the charity being contrary to the statute of mortmain, no meeting of inhabitants was called, nor were any trustees appointed:—Held, that on the general failure of the gift to the charity, the gift over took effect; and therefore, in the case of the house, 4, Douglas Place, W. became entitled to it absolutely. *Hall* v. *Warren*, 9 H. L. Cas. 420.

Held, also, that W. was only entitled, in addition, to the house, 71, Queen's Road, Bayswater, for that the words "all my property so given" must be restricted to that house, and did not affect the general property of the testator, as to which he must be treated as having died intestate. *Ib.*

Gift of Particular Residue of Lands.]—A married woman, having a power of appointment under her marriage settlement over estates A. and B., appointed by will, in September, 1838, estate A. to her husband in fee; "and all other the hereditaments comprised in the settlement not hereinbefore disposed of" to another person. By codicils to her will, she revoked the appointment of estate A. to her husband, and gave him the same estate for life, with remainder to trustees to

sell and pay certain legacies, and pay the residue to charities:—Held, that the devise of "all other the hereditaments," &c., by the will was not residuary, but specific; and that the void gifts to the charities did not pass by it, but lapsed as unappointed. *Brown's Trusts, In re*, 1 K. & J. 522; 3 W. R. 542.

A testatrix gave certain lands in the parish of H. to A., B., and C., as joint tenants in fee, and devised to the plaintiff "the rest of my freehold hereditaments in the parish of H., and all my freehold hereditaments in the parishes of," &c. The devise to A., B., and C., having been declared void, as made on a secret trust for a charity:—Held, that the lands comprised in that devise did not pass under the gift of "the rest of my freehold hereditaments in the parish of H.," but were undisposed of. *Springett* v. *Jennings*, 40 L. J., Ch. 348; L. R. 6 Ch. 333; 24 L. T. 643; 19 W. R. 575.

Unenrolled Deed.]—Real estate was by deed expressed to be conveyed to trustees upon charitable trusts. The deed was not enrolled, and the grantor died within a year after the execution of the deed. On his death the trustees named in the deed entered into possession, and applied the rents and profits according to the trusts of the deed:—Held, that the deed was not voidable only, but was absolutely void under 9 Geo. 2, c. 36, s. 3, and was not valid as conveying the legal estate, and void only as creating charitable trusts. *Thurcher* v. *Martin*, 58 L. J., Ch. 586; 42 Ch. D. 312; 61 L. T. 113; 37 W. R. 682.

—— **Title by Possession — One of Several Trustees Barred.**]—The trustees of the deed, having been in possession more than twelve years prior to the commencement of an action against them by persons claiming under the grantor:—Held, that the action was barred by the statute of limitations. The fact that one of the trustees was the general devisee and legatee of the grantor did not defeat their title, as the trustees could not be held mere licensees of the devisee and legatee *Ib.*

Failure of Objects of Society—Undisposed of Fund—Bona Vacantia.]—A society formed for the sole purpose of raising, by the subscriptions of its members, and the fines and forfeitures imposed by its rules, a fund to provide annuities for the widows of deceased members of the society, and subsequently brought under the provisions of the Friendly Societies Act, 1829 (10 Geo. 4, c. 56), is not a charity, and its funds cannot on the failure of the objects of the society be administered cy près. *Cunnack* v. *Edwards*, 65 L. J., Ch. 801; [1896] 2 Ch. 679; 75 L. T. 122; 45 W. R. 99—C. A.

The members of such a society are not in the position of cestuis que trust as regards the society, but are persons who have entered into a contract with the society that on their making certain payments their widows should receive certain benefits out of the funds of the society, and that being the only destination of the funds of the society, there cannot, on the failure of the objects of the society, be any resulting trust of the funds remaining unexpended in favour of the representatives of the deceased members, and such funds must go to the crown as bona vacantia. *Ib.*

Legacies.]—Legacies to charity, void by the stat. 9 Geo. 2, c. 36, fell into the general residue. *Page* v. *Leapingwell*, 18 Ves. 463.

When there is a clear intention to give to charitable purposes, and the gift is immediate, there is no resulting trust for the next of kin, although the particular application of the fund directed by the will would not of necessity take effect within any assignable limit of time, and could never take effect at all except upon the occurrence of uncertain and contingent events. But if the gift to charity is conditional, and the condition is so remote and indefinite as to transgress the rules of law against perpetuities, the gift fails ab initio. *Chamberlayne* v. *Brockett*, 21 W. R. 299.

Leaseholds.]—A leasehold house, the bequest of which, being to a charity, fails, passes under a general disposition of the residue, and does not belong to the next of kin as undisposed of. *Shanley* v. *Baker*, 4 Ves. 732.

Particular and General Residue.]—A testator gave a fund to particular trustees upon trust to invest on freehold mortgage enough to provide for certain annuities, and gave the residue of that fund to his nephew, J. A. The will contained a general residuary bequest. Some of the gifts of annuities, being charitable, were void:—Held, that J. A. took the whole of the particular residue. *Aston* v. *Wood*, 43 L. J., Ch. 715; 31 L. T. 293; 22 W. R. 893.

Testatrix, after giving certain legacies, bequeathed "all her moneys, securities for money, moneys secured on mortgage, railway stocks and shares, moneys to be produced from sale of any property at S. or P. to which she was entitled, all moneys to which she was entitled under the will of her late grandfather, and also all her moneys secured upon any securities or in any way or manner howsoever" to trustees, upon trust, after payment of her legacies and debts, to invest and pay the income to A. for life, and after her decease to pay thereout a certain charitable legacy, and as to the residue thereof, upon certain trusts, in favour of the defendants. The will contained a general residuary bequest in favour of A. The charitable legacy was partially invalid under the statute of mortmain:—Held, that the portion of such legacy which failed passed to the defendants under the particular gift of residue, and not to A. under the general residuary gift. *Champney* v. *Davy*, 48 L. J., Ch. 268; 11 Ch. D. 949; 40 L. T. 189; 27 W. R. 390.

Pier Bonds.]—More than fifteen years before his death, a testator purchased two Southampton Pier Bonds for 500*l.* each, having, before the purchase, told the plaintiff that he had left her by his will more than her sisters, to enable her to subscribe to some charities, and, very soon after the purchase, that he had invested the 1,000*l.* on the pier bonds in her and his own name, but did not mention any trust or purpose. He privately applied the interest in subscribing to certain charities; and, fourteen years after the purchase, mentioned in several letters the charities to which he wished her to apply the interest, but said he did not intend to bind her by any legal document:—Held, that no valid trust was created, and no resulting trust, but that the sister was entitled to the fund. *Wheeler* v. *Smith*, 1 Giff. 300; 29 L. J., Ch. 194; 6 Jur. (N.S.) 62; 1 L. T. 430; 8 W. R. 173.

Trusts for Masses for the Dead.]—Trusts declared for certain Roman Catholic chapels, for saying masses and requiems for the soul of the donor and for other souls, and for the souls of the "poor dead," and for other purposes:—Held, that the gift for masses, &c., for the dead was superstitious and void; that the pious uses could not, as religious uses, be separated from the others, and were therefore also bad; and that the words "pious uses" could not be construed charitable uses; consequently, the property given to these uses went to the residuary legatees of the donor. *Heath* v. *Chapman*, 2 Drew. 417; 23 L. J., Ch. 947; 2 Eq. R. 1264; 2 W. R. 649.

Bequest to Trustees in Event of Charitable Bequests being Void.]—A bequest of personal estate "to be appropriated for the pious and benevolent uses and purposes" of a charitable association, the objects of which included the purchase of and erection upon land, and also other purposes not within the stat. 9 Geo. 2, c. 36, held to be valid, but that any appropriation of the fund towards purchasing more land would be an illegal application of the bequest. Testator, by a codicil, declared that in case any of the charitable bequests in his will should be incapable of taking effect, he gave all such moneys, &c., to four legatees absolutely, free from any trust or conditions whatever. These four legatees were the trustees named in the will of the charitable bequests:—Held, that in the event of the charitable bequests being void, the four legatees were entitled, and not the next of kin of the testator. *Carter* v. *Green*, 5 W. R. 856.

After giving charitable legacies by her will, a testatrix, by codicil, declared that if any of them should fail, by reason of any part of her estate being of such a nature as could not legally be made applicable to charitable purposes, she gave such part to A. and B., for their absolute use and benefit, having full confidence that they would desire to carry out her intentions, but she declared that that should not have the effect of imposing a trust upon them, or in any manner qualify their interest in the bequest:—Held, that A. and B. took beneficially, and not as trustees for the next of kin. *Cawood* v. *Thompson*, 1 Sm. & G. 409; 22 L. J., Ch. 835; 17 Jur. 798.

A testatrix gave charitable legacies, and the residue to her sister, who survived her, and also made several bequests to charities:—Held, that the impure personalty, which the sister took under the former will, and kept unconverted until her death, was not to be treated as converted for the purpose of the charitable legacies in her own will. *Ib.*

Bequest as Trustee in his Discretion should Approve.]—Bequest in trust for such objects of benevolence and liberality as trustee in his own discretion should most approve, cannot be supported as a charitable legacy, and is therefore a trust for the next of kin. *Morice* v. *Durham* (*Bishop*), 10 Ves. 522. And see *Aston* v. *Wood*, L. R. 6 Eq. 419.

Surplus and Increased Revenue.] — *See* CHARITY.

When Trusts for Conversion.] — *See* CONVERSION.

c. Renewal of Leases.

By Settlor.]—A., possessed of a chattel interest for an unexpired term of years in certain premises, assigned the same to trustees under his marriage settlement. He afterwards obtained, in pursuance of a covenant in the original lease, a renewal lease to himself of the same premises for a longer term of years. Having become a bankrupt, his assignees claimed to be entitled to sell the premises and all interest therein granted by the renewal lease for the benefit of the bankrupt's estate:—Held, that the trustees of the settlement were entitled to the benefit of the additional term granted by the renewal lease subject to the life estate of A. under the settlement (which, subject to the charge of a sum of money received from his wife on marriage), was ordered to be sold for the benefit of his creditors. Held, also, that the premises comprised in the renewal lease in addition to those devised by the original lease should enure to the trusts of the settlement. *Anderson's Estate, In re*, 18 W. R. 248 (Ir).

By Co-Lessees.]—Three lessees of a church lease; one renews in his own name; it shall be a trust for all. *Palmer* v. *Young*, 1 Vern. 376.

Parties interested, jointly with others, in a lease, cannot take to themselves the benefit of a renewal to the exclusion of the others so jointly interested with them. *Clegg* v. *Fishwick*, 1 Mac. & G. 294; 1 Hall & Tw. 396; 19 L. J., Ch. 49; 13 Jur. 993.

By Partners—By One Partner in His Own Name.]—Lease of premises where a partnership trade was carried on, renewed by one partner in his own name clandestinely, is a trust for the partnership, to be accounted for as joint property. *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; 11 R. R. 77.

—— **Private Advantage to Partner Negotiating Lease.**]—A person employed on behalf of himself and his co-partners, in negotiating the term of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself; where, therefore, a sum of 12,000*l.* was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership. Before the transaction was discovered, one of the partners withdrew, and subsequently another partner assigned a share in the stock, and in his proportion of this claim, to persons then admitted into the concern:—Held, that the retired, the continuing, and the new partners were properly joined as co-plaintiffs in a suit to have the trust declared. *Fawcett* v. *Whitehouse*, 1 Russ. & M. 132; 4 L. J. (O.S.) Ch. 64; 8 L. J. (O.S.) Ch. 50; 27 R. R. 260.

—— **Partnership at Will of Mines—Renewal by Some of the Partners—Laches.**]—Several persons were engaged as partners in working coal mines. The partnership was at will. The mines were worked by some of the partners, who, before the expiration of the last lease, agreed among themselves to conduct the whole for their own benefit. They thereupon gave notice to the other partners to dissolve the partnership, and entered into an agreement with the landlord for renewal to themselves only. They gave public notice of the sale by auction of the plant and stock, and informed the other partners that they might bid, and

that they themselves intended to do so, and told them that the landlord had agreed to a renewal. Accounts were made up, and such of the excluded partners as assented and executed releases were paid their shares, but others refused their assent, and claimed the benefit of the renewed lease, besides their shares of the partnership assets. The new lease was granted in 1846, and in 1855 some of the excluded partners filed a bill to have the benefit of the renewed lease, and an account of the profits of the old and new partnership:—Held, that the renewal was a constructive trust for the benefit of all the partners, but that these excluded partners, having taken no active steps for such a length of time to assert their rights, could not have relief, for that mere words were not sufficient without active proceedings. *Clegg* v. *Edmondson*, 8 De G. M. & G. 787; 26 L. J., Ch. 673; 3 Jur. (N.S.) 299.

—— **Agreement for Division of Partnership Effects—Injunction.**]—In 1853, articles of partnership were entered into between the plaintiff and J. H., whereby, after reciting the partnership previously existing, and that the effects consisted of a leasehold dwelling-house, workshop, and land at N., and that the plaintiff and J. H. were jointly entitled to another dwelling-house at M. A., it was agreed that J. H. should stand possessed of the property at N., as to the dwelling-house and one-half of the land, for his own absolute use and benefit, and as to the workshop and other part of the land, in trust to assign the same to the plaintiff; that the property at M. A. should be assigned to the plaintiff, and that when and so soon as the plaintiff and J. H. should erect a dwelling-house at M. A. of equal value with the dwelling-house at N., the same should be assigned to the plaintiff, who should thereupon re-assign the workshop to J. H. It was also agreed that an equal division should be made of the partnership effects, and that neither of the partners should apply any part of the co-partnership moneys or effects for his own private use until such divisions as aforesaid. A renewed lease of the property at N. was afterwards obtained from the lessor by J. H. to himself alone. The partnership continued for some time, but no assignment was made, nor was any dwelling-house built, as contemplated by the agreement of 1853. J. H. afterwards assigned to G. M. the dwelling-house and half of the land at N., of which the plaintiff was then in possession, and G. M. commenced proceedings by ejectment in the county court against the plaintiff, in order to obtain possession of the premises. On a bill filed by the plaintiff against J. H. and G. M., praying for a partnership account, and for an injunction against G. M.:—Held, that, from the circumstances which had arisen, J. H. was not entitled to hold the dwelling-house and half of the land at N. in severalty, but that the plaintiff had sufficient interest in the property to maintain his right to an injunction against G. M., J. H.'s assignee, from bringing ejectment; and an injunction was granted accordingly. *Hawkins* v. *Hawkins*, 4 Jur. (N.S.) 1044.

—— **Right of Representative of Deceased Partner.**]—If partnership property consists in part of leaseholds, the representative of a deceased partner may treat the surviving partner as trustee, and if the latter renews the lease, he is considered to do so for the benefit of the estate of the partner; but where the trade is one of a speculative character, requiring outlay, with an uncertain return, then, if the surviving partner continues the trade in his own name and renews the lease, the court will not consider that the representative of the deceased partner has any interest unless he contributes a due proportion of capital. *Clements* v. *Hall*, 2 De G. & J. 173; 27 L. J., Ch. 349; 4 Jur. (N.S.) 494; 6 W. R. 358.

A. and B. were partners in lead mines held under a lease, which expired in 1845; after that time they continued to work the mines as tenants from year to year, until the death of A. in 1847, when B. worked them, so far only as was necessary to keep the mines in operation, until 1850. In that year he received notice to quit, but before the expiration of such notice he obtained an agreement for a new lease, on the understanding that he would employ a larger amount of capital in working the mines. He continued to work the mines under the new lease until 1853, when he died intestate. On a bill filed by the assignee of C., who was entitled under the will of A. to an annuity charged on the testator's interest in the mines, against D., the legal personal representative of both A. and B., claiming that the estate of the testator had an interest in the mines after his death:—Held, that the testator's interest did not cease on his death, but continued in the partnership for the benefit of the estate. *Ib.*

A deceased partner, having contracted in his own name for a lease of the premises to be employed in the partnership trade, the court refused to restrain the landlord from granting a lease to his representatives, but restrained the representatives from disposing of the lease when granted, except for partnership purposes, and with the assent of the surviving partner. *Alder* v. *Fouracre*, 3 Swanst. 489; 19 R. R. 256.

By Tenant for Life—Crown Lease.]—Tenant for life, under the settlement of a Crown lease, gets a renewal in reversion, it shall go to the uses of the settlement. *Tasker* v. *Marriott*, Amb. 668.

Tenant for life, with remainders over, of a Crown lease for years applies for a further term; a powerful opponent applies for a grant, the tenant for life gives up her pretensions for a sum of money; the money shall be settled to the same uses as the estate was. *Owen* v. *Williams*, Amb. 734.

—— **Leasehold Estates Held under Duchy of Cornwall.**]—One bequeaths several leasehold estates, held for years under the Duchy of Cornwall, to his wife, during so many years of the term as she may live, and after her decease, if the terms of the several leases be then in being, unto and amongst, &c. The wife got an additional term, and:—Held, it shall not be for her own benefit, but should go to the uses of the will. *Rawe* v. *Chichester*, Amb. 715.

—— **Lease Suffered to Expire.**]—When a tenant for life of leaseholds, under a marriage settlement, suffered the lease to expire, and obtained another lease, and died, it was held that the renewed lease must be held upon the trusts of the settlement, and not enure for the benefit of his representatives. *Pickering* v. *Vowles*, 1 Bro. C. C. 197.

—— **Renewable Leaseholds Settled by Regis-**

tered Deed.]—If a man has a limited interest in a term and settles it to a certain use, and then gets a new and extended term substituted for it, he cannot, by so doing, avoid the previous settlement. In 1830 a settlement of certain property held under renewable leases was made in favour of A. In 1831, A., being about to marry, made a settlement of his property to the uses of the marriage. The deed of 1830 was not registered under the Irish Registration Act (6 Anne, c. 2). The settlement of 1831 was registered. In 1840 A., being in actual possession, sold to B., and B., who had no actual notice of the settlement of 1831, entered into possession, and made alterations in the premises. After the death of A., his son, who was entitled under the settlement of 1831, filed a bill against B. to set aside the sale, for an account, and for waste :—Held, that it was not necessary to register the deed of 1830, that the registered settlement of 1831 prevailed against the bonâ fide purchase of B., and that the court below had properly declared him to stand possessed of the leases as a trustee for the parties beneficially interested under that settlement, but held also, that he was entitled to indemnity against the covenants in the leases which he was thus declared to hold as trustee ; that an inquiry ought to be made as to alleged improvements and as to alleged waste ; and that he was entitled to be allowed the benefits of those improvements ; and that, being a bonâ fide purchaser, without misconduct, he ought not to be charged with costs. *Mill* v. *Hill*, 3 H. L. Cas. 828. *S. C.* in court below, nom. *Hill* v. *Mill*, 12 Ir. Eq. R. 107.

—— **Lessee Suffered to be Ejected by Landlord.**]—A leasehold interest was subject to the trusts of a settlement under which A. was tenant for life, with a leasing power. A. made a lease of the premises to B., and at the same time entered into an agreement with B. to sell to him the absolute interest of the leaschold, and to make title at a future period. The agreement contained notice of the settlement. B. assigned the underlease and the benefit of the agreement to C., who entered into possession, and paid the head rent to the landlord. He subsequently entered into an arrangement with the landlord for a reduction of the head rent, to carry out which he suffered the lessee to be evicted by ejectment, and took a new lease from the landlord, at the reduced rent :—Held, that the new lease was a graft, and bound by the trusts of the settlement. *Stratton* v. *Murphy*, Ir. R. 1 Eq. 345 ; 15 W. R. 1125.

—— **Leaseholds for Years Determinable upon Lives.**]—Bequest of leaseholds for years determinable upon lives, for life, with remainder over, for all the residue of the testator's term and interest to come therein at his decease. The term expired in the life of the testator, who continued to hold, and paid half a year's rent before his death as tenant by the year ; upon the general words unrestrained, comprising the interest from year to year, and the intention upon the whole will, and subsequent lease obtained by the executrix, the widow and tenant for life under the will was held subject to the uses of the will, as the residue of the term at his death, if any, however short, would have been. *James* v. *Dean*, 15 Ves. 236 ; 8 R. R. 178. And see *Kempton* v. *Packman*, cited in *Moody* v. *Matthews*, 7 Ves. 174, 176.

—— **Surrender of Old Lease.**]—A tenant for life of a leasehold interest, the subject of settlement, surrendering the lease, and taking a new one for his own benefit, is a trustee for those entitled to estate in remainder under the settlement ; and an accumulation of rent from the death of the tenant for life to the expiration of the new lease, belongs not to his devisee, but to the person next entitled under the settlement. *Eyre* v. *Dolphin*, 2 Ball & B. 290 ; 12 R. R. 94.

—— **Tenant for Life with Power of Appointment.**]—Renewal of a college lease by tenant for life, with a power of appointment, in her own name and at her expense, has not the effect of an appointment in her own favour ; and, therefore, by the death of the appointee in the life of the tenant, there will be a resulting trust by lapse for the representative of the author of the power. *Brookman* v. *Hales*, 2 V. & B. 45 ; 13 R. R. 9.

A., under a voluntary settlement, of which it did not appear that she had notice, was entitled to certain leaseholds held for lives for her life, with remainder to B. Under a subsequent voluntary settlement she took a life interest in the same leaseholds, with an absolute power of appointment over the residue of the leasehold interest. While in possession of the property, she took a renewed lease of it, and died, having appointed all her interest to C. :—Held, that the renewal enured to the benefit of B. *Waters* v. *Bailey*, 2 Y. & C. C. C. 219.

—— **No Obligation to Renew—Provision that Particular Renewal should Enure to Benefit of Trust.**]—Where the tenant for life of leaseholds in settlement, being under no obligation to renew, obtains an extension of the term, he is a trustee for those claiming under the settlement ; and the fact of the settlement containing a special provision that a particular renewal shall enure to the benefit of the trust, does not prevent the application of this general rule. *Tanner* v. *Elworthy*, 4 Beav. 487 ; 5 Jur. 1099.

—— **Lease Renewed in Pursuance of Covenant but not Assigned.**]—A., on the marriage of B. his son, settles a lease on B. for life, to the wife for life, and then to the issue of the marriage ; and B. covenants from time to time to renew the lease and assign it on the same trusts. B. renews the lease, but does not assign it, and dies indebted. This lease is bound by the marriage articles, and is not assets for the payment of debts. *Plowman* v. *Plowman*, 2 Vern. 289.

—— **Tenant for Life of Under-lease Purchasing Interest of Immediate Lessor.**]—If a tenant for life of an under-lease for eighteen years, granted by a person who himself holds the premises so underlet along with other property under a lease for twenty-one years, purchases the interest of his immediate lessor, and obtains from the superior lessor a renewal of the lease thus purchased, the renewed lease is subject, so far as regards the premises which were comprised in the under-lease, to the same trusts, as would have affected the under-lease if it had not been merged or had not expired by the efflaxion of time. The same rule holds, though the lease at the time of the purchase was vested in a trustee upon trusts, under which he could not have granted a renewal of the under-lease, and though the tenant for life outlived by twenty-

five years the time at which the under-lease would have expired by effluxion of time. *Giddings* v. *Giddings*, 3 Russ. 241; 27 R. R. 78.

A., being tenant for life of a leasehold for years, with remainder to B., after devising one estate to B. in tail, bequeathed to him the leasehold during his life, with remainder over, and gave him all the residue of his real and personal property. B. took possession of the residuary estate; suffered a recovery of the lands devised to him in tail; acted as the absolute owner of the leasehold estate; and outlived the term for which the lease was granted, having previously acquired a new interest in the demised premises:—Held, that B. elected to take under the will, and was bound to give effect to the devise of the leasehold in favour of the remainderman. *Ib.*

—— **Tenant for Life of Lease for Lives.**]—A renewal taken by tenant for life of a lease for lives, is a trust for the benefit of those in remainder, and a fine levied by the heir of such tenant for life keeping possession of the title deeds, will not bar those in remainder, nor will any length of time during such a suppression of deeds. *Bowles* v. *Stewart*, 1 Sch. & Lef. 209.

Lands, held under a lease for lives, having been devised to Mary for life, and, after her death, to Thomas absolutely, they joined in surrendering the lease, and procured a new one for lives to themselves and their heirs as joint tenants. Thomas devised the lands, but Mary survived him and devised them:—Held, that the legal estate granted by the new lease was vested in the devisee of Mary, in trust for the heir of Thomas and also of his devisee. *Hill* v. *Hill*, Ir. R. 8 Eq. 140.

J. B. being entitled, by virtue of a lease of 1735, to the lands of C., held under M. for three lives, devised the same to his son, John, for life, with remainders over. John, upon the death of his father, entered into possession under the will, and in 1796 (one only of the cestuis que vie in the lease of 1735 being in existence), obtained from G. and B. (the then head landlords) a new lease, reciting the lease of 1735, for the lives of the surviving cestui que vie in that lease, and two other persons, with a covenant for perpetual renewal at an increased rent and fine:—Held, that the lease of 1796 was a graft upon the original lease of 1735, and subject to the trusts of the will. *Buckley* v. *Lanauze*, Ll. & G. t. Plunk. 327.

R., the last life in a bishop's lease, agrees with C. to surrender this lease on a promise of the bishop to grant a new one for the lives of C. and the son of C., and, in consideration of C. surrendering the old lease, it was agreed the new one should be in trust for the infant son of C. The whole purchase money was paid by C. to the bishop, but the legal estate was granted in the new lease to R. and his heirs during his own life, and the lives of C. and his son. C., after the death of R., took upon him to dispose of it. R., by a deed poll, dated the day after the lease, declares his intention to be, that C. and his son should, after his decease, hold to them and their heirs during the remainder of the term:—Held, that R. had a valuable share in the consideration of the new lease, having given up his interest in the old, and that, having a right to declare the trust, C. had his life only in the lease. *Crop* v. *Norton*, 2 Atk. 74; 9 Mod. 233; Barnard. 179.

—— **Tenant for Life Purchasing Reversion.**]—The doctrine that a renewal of leaseholds by a tenant for life enures for the benefit of the remainderman applies equally to a purchase of the reversion. *Phillips* v. *Phillips*, 54 L. J., Ch. 943; 29 Ch. D. 673; 53 L. T. 403; 33 W. R. 863—C. A.

By his will, J. L., the lessee of certain leaseholds (not renewable), gave the same to his brother for life, with remainder to E. J. L. for life, with remainder for the benefit of the children of E. J. L. During the life of the first tenant for life, E. J. L. purchased the reversion expectant on the determination of the lease. On a summons taken out in these circumstances to ascertain whether the purchaser was a trustee for the remaindermen:—Held, that, there being no case in which the doctrine of *Keech* v. *Sandford* (infra) had been applied to leaseholds not renewable by contract or custom, the purchaser was not a trustee for the remaindermen. *Longton* v. *Wilsby*, 76 L. T. 770.

—— **Leaseholds for Lives subject to Charges.**]—A. was beneficially entitled for his life to renewable leaseholds for three lives held on trust to renew, and subject to certain charges. All the cestuis que vie had died. It being disputed whether the right to renew was lost, the reversioners granted a lease to A. for three new lives, without prejudice to the disputed question. A. subsequently bought the reversion:—Held that the fee became subject to the charges. *Trumper* v. *Trumper*, 42 L. J., Ch. 641; L. R. 8 Ch. 870; 29 L. T. 86; 21 W. R. 692.

—— **Purchase of Reversion by Administrator of Intestate at Auction.**]—A. became entitled, as administrator of an intestate, to certain lands held under a lease from the Commissioners of Church Temporalities in Ireland for twenty-one years, customarily renewable, and being so entitled he, as such administrator, obtained from the commissioners a renewal of the lease for twenty-one years. The commissioners subsequently, under s. 34 of the Irish Church Act, 1869, offered to sell the reversion in fee in the lands in question to A., as their immediate tenant, at a certain price. A. declined to buy at the price named, and the commissioners thereupon set up the reversion in fee for sale by auction, and A. purchased it at the auction, and obtained a conveyance from the commissioners, which was made expressly subject to the lease and to the right of renewal thereunder:—Held, that A. became a constructive trustee of the reversion so purchased for the persons beneficially entitled to the personal estate of the intestate, and that it formed portion of such personal estate, the persons claiming it to pay the purchase-money and all expenses incurred by A. in the purchase. *Randall* v. *Russell* (infra) distinguished. *Gabbett* v. *Lawder*, 11 L. R., Ir. 295.

—— **Purchase of Reversion from Person to whom Reversion had been Conveyed.**]—Testator, seised in fee of a moiety of an estate at L., and in possession of the other moiety as tenant from year to year to St. J. College (this lease from the college having expired), gives to his wife, durante viduitate, "all that his messuage or tenement, with the farm and lands at L., and all his estate and interest therein, she paying the rent reserved to St. J. College, &c." The widow, after his death, obtains a new lease, and subsequently purchases

the reversion of one to whom it had been conveyed by the college under an act of parliament:—Held, that the renewed lease was taken subject to the trusts of the will, and those in remainder to contribute to the fine paid by the widow in proportions to be settled by the master:—Held, that the purchase of the reversion, not from the college, but from the person to whom it had been conveyed by the college, was not, under the circumstances, to be taken subject to the trusts of the will. *Randall* v. *Russell*, 3 Mer. 190; 17 R. R. 56. And see *Hardman* v. *Johnson*, *id.* 347; and *Aberdeen Town Council* v. *Aberdeen University*, 2 App. Cas. 544—H. L. (Sc.)

—— **Renewal becoming Impossible—Purchase of Reversion by Assignee of Tenant for Life.**]—A leasehold for lives was devised by a testator who died in 1820 to trustees, on trust for a tenant for life and other persons in remainder, the ultimate remainder in fee being given to the tenant for life. The first trust was to renew the lease from time to time, paying the necessary fines and expenses out of the rents, or raising them by mortgage. In 1825, the trustees obtained a renewed lease for three lives, one of which was that of the tenant for life. In 1855 and 1859, respectively, the other two lives dropped. In October, 1876, the tenant for life contracted to sell all his interest in the property to B., and a conveyance was executed in March, 1879. In December, 1876, the ecclesiastical commissioners, in whom the reversion subject to the lease was then vested, and who would not renew the lease, contracted to sell the reversion to B., and in August, 1879, they executed a conveyance to him, the conveyance being expressly made subject to "such trusts, equities, estates, and interests," as then affected the leasehold interest. In June, 1878, the School Board for London, under their statutory powers, took part of the property, and in January, 1880, they paid the purchase-money and compensation money into court. The legal estate in the lease was outstanding in the representatives of the last surviving trustee of the will:—Held, that, irrespectively of the form of the conveyance of the reversion to B., it was, according to the ordinary doctrine of a court of equity, impossible for him to purchase the reversion otherwise than as a trustee for the persons interested in the lease under the trusts of the will, and that, subject to his right to be recouped the purchase-money, he was only entitled to an order for payment of the interest on the fund in court during the life of the tenant for life under the will. *Hardman* v. *Johnson* (3 Mer. 347) distinguished. *Rawlagh's (Lord) Will, In re*, 53 L. J., Ch. 689; 26 Ch. D. 590; 51 L. T. 87; 32 W. R. 714.

By Husband of Tenant for Life.]—By a will, a renewable lease was devised to A. for life, remainder to B. for life, or so long as the said lease should continue, remainder to trustees for sale and division of the produce amongst various persons. C., the husband of A., purchased the life interest of B., and then obtained a renewal of the lease to himself, for three lives; and died. The personal representative of B. was held, by the court, to be a trustee for those claiming under the will of the original lessee; and was decreed to convey as they should direct, on payment of their respective due portions of the expenses of the renewal; but the price given by C. for the life interest of B. was not allowed to be considered as a portion of those expenses, although B. was himself the last surviving cestui que vie of the original lease, and therefore was not likely to have renewed. *Cridland* v. *Luxton*, 9 L. J. (O.S.), Ch. 99. And see *Parker* v. *Brooke*, 9 Ves. 583; 7 R. R. 299.

Previously to marriage the fortune of the wife is so settled as, in the event of her surviving her husband, to belong to her absolutely, and by other deeds of the same date, the husband makes a settlement of his property, under which certain interests are given to the wife; he dies in her lifetime, having by his will bequeathed to her considerable benefits, which he directs shall be in satisfaction of all her claims or demands against his estate, or executors, under the settlement made by him, or on any other account whatsoever: the acceptance of the benefit given to her by the will does not preclude the wife from claiming a leasehold, part of her own fortune, which the husband was bound, by deed settling her fortune, to renew in the name of trustees, and upon the trusts of that settlement, but which he had renewed in his own name. *Coleman* v. *Jones*, 3 Russ. 312; 6 L. J. (O.S.), Ch. 16.

Duty of Tenant for Life to Renew, and Apportionment and Contribution for Renewed Fines.]—*See* ESTATE.

Rights as between Lessor and Lessee.]—*See* LANDLORD AND TENANT.

By Trustees.]—A. being possessed of a lease of a market, bequeathed it to B. in trust for an infant. B., before the expiration of the lease, applied to the lessor for a renewal for the benefit of the infant. The lessor refused to grant such renewal, whereupon B. got a lease made to himself:—Held, that B. was a trustee of the lease for the infant, and must assign the same to him, and account for the profits, but he was entitled to be indemnified from the covenants in the lease. *Keech* v. *Sandford*, Select Ca., Ch. 61; 2 Eq. Cas. Abr. 741, pl. 7.

If trustees or mortgagee renew, the new lease is always subject to the trust and limitations of the old lease. *Rawe* v. *Chichester*, Amb. 719.

The word "advantages" is sufficient to take in all the benefits belonging to the trust of an estate for years, not to the profits only, but the renewals which are consequential. *Carte* v. *Carte*, 3 Atk. 178.

Renewal of a lease taken by a trustee, shall accrue to the benefit of the cestui que trust. *Griffin* v. *Griffin*, 1 Sch. & Lef. 352; 9 R. R. 51.

Trustee of a lease, renewing for his own benefit, is considered as still holding for his cestui que trust, even where it is clear that the lessor would not have renewed for cestui que trust. *Fizgibbon* v. *Scanlan*, 1 Dow, 269—H. L. (Ir.)

Renewable leaseholds having been devised by testator upon trusts, one of the trustees obtained a renewal of the lease of the devised lands, and a new lease of additional lands, in one lease, at a bulk rent:—Held, that, quoad the additional land, the renewal was not a graft upon the old lease. *Acheson* v. *Fair*, 2 Con. & L. 208; 3 Dr. & War. 512.

In a suit against a trustee of a church lease, who had expended considerable sums in obtaining renewals and a perpetuity grant, and had made an arrangement for the purchase of the lands in consideration of an annuity to the cestui que trust, under an award, in obtaining which there was some concealment and which

was never completed, though acted on for fourteen years:—Held, that the new interest was a graft, and the trustee bound to account for the entire period. The cases where accounts against defendants are limited in point of time, and where not, considered. *Lovatt* v. *Knipe*, 12 Ir. Eq. R. 124.

Purchase of Reversion by Trustee of Term to Pay Debts.]—Trustee of term to pay debts purchased the inheritance from tenant for life; and had it conveyed to him by fine and feoffment; remainderman is not entitled to account of rents, except from his entry to avoid the fine, and if he neglects to claim for five years he is barred. *Reynolds* v. *Jones*, 2 Sim. & S. 206.

Duty of Trustee to Renew.]—*See* post, C. 6. b. iv.

Executors.]—If an executor renews a lease, he shall account for the new lease as well as the old one for the benefit of the creditors. *Anon.*, 2 Ca. Ch. 208.

An executor to a tenant by sufferance or at will obtaining a larger interest, is a trustee for the residuary legatee, like the case of general occupancy. *James* v. *Dean*, 15 Ves. 236.

A testatrix by will gave her executor all her interest in a farming lease upon trust to carry on the farm for the benefit of the plaintiff. The executor accordingly carried on the farm until the expiration of the lease, and then obtained a new lease. Under the circumstances, held by the court below that the defendant was a trustee for the plaintiff, and an account was ordered of all moneys expended or received by the defendant in carrying on the farm. Upon appeal by the plaintiff against so much of the order as directed accounts:—Held, his having elected to claim the profits of the farm, he could not resist the taking of such an account. *Kendall* v. *Marsters*, 2 De G. F. & J. 200; 2 L. T. 709; 8 W. R. 747.

An executor, six years after the death of the testator, surrendered a lease belonging to the testator, and took a renewed lease, including additional property, and at an increased rent, in his own name. He afterwards deposited the lease as security for money advanced to him, which he applied to his own purposes. The renewed lease contained no mention of the surrender, and the mortgagee did not know that the borrower was an executor, or that he was not the beneficial owner of the lease. He did not, however, make any inquiry into the title. An action was afterwards brought to administer the testator's estate, and a consent order was made for the sale of the leasehold property, without prejudice to any right, the mortgagee giving up the lease to facilitate the sale. He claimed to be paid the amount due to him by the executor out of the proceeds of sale:—Held, that the lease was in equity part of the testator's estate, and that the equity of the estate, being prior to the equity of the mortgagee, must prevail against it. *Morgan, In re, Pillgrem* v. *Pillgrem*, 50 L. J., Ch. 834; 18 Ch. D. 93; 45 L. T. 183; 30 W. R. 223—C. A.

Held, also, that the equitable mortgagee was not injured by the order to give up the indenture of lease, and did not thereby acquire any claim upon the proceeds of the sale. *Ib.*

A., by his will, bequeathed a term of years to his two sons, R. and F., subject to debts and legacies, and appointed his widow executrix during her viduity, and died during the same year; the widow, having married, ceased to be executrix, and thereupon administration de bonis non was taken out by R. in 1789, but previously, in 1786, R. had procured a new lease for himself for three lives:—Held, that the new lease was a graft on the original interest, and subject to the trusts of the will, although it did not appear that the original term was unexpired at the date of the new lease. *Jackson* v. *Welsh*, Ll. & G. t. Plunk. 346.

Executor de son tort.]—A bishop's lease was granted, after the expiration of a former one, at a less fine, because the lessee was son of the old tenant who died without assets to pay the fine; another person was his administrator, but the son had made himself executor de son tort; the new lease was held a graft, and the lessee bound to renew to a sub-lessee, without contribution. The sub-lessee, having been evicted on the expiration of the term granted by his lease, sued on a covenant to grant an additional term; but the term covenanted to be granted having nearly expired at the time of the decree, instead of a specific performance, an account in the nature of an inquiry quantum damnificatus was directed. *M'Nulty* v. *Hamill*, Beat. 544.

Lease obtained by a person interfering with the assets, and compelling the surrender by executors of a leasehold interest, bequeathed to minors, a graft on the former lease so surrendered. *Mulvany* v. *Dillon*, 1 Ball & B. 400; 12 R. R. 43.

Mortgagee.]—A new lease obtained by a mortgagee of a leasehold interest who had been evicted for nonpayment of rent, taken after the expiration of six and nine months, allowed to the lessee and mortgagee to redeem by 3 Geo. 4, c. 2, s. 4, but in pursuance of a contract entered into in the period between the six and nine months, if the parties interested did not redeem, is not a graft on the former lease, nor a trust for the lessee, the mortgagee not being in possession nor procuring the lease behind the back of the lessee. The principles on which courts of equity act in considering renewed interests obtained by mortgagees, trustees, &c., to be grafts are, that the advantage was procured either by being in possession, or, when out of it, by a contrivance to oust the lessee of the benefit of renewal. *Nesbitt* v. *Tredennick*, 1 Ball & B. 29; 12 R. R. 1.

In 1822 a lease of lands was made for twenty-one years. The lands were afterwards mortgaged, and a renewal was granted to a mortgagee in 1829. In 1830, by deed, reciting the lease of 1822 and the mortgage, but not the renewal, the mortgagee conveyed the lands, and all his estate, title, interest, use, trust, property, profit, claim, challenge and demand, both at law and in equity therein, and also the mortgage debt and interest, to hold during the residue of the term granted by the lease of 1822. The deed contained covenants against acts by the mortgagee, for good title and further assurance:—Held, on exceptions to the master's report of bad title, that the legal estate, under the renewal of 1829, passed by the deed of 1830. *Reynolds* v. *Reynolds*, 12 Ir. Eq. R. 172.

Mortgagor.]—The defendants, who were entitled to the equity of redemption of leaseholds charged with a mortgage, attempted to get rid of it by fraudulently incurring a forfeiture, which they induced the lessor to take advantage of.

They afterwards obtained a new lease from him, which they sold:—Held, that the new lease was subject to the mortgage, notwithstanding the 15 & 16 Vict. c. 76, ss. 2, 10, and a decree was made for payment by the defendants of the mortgage, with costs. *Hughes* v. *Howard*, 25 Beav. 575.

A. being entitled to a leasehold interest, in 1814, assigns the same, by way of mortgage, to B. In 1824, A. obtains from the landlord a lease of lives renewable for ever, in lieu of the former interest, and in 1835, deposits this new lease with his solicitor in England, to whom he was considerably indebted for costs at the time. By the decree pronounced at the original hearing, the new lease was declared to be a graft upon the old one, and that the mortgagee was entitled to the benefit of it:—Held, that the solicitor's lien upon the new lease could not prevail against the mortgagee. *Smith* v. *Chichester*, 2 Dr. & War. 393; 1 Con. & L. 485; 4 Ir. Eq. R. 580.

By Owner of Rent-charge.]—Renewal obtained by a party having a rent-charge on leasehold interest, evicted for nonpayment of rent, is a trust for the original lessee, and a grant on the former lease. *Fitzgerald* v. *Rainsford*, 1 Ball & B. 37, n.

Assignee of Lease—Subject to Annuity.]—Where a party is in possession of premises as the assignee of a lease, subject to an annuity, amongst other charges, and, pending an eviction for non-payment of rent, enters into a new agreement, whereby, subject to the right of redemption, he is, in consideration of a sum of 750*l*., to get a lease at a less rent, to commence from the termination of the nine months allowed for redemption; there though the ejectment proceeding has been perfected, and the eviction actually had, yet the new interest is a graft upon the old, and, as such, subject to the annuity. *Jones* v. *Kearney*, 1 Dr. & War. 134; 1 Con. & L. 34; 4 Ir. Eq. R. 74.

Whoever has a lease has an interest in the renewal; and when an additional term has been granted, the old term may be said to be still in existence. *Winslow* v. *Tighe*, 2 Ball & B. 205; 12 R. R. 75.

The tenant's right of renewal is a part of his interest in the lease. *Ib.*

—— **To Discharge Tithes.**]—A testator, being seised in fee of a farm in the parish of A., and being also possessed of a lease for lives of the rectorial tithes of that parish, devised the farm to his nephews in tail male, and the lease to his brother J., his executors, administrators, and assigns, upon condition that his said brother J., his executors, administrators, and assigns, owners or occupiers of the said parsonage, tithes, and premises, should, at all times after his decease, free and discharge his said farm from all manner of tithes which should be payable out of the same to the said owner or occupier of the parsonage and tithes aforesaid. J. survived the testator, and devised his interest in the lease to his four sons, who took several renewals, and in 1782 assigned the existing lease for a valuable consideration to A. B., with notice of the trusts of the will:—Held, that a party to whom the tithes were bequeathed by the will of A. B., and who took a renewal of the lease in 1817, held the renewed lease upon the trusts of the will, and consequently he had no title to the tithes of the farm, and that the owner of the farm was not bound to contribute to the renewal fines. *Webb* v. *Lugar*, 2 Y. & C. 247; 6 L. J., Ex. Eq. 49.

Leases for Lives, one to "Lessee and her Heirs" and another to "Lessee and her Executors."]—One lease for lives is to the "lessee and her heirs," and another to the "lessee and her executors;" as to the effect in equity of a declaration of trust for A. simply, quære. But if the leases were merely renewals by a guardian, the trust must follow the actual interest of the infant; viz. in one estate to the heir, in the other to the executor. *Milner* v. *Harewood (Lord)*, 18 Ves. 274.

Ecclesiastical Leases.]—A., possessed of a church lease for three lives, devised it to trustees for certain purposes till his son, R., should attain twenty-one; and when his said son should attain that age, he directed his trustees to stand seised of it to the use of his said son, and the heirs of his body; and, by a codicil, he directed, that if his son, R., should die without issue, his son, P., should inherit the estate in the same manner as R. was to inherit it. R. being quasi tenant in tail, if he surrender his lease, and take a new one to himself and his heirs for three new lives, there is no equity on behalf of P., to make R. or his devisees trustees of the new lease for P. *Blake* v. *Blake*, 1 Cox, 266; 1 R. R. 35.

In the case of leases from colleges and ecclesiastical bodies, if the lessee in the new lease takes in the right of him who had the old one, he must be subject to all the equity to which the original lessee was liable. *Elwards* v. *Lewis*, 3 Atk. 538.

By Husband of One of the Persons entitled.]—S. was entitled, with her brother and four sisters, to a lease for thirty-one years, as one of the next of kin to her mother, one of whose personal representatives she also was. The landlord made a lease for fifty-one years, which was expressed to be made in consideration of the surrender of the former lease, and described the lands as late in the possession of the mother, and then in the possession of S., and one of her sisters, who was her co-administratrix. There was an indorsement on the lease, stating that it was made in trust for herself and her brothers and sisters. S. married, and the landlord made a lease to her husband of the same lands for forty years, to commence after the expiration of the fifty-one years:—Held, that the new lease was a graft. *M'Allister* v. *Walsh*, 8 Ir. Eq. R. 250.

Lessee of Way-leave at a Rent—Land and Rent sold Separately—Agreement to put an End to Lease.]—Lands were subject to a lease of a way-leave at a certain rent for sixty-three years, which the lessee had the power of determining. The land and rent were sold separately by auction in two lots, and were purchased by two different persons. After some time, the purchaser of the land entered into an arrangement with the lessee, to put an end to the lease, and entered into a different one, in order to defeat the right of the purchaser of the rent:—Held, that this was contrary to equity, and the right of the purchaser of the rent was made good out of the new contract. *Wood* v. *Londonderry (Marquis)*, 10 Beav. 465; 16 L. J., Ch. 460; 12 Jur. 735.

Assignment and Declaration of Trust for Creditors.]—In May, 1835, a lease (to commence

in December, 1833, and to continue for twenty-one years and thirty-three days) of certain lead mines in Yorkshire, was granted by the crown to four lessees, of whom F. M. was one. In June, 1848, F. M. conveyed and assigned to J. H., inter alia, the property of which he was possessed for any term of years, &c., upon the trusts mentioned; and in July, 1848, F. M. granted and assigned to J. H. all his personal estate, and the surplus, if any, which might arise on the sale of his freehold and leasehold estates, upon trusts, after paying costs, &c., for the benefit of creditors, as therein mentioned. The plaintiffs, who were creditors of F. M., executed the deed in 1849, but no other creditor executed the deed until 1855. J. H. did not dispose of F. M.'s share in the mines. In May, 1854, the crown granted a lease of the said lead mines to seven lessees (two of whom were F. M. and J. H.) for a term of twenty-one years, to commence on the 5th January, 1855. F. M. died intestate in August, 1854. G. B., in August, 1848, recovered a judgment on two bonds against F. M., which was duly entered up; and in July, 1848, J. C. and others also recovered judgment against F. M., which was duly entered up in August following. Subsequently these judgments were assigned to J. B. S., and were duly registered in the county of York, and in the common pleas, which was afterwards renewed: —Held, that the plaintiffs had, by virtue of the assignment of June, 1848, and of the declaration of trust of July, 1848, they having executed the latter deed in 1849, acquired a beneficial interest in the renewed lease. *Langhorne* v. *Harland*, 2 Jur. (N.S.) 872; 4 W. R. 696.

Reversionary Lease.]—A. demises lands to B. for ninety-nine years; B. demises same to C., reserving a reversion of two years. C. demises the premises to occupying tenants, and afterwards, without notice to B., applies for and obtains a reversionary lease of the premises from A.; such lease is not a graft upon the original lease nor a trust for B. *Maunsell* v. *O'Brien*, 1 Jones, 176.

Semble, if C. had obtained the reversion lease, by representations made by him to A., that he was entitled to the entire interest in the lease made by A. to B., such misrepresentation would not be a ground for decreeing that lease a trust for B. *Ib.*

The reservation of a reversion by the intermediate landlord does not create an implied contract between him and the sub-lessee, that the latter shall not seek to obtain for his own benefit a reversionary lease of the premises from the head landlord. *Ib.*

Testator gave leasehold premises to his daughter for life, if his term or terms and interest should therein for so long subsist, for her sole and separate use, notwithstanding her present or future coverture, and after her decease to her children equally, their executors, &c., during all the remainder of the estate, term or terms, and interest therein which should be then to come and unexpired. No trustees being interposed, the husband, having possession, was held accountable according to the uses of the will, both as to the original leases, and also as to reversionary leases granted to him, as the person entitled under the will of the former tenant upon favourable terms, and the equity was established against a purchaser from him with notice. *Parker* v. *Brooke*, 9 Ves. 583; 7 R. R. 299.

6. Trusts for Advancement and Maintenance.

a. Advancement.

Persons Entitled.]—A. makes two of his daughters his executors, and directs them to distribute a sum of 400*l.* and also the residue of his personal estate among themselves and their brothers and sisters, according to their needs and necessities, as they in their discretion should think fit. The court restrained the exercise of this power, by decreeing a double share to the eldest son and heir, looking upon him as a necessitous person. *Warburton* v. *Warburton*, 4 Bro. P. C. 1.

Bequest of residue to A. for life, with power thereout to advance her eldest son, and a gift, after A.'s death, of the said residue to A.'s children equally:—Held, on the context, that the amount advanced to A.'s eldest son was not to be taken into account in the ultimate division of the remainder amongst A.'s children. *Upjohn* v. *Upjohn*, 7 Beav. 152.

By a marriage settlement certain stock in the funds was settled upon the intended husband and wife for their joint lives, and the life of the survivor, and then upon the children of the marriage, with a power to the trustees, with the consent of the wife, to advance part of the fund for the benefit of the children in her lifetime. There were four children of the marriage; the husband died; the wife married again; the second husband assigned the wife's life interest for value; after the assignment the trustees, with the consent of the wife, exercised the power of advancement in favour of the children of the first marriage:—Held, that the power was well executed as against the assignee of the second husband. *Whitmarsh* v. *Robertson*, 1 Coll. C. C. 571; 14 L. J., Ch. 157; 9 Jur. 125. And see *S. C.*, 1 Y. & C. C. C. 715; 11 L. J., Ch. 404; 6 Jur. 921.

Consent to Exercise of Power.]—A tenant for life of a fund under a settlement which empowered the trustees with his consent to advance part of the presumptive share of a child, assigned his life interest in the fund by way of mortgage: —Held, that the trustees might be restrained from making any advancement to a son of the tenant for life during his life, he having by executing the mortgage lost his power to consent. *Nottidge* v. *Green*, 33 L. T. 220.

Duration and Cesser—Power not restricted to Minority.]—On the construction of a power of advancement, it was held not to be restricted to minority, and did not cease by the expiration of twenty-one years from the date of the testator's death, when the power of accumulation ceased. *Pride* v. *Fooks*, 2 Beav. 430; 9 L. J., Ch. 234; 4 Jur. 213.

"Collieries" held to mean freehold collieries, and not shares in leasehold collieries, the testator having both. *Ib.*

A deed, after reciting that A. was desirous of securing the payment after his death of the several annuities and the gross sum thereinafter specified, to the several persons thereinafter named, contained a covenant by A. with trustees that if B. should attain the age of twenty-one, either in the lifetime or after the death of A., then the heirs, executors, or administrators of A. should at such time after his death, or after the

day on which B. should attain the age of twenty-one, whichever should last happen, as the trustees or the survivors or survivor of them should in their or his uncontrolled discretion think fit, and either in one sum or from time to time in various sums pay to B., or for his use or benefit, any sum not exceeding 300*l.*, without any deduction or abatement whatever. The covenant, as originally drawn, was an absolute covenant for the payment of 300*l.*, but was altered by the direction of the covenantor at the time when he executed the deed. The sum of 300*l.* was the only gross sum mentioned. The trustees proposed to exercise their discretion by paying B. 5*l.*, and expressed their intention of not exercising it further for his benefit:—Held, that the discretion of the trustees was confined to the time at which the sum or sums was or were to be paid to B., and that he was entitled to the full sum of 300*l.* *Palmer* v. *Newell*, 25 L. T. 892.

—— **Power ceasing at Majority.**]—Under a will a mother was tenant for life of a fund, to her separate use, without power of anticipation. After her death the fund was to go to her children as she should appoint by deed or will, and in default of appointment, among her children equally, the shares of sons being vested at twenty-one, and the shares of daughters at twenty-one or on marriage. The trustees had power to advance the whole or any part of the share to which each of the children being a minor was actually or presumptively entitled:—Held, that there was no power, even with the consent of the mother, to make an advance to a son who had attained twenty-one. *Clarke* v. *Hogg*, 19 W. R. 617.

—— **Purpose becoming impossible.**]—By a deed of settlement a sum of money was settled upon trust for A. for life, and after her death for B. for life, or until alienation, and afterwards in trust for B.'s children, and it was declared that the trustees might, in their absolute discretion, but with the consent of the first tenant for life, if living, advance any sum not exceeding 2,000*l.* for the promotion in the army of B. In 1871 promotion in the army by purchase was abolished:—Held, that the trustees could not after that raise the money and pay it to B. *Palmer* v. *Flower* (infra) distinguished. *Ward's Trusts, In re*, 42 L. J., Ch. 4; L. R. 7 Ch. 727; 27 L. T. 668; 20 W. R. 1024.

In the event of the object failing for which money has been advanced by trustees under a power of advancement, the money belongs to the person for whose benefit it was advanced, and cannot be recalled into the original fund. *Lawrie* v. *Bankes*, 4 K. & J. 142; 27 L. J., Ch. 265; 4 Jur. (N.S.) 299; 6 W. R. 244.

Therefore, where, under such a power, the trustees purchased a commission in the army, and the person for whom the commission was purchased sold out shortly after joining his regiment, there being no fraud:—Held, that he, and not the trustees, was entitled to the purchase money. *Ib.*

A testator by his will declared that it should be lawful for his trustees, at the request of E. P., during her life and after her death, at their discretion, to expend any sum or sums not exceeding 6,500*l.* in purchasing commissions for or obtaining the promotion of W. P. in the army. E. P. requested the trustees to pay, under the trusts of the will, the sum of 6,500*l.* absolutely to W. P., who was in the army. Before any payment had been made purchase in the army was abolished:—Held, that W. P. was entitled to have the 6,500*l.*, with interest at 4 per cent. from the date of the request, paid to him absolutely. *Palmer* v. *Flower*, 41 L. J., Ch. 193; L. R. 13 Eq. 250; 25 L. T. 816; 20 W. R. 174.

A power in a settlement to withdraw funds and lay them out in the purchase of a trade for the benefit of the husband and wife may be exercised after the death of one of them for the benefit of the survivor alone. *Doorly* v. *Arnold*, 18 W. R. 540.

In exercising it the trustees ought to see that a purchase is bonâ fide made, but they need not inquire into the value of the property or expediency of the purchase. *Ib.*

—— **Inquiry as to Necessity of Advancement.**]—Trust by will as to the residue of real and personal estate, for a nephew and his heirs, to pay him the interest for life, with power to the trustees, in case they should see it would be for his benefit, to advance him, when it may be in their power, any part of the principal for his advancement in life, that they will not withhold such assistance as they may deem necessary; but in case no part should be advanced, the residue to be divided among the nephew's issue; with a limitation over, if he should leave no issue. The nephew is entitled, not to the absolute property, but for life only; and no advancement having been made, an inquiry was directed, whether his circumstances required advancement. *Robinson* v. *Cleator*, 15 Ves. 526; 10 R. R. 118.

Proper Advances—Purchase of Commission.]—A fund, bequeathed by will, was directed to accumulate till infants should attain twenty-one, deducting annually from the interest such portion as might be necessary for their education and other expenses; with benefit of survivorship; in case of either dying under twenty-one, the shares to be vested at twenty-one. The court (parties to whom the fund was given over consenting) directed an advancement for the purchase of a commission for one of the infants, but with considerable hesitation. *Evans* v. *Massey*, 1 Y. & J. 196.

—— **Expenses as a Cadet.**]—Under a marriage settlement, stock was vested in trustees, in trust to pay the interest and dividends to the wife for life, remainder to the husband for life, with a power to them and the survivor to appoint the principal among the children of the marriage. The wife died, and the husband appointed a third part thereof absolutely and at once in trust for an infant child, payment to be postponed till twenty-one. The court, on the application of the infant that the trustees might apply a sufficient part of the capital of his share of the stock in payment of the expenses incurred and to be incurred for his education as a cadet, and his advancement in India, granted the prayer of the petition so far as related to payment of part of the expenses incurred, and as to the expenses of education and residence as a cadet at Addiscombe, and ordered the rest of the petition to stand over. *Lane, In re*, 17 Jur. 219.

—— **Outfit.**]—Trustees having a power of advancement for the benefit of children, were

authorised by the court to make an advancement for the passage and outfit of the children with their parents to New Zealand, for the sake of their health, each child's share contributing equally to the passage and outfit of their parents. *Long's Settlement, In re*, 38 L. J., Ch. 125; 19 L. T. 672; 17 W. R. 218.

The court declined to sanction the transfer of the trust funds to new trustees resident in New Zealand. *Ib.*

—— **Past Maintenance and Future Outfit.**]—The whole of a small legacy and its accumulations, were paid out of court to the solicitor of an infant who had no other property, upon his undertaking to apply it in discharging a sum claimed for past maintenance and for a prospective outfit, and, after deducting the costs, to pay any remaining balance to the infant at majority. *Welch, In re*, 23 L. J., Ch. 344; 2 W. R. 310.

—— **Payments of Debts of Adults.**]—A father bequeathed a fund upon trust for L. during his life, and after his death for his children, as he should by will appoint, and in default of appointment for his children, who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares. The testator empowered the trustees, at any time or times during the life of L., to apply any part of the fund not exceeding one moiety in or towards the preferment or advancement of L., or otherwise for his benefit as the trustees should in their discretion think fit. At the date of the will L. was thirty years of age, and had been married for nearly three years:—Held, that the trustees might apply one moiety of the trust fund in payment of debts incurred by L., the interest on which absorbed nearly the whole of L.'s income, and the principal of which he was unable to pay out of his own resources. *Lowther* v. *Bentinck*, 44 L. J., Ch. 197; L. R. 19 Eq. 166; 31 L. T. 719; 23 W. R. 156.

A testator gave 5,000*l.* to trustees upon trust to pay and apply so much of the interest as they should in their uncontrolled discretion think necessary or expedient to be paid and applied yearly and every year from the time of his death, until A. should attain thirty-two, in aid of the allowance which A.'s father should or ought to make for that purpose in order to prepare A. for his establishment in and to enable him to follow some profession, &c., and, subject thereto, to accumulate the income by way of compound interest, and upon A. attaining thirty-two to pay the interest of the 5,000*l.*, and of the accumulated fund arising therefrom to A. during his life, so long as he should not have been bankrupt. And after the death of A. the 5,000*l.* and the accumulated fund were to be held in trust for the children of A. &c. On the testator's death, in 1842, A. was six years old, and his father died in 1849. The testator's estate was being administered in chancery, and a considerable fund arose from the accumulations of the income. A. was married, and had one child; and having contracted debts which prevented his living in this country, he petitioned the court that a sufficient sum for their payment might be raised out of the accumulated fund:—Held, that there was power to apply a portion of the accumulations for that purpose; and that as it was clearly, under the circumstances, for A.'s benefit, the court directed the necessary sum to be so raised, and applied in payment of the debts. *Edwards* v. *Grove*, 2 De G. F. & J. 210; 29 L. J., Ch. 839; 2 L. T. 620.

E. B. by will gave 1,000*l.* to trustees to invest and stand possessed of the same until P. L. attained twenty-one, and then pay the interest to him for life, with remainder to his children at twenty-one or marriage, with power to the trustees if they thought proper, but not otherwise, to advance all or any part of the legacy for the advancement of P. L. P. L. had twelve children; seven died infants, and unmarried, and five attained twenty-one; and P. L. being distressed, and having mortgaged the legacy, now petitioned, with the consent of four of the surviving children, one being abroad, that the security might be paid off out of the legacy, and the residue paid to him under the power in the will:—Held, that the trustees had no power to do what was asked. *Luard* v. *Pease*, 22 L. J., Ch. 1069; 1 W. R. 527.

—— **Payment to Trustees of Post-nuptial Settlement.**]—A power in a marriage settlement to advance to a son of the marriage part of the trust funds for placing or establishing him in any business, profession, or employment, or otherwise for his advancement or preferment in the world:—Held, to authorise the payment of part of the trust fund to the trustees of a post-nuptial settlement made by a son in favour of himself and his wife and the issue of their marriage, neither the son nor his wife being entitled to any property producing an immediate income, and the son being engaged in study, preparatory to entering the legal profession. *Roper-Curzon* v. *Roper-Curzon*, L. R. 11 Eq. 452; 24 L. T. 406; 19 W. R. 519.

—— **Setting up Husband in Business.**]—Trustees having power to advance for the benefit of a testator's daughter at any period of her life half the capital, the income of which was given by the will to her separate use, were authorised by the court to make the advance for the purpose of setting up her husband in business. *Kershaw's Trusts, In re*, 37 L. J., Ch. 751; L. R. 6 Eq. 322; 18 L. T. 899; 16 W. R. 963.

Where there was a power of advancement in favour of an infant female legatee to whom an interest for life for her separate use, without power of anticipation, was given, with remainder to her children, the court, after the legatee had attained twenty-one, and married, ordered an advancement to be made for the purpose of enabling the husband to enter into a partnership, upon the husband insuring his life, and entering into a bond for the payment of the sum advanced and the premiums on the policy. *Phillips* v. *Phillips*, Kay, 40; 2 Eq. R. 362; 23 L. J., Ch. 7; 18 Jur. 69.

A discretionary power of advancement vested in trustees for setting up testator's sons and daughters in business may not be exercised in favour of the married daughters' husbands, either for paying their debts or setting them up in business. *Talbot* v. *Marshfield*, 37 L. J., Ch. 52; L. R. 4 Eq. 661. Affirmed, with a variation, L. R. 3 Ch. 622; 19 L. T. 223.

But where a share was advanced for the purpose of setting up a married daughter in a farming business, her husband covenanting that the business should be for her separate use:—Held, that this was a good execution of the power. *Ib.*

If such a power is exercised by the trustees pending a suit for administration of their testator's estate, the court will require the strictest evidence of bona fides, and of the propriety of the advancement. *Ib.*

Trustees having, in the opinion of the court, exercised such a power malâ fide, for the purpose of defeating the plaintiff's interest, were ordered to refund the sums advanced, and pay all costs of the litigation occasioned beyond the estimated costs of an ordinary administration suit. *Ib.*

—— **Marriage Portion.**]—Trustees of a marriage settlement had authority, with the consent of the husband and wife, or the survivor, to raise 2,000*l.* for placing the issue of the marriage to any profession, trade, or business, or for their advancement in life:—Held, that in the case of a daughter, "advancement in life" might be taken to mean "advancement in life by way of marriage." *Lloyd* v. *Cocker*, 27 Beav. 645; 29 L. J., Ch. 513; 6 Jur. (N.S.) 336; 8 W. R. 252.

—— **Benefit and Advancement.**]—Power of advancing the capital of a fund was given to a trustee for the "benefit and advancement in the world" of the person entitled to the income of the fund for life, and there were words at the end of the clause conferring the power, which seemed to indicate that the power was to be a wide one:—Held, that the word "and" must be read disjunctively, and that the trustee could advance the fund, not only for the advancement, in a strict sense, of the object of the power, but also for such wider purposes as would come within the meaning of "benefit." *Brittlebank, In re, Coates* v. *Brittlebank*, 30 W. R. 99.

—— **Reference to Master to Inquire.**]—Testator, after making a certain provision for A., the son of a relation, till he attained the age of sixteen, added: "I then leave him to the care of my trustees to provide for him in some business or profession, and his future maintenance, out of my funded property":—Held, that these words created a trust for placing out A. in business, and also that he was entitled for life to a certain annual sum, the amount of which, as well as of the sum for placing him out, was referred to the master. *Kilvington* v. *Gray*, 10 Sim. 293.

Powers of Advancement and Appointment—Hotchpot Clause.]—A settlement contained a power of advancement, a power of appointment, and a hotchpot clause, applicable to the former, and not to the latter. Part of the trust fund having been taken out of the settlement and paid over to a child, without stating under which power:—Held, that it was primâ facie attributable to the advancement clause, and that this was confirmed by subsequent memoranda in the handwriting of the donee of the power. *Gosset's Settlement, In re*, 19 Beav. 529.

—— **Allowances to Trustees in Accounts.**]—A trustee bonâ fide advanced a sum to apprentice an infant, in the life of his father, who was in great pecuniary distress, and while the infant's interest in the trust fund was contingent, and before a power of advancement had come into operation:—Held, that in taking the accounts as against the trustee, the amount ought to be allowed him. *Worthington* v. *M'Craer* or *M'Craw*, 23 Beav. 81; 26 L. J., Ch. 286; 5 W. R. 124.

Trustees applied a part of the capital of a fund belonging to infants, who had been left destitute by their father, for their benefit. They were allowed the amount. *Prince* v. *Hine*, 26 Beav. 634.

When two trustees under a will, one of them the wife of the testator, had a power to make advances to the testator's children, and there was a direction to appoint new trustees, or a new trustee, in case of the first two or either of them dying or not acting, and the wife only acted and made advances without the concurrence of the other trustee, as was alleged:—Held, that the power of making advances was not vested in her, and the court refused to inquire into the propriety of particular advances made by her with a view to their being allowed. *Palmer* v. *Wakefield*, 3 Beav. 227.

Effect of Trusts or Powers on Vesting.]—*See* VESTED, CONTINGENT AND FUTURE INTERESTS.

Absolute Interests or Trusts where Gifts to a Person for the Benefit of Himself and Children, or to Benefit a Legatee in a Particular Way.]—*See* POWER—WILL.

b. Maintenance.

i. *Persons Entitled.*

In General Terms—Children.]—A direction for maintenance in general terms, comprehending all children, not restrained by the bequest of the capital, in terms limited, to those living at the date of the will. *Freemantle* v. *Taylor*, 15 Ves. 363.

—— **Children requiring Support.**]—Bequest in trust to pay the interest to the testator's wife for life, for the separate use of his wife and their children, and applied for the maintenance and support of himself, and the maintenance, education, clothing, and support of such children. The widow mortgaged her interest and became insolvent:—Held, that the trust was only for the benefit of those children requiring support, and a reference was directed to ascertain what part of the income was necessary for that purpose. *Carr* v. *Living*, 28 Beav. 644. And see *S.C.*, 33 Beav. 474.

Devise until Youngest Child attained Twenty-one.]—Devise to the children of A., B., and C., who should be living when the youngest attained twenty-one, with a direction that "the present yearly rents" should be paid to the persons who brought up the children of C.:—Held, upon the context, that until the contingency happened, the rents were to be paid to such person in trust not only for the children of C., but of A. and B. *Sanders* v. *Miller*, 25 Beav. 154.

Persons absolutely or presumptively Entitled.]—Power of maintenance of the "person for the time being entitled" to the estate:—Held, to include persons absolutely or presumptively entitled. *Sidney* v. *Wilmer*, 25 Beav. 260.

Maintenance of Infants—In General and Orders of Court.]—*See* INFANT.

Gifts on Condition as to Maintenance or Education of Infants.]—*See* CONDITION.

ii. *Lunatics.*

Fund primarily Liable.]—A mother, whose only daughter, a lunatic, was entitled to a large real and personal estate under her father's will, bequeathed the residue of her estate and effects to trustees, upon trust to apply the interest, amounting to about 1,600*l.* a year, towards the maintenance and support of her daughter, and otherwise for her comfort and advantage, as they should think proper, without being liable to account; and after her decease to pay the principal, and also such interest as should not have been actually so applied, to the testatrix's nieces:—Held, that the allowance of the lunatic ought to be borne exclusively by the maternal estate, as that arrangement, in the event of her recovery, would be most beneficial for her. *Ashley, In re*, 1 Russ. & M. 371. And see *Sanderson's Will, In re*, 3 K. & J. 497; 26 L. J., Ch. 804; 3 Jur. (N.S.) 658; 5 W. R. 864, post, col. 488.

A father, by will, directed the income of his real and personal estate to be expended as the trustees might think fit, in the maintenance of his son, a lunatic, and gave the corpus so that it vested in the lunatic absolutely. Afterwards, the mother of the lunatic gave her personal estate to trustees, upon trust, to apply a sufficient part of the income in his maintenance, with a direction to accumulate the surplus, and gave the corpus and accumulations over:—Held, that the mother had dedicated the whole of the income of her estate for the benefit of her son, subject to a provision that the surplus should be added to the principal, and that the question of contribution between the two estates to the lunatic's maintenance must be decided solely with reference to his interest; and the income of the mother's estate alone being insufficient for the lunatic's maintenance, the whole thereof must be applied for that purpose in the first instance, before any part of the income of the father's estate should be applied. *Methold* v. *Turner*, 4 De G. & Sm. 249; 20 L. J., Ch. 201; 15 Jur. 810.

A testator gave a fund to trustees in trust to pay the income to his sister for her life or "apply the same, or so much as may be necessary, for her support and maintenance, in such manner as may be most to her comfort and advantage." He then directed the surplus, if any, to be accumulated and added to the capital of the fund, which was given over after her death. The sister, who was of unsound mind, was entitled to a life interest under a settlement of which the testator was a trustee. After the testator's death she was found lunatic, and the allowance for her maintenance was fixed at a sum exceeding the income of the bequeathed fund:—Held, that this income was the primary fund for her maintenance, and that therefore the whole of it must be so applied. *Rudland* v. *Crozier*, 2 De G. & J. 143; 27 L. J., Ch. 261; 4 Jur. (N.S.) 675; 6 W. R. 305.

Where a lunatic has property to which he is entitled for life under a settlement as well as property to which he is absolutely entitled, the court will apply the life interest in the first place towards his maintenance; unless the trustees of the settled property have an absolute discretion whether to employ the whole or any part of the income for the lunatic's benefit. Therefore where property was held upon trust to pay the income in such way, at such time, and in such manner as the trustees should think fit towards the maintenance of a lunatic during her life, with power to invest any surplus not required for the purpose as capital, it was held that the trustees had no such discretion as would oust the jurisdiction of the court to apply the whole of the income in the lunatic's maintenance in exoneration of her absolute property. *Gisborne* v. *Gisborne* (infra) distinguished. *Weaver, In re*, 21 Ch. D. 615; 48 L. T. 93; 31 W. R. 224—C. A.

The brother of a lunatic lady not so found by inquisition advanced money for the maintenance of his sister for several years under circumstances which left it doubtful whether he intended it for a gift or expected to be repaid. He died, and his sister was then found to be lunatic by inquisition. His executors having brought in a claim against the lunatic's estate for repayment of the advances, the court made an allowance to the testator's estate for past maintenance, but limited it to advances made within six years before the testator's death. *Ib.*

Where there are two funds, both of them applicable to the maintenance of a lunatic, under the management of the court of chancery, to one of which the lunatic would be absolutely entitled as her own property, the other of which, so far as she might not benefit by it, would pass away to different persons, the court might direct her maintenance to be provided for out of the latter fund. But where such latter fund is provided by a will which vests the fund in trustees, and gives them an absolute discretion and "uncontrollable authority" over its application, the court will not exercise its ordinary power. The fund so specially provided will be left to the exercise, bonâ fide, of the discretion of the trustees. *Gisborne* v. *Gisborne*, 46 L. J., Ch. 556; 2 App. Cas. 300; 36 L. T. 564; 25 W. R. 516—H. L. (E.)

A testator devised real estate, and bequeathed his residuary personal estate to trustees upon trust, that they, in their discretion and of their uncontrollable authority, should pay and apply the whole or such portion only of the annual income, of his real and residuary personal estate as they should think expedient to or for the maintenance of his wife (a lunatic) at such time or times and in such proportion and manner in all respects as his trustees should think most conducive to her comfort, enjoyment, and convenience, without being liable to account for such payment and application. The lunatic became, on her husband's death without issue, entitled under her marriage settlement to a life interest in certain funds, and absolutely to other funds therein respectively comprised. By an order of the lords justices in lunacy, it was ordered that without prejudice to the question as to the primary liability of the testator's estate to provide for the maintenance of the lunatic, the sum of 696*l.* a year should be applied for that purpose:—Held, that the trustees had an absolute discretion as to whether or not they would apply any and what part of the income of the testator's estate for the maintenance of the lunatic, and that the court was not entitled to control or interfere with such discretion. *Ib.*

Absolute Gift.]—A testator gave the residue of his estate to trustees, upon the usual trusts for conversion and investment, and directed them to pay such sums for the maintenance and education of his sons M. and N. during their minorities,

or for apprenticing them, as his trustees should think proper; and declared that, when his sons should have attained their ages of twenty-one years, his trustees should pay the then residue of the money unto his two sons, provided that they should be, in the opinion of his trustees, of competent understanding and sufficient discretion to manage and take due care thereof. M. and N. were both lunatic at the time of their attaining their majority:—Held, that the qualification as to the sons being of competent understanding did not make the gift to them conditional, and that the testator's estate vested in them absolutely. *Wright* v. *Wright*, 21 L. J., Ch. 775.

A testatrix gave real and personal estate to trustees to pay the income to E. for life, and hold the capital in trust as E. should by will appoint, and in default to pay thereout certain legacies, and hold the residue in trust for C. and W. And in case E. should become of unsound mind, to apply the income or any part of it at their discretion towards her maintenance and support:—Held, that while E. was of sound mind, she, together with C. and W., could, on providing for the legacies, dispose of the estate. *Gardiner* v. *Young*, 34 L. T. 348.

Charge upon Estate for Maintenance.]—P., by his will, directed that his widow A., and second son B., who were devisees of his estates, should apply a sum not exceeding 400*l.* per annum for the maintenance and care of his son John, who was a lunatic, and that whoever should at any time be in possession of his estate should, during the life of his son, apply such sum annually for his comfortable support, care, and maintenance; and that such sum should be deemed, taken, and considered as a charge thereon:—Held, that there was no greater charge upon the estate than what was actually required and applied for the maintenance of the lunatic. *Ponsonby, In re*, 3 Dr. & War. 27; 2 Con. & L. 30; 5 Ir. Eq. R. 268.

After A. and B. had died, the court fixed the allowance of 280*l.* a year:—Held, after the lunatic's death, as between the owner of the estate charged and the administrator of the lunatic, that the owner of the estate was entitled to the difference between 280*l.* and 400*l.* a year, and not the administrator of the lunatic. *Ib.*

The committee of a lunatic is beneficially entitled to the savings out of the lunatic's allowance. *Ib.*

Allowance out of Wife's Separate Maintenance.]—A wife was insane before and during the time of her being entitled to a separate maintenance left by the will of a testator who knew her to be insane; no commission had issued; she had an only child, an infant, entitled to the capital in the event of surviving his mother; upon the husband's application for an allowance out of the wife's separate maintenance for her support, a reference was directed to the master to inquire who had maintained the wife, at what expense, how far the husband was able and willing to maintain her, and if any part of this fund was to be advanced to any one, what securities should be taken for its due application. *Brodie* v. *Barry*, 2 V. & B. 36; 13 R. R. 6, 37.

iii. *Married Women or Widows.*

Separate Use.]—A testator directed his trustees to apply a legacy for the support and maintenance of the wife of H., and for the support and education of his children. There were none at the testator's death:—Held, that the wife took absolutely for her separate use. *Cape* v. *Cape*, 2 Y. & C. 543; 1 Jur. 307.

If an estate is given to a husband for the livelihood of his wife, he will be a trustee for her separate use, and technical words are not necessary to create a separate trust; "livelihood" is enough here to show the testator's intention. *Darley* v. *Darley*, 3 Atk. 399.

Held, under the limitations of an antenuptial settlement giving inter alia a life interest to the wife for her separate use, without power of anticipation, with a clause of maintenance, that the maintenance clause did not enable the wife to affect her life interest by a prospective provision for the children, at all events as regarded any period beyond the minority of the sons, or the minority or marriage of the daughters. *Horlock* v. *Horlock*, 2 De G. M. & G. 644.

Gift to Widow in Consideration of Maintenance of Children.]—Testator gave his wife 400*l.* a year in addition to 500*l.* a year under her settlement, in consideration of the expense and care she would incur in the maintenance of their children; she must maintain them when at home, but is not to be charged with education or maintenance at school. *Collier* v. *Collier*, 3 Ves. 33.

Second Husband.]—Testator gave his property to trustees on trust during the life of his son to pay, apply, and dispose of the annual produce of a portion of it for the maintenance and support of his son and his present or any future wife, and the maintenance, education, and support of their children, or any or either of them his son and his wife and children, in such manner and such proportions as the trustees should in their discretion think fit and proper, without being answerable or accountable to any person for the way in which they should apply the same; and, after the decease of his son, to pay and apply the annual proceeds in like manner unto and for the benefit of any widow for life, and any children until they should attain twenty-one or marry, and subject to those trusts in trust for the children. The son died in 1849, leaving a wife and six children, the youngest of whom attained twenty-one in 1870. In 1851 the widow married again. The settlement made on the marriage did not comprise the above annual proceeds, and the trustees continued to pay them to the wife as part of her separate estate and on her separate receipt. The second husband, who was living apart from his wife, claimed to be entitled to the income during her life:—Held, that the trustees had a discretion to pay the wife the income for her separate use. *Austin* v. *Austin*, 46 L. J., Ch. 92; 4 Ch. D. 233; 36 L. T. 96; 25 W. R. 346.

Testator bequeathed his residuary estate to trustees in trust to pay the income to his wife for her life, to be by her applied for the maintenance of herself and such children as he might leave at his death:—Held, not to be a trust for the separate use of the wife. *Wardle* v. *Claxton*, 9 Sim. 524; 8 L. J., Ch. 119; 3 Jur. 145.

—— **Widow's Pension.**]—Under a trust deed providing pensions to be paid for the maintenance of widows and children of clerks in the East India company's service, and stipulating that any recipient of a pension who should dispose of or incumber it should lose all right to such pension, a widow became entitled to a pension. She married a second husband, who claimed to be entitled to the pension in his marital right:—Held, that the pension provided for the petitioner was intended by the trust deed to be for her separate use, and the money was ordered to be paid to her upon her sole receipt. *Peacock's Trusts, In re*, 48 L. J., Ch. 265; 10 Ch. D. 490; 39 L. T. 661; 27 W. R. 500.

Amount allowed and Parents' Ability where Express Trusts, and where Several Funds.]—*See* INFANT.

iv. *Statutory Powers of Maintenance.*

Contingent Legacy — Income — Lord Cranworth's Act.]—Trustees may, under 23 & 24 Vict. c. 145, s. 26, apply for or towards the maintenance of an infant the income of a legacy bequeathed to an infant by a stranger contingently on attaining the age of twenty-one years. *Cotton's Trusts, In re*, 45 L. J., Ch. 201; 1 Ch. D. 232; 33 L. T. 720; 24 W. R. 243.

When a fund was bequeathed upon trust for all the children of A. who should attain twenty-one in equal shares, and if there should be but one such child, then for that child, and A. died leaving one infant child:—Held, that the income of the fund might be applied in the maintenance of the child. *Ib.*

The 23 & 24 Vict. c. 145, s. 26, empowering trustees to apply towards the maintenance of an infant the income to which such infant may be entitled in respect of a legacy payable contingently on his attaining twenty-one, does not apply to a case where the infant on attaining twenty-one would not be entitled to interest on his legacy till the time of payment. *George, In re*, 47 L. J., Ch. 118; 5 Ch. D. 837; 37 L. T. 204; 26 W. R. 65—C. A.

A testator declared that his personal estate should be held upon trust out of the annual produce to raise for every daughter who should be under age and unmarried the yearly sum of 50*l.* for their maintenance and education, and to accumulate the surplus income as part of his residuary personal estate, and he bequeathed to each of his daughters a legacy of 4,000*l.* if and when they should respectively attain twenty-one or be married, and gave his residuary personal estate to his eldest son:—Held, that the legacies to the daughters did not carry interest until the time of payment, and that the court had no power, under s. 26 of the 23 & 24 Vict. c. 145, to apply any part of the income of the expectant legacies to the maintenance of the daughters. *Ib.*

—— **Conveyancing Act, 1881.**]—Trustees cannot, under s. 43 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), apply the income of an infant's contingent legacy for the benefit of the infant, unless the income will go along with the capital of the legacy if and when such capital vests. *Judkin's Trusts, In re*, 53 L. J., Ch. 496; 25 Ch. D. 743.

—— **"Contrary Intention."**]—A testator gave a fund to trustees, on trust for all the children of A. equally, who being sons should attain twenty-one, or being daughters should attain twenty-one or marry, with benefit of survivorship amongst them, and he directed his trustees to accumulate the income of the shares of the children, and to pay the same to them as and when their presumptive shares should become payable under the previous trust:—Held, that the will did not express a "contrary intention" within the meaning of s. 43 of the Conveyancing Act, 1881, and that, the children being infants and unmarried, the trustees might at their discretion apply the income of the trust fund in or towards the maintenance and education of the infants. *Thatcher's Trusts, In re*, 53 L. J., Ch. 1050; 26 Ch. D. 426; 32 W. R. 679.

—— **Bequest of Residue.**]—A testatrix bequeathed "the residue of my money" to an infant:—Held, that the estate being cleared and the residue ascertained, the executor would hold the residue in trust for the infant, within the meaning of s. 43 of the Conveyancing Act, 1881, and would be entitled to apply the income for the infant's maintenance, education, or benefit, as provided by that section. *Smith, In re, Henderson-Roe* v. *Hitchins*, 58 L. J., Ch. 860; 42 Ch. D. 302; 61 L. T. 363; 37 W. R. 705.

v. *Fund out of which Maintenance Payable.*

General rule.]—General rule, that trustee shall not break in of his own authority upon the capital of infant's fortune. *Walker* v. *Wetherell*, 6 Ves. 473.

Capital.]—Trustees may, in a case of necessity, be justified in breaking in upon the capital of a trust fund, either for the maintenance and education, or for the advancement in life of infant children, even where there is a gift over to the issue of such children in the event of their dying under twenty-one. *Tibbs' Trusts, In re*, 17 W. R. 304.

When a settlor directed maintenance for his children to be paid to their mother for their support up to fourteen years of age out of yearly income, and from fourteen to twenty-one to be allowed by trustees "out of the share" of each child in a certain fund of 6,000*l.*, to which each would be entitled on attaining the latter age, and there was no direction for the payment of interest on that fund from fourteen to twenty-one:—Held, that the maintenance for each child from fourteen to twenty-one must come wholly out of the capital of the share of that child in the 6,000*l.* *Cusack* v. *Jellico*, 22 W. R. 344.

A testator left stock to trustees for the maintenance of his two granddaughters till twenty-one, and then to be divided between them. The court refused to assume as a fact against one of these granddaughters, who, after the lapse of many years, was claiming her share of the principal fund against the estate of the surviving trustee, that that share had been expended by the trustees in maintaining her. *Clarke* v. *Wyburn*, 12 Jur. 613.

Quære, whether the trustees would have a right so to have applied the principal fund. *Ib.*

Interim Rents of specifically devised Freeholds.]—A testator, in 1853, devised freeholds to trustees, to pay the rents (after satisfying certain premiums and repairs) to and for the use of his grandson for life, and after his decease "to and

for the use of all and every child or children of his grandson, equally as tenants in common, who should attain the age of twenty-one being sons, or being daughters, should attain that age or marry," and if but one such child, to him or her absolutely. The testator devised and bequeathed the residue of his estates to his trustees, to convert, invest, and hold the same and the accumulations, upon similar trusts for his grandchildren and their issue. He then directed his trustees to apply a competent part of the income of the investments for the maintenance and education of such "grandchildren and their issue"; and to accumulate the residue, as in his will was mentioned. The grandson attained twenty-one and died in 1869, leaving three children, infants:—Held, that they were entitled to maintenance out of the interim rents and profits of the specifically devised freeholds. *Best* v. *Donmall*, 40 L. J., Ch. 160; 24 L. T. 217; 19 W. R. 400.

Bequest of Income for Lunatic possessed of Absolute Property.]—A testator gave a share of his residuary estate to trustees upon trust to pay the annual produce to the plaintiff for her life; or to apply the same, or so much as might be necessary for her support and maintenance, in such manner as might be most for her comfort and advantage. The plaintiff having been found lunatic by inquisition, an allowance out of her fortune was made for her maintenance. The plaintiff was also entitled to certain property in her absolute right:—Held, that the income of her life estate, under the will, must be first applied for her maintenance in exoneration of her absolute property. *Rudland* v. *Crozier*, 2 De G. & J. 143; 27 L. J., Ch. 261; 4 Jur. (N.S.) 675; 6 W. R. 305.

Life Interest of Widow of Testator.]—Testator gave his real estate and residuary property to his wife for life, remainder to an infant great-nephew for life; a statement in the will that it was his particular wish and request that his wife and the infant's grandfather would superintend and take care of the infant's education, so as to fit him for any respectable profession or employment, was held, under the circumstances, and upon the effect of the whole instrument, to charge the maintenance and education of the infant upon the interest taken by the testator's widow under the will. *Foley* v. *Parry*, 2 Myl. & K. 138; Coop. t. Brough. 219; 5 Sim. 138.

A testator bequeathed as follows: "I leave J. B. under the protection of my wife A. P., to be by her apprenticed and taken care of, and to be provided for to the best of her judgment, as long as the said A. P. remains unmarried":—Held, that J. B. was entitled to maintenance out of the testator's estate. *Batt* v. *Anns*, 11 L. J., Ch. 52.

Testator gave all his property to his wife and two other persons in trust for the under-mentioned purpose, namely, to pay the income to his wife for the education and support of his children by her, and after her death the property to be divided among his children; and he gave his furniture, plate, &c., to his wife absolutely:—Held, that the children were not entitled to the trust property on their father's death; but that their mother was entitled to the income for her life, she maintaining and educating the children out of it. *Gilbert* v. *Bennett*, 10 Sim. 371.

Residue.] — A testator, having bequeathed various legacies, and, among others, an annuity of 5*l.* to his daughter during her life, directs his son (whom he afterwards makes his executor) to take care of and provide for her, and, "subject as aforesaid," he gave to that son the residue of his real and personal estate: the daughter is entitled to a provision out of the residue in addition to her annuity, and a reference will be directed to the master to fix the amount of such provision. *Broad* v. *Bevan*, 1 Russ. 511, n.; 1 L. J. (O.S.) Ch. 69; 25 R. R. 123.

Accumulations of Surplus Income.]—A legacy of 5,000*l.* was bequeathed to trustees, to pay and apply so much of the interest as they, in their uncontrolled discretion, should think necessary or expedient, yearly and every year from the time of the testator's decease, until A. should attain thirty-two, in aid of the allowance which A.'s father should or ought to make for that purpose, in order to prepare A. for his establishment, and to enable him to follow, some profession or business, and subject thereto, to accumulate the income until A. should attain thirty-two or die, whichever should first happen; and on A. attaining thirty-two, to pay the interest of the capital, and of the accumulated fund arising therefrom, to A., during his life, so long as he should not have been found bankrupt, or taken the benefit of the insolvent acts, or have assigned his estate for the benefit of, or have compounded with, his creditors for payment of less than the debts due to them; and subject to the trust above mentioned, the principal and the accumulated fund were to be held in trust for the child or children of A. in manner therein mentioned, with a gift over in default of a child or children becoming entitled under such trust. A., soon after attaining his majority, became involved in debt, and, in consequence, unable to provide for his wife and infant child, or to pursue any profession or business. The court directed a portion of the fund which had arisen from accumulations of surplus income to be applied in payment of his debts. *Edwards* v. *Grove*, 2 De G. F. & J. 210; 29 L. J., Ch. 839; 2 L. T. 620.

Power of trustees to resort for future maintenance to accumulations of dividends which would, if required, have been applicable to past maintenance. *Ib.*

Policy Money and Bonus.]—Money, secured by a policy, was settled to A. and B., wife and husband, successively, for life, then in trust for the children of the marriage, with powers of advancement and for maintenance, with an ultimate trust; on failure of children, to the wife's appointment. There was but one child of the marriage, and the wife bequeathed all her interest under the settlement to her husband, and died. There was a bonus declared on the policy, and the assurance office was willing to pay money in respect of it. The husband was in insolvent circumstances, and about to emigrate, and he and the child petitioned that the trustees might be at liberty to receive the money payable in respect of the bonus, and, by yearly payments out of it, maintain the child; and the court granted the prayer of the petition, on the husband (the father) agreeing to give up all his life-interest, not only in the bonus money, but in the principal money assured, although there was no suit in court for the administration of the trust. *Hays, Ex parte*, 18 L. J., Ch. 441; 13 Jur. 762.

Money raised under Term of Years.]—Term of years to trustees to raise money for maintenance, &c. of younger children of A. in such shares, &c. as A. should direct, and, in default of direction, to be applied for the benefit of children equally, the same to be paid them respectively till their respective portions provided out of other property should be paid. A., by will, appointed a certain portion for the plaintiff, to be vested in her at the age of twenty-one or marriage, and directed that a certain part of the interest and dividends should be applied towards her maintenance, &c. but did not make any appointment, or give any directions relative to the sum of money raisable for that purpose under the term :— Held, on the construction of the settlement, that the plaintiff was entitled to have her share of the money provided by the term raised for her benefit, until her portion should become payable. *Poulett* v. *Poulett*, 6 Madd. 167.

Accumulation of Rents.]—A testator devised estates to trustees upon trust to pay certain annuities to his wife and other persons, with a direction that during the life of his wife the surplus rents should be applied in discharge of incumbrances affecting the devised property; and subject to these trusts, he declared that the trustees should stand seised of the property, in trust for various persons (not in esse at the testator's death) successively in tail, with remainder to the testator's niece for life, with a direction that during her minority the rents should be applied as after mentioned ; and then followed a clause to the effect that, if any person beneficially entitled to the rents should be in his or her minority, an annual sum not exceeding 300*l.* should be applied out of the rents to the maintenance of that person, and that the residue of the rents should accumulate, and the accumulations be applied in the discharge of incumbrances :—Held, upon the construction of these inconsistent clauses, and other parts of the will, that the testator's niece was not (at least during the life of the testator's widow) entitled to any part of the rents for her maintenance during minority. *Williams* v. *Edwards*, 2 Coll. C. C. 176.

Income during Widowhood.]—Testator desired his trustees to pay the whole of the income of his property to his wife "for her own use and the use of her children" ; but if she married again he gave her one-third only, the other two-thirds to be received for the benefit of the children in providing for their education and outfits in life. The wife's third to be for her life, and then to go to the children with the remainder :—Held, that during the widowhood of their mother the children were not entitled to any portion of the income, or to have any part set apart for their maintenance or advancement. *Kennedy* v. *Kennedy*, 2 W. R. 298.

Third Person interested not Sui Juris.]—W. by will gave all his real estate to trustees until his son attained twenty-five, remainder to his said son W. the younger for life, remainder to trustees to preserve, remainder to his first and other sons in tail, with remainders over. And in case his said son should leave any child other than an eldest or only son, the trustees had power, at any time after the son's death, to demise or mortgage for years to raise 5,000*l.* for portions for younger children, as W. the younger should appoint, and in default equally between them, to be vested and payable at twenty-one. W. the younger never appointed, and died leaving an infant son and three younger children. On bill filed, and an application for maintenance for them :— Held, that there being a third person (the eldest son) interested, and not sui juris, no maintenance could be allowed. *Wilcox* v. *Brown*, 2 W. R. 153.

Annuity to Children payable at Twenty-one.] —Where a testator bequeathed an annuity to his granddaughter for her life, and directed that if she should die during the lifetime of his widow, the annuity should be paid for the maintenance of the children of the granddaughter, and that from and after the decease of his widow and granddaughter, the value or the amount of the annuity (such a sum as would produce it according to the then legal rate of interest) should be paid to all and every the child and children of the granddaughter, if more than one, to be equally divided amongst them, when and as they should respectively attain the age of twenty-one years, and if there should be but one, then the whole to such one child, with a gift over, in case of the death of the granddaughter without issue who should attain the age of twenty-one ; the children of the granddaughter are not entitled to the annuity or interest of the fund after the death of the widow and their mother, until they attain the age of twenty-one years. *Festing* v. *Allen*, 5 Hare, 575. *S. C.* at law, 12 M. & W. 279 ; 13 L. J. Ex. 74.

Interest of Pecuniary Legacies.]—A testator bequeathed pecuniary legacies to each of his children, some of whom were minors : and he bequeathed the residue of his property, after payment of all his just debts, and funeral and testamentary expenses, and the several legacies bequeathed by his will, to be equally divided between all his sons and daughters ; and he directed that the "interest of the legacies" thereby given to such of his children as should not be of age at the time of his decease should be paid to his wife, to be applied by her for and towards their maintenance and education :— Held, that the interest of the respective shares of the residue, as well as that of the pecuniary legacies, was applicable to the maintenance of the minor children. *Guinness* v. *Guinness*, 14 Ir. Ch. R. 218.

Where a testator made a special provision for the maintenance of his younger children until receipt of their portions, and stated that the maintenance given to the sons (saying nothing as to daughters), which was less than the interest on their portions, should be in lieu of interest :—Held, that the daughters were not entitled to interest as well as maintenance, although the will directed that the trustees should stand possessed of the fund appointed for payment of their portion, and of the interest, dividends, and annual produce thereof, in trust for the daughters, on their attaining twenty-one. *Selby* v. *Gillum*, 2 Y. & C. 379.

Devise of real estate to the testator's daughter for life, with remainder to his two sons in fee : and in case the daughter should leave any child or children living at her death, then he directed that the two sons or their heirs, should pay to such child or children, 200*l.*, equally between them, as they should severally attain twenty-one,

and interest for the same, until the legacy should become due, for maintenance, &c. The daughter left one child, which lived several years, but died an infant:—Held, that interest was due from the mother's death to the child's death. *Harris* v. *Finch*, M'Cle. 141.

Testatrix directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews George and Charles, and the principal to be applied either in binding them apprentices at the age of fourteen, or to be reserved till they attained twenty-one, to commence business. "In the event of George and Charles (both or either of them) being settled before this will comes in force, I provide that the next boy (James or Henry) have the benefit, and so on." George and Charles survived the testatrix, but died under twenty-one:—Held, that James and Henry were entitled to the residue. *Prestwidge* v. *Groombridge*, 6 Sim. 171.

A testator, standing in loco parentis, directed his trustees to levy and raise, for the maintenance of such of the children of his son J. and his daughter E. for whom it was his intention to provide portions, in the meantime, until such portions should become payable, such yearly sum (not exceeding what the interest of the expectant portions intended to be provided for such children would amount to at 4 per cent.) as the trustees should deem sufficient:—Held, that the legatees were not entitled to interest at 4 per cent. from the testator's death, but to maintenance only. And the trustees having applied less than 4 per cent. on their portions for the maintenance of the children:—Held, that they were not entitled to have the difference paid to them. *Rudge* v. *Winnall*, 12 Beav. 357; 18 L. J. Ch. 469; 13 Jur. 737.

Legacy to a father, the better to enable him to provide for his younger children: he consented to secure the capital, but was held entitled to the interest. *Brown* v. *Casamajor*, 4 Ves. 498.

A testator bequeathed to each of his six grandchildren 200*l*., and in case any of them should not have attained twenty-one at the death of the testator, he directed his trustees, who were also his executors and residuary legatees, to pay interest for the legacies of such children, after the rate of 5 per cent., towards their maintenance and education. Upon differences arising between the father of the children and the trustees as to the investment of the money pending minorities, the trustees file their bill to obtain the direction of the court, and for leave to pay the amount into court:—Held, that the trustees might pay the principal money into court; and, semble, the trustees will not be liable to make up the difference between the dividends on the money in court and the 5 per cent. *Abraham* v. *Holderness*, 6 Jur. 290.

Semble, if the direction in the will had been, for the trustees to pay interest at 2 per cent., and the money was paid into court, the legatees would be entitled to the full amount of the dividends. *Ib.*

Interest of Portions—Eldest Son put to Election.]—By the settlement on the marriage of J. H. with C. R., portions were to be raised for the younger children of J. H. by C. R. or any future wife, but not to be paid until after the decease of J. H., C. R., or any future wife, though no estate was given to such future wife; and power was given to J. H. to appoint the interest of the portions to be raised for the children's maintenance; and on his default the same power was given to the trustees, and the maintenance was directed to be paid on the first quarter day after the decease of the survivor of J. H., C. R., or such future wife. J. H. died, leaving his second wife surviving, and by his will, which was not duly attested, directed the maintenance to be raised from the time of his death, and gave other benefits to his eldest son:—Held, that the trustees had no power to allow maintenance during the second wife's lifetime; but that the eldest son should be put to his election, as he had other benefits under the will, and was the only party that could be benefited by withholding the maintenance. *Hume* v. *Rundell*, 2 Sim. & S. 174.

Reversionary Interest of Infants.]—The court has jurisdiction to charge reversionary property of infants with money required for their maintenance, even where some of the infants for whose benefit the money is raised may not ultimately become entitled in possession to the property charged. A security for this purpose approved, with a provision for restoring the money by means of an insurance against the contingency. *De Witte* v. *Palin*, L. R. 14 Eq. 251; 26 L. T. 825; 20 W. R. 858.

Profits of Trade.]—An hotel keeper by his will desired his wife to carry on the business after his decease for the benefit of herself and his family so long as it might be conducted with advantage; and gave the hotel, &c., to trustees, upon trust to permit his wife to receive the profits, that she might apply the same in the maintenance of herself and family and for the education of the children; and if such profits were not sufficient, a sufficient proportion of the interest, &c., of the residue of his property was to be so applied. The testator left two children. The wife in 1852, after his death, left the hotel, abandoned her children, and otherwise misconducted herself. Upon the construction of the will:—Held, that since that time she was entitled to maintenance only out of the testator's estate; and one-third of the profits of the business was allowed to her for that purpose. *Castle* v. *Castle*, 5 W. R. 643.

Income of Life Estate of Parents given on Condition of Maintaining Children.]—By marriage settlement a sum of stock was vested in trustees, upon trust to pay the dividends to the husband and wife, and the survivor during life, upon the condition that they should, during the minorities of their children, find and provide them with suitable diet, clothing, and general maintenance and support, in proportion to the circumstances and condition in life of the husband and wife, and to the expectancies of the children. The husband subsequently presented a petition, under the Insolvent Debtors Protection Act, upon which an official assignee was appointed and an order for protection granted, on the terms of his paying 30*l*. a year out of the dividends of the settled estate in discharge of his debts. The husband and wife afterwards assigned all their interest in the trust fund to R. O., an assignee, for valuable consideration. The trustees having paid the fund into court, under the provisions of the Trustee Relief Act, the infant children presented a petition,

asking that the dividends of the whole trust fund might be applied for their maintenance and support. This petition was opposed by R. O. The lord chancellor, however, made the order, holding that under the terms of the settlement the children were entitled, but without deciding what he would have done if it had been shown that the money borrowed from R. O. had been directly for the benefit of the children, and without determining what was the effect on the interest of the husband of the order for protection. *Dalton's Settlement, In re*, 1 De G. M. & G. 265; 21 L. J., Ch. 681; 16 Jur. 253.

Surplus Income for Grandchildren attaining Twenty-five.]—Testator devised his real and personal estate to trustees, in trust to pay certain annual sums for the maintenance of his grandchildren till they attained twenty-five, and to accumulate the surplus income of his estates, which was to form part of his residuary personal estate; and to divide the income of his estates amongst his grandchildren when they attained twenty-five, with benefit of survivorship on any of them dying under twenty-one, without leaving a child that should attain twenty-one; and, on the death of them leaving such child, to convey the parent's share to such child; and he empowered his trustees, after the death of the father of his grandchildren, to convey to his grandsons, absolutely, the shares of his estates to which, under the previous trusts, they would be entitled for their lives. A petition by one of the grandsons for an increase of the maintenance provided by the testator was dismissed, the disposition of the property not being such as that the grandchildren must of necessity take the whole fund. *Turner* v. *Turner*, 4 Sim. 430.

Annual Proceeds of Portions raised by Long Term.]—Upon a marriage settlement, the settlor conveyed certain lands in trust for himself for life, remainder to trustees for a term, to raise an annuity for the lives of the husband and wife, and of the survivor, and subject thereto and in the meantime to trustees for a long term, in trust, subsequently to the previous charge, by mortgage or otherwise, to raise a sum as a portion for the children of the marriage; and with the annual proceeds, or otherwise, to provide for their maintenance from and after the decease of the settlor, as the parents should by deed appoint:—Held, that the latter term did not wait for the commencement of it until after the death of the survivor of the husband and wife, but commenced at the death of the settlor; and that the parents, after the death of the settlor, might, by deed under the powers, direct an annual sum to be raised for such maintenance. *Gough* v. *Andrews*, 1 Coll. C. C. 59; 8 Jur. 305.

vi. *Duration and Cesser.*

Interest—Interval between Twenty-one and Twenty-five.]—A husband directed his trustees to pay to his widow 100*l.* per annum for the maintenance and support of each of his children until he or she should attain twenty-one, with power to increase or decrease such allowance; and he empowered his trustees, with the consent of his widow, to advance any sums not exceeding in the whole one-fourth of the presumptive share of any child for his or her placing out or advancement in life, or otherwise for his or her benefit; the residue to be held in trust for all the children of the testator, who being sons should attain twenty-one, or being daughters should attain twenty-five or marry, without any provision for the maintenance of unmarried daughters during the interval:—Held, that the trustees had no power, either under 23 & 24 Vict. c. 145, s. 26, or by way of interest on their contingent shares, to allow maintenance to unmarried daughters during the interval; but that the advancement clause enabled them to advance the necessary sums of money for the purpose. *Breed's Will, In re*, 45 L. J., Ch. 191; 1 Ch. D. 226; 24 W. R. 200.

Semble, that if the testator's estate was being administered by the court, interest on their contingent shares would have been given by way of maintenance. *Ib.*

Held, also, that the trustees would be justified in increasing the allowance for infant daughters of the testator so as to meet the expenses of education, as included in maintenance and support. *Ib.*

—— **For Daughter until Twenty-one or Marriage.**]—Testator directed maintenance for his sons during minority and for his daughter till twenty-one or marriage, and gave her a legacy in case she should attain twenty-one, payable at and to carry interest from that time. Having married at eighteen, she was allowed maintenance for the interval until twenty-one. *Chambers* v. *Goldwin*, 11 Ves. 1; 8 R. R. 61. S. P., *Martin* v. *Martin*, 35 L. J., Ch. 281; L. R. 1 Eq. 369; 14 L. T. 129; 14 W. R. 421; but see *Kime* v. *Welfitt*, 3 Sim. 533.

Testator directed his residue to be converted into money, and his wife to receive the interest of it for the maintenance of herself and children, and at her death he bequeathed the whole, share and share alike, to all the children she might have by him. The testator left a son and a daughter. Some years after his death the daughter married:—Held, that thereupon her right to maintenance ceased. *Bowden* v. *Laing*, 14 Sim. 113.

A discretionary trust, for the maintenance of children during their minority, and for their future advancement in life:—Held, not to be determined as to the maintenance, by marriage of a female object of it, but only on her attaining the age of twenty-one; and as to the advancement to be still subsisting after her marriage. The trust was as to the income of a fund which was directed to be accumulated, subject to the trust, and the period of lawful accumulation had expired before the suit. *Pride* v. *Fooks*, 2 Beav. 430; 9 L. J., Ch. 234; 4 Jur. 213.

Under a trust for maintenance of an infant till twenty-one, at which age the corpus of the fund was given her, maintenance allowed from her marriage at twenty till twenty-one. *Coleman* v. *Rackham*, 8 Jur. 556.

A testator bequeathed a fund to his widow to be at her sole and entire disposal for the maintenance of herself and their children. There was only one child, a daughter, who attained twenty-one and married:—Held, that the trust for maintenance did not cease when the child attained twenty-one or married, and that the widow was not entitled to have the fund transferred to her. *Scott* v. *Key*, 35 Beav. 291; 6 N. R. 349; 11 Jur. (N.S.) 819; 13 W. R. 1030.

Bequest by a man to his wife, to be applied for the maintenance of herself and their children :—Held, that the right of an unmarried daughter to maintenance did not cease on her attaining twenty-one. *Carr* v. *Living*, 33 Beav. 474.

By marriage settlement maintenance for daughters is made payable half-yearly, at Lady-day and Michaelmas, until the portion became payable, which was at eighteen or marriage. A daughter attained her age of eighteen the 16th August. Decreed to have her maintenance pro ratâ, from the last Lady-day to the time of her attaining her age of eighteen. *Hay* v. *Palmer*, 2 P. Wms. 501.

By a marriage settlement, a term was limited to trustees for raising, on failure of issue male, 3,000*l.* for daughters' portions, payable at eighteen, or marriage. The father and mother die, leaving issue two daughters only, who at the death of the father (who survived the mother) were fifteen or sixteen years of age, and who had, by the father's will, 500*l.* a piece devised to them, payable at the same time with their original portions ; but the estate was devised to S., one of the daughters, being married and being of the age of twenty :—Held, on her bill, that she must have maintenance from the time of her father's death till the portion became due. and from thence interest at five per cent. till paid. *Greenhill* v. *Waldoe*, Pre. Ch. 367 ; Gilb. Eq. R. 31.

—— **For Sons during Minority.**]—Testator bequeathed one-fifth of his residuary personal estate to trustees, upon trust for all and every the children or child of his son J. B., born and to be born, and who, being a son or sons, should live to attain twenty-one, or, being a daughter or daughters, should live to attain that age or be married, to be equally divided between them, if more than one, share and share alike, as tenants in common ; and he directed that the dividends, interest, and income of the share or expectant share of each such child should be paid to his said son J. B., during his life, and after his decease then during the minority of each such child should be retained by his said trustees or trustee, and be applied by him or them, as the event should happen, in, for, or towards the maintenance, clothing, and advancement of each such child, in such proportion, manner, and form as his said son J. B., or, as the event might happen, his said trustee or trustees should think fit. At the date of the will and of the testator's death, J. B. had three children, one of whom, a son, afterwards attained twenty-one, married, and lived separately from his father :—Held, first, that a trust was constituted in J. B. of the income, for the maintenance, clothing, and advancement of his children, which trust did not terminate upon all or any of his three children attaining majority in his lifetime ; secondly, that J. B. was not entitled to apply the income arbitrarily, according to his own will and pleasure ; thirdly, that he was entitled to apply the income of a child's prospective share towards that child's maintenance, clothing, and advancement, without reference to his ability to maintain and educate that child ; and fourthly, that the son who had attained his majority was not entitled to an immediate transfer of one-third of the fund, inasmuch as it did not appear that the testator meant to exclude after-born children, and at all events he did intend to authorise an unequal distribution from time to time of the income, for the benefit of J. B.'s children. *Bateman* v. *Foster*, 1 Coll. C. C. 118.

A party whose interest in a fund had not vested :—Held, under the terms of a power in a will, entitled to maintenance, even after attaining twenty-one. *Ellis* v. *Maxwell*, 3 Beav. 587 ; 10 L. J., Ch. 266.

Gift to a widow, she maintaining and educating the testator's son and two daughters thereout, until the son attained twenty-one :—Held, that the son, who had married and ceased to reside with his mother, but was still a minor, was not entitled to maintenance. *Staniland* v. *Staniland*, 34 Beav. 536.

Annuity for Mother and Children for Joint Maintenance.]—A bequest of 30*l.* a year to A., together with her children B., C. and D., and for their joint maintenance :—Held, a bequest of that annual sum to the mother and her children as joint tenants for the life of the longest liver of them. *Wilson* v. *Maddison*, 2 Y. & C. C. C. 372 ; 12 L. J., Ch. 420 ; 7 Jur. 572.

A bequest of an annual sum to be raised for the support of the children of H., to be paid them from time to time as their necessities require, without regard to their father and mother, cannot be confined to the minority of the children. *Alexander* v. *M'Culloch*, 1 Cox, 391.

A testator gave an annuity to his niece of 8*s.* a week "towards the support and maintenance of her two children until they shall attain the age of twenty-one years." By a codicil the testator gave certain leasehold property to the niece "to enable her to provide for her children," and referred to his will as "my said will in her favour." One of the children of the niece died, and the other attained twenty-one :—Held, that the words in the gift of the annuity referring to the support and maintenance of the children were merely descriptive of the testator's motive in making the gift, and that they did not cut down the life estate of the niece. *Farr* v. *Hennis*, 44 L. T. 202.

Annuity to Son from Majority to Death or Second Marriage of Testator's Widow.]—The testator bequeathed to his son an annuity of 40*l.* from the period of his majority to the death or second marriage of the testator's wife. The son attained twenty-one, and died before the widow : —Held, that the legal personal representative of the son was entitled to the annuity until the death or second marriage of the widow. *Ord, In re, Dickinson* v. *Dickinson*, 12 Ch. D., 22 : 41 L. T. 13—C. A. Affirming, 26 W. R. 880.

Direction for Conversion—Annuities Payable until Distribution.]—R. N. gave and bequeathed the residue of his estate and effects to trustees, upon trust, out of the rents, profits, and dividends, to pay each of his children, R. C. N. and P. N., an annuity of 150*l.* ; and as his other children respectively attained the age of twenty-one, to pay to each of them an annuity of 100*l.* ; all the annuities to be paid until the period should have arrived for the distribution and division of his estate and effects between his children in the manner after mentioned ; and when and so soon as all his children should have attained twenty-one, or at such earlier or deferred period as the trustees might think proper, the testator authorised and empowered the trustees to sell and convert into money all his estate and effects, and

to invest the residue in their names upon trust, during such time as any of his children should be under the age of twenty-one, to pay to those who might have attained twenty-one the said several annuities until such period of distribution and division; but when and so soon as all his children should have attained the age of twenty-one, then the trustees were directed to distribute and divide the stocks, funds, &c., between all those who should have attained that age. The testator directed "that the rents and profits of his real and personal estate and effects, remaining unsold and unconverted, should be applied in the same manner as the income of the produce of such estate and effects, if sold and converted, might be applicable." The youngest son attained the age of twenty-one years on May 15th, 1853, and an order had been obtained for the sale of the real estate, but no conversion had actually taken place:—Held, that the annuities did not determine upon all the children attaining the age of twenty-one, but were to be continued until the period of distribution; and that, as the conversion of the estates had not been effected, no present distribution could be made; the annuities, therefore, to be continued until the period for actual distribution should have arrived. *Nicholson* v. *Locke*, 18 Jur. 263.

Annuity for Maintenance of Children until Twenty-one — Further Sum to be Divided amongst them as they attain Twenty-one.]—Bequest of an annuity to a father for the maintenance of his children until they respectively attained twenty-one, and a further bequest of a principal sum to be divided among the children as they respectively attained twenty-one, the amount of the annuity will not be reduced proportionately as the children respectively come of age. *Bortoft* v. *Wadsworth*, 12 W. R. 523.

Annuity to Children "for their Maintenance and Education."]—An annuity to the children of A. "for their maintenance and education" is not confined to the minorities of the children. Bequest of an annuity of 100*l.* to A., followed by a direction in these words: "In the event of her death the annuity is to be continued to her children for their maintenance and education, and I have to request Mr. W. G., banker, to see it carried into execution." A. survived the testator and died. On the death of A.:—Held, that the annuity of 100*l.* was payable to the children, not merely during their respective minorities, but during their joint lives and the lives and life of the survivors and survivor of them. *Somes* v. *Martin*, infra, followed. *Gardner* v. *Barker*, infra, observed upon. *Knapp* v. *Noyes*, Amb. 662, explained. *Wilkins* v. *Jodrell*, 49 L. J., Ch. 26; 13 Ch. D. 564; 41 L. T. 649; 28 W. R. 224.

Under a trust in a will to apply the yearly sum of 50*l.* (and so on in proportion for any less term than a year) for the maintenance and education of A. in such manner as the trustees should, in their own discretion, think proper, the will containing gifts of other annuities during life:—Held that this annuity ceased upon A.'s attaining twenty-one. *Somes* v. *Martin*, infra, overruled. *Gardner* v. *Barker*, 2 Eq. R. 888; 18 Jur. 508; 2 W. R. 407.

Held, also, that, the annuities being in arrear, they should abate pro tanto for the present, to be recouped out of the interest accruing on the outstanding portions of the trust funds, which, when paid, was to be regarded as income for this purpose. *Ib.*

A gift of the interest of a sum of money, for the "maintenance and education" of A., is a gift for life: aliter, "bringing up." *Somes* v. *Martin*, 10 Sim. 287; 8 L. J., Ch. 367; 3 Jur. 1144.

A direction by testator to apply the interest of a fund for the maintenance and education of his infant nephew, without any disposition of the principal:—Held, to give the interest for life to the nephew. *Ib.*

Annuity for Maintenance, Clothing, and Education of Children.]—Testator devised estates to trustees in trust to pay 300*l.* a year for the maintenance, clothing, and education of his son's children during the life of their father. The son had three children, all of whom attained twenty-one, and then one of them died:—Held, that the personal representative of the deceased child was entitled to one-third of 300*l.* a year during the father's life. *Lewes* v. *Lewes*, 16 Sim. 266; 17 L. J., Ch. 425.

An annuity charged on lands was bequeathed to three trustees and the longest liver of them, to continue during the life of the longest liver of them, and no longer, in trust to apply it, "to assist in the support of" the testator's daughter, A., "in aid of, and towards the clothing, maintenance, and education of her children, free from the control or interference of her present or any future husband, and not subject to his or their debts, contracts, or engagements." After the death of A., her children, being all of full age, and forisfamiliated, filed a bill, praying for a declaration that the annuity was well charged on the lands, and that they were entitled to have it applied towards their clothing, and maintenance, or otherwise for their benefit:—Held, that the will created no trust in favour of the children of A. of which they could enforce the execution in equity; and, therefore, that the trusts of the annuity ceased on the death of A. *Ryan* v. *Keogh*, Ir. R. 4 Eq. 357.

—— **Maintenance, Education, and Bringing Up.**]—A testatrix devised lands to trustees, in trust, in the first place, at their discretion, to pay an annuity to her son A.; and next, to apply the rents to the maintenance, education, and bringing up of the three children of A. during A.'s life; the sole survivor of the three children attained twenty-one in the lifetime of A.:—Held, that the interest of such surviving child in the surplus rents and profits did not cease on his attaining twenty-one, but that he continued entitled to them during the life of his father. *Badham* v. *Mee*, 1 Russ. & M. 631.

Income during Life of One to Another for his Maintenance.]—A gift of the income to arise from a fund during the life of A. to B., for his maintenance, is an absolute gift to B., his executors and administrators, during the life of A., and is not confined to the joint lives of A. and B. *Attwood* v. *Alford*, L. R. 2 Eq. 479; 14 W. R. 956.

Annuity to Mother for Life, and after Decease to "Support, Maintenance, and Education" of her Children until Twenty-one—Sale and Division of Proceeds among Children.]—A testator, by will, made in 1810, bequeathed "one annuity or

clear yearly rentcharge or sum of 300*l.*" to his niece, "for and during the term of her natural life;" and after her decease he bequeathed "the said annuity, yearly rentcharge, or sum of 300*l.* unto all and every the children, if any, of his said niece lawfully to be begotten; if more than one, share and share alike; and if but one, then to such only child," to be applied in the "support, maintenance, and education of such child or children" until such only child, or the youngest of such children, should attain twenty-one, when he directed that the annuity should "be absolutely sold and disposed of by such child or children," and the produce to be derived from such sale to be equally divided among such children, if more than one, share and share alike; and he charged his real estates with the annuity, and, subject thereto, devised the same to H. in fee:—Held (affirming 27 L. J., Ch. 769), that the annuity was a perpetual charge upon the real estate. *Manserqh* v. *Campbell*, 3 De G. & J. 232; 28 L. J., Ch. 61; 4 Jur. (N.S.) 1207; 7 W. R. 72.

The devise of an estate in fee-simple charged with an annuity is not of itself sufficient to indicate an intention that the duration of the annuity should correspond with the limits of the estate charged. *Ib.*

Annuity to One for bringing up Another.—Gift to A. of 15*l.* per annum for bringing up B.:—Held, that a trust was created for the benefit of B., which did not fail by the death of A. *Pilcher* v. *Randall*, 4 L. T. 398; 9 W. R. 251.

A testator directed his executors to apply 500*l.* for the support and education of his nephew, whose education for holy orders he directed to be under the control of certain persons named, and that, if any part of the sum should remain after providing for such support and education, such residue should be applied for certain religious purposes:—Held, first, that this was not a general legacy. *Lee's Trusts, In re*, Ir. R. 10 Eq. 157.

Held, secondly, that although the nephew had determined not to enter holy orders, and had been apprenticed to a trade, an adequate part of the sum bequeathed should be applied for his maintenance and education. *Ib.*

Income to Testator's Wife for her own Use and for Maintenance and Education of his Children so long as she Continued his Widow.]—Testator gave, devised, and bequeathed to his executors all his real and personal estate upon trust, to permit his wife M. to receive the income thereof for her own use and benefit, and for the maintenance and education of his children, naming them, so long as she should continue his widow; and in case she should marry, to pay her an annuity of 100*l.* per annum; and subject to such trusts, in trust, after the decease or marriage of M., for his said children in equal shares, when and as they should attain the age of twenty-one:—Held, that a trust was constituted of a sufficient part of the income of the property for the maintenance and education of the children, and that such trust was capable of continuance beyond the period of a son attaining twenty-one, or a daughter attaining that age or marrying. The court, however, being of opinion that a discretionary power as to the mode of executing the trust was given to M., directed inquiries for the purpose of ascertaining how such discretionary power had been and how it ought to be exercised. *Longmore* v. *Elcum*, 2 Y. & C. C. C. 363; 12 L. J., Ch. 469.

Income to Testator's Wife and Daughters for Life—Share of Daughter Dying to be applied to Maintenance of her Issue.]—A testator gave the income of his estate to his wife and daughters for their respective lives, with a survivorship clause amongst them for their respective lives in case of the death of his wife or of any of his daughters leaving no issue. In the event of a daughter dying and leaving issue, the trustees were empowered to apply all or any part of the trust moneys or annual produce and premises to which such daughter, if living, would be entitled, in the maintenance, education, and advancement of such her issue. After the death of his wife and all his daughters, the principal was to be divided amongst the issue then living of his daughters:—Held, that the trustees had power to make allowances for the maintenance of the deceased daughter's children after they attained their majority. *Hill* v. *Rawlinson*, 15 W. R. 148.

Marriage Settlement—Rents to be paid to Husband for Life—On his Second Marriage One-half to be paid to Him, and the other Half to be applied for Maintenance and Education of Children.]—By a marriage settlement property was vested in trustees upon trust, after the death of the wife, to pay the rents and profits to the husband for life, or until he married again, and in case he married again and there was issue of the intended marriage, then to pay him one-half of the rents and profits, and out of the other half to levy and raise for the maintenance and education of one child one-fourth, of two or three children one-third, and of four or more children the whole income of such other half, and subject thereto to pay the whole income thereof to the husband for his life, and if there should be no issue, then to pay the whole of the rents and profits to the husband. The husband married again, and at the date of the decree there were four children of the first marriage, two daughters and one son who had attained twenty-one, one son under age, and a child of a deceased daughter:—Held, that the trust for maintenance and education did not cease upon the children attaining twenty-one, but that the four children were entitled equally to one-half of the rents and profits during the life of their father, that the daughters were equally entitled in the event of their marrying, and that the word "issue" was restricted to the first generation, and, therefore, that the child of a deceased daughter took no interest. *Frewen* v. *Hamilton*, 47 L. J., Ch. 391.

Gift to Children equally—Gift over to Survivors if any died under Twenty-five—Power to apply Accumulations during Minority.]—A testator gave the residue of his estate and effects to his four children equally to be divided between them, share and share alike, with a gift over to the survivors or survivor, in the event of any dying under twenty-five. He appointed guardians during their minorities, with a power to apply accumulations of the income of each child's share, during minority, in maintenance, education, &c.:—Held, that the children were entitled, for maintenance, &c., to the income of their shares between twenty-one and twenty-five. *Fraser* v. *Fraser*, 1 N. R. 430; 8 L. T. 20.

Legacy to unborn Children of named Person to vest at Twenty-five—Direction to apply Income

in Meantime for their Maintenance.]—A legacy to unborn children of a person named in a will to vest at twenty-five being void for remoteness, a direction in the same will to apply the income in the meantime for their maintenance is also void, and cannot be supported even for a period of twenty-one years. *Pickford* v. *Brown*, 2 K. & J. 426; 25 L. J., Ch. 702; 2 Jur. (N.S.) 781; 4 W. R. 473.

Widow to be allowed Money during Minority of Son — Abandonment of Son.]—A widow who was by the terms of the will to be allowed money by the trustees during the minority of an infant—her son—abandoned the child, for whom other guardians were appointed by the court, and afterwards having cohabited with a married man, and by him had several illegitimate children, lived with them in a house to the use of which she was entitled under the will. The trustees under these circumstances refused to make her any allowance out of the trust moneys:—Held, that she could not compel the trustees so to do, but was disqualified from making any claim by her abandonment of the child independently of other misconduct. *Mellor* v. *Mellor*, 20 W. R. 51.

Provision for Infant until Sixteen—Trustee then to provide for his Future Maintenance.]—Testator made a certain provision for the infant son of his relation M. W. until the age of sixteen, and then left the infant to the care of his trustees, to provide for him in some business or profession, and his future maintenance, out of the testator's funded property:—Held, that the infant, on attaining sixteen, was entitled to receive out of the testator's funded property a sum sufficient to provide for him in some business or profession, and to an annual allowance for his future maintenance during his life; and it was referred to the master to inquire and state what sums were proper to be allowed for those purposes. *Kilvington* v. *Gray*, 10 Sim. 293.

Income Payable till Bankruptcy—Discretion to apply for Benefit of Bankrupt—Assignment of Income—Date of Operation of Cesser.]—Testatrix directed her late husband's trustees to stand possessed of 15,000*l.*, and invest the same, and pay the income to B. "during his life, or until he should become a bankrupt or a liquidating debtor, or cease to be entitled to receive such income or any part thereof for his own personal use or benefit by any means or for any purpose, and in the event of or upon the said B. becoming a bankrupt or a liquidating debtor, or ceasing to be entitled to receive the said income or any part thereof for his own personal use or benefit, by any means or for any purpose, to pay to him or apply for his benefit during the remainder of his life, either the whole, or so much, and so much only, of the said income as my late husband's trustees or trustee shall in their uncontrolled discretion think fit, and subject to the aforesaid interest hereinbefore appointed in favour of the said B," to hold the said 15,000*l.* and the investments and income thereof, in trust for the persons therein named. The income of the investment was payable on the 15th of January and the 15th of July. On the 30th of January, 1889, B. charged his interest to secure an advance to L., notice of which charge was received by the trustees on the 23rd of August, 1890. In November, 1890, B. was adjudicated a bankrupt, but the trustee in bankruptcy withdrew his claim to receive the income:—Held, first, that the charge operated as a cesser of B.'s interest from the date thereof, and not from the date of the notice, and, therefore, L. was not entitled to the income accruing before notice given; and secondly, that notwithstanding the discretionary trust did not extend to benefiting any wife or children of B., such trust was valid, and, although the income could not be properly paid to B., the whole or part thereof might be applied by the trustees for his maintenance. *Bullock, In re, Good* v. *Lickorish*, 60 L. J., Ch. 341; 64 L. T. 736; 39 W. R. 472.

Insolvency — Discretion of Trustees as to Application of Trust Fund for Particular Individual.]—Where trustees under a will have a discretion as to the manner of the application of the trust fund for the benefit of a particular person, but no power to apply it otherwise than for the benefit of that cestui que trust during his life, his interest passes to his assignees under the Insolvent Act, notwithstanding a proviso in the will, that he shall not have power to sell, mortgage, or anticipate the income of the fund. *Green* v. *Spicer*, 1 Russ. & M. 395; Tam. 396; 8 L. J. (O.S.) Ch. 105.

A testator bequeathed a legacy of 400*l.* to his executors, upon trust to pay the same to his son, in such smaller or larger portions, at such time or times, and in such way or manner, as they should, in their judgment and discretion, think best:—Held, that the discretion of the executors was determined by the insolvency of the legatee, and that the legacy vested in the assignee of the insolvent. *Piercy* v. *Roberts*, 1 Myl. & K. 4; 2 L. J., Ch. 17.

A. assigned 800*l.* to trustees in trust during the life of B., or such part thereof as they should think proper, or at such other times and in such portions as they should judge expedient, to pay the interest to him, or, if they should think fit, to lay it out in procuring for him diet and other necessaries, but so that he should not have any right to the interest other than the trustees, in their uncontrolled discretion, should think proper, and so that no creditor of his should have any claim thereon, nor should the same be subject to his debts, disposition or engagements: and it was declared that, after his death, the 800*l.*, and all savings and accumulations of interest, if any, should be in trust for his children, and, if he should have no child, then in trust for C. B. became bankrupt. The trustees had paid him the interest down to his bankruptcy:—Held, that his life interest passed to the assignees. *Snowden* v. *Dales*, 6 Sim. 524; 3 L. J., Ch. 188.

Under a marriage settlement, trustees were, after the bankruptcy of the husband and the death of the wife, to pay the income "in such manner, for the maintenance and support or otherwise for the benefit of the husband and the issue," as they might think proper:—Held, that the discretionary power of the trustees, as to the application of the income, was not taken away by the bankruptcy, so as to entitle the objects to take equally. An inquiry was directed as to what had been properly applied for the maintenance of the issue, and the assignees were declared entitled to the surplus. *Wallace* v. *Anderson*, 16 Beav. 533.

A testatrix gave the interest of a share of her residuary personal estate to A. for life; and

afterwards, by a codicil, she noticed the facts of the bankruptcy of A., and of his becoming of unsound mind, and thereby revoked the bequest to A., and gave the same to her executors, upon trust, during the life of A., to apply the whole or such part thereof, at such time, and in such proportions and manner, for the maintenance and support of A., and for no other purposes whatsoever, as her executors should in their discretion think expedient :—Held, that the interest given by the said bequest did not pass to the assignees of A. under his bankruptcy. *Twopeny* v. *Peyton*, 10 Sim. 487 ; 9 L. J., Ch. 172 ; 4 Jur. 456.

—— **Valid Gift over on Alienation.**]—If there is a valid gift over on alienation by one entitled to a life interest in personalty, it will take effect on insolvency, and the interest of the insolvent will not pass to his assignee. *Rochford* v. *Hackman*, 9 Hare, 475 ; 21 L. J., Ch. 511 ; 16 Jur. 212.

—— **Trust for Support, Clothing and Maintenance of an Adult.**]—Trust for the support, clothing, and maintenance of an adult :—Held, to be a trust for his benefit generally, and to devolve to his assignees under the Insolvent Act, notwithstanding a provision to the contrary in the will by which the trust was created. *Younghusband* v. *Gisborne*, 1 Coll. C. C. 400 ; 8 Jur. 750. Affirmed, 15 L. J., Ch. 355 ; 10 Jur. 419.

—— **Annuity for Personal Support.**] — An annuity given to A. for his personal support, not to be liable to his debts, and to be paid from time to time into his proper hands, and not to any other person, and his receipt only to be a sufficient discharge, passes on A.'s bankruptcy to his assignees. *Graves* v. *Dolphin*, 1 Sim. 66 ; 5 L. J. (o.s.) Ch. 45 ; 27 R. R. 16.

—— **Trust to Pay Rents of Husband's Estate for Maintenance and Support of Husband, Wife and Children.**]—Settlement of husband's estate on his marriage, in trust to pay the rents, &c., "unto or for the maintenance and support of the husband, wife, and children, or otherwise, if the trustees should think proper to permit the same to be received by the husband during his life, without power to charge, &c."; on the bankruptcy of the husband :—Held, that a trust had been created for the maintenance and support of the wife and children out of the property during the husband's life. *Page* v. *Way*, 3 Beav. 20 ; 4 Jur. 600.

—— **Bequest of Share in Trust Funds—Proviso for Forfeiture if Donee should during certain Lives Assign Charge or otherwise Dispose of Share—Assignment to Trustees for Creditors.**]—Bequest of a share in certain trust funds, in trust for A., his executors, administrators, and assigns, provided that, if A. should, during the life of B. or C. assign, charge, or otherwise dispose of his share in the principal or interest thereof, or attempt or agree so to do, or do any act whereby his share in the said moneys, if payable to himself or his executors, or administrators, would become vested in some other person, then, and in such case, all his estate, right, title, and interest in such trust moneys should absolutely cease and determine, and thereby and thereupon become absolutely forfeited ; and the trustees should thenceforward stand possessed of the shares or share so forfeited, in trust to pay, apply, and dispose of the annual produce thereof, during the lives of B. and C., for the support and maintenance of A., and of his wife and family, or otherwise for his and their benefit, in such manner as the trustees should think proper ; and after the death of B. and C. should settle and assure, or pay and apply, and dispose of the share so forfeited, in trust for, or for the benefit of A. and his family, in such manner as they should in their discretion think proper ; A. assigned all his property to trustees for his creditors, and thereby committed an act of bankruptcy, and, a fiat being issued against him, he was declared a bankrupt :—Held, that, upon the execution by A. of the assignment, his share and interest in the trust moneys became subject to the trust declared by the will for the benefit of A. and his wife and family ; that A. was not of necessity entitled to any part of the income of the trust moneys separately from his wife and children ; but that any interest of A. in the trust moneys not applicable for the support and maintenance of his wife and children passed to his assignees on his bankruptcy. *Kearsley* v. *Woodcock*, 3 Hare, 185 ; 8 Jur. 150.

Testator bequeathed his residuary estate to trustees, and, after making a provision out of it for the benefit of his son for his life, and after the son's death for his wife and children, directed, that if his son should assign or charge the interest to which he was entitled for life, or attempt or agree to do or commit any act whereby the same or any part thereof might, if the absolute property thereof were vested in him, be forfeited to or become vested in any person or persons, then the trustees should pay and apply the said interest for the maintenance and support of his son, and any wife and child or children he might have, and for the education of such issue as the trustees should in their discretion think fit. Some years after the testator's death the son became bankrupt :—Held, that the trust for the benefit of the son, his wife, and children was valid, and that the assignees were not entitled to any part of the provision. *Godden* v. *Crowhurst*, 10 Sim. 642 ; 11 L. J., Ch. 145.

A testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself and his family, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate, or incumber them ; but that if he should attempt so to do, or if the dividends, by bankruptcy, insolvency, or otherwise, should be assigned or become payable to any other person, or be or become applicable to any other purpose than for the maintenance of the nephew and his family, his interests therein should cease, and the stock be held upon trusts for his children. Long subsequently to the date of the will, and a few weeks prior to a codicil confirming it, the nephew took the benefit of the Lords Act (1 Geo. 4, c. 119), in the usual way ; and some years afterwards the testator died : — Held, that this insolvency operated as a forfeiture of the life interest given to the nephew by the will. *Yarnold* v. *Moorhouse*, 1 Russ. & M. 364.

—— **Trusts for Accumulation if Son in any way Impeded or Frustrated the Trusts of Will.**]—Testator devised his estates to trustees, in trust to pay out of the rents 300*l.* a year for the

maintenance of his son's children, and to pay the surplus rents during his life for the maintenance of himself and his family; but so that he should not have any power to charge or alienate the same: provided that if his son should, in any manner, impede or frustrate the trusts of the will, then the surplus rents, should be no longer paid to him, but should be accumulated by the trustees, for the benefit of the children. The son conveyed his interest under the will to trustees for his creditors:—Held, that, thereupon, the trust for accumulation took effect. *Lewes* v. *Lewes*, 6 Sim. 304; 3 L. J., Ch. 55. Affirmed, 4 L. J., Ch. 77.

—— **Settlement of Life Interest for Maintenance of Settlor, his Wife and Children.**]—A. being entitled to a life interest in the dividends of 9,000*l.* consols, and being largely indebted, his brother agreed to pay all debts not charged on A.'s life interest, upon condition that such life interest should be settled so as to be applicable for the maintenance of A., his wife and children, or any of them, at the absolute discretion of the trustees. This transaction having been carried into effect:—Held, that such settlement was valid against subsequent creditors, and also against a person who was a creditor of A. at the time of the settlement, and whose debt was concealed by A. from his brother, and was the only one not paid by him. *Holmes* v. *Penney*, 3 K. & J. 90; 26 L. J., Ch. 179; 3 Jur. (N.S.) 80; 5 W. R. 132.

Property Settled by Father on Son until he should take Benefit of Insolvent Debtors Act.]—Property was settled on J. R. by his father, until he should take the benefit of the insolvent debtors act, and then the trustees were, during his life, to apply it in such manner and to such persons, for the board, lodging, and subsistence of J. R. and his family, as the trustees should think proper; and after his decease upon trust for such persons as J. R. should appoint, and in default of appointment in trust for his children. J. R. took the benefit of the insolvent debtors act. He had three children, but his wife was dead:—Held, that his children, who were all infants, became entitled to three-fourths, and the assignees to one-fourth, of the life interest of J. R. *Rippon* v. *Norton*, 2 Beav. 63.

A person conveyed certain freehold and leasehold property to trustees upon trust, to pay the rents and profits to his son T. for life, provided that in case T. should be declared bankrupt, or be discharged under any insolvent act, the trustees should apply the rents and profits in or towards the maintenance, clothing, lodging, and support of T. and his then present or any future wife, and his children or any of them, or otherwise for his, her, their, or any of their use and benefit, in such manner as the trustees should in their discretion think proper. T. was taken in execution for debt, and sent to prison at the suit of a creditor who obtained a vesting order against him under the 1 & 2 Vict. c. 110. The insolvent was afterwards discharged under that act:—Held, that the life estate of the insolvent was forfeited at the time of his discharge; that from the date of the vesting order to the time of the discharge the rents and profits of the estate belonged to the assignee under the act; that upon the discharge taking place, the discretionary power given to the trustees by the settlement might be exercised by them in favour of the insolvent, his wife and children collectively, or in favour of any of those persons, to the exclusion of the others; and that to whatever extent the power might be exercised in favour of the insolvent, the benefit which he would take by the appointment would vest in the assignee. *Lord* v. *Bunn*, 2 Y. & C. C. C. 98.

Legacy in trust for the testator's son for his own use and benefit, provided no misfortune in business shall in the meantime have happened to him, so as to deprive him or his family of the benefit of it; the testator declaring his intention, his son's fortune being amply sufficient, by this fund to form a certain and permanent provision for him or his family; but in case he fail in business at any time before the age of thirty-two, then in trust for the support of him, his wife, and children, as the trustees think proper, so long as he shall labour under the effects of any misfortune in trade; but as soon as he shall be freed and absolutely discharged from the effects of any misfortune or failure in trade, then (but not before) to be paid to him: otherwise the interest to be continued to be paid for the support of him, his wife, and children, for his life; and if at his death he shall be under any difficulty from misfortune or failure in business, in trust for his wife and children according to his appointment by will; and if he shall leave no widow or child, according to his disposition. There was a considerable settlement. The son in the twenty-eighth year of his age being discharged under a deed of composition, the legacy was decreed to him; the trustees and his children not opposing it: but the court observed, that if he should not be discharged, as in case it should end in a bankruptcy, the trustees would not be indemnified. *De Mierre* v. *Turner*, 5 Ves. 306.

Bankruptcy under Scotch Sequestration — Before Discharge Will of Wife giving Bankrupt Annuity for Life with Cesser on Bankruptcy.]—After G. had been adjudged a bankrupt by a Scotch sequestration, and before he obtained his discharge, his wife, who had taken part in procuring the sequestration, made her will, and thereby gave an annuity to him for life, and declared, that if he should become bankrupt, or should assign, the annuity should cease; and she also empowered the trustees of her will in their discretion at any time to refuse or discontinue payment of the annuity to her husband. After the death of the testatrix, and before the first payment of the annuity became due, G. obtained a discharge which did not divest the property from the trustee in the sequestration:—Held, that the annuity was forfeited. *Trappes* v. *Meredith*, 41 L. J., Ch. 237; 26 L. T. 5.

Uncertificated Bankrupt—Life Interest if he obtained Discharge.]—A testatrix gave real and personal estate to trustees, during the life of her nephew, an uncertificated bankrupt, at their uncontrolled discretion, to apply the interest for the benefit of him, or his wife, or his children; and as to the income which should not be applied, to invest the same; but should he at any time obtain his certificate so as to enable him to hold and enjoy real and personal estate for his own personal use, enjoyment, and benefit, then she directed that thenceforth during his life, and so long as he should be able to hold and enjoy real and personal estate for his own personal use, enjoyment, and benefit, the whole income should be paid to him for his own use. The nephew never married, and after several years he obtained

his discharge :—Held, that the will conferred on the nephew a contingent interest in the income, which passed to the assignees, and, upon his obtaining his discharge, vested in them absolutely. *Davidson* v. *Chalmers*, *Perry* v. *Chalmers*, 33 L. J., Ch. 622 ; 10 Jur. (N.S.) 910 ; 11 L. T. 217 ; 12 W. R. 592.

Annuity until Annuitant should attempt to Charge it or some other Person should Claim it.] —A testator directed his trustees to pay an annuity to his brother, until he should attempt to charge it, or some other person should claim it, and then to apply it for his support and maintenance. The annuitant having become insolvent :—Held, that his assignees were entitled to the annuity. *Younghusband* v. *Gisborne*, 1 Coll. C. C. 400 ; 15 L. J., Ch. 355. And see *Coleman, In re*, *Henry* v. *Strong*, post, col. 494.

Fund on Condition that Person should Conduct Himself to Satisfaction of Trustees—Effect of Assignment.] — A fund was bequeathed to trustees upon trust after the death of the testator's widow to make a weekly allowance to S. and his children, if he should have died leaving any, towards his or their maintenance and support, such allowance to be in the discretion of the trustees. The testator also declared that it should be in the discretion of the trustees during the life of his widow with her consent to advance and pay all or any part of the principal money to S. or his children towards his maintenance and advancement in the world, it being his wish that S., if living, should have the whole benefit of such moneys if he should conduct himself to the satisfaction of the trustees. S. assigned all his interest under the will to X. The trustees having paid the fund into court without imputing any unsatisfactory behaviour to S. :—Held, that X., the assignee of S., took the whole fund. *Coe's Trust*, *In re*, 4 K. & J. 199 ; 4 Jur. (N.S.) 158.

vii. *Surplus.*

Surplus Rents and Profits.] — A testatrix devised lands to trustees, in trust, in the first place, at their discretion, to pay an annuity to her son A. ; and next to apply the rents to the maintenance, education, and bringing up of the three children of A. during A.'s life ; the sole survivor of the three children attained twenty-one in the lifetime of A. :—Held, that the interest of such surviving child in the surplus rents and profits did not cease on his attaining twenty-one, but that he continued entitled to them during the life of his father. *Badham* v. *Mee*, 1 Russ. & M. 631.

A., seised of an estate of 600*l.* per annum, devises 300*l.* per annum to an infant, whose father was his heir-at-law, and the other 300*l.* per annum he devises to the father for his care in looking after the son's estate till he should come to the age of twenty-one. The father dies, leaving the son six years of age, having, by his will, devised this 300*l.* to his wife, and desired her to save what she could out of it for a portion for his daughter, and appointed her guardian for his son. This 300*l.* per annum does not determine by the father's death, but the wife shall have it till the son arrives at the age of twenty-one. *Anon.*, Pre. Ch. 597.

An estate was devised to trustees for five hundred years, with remainder to persons still unborn, with remainder to the plaintiff. The trustees had active duties as to the management of the estate and large discretionary powers, and they were authorised, "during the minority of any person absolutely or presumptively entitled," to apply the surplus income for the benefit of such person, accumulating the surplus : —Held, that the plaintiff, who had attained her majority, had no right to any part of the surplus rents accruing prior to her estate becoming vested in possession. *Sidney* v. *Wilmer*, 25 Beav. 260.

Where after a devise for successive estates for life, with remainders in tail, subject to a term of ninety-nine years, the trusts of such term were declared to be that the trustees should, out of the rents and profits of the estates, insure the messuages and keep the same in repair during the respective lives of the several tenants for life, and should, during the respective minorities of each and every person thereby made tenants for life or in tail, apply the surplus or residue of the rents and profits for the maintenance and education of the tenants for life or in tail, who for the time being should be entitled in possession to the estates : and in case the whole of the surplus of the said rents and profits should not, during the minority of any such tenant for life or in tail as aforesaid, be applied for his or her maintenance and education, then the surplus thereof was from time to time to be laid out on real or government securities, at interest, in the names of the trustees, upon trust for such person or persons from time to time, as for the time being should under the limitations of the will be entitled in possession to the said estates ; and if any person who might become entitled in possession or remainder to an estate tail in the estates under any of the said limitations should die under twenty-one, without issue inheritable to such estate-tail, then the absolute interest in the moneys so directed to be laid out and invested was to be considered as not having vested in such person, but the same was to go over to the next taker :—Held, that the first tenant for life in possession of the estates was not absolutely entitled to the accumulations of the rents and profits which had accrued during his minority, but was only tenant for life of such accumulations. *Crosse* v. *Glennie*, 2 Y. & C. C. C. 237 ; 7 Jur. 274.

Devise of houses to executors in trust to receive the rents for the support, clothing, maintenance, and education of the testator's children, until they should respectively attain the ages of twenty-one years or marriage, and from and after which to A., B. and C., or such of them as shall be then living :—Held, that the devise to A., B. and C. did not take effect in possession until after all the children attained twenty-one or married. *Farran* v. *Smith*, 11 Ir. Eq. R. 254.

Quære, whether there was an intestacy as to the surplus rents beyond what was necessary for maintenance and education of the children during their minorities. *Ib.*

Surplus Income.]—Bequest of stock, &c., and interest and dividends to accrue. to the testator's two great-nieces, equally to be divided, and to be assigned, transferred, &c., to them, when and as they should respectively attain twenty-one ; with limitations of their respective shares in the event of death under twenty-one to their respective children ; with survivorship in case of no children, and a direction, that the executors

should during the respective minorities of the legatees receive the dividends, interest, &c., and that so much as should be necessary should be applied for maintenance, &c.; and the residue accumulate for their respective benefits, until they should respectively become entitled to their respective parts. The surplus interest held to go with the principal upon the death of one under twenty-one without children. *Sisson* v. *Shaw*, 9 Ves. 285; 7 R. R. 190.

A particular sum being given for maintenance will not bar the party from being entitled to the surplus profits. *Stafford (Earl)* v. *Buckley*, 2 Ves. Sen. 171.

Upon the construction of a will:—Held, that the surplus dividends of a legacy, after payments for maintenance during the minority of the legatee, go with the corpus. *Slade* v. *Parr*, 1 Y. & C. C. C. 565.

A legacy was given to trustees to be expended by them for the benefit and advancement of an infant as they in their absolute discretion should think fit. There was also a gift by the will, of the income of a share of the residue to the infant for life on his attaining twenty-one, with a power to the trustees to apply the income during his minority for his maintenance and education. A suit for administration was instituted by the trustees immediately after the testator's death, and orders were from time to time made in it for the advancement, and also the maintenance and education of the infant out of the legacy. On his attaining twenty-one:—Held, that he was absolutely entitled to the unapplied residue of the legacy. *Furley* v. *Hyder*, 41 L. J., Ch. 583; 26 L. T. 864.

Held, also, that inasmuch as maintenance would have been ordered out of the income of the contingent share of the infant, he was entitled to be recouped out of the past income of the residuary estate what had been expended out of the legacy for his maintenance and education. *Ib.*

Discretionary Trust of Residue for Benefit of Legatee—Non-exercise of Discretion—Interest of Legatee.]—Gift of a share of residue, after the determination of a life tenancy therein, to trustees, upon trust to "pay or apply all or any portion of the income or corpus of the same in or towards the support or maintenance or otherwise for the benefit of their brother R., in such manner and proportions in every respect and at such times as they shall deem most conducive to his welfare." The brother predeceased the tenant for life:—Held, that the effect of the gift was to empower the trustees to apply so much of the share as might be required for the personal benefit of their brother, but that no trust was to be implied in his favour as to the whole of the share; consequently that the share did not pass to his legal personal representative. *Sanderson's Will, In re*, infra, followed. *Gude* v. *Worthington* (3 De G. & Sm. 389; 18 L. J., Ch. 303; 13 Jur. 847) distinguished. *Stanger, In re*, *Moorsom* v. *Tate*, 60 L. J., Ch. 326; 64 L. T. 693; 39 W. R. 455.

Accumulations—Interest.]—Such part of interest of legacy of 4000*l.* as was not wanted for support of M. Q. to accumulate and be added to, and managed along with, the principal sum for the benefit of the persons to be entitled to the same after M. Q.'s death. In that event the principal and accumulations to go to her child or children. If no issue 1,000*l.*, part thereof, to J. H.; 750*l.*, other part thereof, to G. W.; 750*l.*, other part thereof to J. M.; and the remainder to T. H.:—Held, that the latter took the whole accumulations. *Woodhead* v. *Marriot*, C. P. Cooper, 62.

T. gave the residue to trustees, inter alia, to lay out one-third part in securities, the interest to accumulate for the benefit of the children of his niece, and if she should survive her husband, and have issue under twenty-one years of age, the trustees were to apply the interest for their maintenance till twenty-one, and upon the children attaining their ages of twenty-one equal shares of the principal to be transferred to them; the interest accrued between the elder and the younger children coming of age decreed to be divided between them. *Hawkins* v. *Combe*, 1 Bro. C. C. 335.

—— **Mixed Fund.**]—Testator directed his executors to pay and apply the whole or any part of the rents, issues, and profits of his real and personal estates during the life of J. S. for or towards his maintenance, attendance and comfort; and after the death of J. S., to sell the real and personal estate, the produce of the sale to be deemed part of the testator's personal estate, and the rents and profits of the real estate in the meantime, and until a sale, to be deemed part of the annual income of his personal estate. The whole of the rents of the real estate, and part only of the personal estate, had been applied by the trustees for the maintenance of J. S., who was of unsound mind, without touching upon his private property:—Held, that the personal representatives of J. S. were not entitled to the unapplied savings of the testator's real and personal estate as upon an absolute gift of the income to J. S., though the whole income, however large, might have been applied by the trustees for his maintenance, if necessary; but that the mixed fund must be apportioned between the testator's heir-at-law and residuary legatees. *Sanderson's Will, In re*, 3 K. & J. 497; 26 L. J., Ch. 804; 3 Jur. (N.S.) 658; 5 W. R. 864.

Held, also, that if the trustees had accumulated the testator's estate, and allowed J. S. to have been maintained out of his own property, his administration would have been entitled to be recouped to the full extent. *Ib.*

—— **Investments of Unapplied Income.**]—Funds were vested in trustees by M., upon trust (after certain intermediate trusts) to pay the whole or so much as they should think fit of the dividends thereof towards the maintenance, &c., of an infant; and upon trust, when the infant attained twenty-one, to pay the whole dividends to her, with further trust as to corpus of the fund for her children; but if the infant died under twenty-one without issue, then upon trusts as to the corpus of the fund, and the dividends thenceforth to accrue, for the next of kin of M. A power was contained in the settlement authorising the trustees to invest so much of the income to which the infant "shall be entitled" as might not be required for her maintenance, etc., and to transfer such investments to the infant on her attaining twenty-one, with power to the trustees to resort to the accumulations of any previous year, and apply the same for the infant's maintenance, &c., in any succeeding year. The infant died under twenty-one, and there was a considerable sum invested, being accumulations of unapplied income:—Held, as between the parties claiming under the gift over, the next of

kin of the infant, and the personal representatives of the settlor, that the invested accumulations passed to the personal representatives of the settlor as a resulting trust. *Baker* v. *Pugh*, 5 W. R. 239.

—— **Arrears of Fund never raised for Maintenance.**]—By a post-nuptial settlement the sum of 15,000*l.*, secured by mortgage of the settlor's property, was settled upon his children, with power for the trustees to apply the income for their maintenance. The money was never raised or paid to the trustees; the settlor maintained his children until his bankruptcy:—Held, that the children were entitled to the arrears of the fund. *Kerrison's Trusts, In re*, 40 L. J., Ch. 637; 25 L. T. 57; 19 W. R. 967.

—— **No Direction to Accumulate—Past Accumulations and Future Income during Children's Minority.**]—By settlement trustees were directed to pay the income of 1,000*l.* for the maintenance, education and support of the children of the marriage, and when they should attain twenty-one years to pay the same sum and the accumulations thereof accruing to such children. The father had maintained the children at a greater expense than the income of 1,000*l.* There was no direction to accumulate:—Held, that the father was entitled to the past accumulations of income, and the future income during his children's minority. *Birch* v. *Sumner*, 3 Jur. (N.S.) 712.

Interest accruing due on Shares during Minority not applied for Maintenance.]—A testator, after bequeathing certain shares of his residuary estate (the produce of a mixed fund) to his son and daughter respectively, directed that the interest of the share given to the son should be applied for his maintenance and education till twenty-one, and that after such period he should have power to receive and dispose of such interest till his age of twenty-five, when the whole of the property bequeathed to him was to be at his own disposal. He further directed that half the property given to his daughter should be invested, in trust, for her maintenance, education, use, and benefit, during her life, and for her children, if any, after her decease; and if there was no issue living at her decease, the said property was to devolve to his son; and in case he was dead also, and had left no issue, the said property was to devolve to his executors thereinafter named. The other half of the property bequeathed to his daughter he directed to be invested for her sole use and benefit till twenty-one, and that the said property should then be at her own disposal; and if either the son or daughter should die under twenty-one, the property bequeathed to the one so dying should devolve to the other; and if both should die under that age, then the property bequeathed to them should devolve to, and become the property of, the four persons therein named and described, to be divided betwixt them, in equal proportions, and their heirs for ever; which four persons he also appointed his executors. One of the four persons named executors renounced probate, and declined to act; and afterwards both the son and daughter died under twenty-one, and without issue:—Held, that the interest which accrued upon the shares of the son and daughter, during their respective minorities, so far as it had not been applied to their maintenance and education, vested absolutely in them, and passed to their personal representatives. *Barber* v. *Barber*, 3 Myl. & Cr. 688; 8 L. J., Ch. 36; 2 Jur. 1029.

Testator bequeathed the residue of his personal estate to three trustees, in trust to pay, apply, and dispose of all the interest thereof for the maintenance, support, and benefit of his three children and the survivors and survivor of them, in such shares and proportions, and in such manner, as they should think most proper and advisable; and if all the children should die without leaving issue, then that the trust fund should remain vested in two of the trustees in trust for the persons thereinafter mentioned:—Held, that the whole income of the residue was given for the children's benefit, and, the trustees having applied only part of it for their benefit, that the surplus devolved on the survivor's death to his personal representative. *Beevor* v. *Partridge*, 11 Sim. 229; 10 L. J., Ch. 89.

—— **Liability to Account for Surplus.**]—Testator gave all his property to trustees, in trust to pay an annuity to his wife, and, subject to that payment, to convey, assign, or transfer, all his property, unto and equally between his children, when and as they severally attained twenty-one; and, in the meantime to pay, to his wife, or otherwise apply the rents and proceeds of their respective shares for or towards their respective maintenance, education, and advancement. But, in case of the decease of any of the children under twenty-one, then upon trust to convey, assign or transfer the shares of such of them as should so die, and the accumulations, if any, unto and equally between such of them as should attain twenty-one. The testator's widow maintained and educated the children for several years, and advanced three of them, out of the income received by her from the testator's property, exclusive of her annuity; and, the income being more than sufficient for those purposes a considerable surplus remained in her hands:—Held, that the surplus belonged, not to the children, but to the widow. *Browne* v. *Paull*, 1 Sim. (N.S.) 92; 20 L. J., Ch. 75; 15 Jur. 5. S. P. *Berkeley* v. *Swinburne*, 6 Sim. 613; 3 L. J., Ch. 165; 5 L. J., Ch. 32. *Hadow* v. *Hadow*, 9 Sim. 438. And see *Raikes* v. *Ward*, 1 Hare, 446; 11 L. J., Ch. 276.

A testator directed his executors to apply the dividends of the property belonging to him, which might remain after paying legacies and providing for the payment of annuities, with his funeral expenses, his debts being all paid, to the maintenance, education, and benefit of R. S., as they should judge most advantageous for him; and in the event of the death of R. S. under twenty-one, he directed the dividends to be applied as therein mentioned. R. S. survived the testator about two years, and the executors applied a part of the dividends to his maintenance, education, and benefit:—Held, that the unapplied part of the dividends, with the accumulations, formed part of the residue. *M'Donald* v. *Bryce*, 2 Keen, 517; 7 L. J., Ch. 217; 2 Jur. 295.

C., by his will, devised all his freehold and copyhold estates to his two daughters, A. and M., and all other daughters that he might thereafter have, as tenants in common fee; he had afterwards another daughter L. He then gave directions for another will, by which he

gave all his real estates to his two eldest daughters, and a sum of 15,000*l.* to his daughter L. The attorney took the minutes of this second will in writing, but before it was prepared the testator died; these minutes were proved in the spiritual court as a testamentary paper:—Held, first, this paper, being proved in the spiritual court, is sufficient to pass copyhold estate; secondly, but is so totally void as to the freehold, that it will not put L. to her election, and she thereafter will take her share of the freeholds under the first will, as well as the 15,000*l.* under the second; thirdly, the testator gave the 15,000*l.* to his daughter L., to be paid to her at twenty-one or marriage, without interest for the same in the meantime; but if she died before twenty-one or marriage, then the 15,000*l.* was not to be raised, but was to sink into the residue of his personal estate. And he directed that, out of the interest of the 15,000*l.*, certain sums of money should be applied for the maintenance of L. The interest of this legacy, beyond the maintenance, is vested in L., and must be appropriated to accumulate for her benefit. *Carey* v. *Askew*, 2 Bro. C. C. 51; 1 Cox, 241. And see *Sheddon* v. *Goodrich*, 8 Ves. 492, 498, 499.

—— **Defeasible Estate.**]—A testator directed that certain funds should be made payable to children on their arriving at the age of twenty-one, and that his trustee should in the meantime pay and apply the interest towards the maintenance of such children until their respective shares should became payable; and that it should be lawful to apply the whole or any part of the principal to which any infant might be entitled under the provisions thereinbefore contained, at any earlier period than the same would become vested or payable by virtue of such provision, for the advancement of such infant:—Held, that the representatives of a child who died under the age of twenty-one were not entitled to the interest accrued during his minority. *Skaife* v. *Stewart*, 10 Jur. 299.

Property was bequeathed to trustees in trust for an infant, with a gift over in case of his death under twenty-one. The trustees accumulated the income of the property not required for his maintenance, in pursuance of the powers given by s. 26 of Lord Cranworth's Act. The infant died under twenty-one:—Held, that the accumulations of income to the time of the death of the infant belonged to the infant, and were not to be held for the benefit of the remainderman who ultimately became entitled to the property from which the accumulations arose. *Buckley's Estate, In re*, 52 L. J., Ch. 439; 22 Ch. D. 583; 48 L. T. 109; 31 W. R. 376.

viii. *Discretion of Trustees.*

Exercise of Power of Appointment—Discretion not taken away.]—Under a marriage settlement, property was to be held by the trustees, after the death of the wife, for all and every or such one or more of the children of the marriage, &c., as the wife should appoint, and in default of appointment, for the children equally; and the trustees were empowered during the minorities of the children to apply the income of their presumptive shares for their maintenance and education, although the father might be of ability to maintain them. In exercise of the power, the wife appointed the property among the children equally, and directed that during their minorities the income of their respective shares should be paid to the husband, to be applied by him for their maintenance:—Held, that the discretion of the trustees as to the application of the income during the minorities was not thereby taken away. *White* v. *Grane*, 18 Beav. 571; 23 L. J., Ch. 863; 2 W. R. 320.

Delegated Authority.]—Devise and bequest of freehold, copyhold, and personal estate, upon trust for sale at the discretion of the trustee, and that the rents, interest, and proceeds should be divided amongst a class, either equally or in other proportions, as the trustee having regard to their circumstances, should appoint; followed by an unattested codicil, directing the application of such rents, interest, and proceeds for the benefit of such of the class as were unsettled, and particularly for the comfortable support of P. (one of the class), who was of weak mind; and in case the trustee should not live to perform the whole trust, the rest to be executed by any persons he might appoint, having regard to the said intentions. The trustee by deed directed the manner in which the estates should be sold, and the proportions of the proceeds applied, and directed the division thereof amongst the other objects to be postponed until after the death of P., and nominated other persons to execute the trusts, which might remain unexecuted at his (the trustee's) death, with the same discretionary power that he had himself:—Held, that the trustee, for the government of his own discretion, might properly have regard to the direction of the unattested codicil, even as to the proceeds of the real estate, so far as he was not restrained by the effect of the will; that the prospective directions in the deed of appointment were not necessarily invalid, especially those which related to the future maintenance of P.; and that the attempt to delegate powers which the trustee could not transfer did not invalidate the directions in the same deed which he had power to give. *Hitch* v. *Leworthy*, 2 Hare, 200; 15 L. J., Ch. 235.

A testator directed his trustees, in their uncontrolled discretion, to apply such part of his residuary estate for the maintenance, comfort, and support of his wife, as, together with her own property, should make up her annual income to 500*l.* At the date of the will, and at his death, the wife was of unsound mind, but she afterwards recovered:—Held, that she was entitled to have her income made up to 500*l.* per annum. *Bullock* v. *Bullock*, 11 Jur. (N.S.) 29; 11 L. T. 561; 13 W. R. 212.

A. disinherits his son, and by will gives the greatest part of his estate to B., and tells B., if his son behaved well, he might pay him 20*l.* a quarter; and if he used that well, he might make it up 40*l.* a quarter. Decreed 40*l.* a quarter to the son. *Kingsman* v. *Kingsman*, 2 Vern. 559.

Refusal to make Allowance.]—A widow, who was by the terms of the will to be allowed money by the trustees during the minority of an infant—her son—abandoned the child, for whom other guardians were appointed by the court, and afterwards having cohabited with a married man, and by him had several illegitimate children, lived with them in a house to the use of which she was entitled under the will. The trustees under the circumstances refused to make her any

allowance out of the trust moneys:—Held, that she could not compel the trustees so to do, but was disqualified from making any claim by her abandonment of the child, independently of other misconduct. *Mellor* v. *Mellor*, 20 W. R. 51.

Keeping considerable Balances in Hand.]—Trustee, being directed to apply in his discretion such portions of the income as he should think fit, towards the support of F. H. and her children, and to invest and accumulate such part of the income as should not be so applied:—Held, to be justified in keeping considerable balances in his hands to answer contingencies, and not chargeable with interest on such balances. *Cantwell* v. *Higgins*, 1 Jur. 792.

Difference between Trustees as to Accumulation.] — Under a settlement, discretionary power over a fund of 500*l.* a year was given to two trustees upon trust, to apply it to the maintenance of an infant, or else in their discretion to accumulate it, and if the trustees did not apply the fund to either of these objects, it was to be paid to Mrs. W. They both agreed the fund was not required for maintenance, but differed on the question of accumulation:—Held, that as the maintenance was amply provided for, and the court in the exercise of its discretion on the point, when the trustees differed, thought the accumulation unnecessary, Mrs. W. was entitled to the fund until further order. *Windham* v. *Cooper*, 24 L. T. 793.

Payment to Annuitant where Discretionary Power to Purchase Annuity.]—By will a sum was given to two trustees on trust to pay the income to C. for his life, with a gift over of the principal on his death; but the trustees had a discretionary power to purchase with the principal an irredeemable annuity for the life of C. for his benefit. The trustees did not purchase an annuity, but one of them paid to C. during his life, from time to time, various small sums, amounting in the aggregate to more than the total income, but less than the principal:—Held, that this was a proper exercise of the discretionary power. *Messeena* v. *Carr*, 39 L. J., Ch. 216; L. R. 9 Eq. 260; 22 L. T. 3; 18 W. R. 415.

Arrestment by Creditors—Effect on Power to Postpone Payments.]—Where trustees have an unlimited discretionary power to postpone, as long as they think fit, the payments of shares of a residuary fund; and where of the time and manner of exercising the power they are to be the sole and final judges, arresting creditors of the fund will be defeated by the trustees executing, even after action raised, a deed applying the fund as an alimentary provision for the behoof of the beneficiaries. No proceedings resorted to by creditors of the beneficiaries can in such a case abridge the powers of the trustees. *Chambers* v. *Smith*, 3 App. Cas. 795—H. L. (Sc.)

Power to Purchase a Trade.]—A power in a settlement to withdraw funds and lay them out in the purchase of a trade for the benefit of the husband and wife may be exercised after the death of one of them for the benefit of the survivor alone. *Doorly* v. *Arnold*, 18 W. R. 540.

In exercising it the trustees ought to see that a purchase is bonâ fide made, but they need not inquire into the value of the property or expediency of the purchase. *Ib.*

Discretionary Trust for Maintenance — Child Assigning Interest.]—A testator directed his trustees, after the death of his wife, to apply the income of his estate "in and towards the maintenance, education, and advancement of my children in such manner as they shall deem most expedient until the youngest of my said children attains the age of twenty-one years," and on the happening of that event he directed them to divide his estate equally among all his children then living. The testator left four children, two of whom at the death of the widow in 1884 were of age, and the youngest was in his seventh year. After the decease of the widow the trustees paid each of the adult children one-fourth of the income, and applied the other two-fourths for the benefit of the minors equally till 1886, when J. S. C., the eldest son, made an absolute assignment for value of all his interest under the testator's will to H. The trustees declining to pay one-fourth of the income to H. he took out a summons to have the construction of the will determined:—Held, that no child of the testator was entitled, prior to the attainment of twenty-one by the youngest of the testator's children, to the payment of any part of the income, and that the trustees were entitled to apply the income for the maintenance, education, or advancement of the children, including J. S. C., in their absolute discretion. *Coleman, In re, Henry* v. *Strong*, 58 L. J., Ch. 226; 39 Ch. D. 443; 60 L. T. 127—C. A.

Held, also, that H. was entitled to no interest in the income except such moneys or property, if any, as might be paid or delivered or appropriated for payment or delivery by the trustees to J. S. C., and that the trustees could not pay or deliver to J. S. C. money or goods forming part of the income or purchased out of the income, for that such moneys and goods so paid or delivered, or appropriated to be paid or delivered, would pass by the assignment. *Ib.*

Payment into Court.]—Where, under a will, the income of a fund is payable for the maintenance of T., the trustee, by paying the fund into court, relinquishes his discretionary power. *Tegg's Trusts, In re*, 15 L. T. 236; 15 W. R. 52.

—— **Power to Advance Money.**]—A testator by his will devised and bequeathed his residuary estate to trustees, and gave thereout a legacy of 10,000*l.* to each of his five daughters, and directed that the legacies should be held upon certain trusts for the benefit of his daughters, their husbands and children respectively, and he provided that, on the request of any of his daughters, it should be lawful for the trustees, if they should think fit, to advance to the husband or husbands of any one or more of his daughters, part of her legacy (not exceeding 5,000*l.*) for the purpose of setting up the husband in business, or otherwise promoting the advancement or benefit of his said daughter and her husband and family. The trustees paid the legacy of one of the daughters into court under the trustee relief act. Application was now made for the advance of a sum of 3,000*l.* to the husband of the daughter whose share had been so paid in, for the purpose of furnishing him with a professional residence. The surviving trustee of the will consented to the advance being made:—Held (following *Cole's Trust, In re*, supra, col. 485), that the trustees, by paying into court, had terminated their discretion, and that the discretion being a personal

one could not be exercised by the court, and the advance could not therefore be made to the husband. *Landon's Trusts, In re*, post, col. 512, not followed. *Nettlefold's Trusts, In re*, 59 L. T. 315.

But see *Ashburnham's Trusts, In re*, 54 L. T. 84.

A testator bequeathed to his executors a sum of 450*l.*, which he directed should be held by them in trust for his brother James' family; and should be by his said executors expended for the benefit of the said family, in such a manner as to them should seem most expedient. The executors having paid the 450*l.* into court under the trustee relief act:—Held, that the payment into court terminated the discretionary power of applying the fund. *Mulqueen's Trusts, In re, Mulqueen, Ex parte*, 7 L. R. Ir. 127.

Pending Suit.]—Power given by a will to trustees, at their discretion, to apply during the life of the testator's wife any part not exceeding one moiety of the annual income of the trust estate for or towards the maintenance and education of his daughter, or otherwise for her benefit, in such manner as the trustees should think proper, may be exercised, notwithstanding bill filed by trustees to have the trusts of the will performed and carried into execution under the direction of the court. *Sillibourne* v. *Newport*, 1 K. & J. 602; 1 Jur. (N.S.) 608; 3 W. R. 653.

Decree for Administration.]—When a testator by his will gives his trustees a discretionary power of advancement for the maintenance and education of children presumptively entitled under the will, the court will not control the trustees in the exercise of their discretion, because a decree has been made in a suit for the administration of the testator's estate. *Brophy* v. *Bellamy*, 43 L. J., Ch. 183; L. R. 8 Ch. 798; 29 L. T. 380—C. A.

But see *Minors* v. *Battison*, post, col. 503.

Interference of Court—Maintenance of Infant.]—A female infant was entitled contingently on her attaining twenty-one, or marrying, to a fund of which her deceased mother had been tenant for life. The trustees had power to "apply all or any part" of the income (about 538*l.* a year) for her maintenance and education. On a summons in the matter of the infant, Bacon, V.-C., held that he had jurisdiction to control the discretion of the trustees as to the quantum to be allowed, and made an order on them to pay 400*l.* a year to the father for her maintenance and education. The trustees appealed, and in answer to an inquiry by the court, stated their intention to allow 250*l.* to the father for her maintenance and education:—Held, that the order of the vice-chancellor was irregular, and must be discharged, the court having no jurisdiction on a summons in the matter of an infant to make any order for payment by trustees or other persons. *Lofthouse, In re*, 54 L. J., Ch. 1087; 29 Ch. D. 921; 53 L. T. 174; 33 W. R. 668—C. A.

Whether the court could control the discretion of the trustees as to the amount to be allowed for maintenance and education, so long as such discretion was honestly exercised. Quære. *Ib.*

—— **Reasonable and Honest Exercise of Discretion.**]—A direction by will that the testator's widow shall receive all the income of his real and personal estate, and pay and apply the same to and for the use of herself and the children of their marriage, agreeably and according to her own discretion during her life, confers on the wife a discretionary power, which the court will not disturb so long as it is reasonably and honestly exercised. *Costabadie* v. *Costabadie*, 6 Hare, 410; 16 L. J., Ch. 259; 11 Jur. 345.

Where in a marriage settlement the trustees had power to apply the income of the settled fund for the benefit of the husband and wife and their children as they should "in their uncontrolled and irresponsible discretion think proper," the court, while expressing an opinion that the trustees were not acting judiciously, declined to interfere with their discretion, there being no proof of mala fides. *Tabor* v. *Brooks*, 48 L. J., Ch. 130; 10 Ch. D. 273; 39 L. T. 528.

Where a testator has reposed a discretion in his trustees as to the application of rents and profits in the maintenance, &c., of his widow and children, the court will not interfere, in the absence of misconduct, without their consent. *Collins* v. *Vining*, C. P. Cooper, 472.

Where a testator has given a discretionary power to trustees to apply the income of his estate for the maintenance of an infant, the court will not interfere unless the trustees have been guilty of extravagance. *Douglas* v. *Andrews*, 3 Jur. 949.

Where a fund was by will given to trustees for infants, and the trustees were desired to pay the income to the mother to be by her applied for their benefit at her discretion:—Held, that the court had power, where the mother had not exercised a sound discretion, to order the income to be paid to the father for the maintenance of the infants. *Roper's Trusts, In re*, 11 Ch. D. 272; 40 L. T. 97; 27 W. R. 408.

——**Past and Future Maintenance.**]—A testator gave a legacy of 3,000*l.* to three children, or the survivors or survivor, who should attain twenty-one; but if all three died under twenty-one there was a gift over. The will contained a direction to the trustees to apply the whole, or such parts as they should think fit of the income of the legacy for the maintenance and education of the legatees while under twenty-one:—Held, that the court had power to control the discretion of the trustees in the allowance to be made for children; and the court, in opposition to the trustees, directed that the whole income should be paid to the father of the children for their maintenance, together with an equal amount for past maintenance. *Hodges, In re, Davey* v. *Ward*, 47 L. J., Ch. 335; 7 Ch. D. 754; 26 W. R. 390.

Testator bequeathed an annuity to his granddaughter, to be applied whilst she was under age in and towards her maintenance and education, in such manner as his trustees should in their absolute and uncontrollable discretion think fit, and whether her father should be able to maintain and provide for her or not. The trustees having made a very small payment on account of the annuity, and having made no provision for the maintenance or education of the infant, who had been wholly provided for by her father, the court declared that, in the event of its appearing that the father had properly maintained and educated the infant from the testator's death, he should receive the whole annuity for the time past and till further notice; he undertaking properly to maintain and educate her, and to abide by the order of the court. *Stephens* v. *Lawry*, 2 Y. & C. C. C. 87.

—— **Inquiry as to Exercise of Discretionary**

Power.]—A testator gave to his executors certain real and personal estate, upon trust to permit his wife M. to receive the rents, &c., thereof for her own use and benefit, and for the maintenance and education of his children (naming them), so long as his said wife should continue his widow; and in case she should marry, to pay her an annuity of 100*l.* per annum; and subject to such trusts, in trust, after the decease or marriage of M., for his said children in equal shares, when and as they should attain the age of twenty-one:—Held, that a trust was constituted of a sufficient part of the income of the property for the maintenance and education of the children, and that such trust was capable of continuance beyond the period of a son attaining twenty-one, or a daughter attaining that age or marrying. The court, however, being of opinion that a discretionary power as to the mode of executing the trust was given to M., directed inquiries for the purpose of ascertaining how such discretionary power had been and how it ought to be exercised. *Longmore* v. *Elcum*, 2 Y. & C. C. C. 363; 12 L. J., Ch. 469.

ix. *Account against Trustees.*

Fund to be Applied at Discretion of Trustee for Benefit of a Minor.]—When an annuity was given to A. in trust to apply it at his discretion for the benefit of B. during his life, and for his advancement, maintenance, support, or otherwise for his benefit, without being answerable for any of the money so laid out, or the exercise of the discretion so vested in the trustee as to the mode and extent of expending and laying out the same:—Held, that A. could not apply any portion of the annuity for his own benefit, but was bound to account for all sums not shown to be applied for the advancement, maintenance, support, or benefit of B. *Wainford* v. *Heyl*, 44 L. J., Ch. 567; L. R. 20 Eq. 321; 33 L. T. 155; 23 W. R. 848.

Trustee Insolvent.]—Where lands are devised to maintain an infant till twenty-three, and then to account, he shall not have an account until he attains twenty-three, unless the trustee be insolvent. *Tilly* v. *Simpson*, Mosely, 244.

Application of Fund during Minority.]—A testator gave his residue, on trust to apply the income for the maintenance, education, and support of his children until the youngest attained twenty-one. The children having been maintained and educated, the court declined to direct an account of the application of the income during the minority of the youngest child, without a special case being made out. *Hora* v. *Hora*, 33 Beav. 88.

Testator gave an annuity to a trustee in trust to pay the same to his daughter for her separate use for life, remainder to her husband, to enable him to maintain his children by her until the youngest attained twenty-one; and if the husband should die before the youngest child attained twenty-one, then upon trust for the trustee to apply the annuity in like manner as the husband was directed to do:—Held, the daughter being dead, that the husband was bound to apply the annuity for the maintenance of the children; but that if he maintained them properly, they would not be entitled to an account against him. *Leach* v. *Leach*, 13 Sim. 304; 7 Jur. 273.

The sum of 100*l.* devised to an infant payable at twenty-one, and if he dies before, then it is devised over, and the interest of the 100*l.* is for the child's maintenance. The trustee lays out 20*l.* of the 100*l.* for placing out the child as an apprentice, and the child died under twenty-one. This 20*l.* shall be allowed. *Franklin* v. *Green*, 2 Vern. 137.

Considerable Balances of Income Kept in Hand.]—Trustee, being directed to apply in his discretion such portions of the income as he should think fit, towards the support of F. H. and her children, and to invest and accumulate such part of the income as should not be so applied:—Held, to be justified in keeping considerable balances in his hands to answer contingencies, and not chargeable with interest on such balances. *Cantwell* v. *Higgins*, 1 Jur. 792.

Sums Expended in Luxuries.]—Charges by trustees for money laid out in luxuries under colour of maintenance, and for money unnecessarily expended in pulling down and rebuilding a house, disallowed. *Bridge* v. *Brown*, 2 Y. & C. C. C. 181.

Maintenance of Incapable Adult Cestui que Trust.]—If a trustee be sued in chancery for an account, and it appears that he has properly expended sums of money for the protection and safety, or for the maintenance and support, of his cestui que trust, at a time when he, though adult, was incapable of taking care of himself, the court will allow him credit, in account, for such sums of money. *Nelson* v. *Duncombe*, 9 Beav. 211; 15 L. J., Ch. 296; 10 Jur. 399. S. P., *Sherwood* v. *Sanderson*, 19 Ves. 280; 13 R. R. 193.

No Direction to Accumulate and no Power of Maintenance.]—The fact that a will contains an express direction to accumulate, and no power of maintenance, will not be a ground for charging the trustee with sums properly paid for maintenance. *Aveline* v. *Melhuish*, 10 Jur. (N.S.) 788; 12 W. R. 1020—L.JJ.

Payment to Co-trustee—Vouching Items of Expenditure.]—H. and C. were trustees and executors of a will, and guardians of the testator's daughters. The daughters during their infancy were maintained by C., and H. allowed him to receive the income for that purpose. After they attained majority judgment was given for administration of the testator's estate, in which the usual accounts of the personal estate were directed, and an inquiry how and by whom each of the daughters was maintained during infancy, and what was proper to be allowed and to whom out of the income of her share for her maintenance and education. A dispute having arisen in taking the accounts and inquiry, H. applied for a declaration that the receipts by C. of the income of the shares of the daughters for maintenance were a good discharge to H., and that H. was not to be called upon to produce vouchers in respect of the particular manner in which the income was applied. Kay, J., made an order expressing the opinion of the court that the accounts of the trustees should be taken as directed by the judgment as between guardian and ward, and ordering H. to pay the costs of the application:—Held, on appeal, that H., as trustee, was not discharged by mere evidence of payment of the income to C., his co-guardian,

but that under the inquiry H. was not bound to vouch the items of expenditure; and if it was shown that C. had properly maintained and educated the children, the sum proper for that purpose would be allowed against the balance found due on the account, without vouching the details of the application. *Evans, In re, Welsh* v. *Channell*, 53 L. J., Ch. 709; 26 Ch. D. 58; 51 L. T. 175; 32 W. R. 736—C. A.

Payments by Trustees after Notice of Assignment of Interest by Beneficiary.]—By the will of a testator a share of his estate was given to trustees upon trust during the life of one of his sons to pay and apply the whole or any part of the income or accumulations of income of the share for the support, maintenance, or education, or otherwise for the benefit of that son, his wife, or children, in such manner in all respects as the trustees should in their uncontrolled discretion think fit. The son assigned his interest by way of mortgage to the plaintiff. Notice of the assignment was duly given to the trustees of the will; but, after receiving such notice, they made payments out of the income of the share to or on behalf of the son. The plaintiff sought to make the trustees liable in respect of the payments so made:—Held, that the beneficial interest of the son under the will was that which he was entitled to assign; that money paid to him or to any person on his behalf was necessarily part of his beneficial interest; and that it must be assumed that money paid by the trustees to him or to any person on his behalf was his in their irrevocable determination immediately before the payment, at which period of time the trustees were affected with notice of assignment; and, therefore, that the trustees were liable for all sums paid to or on behalf of the son after they had received notice of assignment. *Neil, In re, Hemming* v. *Neil*, 62 L. T. 649.

Trust for Maintenance of Children—Ability of Father to Maintain.]—J. B. M. having absolute power to dispose of property, devised it to her husband J. M. for life, in trust that he should "apply the same, or as much thereof as he should from time to time think proper, for or towards the maintenance and education or otherwise for the benefit of my son D. M., and shall and do invest the unapplied income, &c., in such stocks, &c., as the said J. M. in his absolute and uncontrolled discretion shall think fit, with power to him at any time and from time to time to use and apply all or any part of such accumulated income for the benefit of my said son, or to pay the same over to him, as the said J. M. may from time to time think proper": and after the death of J. M. she devised the property, and all accumulations which should not have been applied or paid over, in trust for her son D. M. absolutely; and if he should die in the lifetime of his father, J. M., to J. M. absolutely. After the testatrix's death, J. M. received the rents and maintained his son in a manner suitable to his rank until his own death. Independently of the testatrix's property he was during his life of ability to maintain his son. J. M. having died, his administratrix, in an action brought by D. M., claimed credit for a considerable sum for the maintenance and education, &c., of the minor by J. M., during several years. It was sought, on behalf of the plaintiff, to have this credit disallowed on the ground that the father, having been of sufficient ability to maintain and educate his child, was not entitled to apply any of the trust funds for that purpose:—Held, that J. M. was, under the testatrix's will, entitled (notwithstanding his own ability) to apply so much of the income of the trust funds as he should from time to time think proper for and towards the maintenance and education, or otherwise for the benefit, of his son, D. M. *Malcomson* v. *Malcomson*, 17 L. R. Ir. 69—C. A.

7. Discretionary Trusts and Powers in the Nature of Trusts.

a. Who may exercise Powers or Trusts.

Quorum of Trustees.]—A testator devising an estate to persons whom he names trustees, for such purposes as they, or the major part of them, shall think fit, gives no benefit to them, but is an authority only, by appointing a quorum out of them. *Cook* v. *Duckenfield*, 2 Atk. 568.

Personal Trust.]—Archbishop P. devised his options to trustees, regard being had in the dispositions of them, according to their discretion, to his eldest son, Dr. P., the husbands of his daughters, his present and former chaplains, &c.:—Held, a personal trust, and, the treasurership of C. being vacant, one of the trustees might present the other, he being within the description in the will. *Potter* v. *Chapman*, Amb. 98; Dick. 146.

A testator gave his residuary personal estate to the trustees named in his will, their executors, administrators, and assigns, upon trust to apply the same as he should appoint: and in default of appointment as to any part, he directed the trustees to settle such part at their discretion either for pious and charitable purposes, or otherwise for the benefit of the testator's sister and her children:—Held, that this was a personal trust, which a representative of the surviving trustee could not execute, and that a sum which remained at the decease of the surviving trustee, and which had not been applied to charitable purposes, or for the benefit of the testator's sister and her children, was undisposed of, and belonged to the testator's next-of kin. *Down* v. *Worrall*, 1 Myl. & K. 561.

A bequest of 2,000*l.* to testator's executors, in trust, to build a bridge in Scotland over the river Don, "the situation to be chosen by them," was allowed by them to remain unapplied, and to accumulate for thirty years. Semble, the power of selection given to the original executors ceased upon their death. *Forbes* v. *Forbes*, 18 Beav. 552.

Disclaimer by Trustees—Lease by Heir-at-Law.]—Where lands are devised to trustees in fee upon trusts, or with powers requiring the exercise of judgment and discretion, and they disclaim, the heir-at-law cannot exercise such powers or trusts, although he may hold the estate subject to the trusts of the will. *Robson* v. *Flight*, 34 L. J., Ch. 226; 11 Jur. (N.S.) 147; 11 L. T. 725; 13 W. R. 393.

A testator devised real estate to trustees, and directed that they should and might grant leases thereof for the term of twenty-one years. The trustees disclaimed the trusts, and the heir-at-law, who was tenant for life of a moiety, granted a lease:—Held, that the lease was invalid. *Ib.*

Held, also, that the acceptance of rent from 1860, payable under the lease, by one of the plaintiffs, was not a confirmation of the lease. *Ib.*

Person accepting Trust with Bias.]—A person before he accepts of a trusteeship, to which a discretionary power is annexed, is bound to disclose any circumstances in his situation, which may give him a bias or an interest against the due exercise of that discretionary power. If he accepts the trusteeship, without disclosing such circumstances in his situation, he cannot afterwards exercise the discretionary authority for his own benefit. *Peyton* v. *Robinson*, 1 L. J. (o.s.) Ch. 191.

Trustee of Mortgage.]—A discretionary power given to a trustee of a mortgage to act in the premises as the settlor might have done, and to accept part of the debt in satisfaction of the whole, &c., will not authorise him to discharge part of the security. *Dawes* v. *Betts*, 17 L. J., Ch. 315 ; 12 Jur. 709.

Exercise of Trusts for Advancement and Maintenance.]—*See* ante, 6.

Exercise of Powers and Trusts by New Trustees.]—*See* post, c. 5.

See also POWERS.

b. Jurisdiction of Court to Interfere with Discretion of Trustees.

Maintenance of Children—Power or Trust.]—A testator, B., by his will directed that, after the decease or remarriage of his wife, L., his trustees should apply the whole, or such part as they should think fit, of the income of any child's share of his (the testator's) residuary estate for or towards such child's maintenance, and appointed L. and four other persons trustees of his will. L. remarried, but the infant children of her marriage with B. continued to live with her. On an application by the infants that the trustees might be ordered to provide for their maintenance pursuant to the above provision of B.'s will :—Held, that there was no absolute trust to so apply the whole or any part of the income, but only a discretionary trust, carrying an obligation to entertain and consider the question, and then a discretion in the execution of the duty ; and, consequently, that the court could not overrule the discretion of the four trustees, who, after having considered all the circumstances and their duty under the circumstances, had, in the exercise of an honest discretion, refused to make any allowance for maintenance out of the testator's estate ; but assuming the court had a discretion, it would exercise that discretion similarly to these trustees. *Tempest* v. *Camoys* (*Lord*) (infra, col. 504) and *Wilson* v. *Turner* (22 Ch. D. 521) considered and applied. *Bryant, In re, Bryant* v. *Hickley*, 63 L. J., Ch. 197 ; [1894] 1 Ch. 324 ; 8 R 32 ; 70 L. T. 301 ; 42 W. R. 183.

Power coupled with a Trust.]—Where a power is coupled with a trust or duty, the court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their bonâ fide exercise of it. *Burrage, In re, Burningham* v. *Burrage*, 62 L. T. 752.

—— **Power to Release.**]—A marriage settlement executed in 1843 contained a proviso that if the husband should survive the wife it should be lawful for the trustees at their option to withhold the income from him, and to appropriate it as they might think most proper for the benefit of him or his children. After the death of the survivor of the husband and wife, the property was to go as the wife should by deed or will appoint :—Held, that the power, being in the nature of a trust, could not be released. *Saul* v. *Pattinson*, 55 L. J., Ch. 831 ; 54 L. T. 670 ; 34 W. R. 561.

When a power coupled with a duty is conferred upon trustees to be executed by them at a fixed period, and after they have come to a judgment as to the conduct of the individual to be affected, they cannot divest themselves of the power or execute it until the time appointed ; nor can they enter into any anterior compact respecting it. *Weller* v. *Ker*, L. R. 1 H. L. (Sc.) 11.

Power of Revocation.]—A discretion vested in trustees of a settlement must be exercised in such a way as to preserve, not to defeat, the objects of the settlement. *Eland* v. *Baker*, 29 Beav. 137 ; 7 Jur. (N.S.) 956 ; 9 W. R. 444.

Power to Expend Hindoo Testator's Fortune in Religious Ceremonies.]—Where a Hindoo testator made two of his sons his executors, and after directing the performance of various religious acts by them, and that when they should do them they should give notice to their brothers, and that they should all of them perform the acts ; otherwise, whatever the executors might think proper they might do, and, should any one raise objections, they should be inadmissible :—Held, that the executors had not an unlimited discretion in expending the testator's fortune in religious ceremonies. *Mullick* v. *Mullick*, 1 Knapp, 245.

Sale of Leaseholds.]—A testator gave leaseholds, some of which were held on short terms, to two trustees, one of whom was his wife, upon trust for his wife for life, and after her death upon trust that the whole should be sold, and the proceeds divided between four persons. And he authorised his trustees, provided that they should deem it advisable, to sell his short leaseholds and invest the proceeds and allow his wife to receive the income during her life. The leaseholds were in a bad state of repair at the death of the testator ; the widow kept them up in the same state of repair, but declined to do more than this. The remaindermen applied for an order to oblige the tenant for life to maintain the leaseholds in such a state of repair as to satisfy the covenants in the leases, so as to avoid a forfeiture, or else to concur in selling the short leaseholds :—Held, that the court had no jurisdiction to interfere with the discretion of the widow, who had then become surviving trustee, and to order her to exercise her power of selling the leaseholds. *Tempest* v. *Camoys* (*Lord*) (infra) distinguished. *Courtier, In re, Coles* v. *Courtier*, 56 L. J., Ch. 350 ; 34 Ch. D. 136 ; 55 L. T. 574 ; 35 W. R. 85 ; 51 J. P. 117—C. A.

When a residue comprising leaseholds, freeholds and other property is devised in strict settlement, and a direction is given to the trustees to sell so much and such part as, in their sole discretion, they may think necessary for the

purpose of paying all the testator's debts, a presumption is raised against the conversion of such parts as the trustees may not think necessary to sell for the purpose mentioned, and the court will not interfere with the discretion of the trustees. *L. & N. W. Ry., In re*, 19 W. R. 220.

Power of Leasing.]—A testator gave to his trustees a special power of leasing at their absolute discretion; which formed part of a special scheme of management of his mansion house and estate for a limited period:—Held, in a suit for the execution of the trusts of the will, that the court would compel the trustees to exercise the power of leasing. *Tempest* v. *Camoys* (*Lord*), 21 Ch. D. 576, n.

Power of or Trust for Sale.]—Where real estate is devised to trustees in trust for sale, with a discretionary power to postpone the sale, the court will not interfere with a bonâ fide exercise of their discretion as to the time and mode of sale. *Blake, In re, Jones* v. *Blake*, 29 Ch. D. 913—C. A.

—— **Termination of.**]—A discretionary power of, or trust for, sale held not to have been put an end to during the life of the tenant for life by the fact that all the reversioners had acquired vested interests in their shares. *Biggs* v. *Peacock*, 52 L. J., Ch. 1; 22 Ch. D. 284; 47 L. T. 341; 31 W. R. 148—C. A.

—— **Discretionary Power to Sell Property.**]—Frederick Hobson, the elder, by his will, gave to three trustees (one of whom was his eldest son William) all his real and personal property, which included the proprietorship of a newspaper, on trust, to carry on the newspaper during the life of his wife, and they were annually to set apart and invest one-fourth of the profits of the paper as a reserve fund to meet emergencies, and to divide the remaining three-fourth parts of the profits of the same, and the income from his real and personal estate, into six equal parts for his wife and five children (all specially named), and in case of the death of any such child during the life of the wife, to pay the share of that child to the lawful issue of that child, or if none such, equally among the survivors of his children. And, after the decease of his wife "(or during her life if she and the majority of my children, and my trustees, shall deem it proper and expedient so to do), at the sole discretion of my trustees," to sell the real and personal estate and the newspaper, and divide the proceeds among the wife and children, bringing in the amount of the reserve fund as part; the shares to be for their absolute use and benefit immediately after such division. He declared that, "in case, under the above clause, it shall be agreed, or my trustees shall decide to sell" the paper, and if any of his sons should wish to carry on the same, such one should be entitled to purchase it at 500*l.* less than the market price. Till all the property was sold the trustees were to apply the income of the part unsold in the manner before expressed as to the income of the real and personal estate:—Held, that the will created not a mere power, but a trust, to sell, with a discretion in the trustees as to the manner and particular time of selling; that after the death of the wife the trust to sell became absolute; that on the happening of that event the shares of the survivors became absolutely vested; and (there being but three children of the testator then surviving) that William Hobson took an absolute vested interest in an equal third part of the testator's real and personal estate, including the newspaper. *Minors* v. *Battison*, 46 L. J., Ch. 2; 1 App. Cas. 428; 35 L. T. 1; 25 W. R. 27—H. L. (E.)

A testator devised his real and personal estate to trustees upon trust, that a piece of land, part of his real estate, might be absolutely sold as soon as conveniently might be after his death, in such mode as his trustees should decide upon, but in case it should so happen that at that time the complying with his will in that particular would be a sacrifice of property, then it was his will that the piece of land should not be disposed of until such time as his trustees should judge most beneficial for his estate; and when all his children attained the age of twenty-one, then he devised his real and personal estate to his children equally as tenants in common. All the children attained the age of twenty-one. The trustees did not sell the piece of land:—Held, that the trustees had a discretionary power and not a trust for sale, and that there was no constructive conversion of the piece of land; and that, consequently, the heir-at-law and not the next of kin of a deceased child was entitled to the share of such child. *Glover* v. *Heelis*, 32 L. T. 534; 23 W. R. 677.

Two trustees having power to sell the freehold property of an infant at the request of the guardians, and one trustee having declined upon such request to exercise the power of sale, the court refused to control the discretion of the trustees by ordering them to sell the estate—there being no absolute necessity for raising money and the existing income being sufficient to keep down the charges upon the estate—notwithstanding that the effect of the sale would be to increase very considerably the income of the property. *Camden* (*Marquis*) v. *Murray*, 50 L. J., Ch. 282; 16 Ch. D. 161; 43 L. T. 661; 29 W. R. 190.

Where absolute discretion has been given to trustees as to the exercise of a power, the court will not compel them to exercise it, but if they propose to exercise it, the court will see that they do not exercise it improperly or unreasonably. Where the power is coupled with a trust or duty, the court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their bonâ fide exercise of it. *Tempest* v. *Camoys* (*Lord*) 51 L. J., Ch. 785; 21 Ch. D. 571; 48 L. T. 13; 31 W. R. 326.

Power of Purchasing Real Estate and of Mortgaging.]—A testator gave his trustees a power to be exercised at their absolute discretion of selling real estates, with a declaration that the proceeds should be applied, at the like discretion, in the purchase of other real estates. He also gave them power at their absolute discretion to raise money by mortgage for the purchase of real estates. A suit having been instituted for the execution of the trusts of the will, and a sum of money, the proceeds of the sale of real estate, having been paid into court, one of the trustees proposed to purchase a large estate and to apply the fund in court in part payment of the purchase-money, and to raise the remainder of the purchase-money by mortgage of the purchased estate. The other trustee refused to

concur in the purchase:—Held, that the court could not control the dissentient trustee in the exercise of his discretion in refusing to make the purchase, or in refusing to exercise his power of raising money by mortgage for the proposed purpose. *Ib.*

Power to Delegate Authority.]—A testatrix devised freehold and copyhold estates to a trustee, upon trust to sell and divide the proceeds among her brothers and sisters living at her decease, equally or in other proportions, at the discretion of the trustee. She afterwards executed an unattested codicil, by which she directed that the interest of the trust property should be applied for the benefit of such of her brothers and sisters as were not otherwise provided for, and particularly towards the support of one of her brothers, P., who was of weak mind; and in case the trustee should not live to execute all the trusts, they were to be performed by such person as he should appoint. He executed a deed of appointment, naming other trustees, and giving directions as to the time for selling the trust estates and the application of the proceeds, and directed P. to be supported out of the income; and the proceeds of one estate to be divided equally among P.'s brothers and sisters who should be living at his death; and the proceeds of another estate to be divided at his death among such of his brothers and sisters as should most require it:—Held, that the appointment by the trustee, and the directions contained in it, were not altogether invalid; but the court directed, that, after providing for the comfortable support of P., the proceeds from both estates should be divided equally among all the testatrix's brothers and sisters who were living at the death of the testatrix, except P. *Hitch* v. *Leworthy*, 2 Hare, 200; 15 L. J., Ch. 235.

A trustee for the government of his own discretion may have regard to the directions of an unattested codicil, even as to the proceeds of real estate, so far as he is not restrained by the effect of the will. *Ib.*

Absolute Trust for Sale—Discretionary Power to Postpone—Trustees not Agreed.]—A testator devised and bequeathed all his real and leasehold estates to trustees upon trust for sale, and, after providing for investment of the proceeds and payment of the income thereof to his widow for her life, and afterwards for distribution among certain persons, he declared "that it shall be lawful for my trustees or trustee, with the consent of my said wife, during her life, to allow any part or parts of my said residuary estate to remain in their actual state of investment at the time of my decease; and that it shall not be necessary for them to sell my real or leasehold estates, or any part thereof, during the life of my said wife, unless she shall in writing request them so to do." The trustees were not agreed as to the expediency of a sale; but the remaindermen desired it. The testator's widow had not made any request in writing to the trustees:—Held, that it was not obligatory on the trustees to sell the real and leasehold estates during the life of the testator's widow, unless she should in writing request them so to do, or unless the trustees were both of opinion that a sale ought to take place; but that, if they did not so agree that a sale was desirable, and there was no such request in writing, then they could not be compelled to sell. *Lever, In re*, *Cordwell* v. *Lever*, 76 L. T. 71—C. A.

Discretionary Powers of and Trusts for Sale.] *See also* POWERS.

Personal Trust — Mala Fide Exercise.]—In case of personal trust under a will, the court never interferes, unless the trust be corruptly executed. *Potter* v. *Chapman*, Amb. 99; Dick. 146.

If testator's intention is clearly manifested on will to give an unlimited discretion to trustees, the court will not control it; but, in general, discretion must be held to refer to the limitations in the will. *Cowley* v. *Hartstronge*, 1 Dow, 361, 378—H. L. (Ir.) And see *Evans* v. *Ball*, 47 L. T. 165; 30 W. R. 899—H. L. (E.)

A complete miscarriage in the exercise of discretionary power on the part of trustees puts the subject-matter of the trust just as much under the cognizance of the court as if such discretion had been fraudulently exercised. *Feltham* v. *Turner*, 23 L. T. 345.

Direction in will, that executors shall pay annuity, unless circumstances render it unnecessary, impracticable and inexpedient, means unless in the opinion of the executors it shall become so, and the court has no control over such discretion, unless they act mala fide. *French* v. *Davidson*, 3 Madd. 396; 18 R. R. 253.

The court will control the discretion reposed in trustees by the provisions of a will when such discretion is dishonestly or improperly exercised. *Hodges, In re*, *Davey* v. *Ward*, 47 L. J., Ch. 335; 7 Ch. D. 754; 26 W. R. 390.

Where in a marriage settlement the trustees had power to apply the income of the settled fund for the benefit of the husband and wife and their children as they should "in their uncontrolled and irresponsible discretion think proper," the court, while expressing an opinion that the trustees were not acting judiciously, declined to interfere with their discretion, there being no proof of mala fides. *Tabor* v. *Brooks*, 48 L. J., Ch. 130; 10 Ch. D. 273; 39 L. T. 528.

Where the disposition of a trust estate amongst certain objects is made by the author of the trust to depend upon the discretion of the trustee, the court will, in a proper suit, inquire into the manner in which the trust has been administered, and require that such discretion shall be fairly and honestly exercised; and so long as it appears to be so exercised, the court will not deprive the trustee of the discretionary power which he possesses, or assume itself the exercise of that power; but to avoid a repetition of suits where there is reason to apprehend that the conduct of the trustee may be liable to question, the court may require the discretion of the trustee to be exercised under its view. *Costabadie* v. *Costabadie*, 6 Hare, 410; 16 L. J., Ch. 259; 11 Jur. 345.

Where a trustee has a discretionary power, the court will not interfere with the exercise of it, except where it is mischievously, or ruinously, or fraudulently exercised. The onus of showing that it has been so exercised rests on those who impeach the acts of the trustee. *Brittlebank, In re*, *Coates* v. *Brittlebank*, 30 W. R. 99.

And see *Lofthouse, In re*, ante, col. 495.

Consent to Diversion of Trust Funds.]—By marriage articles, a wife was authorised to divert the trust funds for the benefit of herself or children, provided the diversion be acceded to by

the trustees :—Held, that the trustees had a discretion to consent or not, that it must be bona fide exercised, and to justify their assent, the purpose for which the money was to be applied must, in their judgment, appear to be really for the benefit of the wife or children. *Byam* v. *Byam*, 19 Beav. 58 ; 24 L. J., Ch. 209 ; 1 Jur. (N.S.), 79 ; 3 W. R. 95.

Power of Renewing Leases.]—On demurrer : Held, that trustees to whom a discretionary power was given of renewing leases, had not an arbitrary power of renewal, but must renew when most for the benefit of the cestui que trust. *Milsington* v. *Mulgrave*, 3 Madd. 491.

Power of Selection.]—A testator directed his trustee to divide an estate amongst his, the testator's, first cousins as he, in his discretion, might think proper, by dividing the whole equally among them, or between two or more, or giving the whole to any one, for such estates and interests, and subject to such conditions and limitations as he should think proper :—Held, that the trustee had a power of selection only, and that if he appointed to more than one, he must do so equally among them. *Ward* v. *Tyrrell*, 27 L. J., Ch. 749 ; 4 Jur. (N.S.) 779.

A. makes two of his daughters his executrices, and directs them to distribute a sum of 400*l.*, and also the residue of his personal estate, among themselves, and their brothers and sisters, according to their needs and necessities, as they in their discretion should think fit. The court restrained the exercise of this power, by decreeing a double share to the eldest son and heir, looking upon him as a necessitous person. *Warburton* v. *Warburton*, 4 Bro. P. C. 1.

Matters of Fact and of Opinion.]—Where discretion of trustee is to be exercised on matters of fact, court will substitute a master, but not if upon matter of opinion or judgment. *Walker* v. *Walker*, 5 Madd. 424 ; 21 R. R. 320.

Power of Election to a Charitable Foundation.]—Where trustees are appointed to execute a trust according to discretion, they are not bound to state reasons for any conclusion at which they may arrive in fulfilling the duty imposed on them : their discretion must, however, be exercised with an absence of indirect motives, with honesty of intention, and with a fair consideration of the subject ; and the duty of the court generally is to see that the discretion of the trustees has been thus exercised, and not to deal with the accuracy of the conclusion at which they may have arrived. *Wilkes' Charity, In re*, 3 Mac. & G. 440 ; 20 L. J., Ch. 588.

If, however, in such cases, trustees think fit to state a reason for their conclusion, the court may consider the validity of the reason thus stated, and if it sees that the reason does not justify the decision, it may correct the decision accordingly. *Ib.*

Trustees of a charity were to select, out of certain parishes named, a lad to be brought up as a minister of the Church of England, his parents not being able to educate him for that situation, and in the event of no suitable candidate being found in the specified parishes, then to select a lad from any other parish. On a vacancy occurring the trustees chose C. J., a lad not of the specified parishes, and declared the election without stating any reasons for their choice. On a petition presented to set aside this election, and to obtain a decree that the trustees ought to have elected W. G., a lad of one of the specified parishes :—Held, that the trustees were right in abstaining from the statement of any reasons for the selection they had made, and that in the absence of any proof that they had exercised their discretion otherwise than fairly and honestly, the court had no jurisdiction to interfere on the question of the correctness of their decision. *Ib.*

The petition was dismissed accordingly, the petitioners paying their own costs, and the costs of the trustees being paid out of the funds of the charity. *Ib.*

Trust to Enforce Bond.]—L., on his marriage, gave a bond and warrant to the trustees of his settlement, upon trust, "when the trustees should think fit and expedient so to do," to levy the amount, and hold it for the uses of his settlement. No judgment on the bond was ever entered, and the amount of the bond was lost :—Held, that the discretion conferred upon the trustees was not absolute, but to be controlled by the court ; and that the circumstance that enforcing the bond might have been injurious to L.'s credit as a trader and have lost him various situations, did not justify them in omitting to enforce the bond. *Luther* v. *Bianconi*, 10 Ir. Ch. R. 194.

Power to Deal with a Fund—Refusal to Order Payment into Court.] — Although the mere existence of a discretionary power in trustees over a fund affords no reason why the court should not order payment of the fund into court, unless such payment into court would interfere with the exercise by the trustee of such discretion ; yet where it appeared that trustees were about in the due exercise of a discretionary power to deal with a fund, the court refused to order payment into court, although the trustees had not actually parted with the fund. *Talbot* v. *Marshfield*, 2 Dr. & Sm. 285.

Trust for Benefit of Children—Authority to Pay to Parent.]—A trust for the benefit of the children of A. with an authority to pay the trust funds over to their parent or guardian, does not empower the trustees to hand over the trust funds to A., without exercising any discretion in respect of his children's interest. *Gainsborough (Earl)* v. *Watcombe Terra Cotta Co.*, 54 L. J., Ch. 991 ; 53 L. T. 116.

A testator by his will gave certain benefits to A. and her children, on condition that on her marriage her intended husband should "well and effectually, and to the good liking of his trustees, settle or secure to be paid" to or for the issue of the marriage an equal sum. The intended husband, with the approbation of the trustees, gave his bond for the required amount :—Held, that the bond so approved was a satisfaction of the condition contained in the will. *Bacchus* v. *Gilbee*, 2 N. R. 502 ; 33 L. J., Ch. 23 ; 9 Jur. (N.S.) 838 ; 8 L. T. 714 ; 11 W. R. 1049—L.JJ.

Payment of Money to Woman past Child-bearing — Under Advice of Court.] — A woman, aged fifty-two, who had been a widow for twenty-four years, was absolutely entitled in default of children to a fund in the hands of trustees :—Held, on petition for advice, that the trustees were justified in paying it over to her.

Taylor's Settlement Trusts, In re, 43 L. T. 795; 29 W. R. 350.

Power of Conversion—Right of Tenant for Life before Conversion.]—A discretionary power to convert, if and when the trustees shall think fit, entitles the tenant for life to the enjoyment of the leasehold property in specie in the meantime. Where a full discretion is by the will given to the trustees, the rule in *Howe* v. *Dartmouth* (*Earl*) (7 Ves. 137; 6 R. R. 96) is not applicable, and the court will not interfere. *Leonard, In re, Theobald* v. *King*, 43 L. T. 664; 29 W. R. 234.

c. Exercise of Powers and Trusts by the Court.

Refusal of Trustees to Act.]—When trustees are directed to pay a certain sum to a person for life, and are empowered, according to their discretion, to invest the trust funds out of which that sum is to arise, but decline or neglect to act, and the assistance of a court of equity is sought in order to carry into effect the purposes of the will, the court will not, as a matter of course, exercise that discretion, but will only act on its established known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding. *Prendergast* v. *Prendergast*, 2 H. L. Cas. 195; 14 Jur. 989. Affirming 5 Hare, 171; 16 L. J., Ch. 125; 11 Jur. 865.

A testator gave his leasehold to trustees for legatees in succession, and upon trust, if the trustees "should think it proper or advantageous, as to those which were customarily or might be renewed," to endeavour to renew; and in order thereto, should, "if they, in their discretion, should think fit or expedient, but not necessarily or peremptorily," insure the lives of the cestuis que vie, and apply the insurance money in renewing, and out of the rents and profits raise sufficient money to renew so often as a renewal should be advisable; and he gave a power to mortgage for the same purpose:—Held, first, that this was an imperative trust, and that the trustees were bound to renew, if they could do so on reasonable terms; secondly, that if the trustees refused, the court would exercise it; and, thirdly, that they were bound to raise the necessary funds in such a mode as would be most beneficial to all parties interested. *Mortimer* v. *Watts*, 14 Beav. 616; 21 L. J., Ch. 169.

Bequest to trustees to apply the income or principal for the benefit of J., a widow, and of her three children, in such proportions as the trustees in their absolute discretion should think proper; but in case J. married again, her interest to cease. The trustees declined to act:—Held, that the fund must be divided equally between J. and her three children. *Izod* v. *Izod*, 32 Beav. 242; 9 Jur. (N.S.) 1216; 1 N. R. 462; 9 L. T. 191; 11 W. R. 452.

Where property is vested in trustees by an instrument in the Scotch form, and they have an absolute discretion given to them as to the distribution of it amongst a particular class, but decline to exercise that discretion, upon a suit being instituted to secure the property in this country the court will direct the distribution of the fund equally between the members of the class, such discretion not involving the construction of the instrument or the exercise of a discretion in the place of the trustees. *Little* v. *Neil*, 31 L. J., Ch. 627; 10 W. R. 592.

By a marriage settlement, the trustees were empowered to apply the income and capital of the trust estate for the use and benefit of such one or more of the wife and children of P., and the issue of such children, as the trustees in the exercise of a free and unlimited discretion should select and determine; but such provision for the wife to be by annuity depending on the life of P. The trustees declined exercising their discretion, and the court directed the fund to be divided equally between the wife and children and grandchildren, without making any provision as to an annuity to the wife. *Ib.* S. P., *Langmore* v. *Broom*, 7 Ves. 124.

Variation on petition of a scheme settled on further consideration for the administration of the estate of a testator according to a discretion reposed by him in his trustee, and exercised in their stead by the court. *Bennett* v. *Wyndham*, 4 De G. F. & J. 259.

Trust deed, whereby trustees were to give the residue of A.'s estate among his friends and relations, where they should see most necessity, and as they should think most just; though in other cases the court will not interpose where trustees declining to act have a power to distribute generally, according to their discretion, without any defined object, it was:—Held, that here a rule was laid down, the word "friends" meaning "relations," and the court could judge of the respective families' necessities and occasions by a reference to the master. *Gower* v. *Mainwaring*, 2 Ves. Sen. 87.

Joint Speculation in Land—Repudiation of Trust.]—A. and B., for whom land had been purchased by C., with a view to its being re-sold in building lots, on the land being conveyed to them, signed a paper writing purporting to be a memorandum of an agreement between them relative to the land, by which it was agreed that they should each advance half the purchase money, and receive interest on the same at 5 per cent., and that they were to have each one-third interest in the purchase and to reserve one-third of the profits arising therefrom for C., in lieu of his commission for purchasing, selling, surveying, valuing, and laying out the lands in lots, or any other services that might be required of him; but that it was clearly and distinctly understood that C. should have no power or authority whatsoever over the land, and that he should not be entitled to receive any compensation therefrom until the whole was sold and paid for. The land having afterwards greatly increased in value, A. and B. refused to recognise C.'s interest in the speculation, and offered him a money compensation for his services. Whereupon C., who had objected, from the first, to the clause in the memorandum which excluded him from all control, as inconsistent with the original terms for which he had verbally stipulated, filed his bill for an immediate sale of the land. And the court, being of opinion that the defendants, by repudiating the trust as to C.'s share, had devolved upon the court the discretion which they had by the memorandum reserved exclusively to themselves as to the time of sale, declared C. entitled to one-third, and referred it to the master to inquire whether it would be for the benefit of all parties that the land

should be sold. *Dale* v. *Hamilton*, 2 Ph. 266; 5 Hare, 369; 16 L. J., Ch. 397; 11 Jur. 574.

Disclaimer.]—Bequest of 20,000*l.* to executors, in trust to divide amongst testator's younger sons at twenty-five. Further bequest of 50*l.* to each of the sons annually, until their portions should be payable, and such a further sum as in the discretion of the trustees might seem necessary, but not to exceed 3,000*l.* These legacies were charged on the real estate. One of the executors having disclaimed on a bill filed by the other executor and the elder sons:—Held, that the whole 3,000*l.* should be raised. *Young* v. *Young*, 1 Jur. 840.

Non-agreement of Trustees.]—If trustees in whom a discretionary trust is vested do not concur, the court will distribute the trust fund among the parties equally. *Gray* v. *Gray* 13 Ir. Ch. R. 404.

Where one of two trustees in whom a discretionary trust is vested was resident in Australia, the court would not act on a scheme for the distribution of the fund, approved of by his solicitor in the suit and the other trustee. *Ib.*

Testator directed his residuary real and personal estate to be divided by his trustees, in such shares and at such times as they should think proper, amongst his nephews, A., B. and C., and his other nephews and nieces, sons and daughters of his late sisters, T. and H., who should be living at his decease, and the children of any other such nephews and nieces who, having died in his lifetime, had left issue. There were several children, and children of deceased children, both of T. and H., living at the testator's death. The trustees not being able to agree as to the division of the property, the court ordered it to be divided amongst the children, and the children of the deceased children of T. and H., per capita. *Tomlin* v. *Hatfeild*, 12 Sim. 167.

Power not Exercised.]—A husband gave his property to trustees for his wife for life, and at her death he directed his trustees to pay 1,000*l.* equally between and among such ten of the children and grandchildren and other descendants of W. B. and H. B., as his trustees should, in their uncontrolled discretion, after inquiry, judge most to require the benefit of such a bequest. The trustees died without making a selection. There were no descendants of W. B., and at the death of the testator's widow there were only six descendants of H. B. living:—Held, that the sum was divisible amongst them. *Carthew* v. *Enraght*, 26 L. T. 834; 20 W. R. 743.

A testator empowered his widow, with the assistance of his trustees, to sell his estates, and the money arising therefrom "she, his said wife, should and might divide and appoint among his children, as she should think fit and proper, or as she should direct and order by any will":—Held, that this was a trust for the children, and that, no valid appointment having been made by the widow, the children were entitled equally. *Grieveson* v. *Kirsopp*, 2 Keen, 653; 6 L. J., Ch. 261.

A settlement was made of a trust fund, in moieties, for the granddaughters of the settlor for life (subject to a prior interest in their mother), with remainder to their children as they should appoint, or in default equally. A power was interposed, that in the event of either of the granddaughters marrying with consent, the trustees might transfer to her part of the trust funds. One of the granddaughters married with consent, but the power was not executed by the trustees:—Held, that the execution of the power was discretionary with the trustees, and they not having exercised it, the granddaughter was not entitled to payment to her of any part of the capital of the trust funds. *Strickland's Trusts, In re*, 1 N. R. 164.

Charitable Gift.]—Charitable gift to the use of the reparation of the church of U., and to the use of the reparation of the bridge of U., and to the use of other things needful within the parish of U., at the discretion of the trustees, to be applied and distributed for ever:—Held, that the discretion applied to the third branch only, and that the three objects took equally. *Hall's Charity, In re*, 14 Beav. 115; 15 Jur. 940.

Payment into Court.]—A trustee having discretionary power as to the application of a trust fund, does not necessarily abandon it by paying the trust fund into court. *Landon's Trusts, In re*, 40 L. J., Ch. 370.

Suit for Administration.]—Where a discretionary trust is vested in trustees, the court will not interfere with the exercise of the discretion, if it be not capricious or improper, though a suit is instituted for the administration of the trust funds. *Gray* v. *Gray*, 13 Ir. Ch. R. 404.

Decree for Administration.]—After a decree in a suit for administration of trust funds the court will not without reason control a discretionary power given to the trustees by the instrument creating the trust. *Brophy* v. *Bellamy*, 43 L. J., Ch. 183; L. R. 8 Ch. 798; 29 L. T. 380—C. A.

The court having possession of a fund impressed with a trust, but subject to a discretion given to trustees, will execute the trust without regarding the discretion. *Coe's Trust, In re*, 4 K. & J. 199; 4 Jur. (N.S.) 158.

See also EXECUTOR AND ADMINISTRATOR—POWERS.

C. THE TRUSTEE.

1. *Appointment of Trustees by Settlor*, 514.
2. *Acceptance or Disclaimer by Trustees.*
   a. Acceptance, 515.
   b. Disclaimer, 517.
3. *Estate of Trustees.*
   a. When Trustees take Legal Estate, 520.
   b. Quantity of Estate of Trustees.
      i. General Principles, 527.
      ii. Direction to Pay Debts or Legacies, 530.
      iii. Power or Trust for Sale, 535.
   c. Devolution of Trust Estates.
      i. Devise in General Terms, 536.
      ii. Assignment or Specific Devise, 540.
      iii. Under Statute, 542.
4. *Retirement or Removal of Trustees.*
   a. Retiring Trustees.
      i. In General, 543.
      ii. Rights, 545.
      iii. Liabilities of Retiring Trustees, 545.
   b. Removal of Trustees, 548.

5. *Appointment of New Trustees.*
a. Under Powers in Settlement.
i. Who may Exercise Power, 551.
ii. Exercise of Power pending Suit, 559.
iii. Duty in Exercise of Power, 561.
iv. Who may be Appointed New Trustees, 561.
v. Number of New Trustees, 563.
vi. Rights and Liabilities, 565.
b. Under Statutory Powers, 567.
c. Appointment by the Court.
i. In General, 570.
ii. Under the Trustee Acts, 1850 and 1852...572.
iii. Under the Trustee Acts prior to 1850...580.
iv. Persons appointed New Trustees, 585.
v. Number of New Trustees, 589.
vi. Powers of New Trustees, 591.
vii. Separate Sets of Trustees, 594.
viii. Practice.
a. Present Practice, 595.
b. Under the Trustee Acts, 1850 and 1852...596.
c. Under the Trustee Acts prior to 1850...601.
ix. Costs, 603.

6. *Rights, Powers, Duties and Liabilities.*
a. In General, 604.
b. Management.
i. In General, 607.
ii. Power to Mortgage, 616.
iii. Power of Leasing, 621.
iv. Renewed Leases, 623.
v. Power of Sale, 625.
vi. Payments to and Receipts by Trustees, 635.
vii. Preservation, Repair, and Improvement of Premises, 636.
viii. Allowance of Payments and Advances, 644.
ix. Notice of Assignments, 647.
x. Remuneration, 650.
xi. Application for Advice or Opinion of the Court.
a. Under the General Jurisdiction of the Court, 652.
b. Under the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 30. Repealed by Trustee Act, 1893...654.
c. Investment of Trust Funds.
i. In General, 658.
ii. Discretion of Trustees, 662.
iii. Express Powers of Investment with Consent, 664.
iv. Advancement of Trust Funds to Husband.
a. Express Power, 667.
b. Concurrence of Wife, 669.
v. Purchase of Land, 673.
vi. Mortgages.
a. Freeholds, 680.
b. Leaseholds, 691.
c. Railway Mortgages or Debentures, 692.
d. Stock Mortgages, 692.
vii. Other Securities.
a. Loan on Personal Security, 693.
b. Exchequer Bills, 695.
c. Foreign Bonds or Securities, 696.
d. Shares of Public Companies, 698.
e. South Sea Stock, 701.
viii. Non-investment by Trustees in Specified Securities, 701.
ix. Improper Sale of Stock, 704.
x. Funds in Court and Investment with Sanction of Court, 705.
xi. Power to vary Investments, 712.
7. *Indemnity, Lien and Reimbursement.*
a. Indemnity Clause, 714.
b. Express Agreements by Cestuis que Trust to Indemnify Trustees, 717.
c. Right of Trustee in other Cases, 719.
d. Statutory Power of Court to Impound Interest of Beneficiary, 731.
8. *Release*, 733.
9. *Contribution from Co-Trustee*, 737.
10. *Solicitor-Trustee*, 742.
11. *Liabilities of Trustees for Breaches of Trust.*
a. Nature of Breach of Trust, 746.
b. Personal Liability of Trustees.
i. In General, 750.
ii. Trustees de facto, 756.
iii. Deceased Trustees, 758.
iv. Loss of Trust Property, 763.
v. Negligence in Getting in Trust Property, 763.
vi. Payment of Trust Moneys to Persons not Entitled, 767.
vii. Liability for Interest or Profits.
a. Interest, 771.
b. Rate of Interest, 773.
c. Compound Interest and Rests, 776.
d. Profits Accruing from Trust Property, 778.
viii. Title Deeds, 786.
c. Liability of Trustees for Acts of Co-Trustees.
i. In General, 787.
ii. Leaving Trust Funds under Sole Control of Co-Trustee, 789.
iii. Trustee Joining in Receipts, 795.
12. *Agents Employed by Trustees.*
a. Rights of Trustees in Respect of Appointment, 796.
b. Liability of Trustees for Acts of Agents.
i. In General, 797.
ii. Bankers, 799.
iii. Brokers, 801.
iv. Solicitors, 802.
c. Personal Liability of Agents.
i. In General, 805.
ii. Accountants, 806.
iii. Stockbrokers, 807.
iv. Bankers, 807.
v. Solicitors, 810.

1. APPOINTMENT OF TRUSTEES BY SETTLOR.

Corporation.]—Corporation may be trustees. *Att.-Gen.* v. *Lauderfield*, 9 Mod. 287.

Infant.]—Presumption against intending an infant to be a trustee. *King* v. *Denison*, 1 V. & B. 278; 12 R. R. 227.

Devise to Persons for such Purposes as Major Part think fit.]—A testator devising an estate to persons whom he names trustees, for such purposes as they, or the major part of them, shall think fit, gives no benefit to them, but is an authority only, by appointing a quorum out of them. *Cook* v. *Duckenfield*, 2 Atk. 568.

Trustee and Executor of Will.]— Where a testator constitutes a person "trustee and executor of his will," that does not authorise the person to act as a trustee jointly with other persons to whom property has been given by the will on particular trusts. *Sidebotham* v. *Watson*, 11 Hare, 170 ; 1 W. R. 229, 303.

A testatrix bequeathed funds standing in the name of A., her trustee, to B., C., and D. (her executors), upon certain trusts, and she directed A., within six months after her death, to execute a deed, declaring that he, his executors, &c., would "thenceforth stand and be possessed" of the funds upon the trusts declared by her will : —Held, that A. was a co-trustee of the funds under the will, and could not safely transfer them to B., C., and D. without the sanction of the court. *Iredell* v. *Iredell*, 18 Beav. 202.

Power of Court on Application of Settlor to Appoint a Judicial Trustee.] — *See* Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 1.

Revocation of Appointment.]—*See* WILL.

2. ACCEPTANCE OR DISCLAIMER BY TRUSTEES.

a. Acceptance.

Proving Will.]—Where personal property is bequeathed to the executors, as trustees, the probate of the will is an acceptance of the trusts. *Mucklow* v. *Fuller*, Jacob, 198 ; 23 R. R. 29.

Lapse of Time without Disclaimer.]— A person to whom, with others, a term of years had, in the year 1810, been bequeathed in trust, and who was appointed, with the other trustees, an executor of the will, was in 1844 presumed to have accepted the trust, though he had never acted in it ; the will having been proved by the other executors, saving his right, and he never having disclaimed. *Needham, In re*, 1 Jo. & Lat. 34 ; 6 Ir. Eq. R. 557.

Trustee of Two Trusts Executing Deed relating to One.]—A testator gave a legacy of 1,100*l.* to two persons, upon certain trusts, for the benefit of his daughter and her children ; he then gave a messuage to the same persons, upon trust for his widow for her life, and after her decease to apply the rents for his grandson H. during his minority, and to convey the messuage to H. at twenty-one ; and he appointed his widow sole executrix. At the time of the widow's death, H. had attained twenty-one ; and afterwards, by deed reciting the death of the widow, and that, in her lifetime, H. attained twenty-one, "whereby it became unnecessary for them to act in the trusts declared by the will, and in fact they never intermeddled therein ; but, inasmuch as the legal estate in the said messuage was still outstanding in them by virtue of the recited will, they had consented, at the request of H., to convey such estate to him," the two persons named in the deed conveyed the devised messuage to H. :—Held, that the execution of this deed was of itself sufficient evidence that the persons who executed it had accepted and acted in the trusts of the will. *Urch* v. *Walker*, 3 Myl. & Cr. 702 ; 7 L. J., Ch. 292 ; 2 Jur. 487.

Execution of Trust Deed.]—A trustee who has duly executed a trust deed must, in the absence of special circumstances, be bound by that indication of his acceptance of the trust, and will not afterwards be heard to say that he thought he was merely signing as a witness. *Jones* v. *Higgins*, 35 L. J., Ch. 403 ; L. R. 2 Eq. 538 ; 14 L. T. 126 ; 14 W. R. 448.

Interference with Subject-matter with Notice of Appointment.]—A trustee, with notice of his appointment as such, interfering with the subject-matter, cannot repudiate the trust, and say he acted merely as factor or agent. *Conyngham* v. *Conyngham*, 1 Ves. Sen. 522. And see *Lowry* v. *Fulton*, 9 Sim. 115 ; 8 L. J., Ch. 314 ; 3 Jur. 454.

Effect of Acceptance.]—A person who has accepted property as a trustee, and held it as such, is not at liberty to dispute the title of his cestui que trust, though that title may be doubtful. *Neligan* v. *Roche*, Ir. R. 7 Eq. 332.

—— **Evidence of Settlor's Title to Appropriate Fund.**]—An executrix, by a deed, reciting that she intended to appropriate a part of her testator's assets in payment of a debt due from him to her, declared trusts of the fund intended to be thus appropriated. She died without making the appropriation, which was made after her decease by her executors. New trustees of the deed, subsequently appointed, executed a declaration of trust (contained in the deed appointing them), whereby they declared that they would hold the fund upon the trusts. On their inquiring, before their appointment, for evidence in verification of the recital as to the existence of the debt from the testator to the executrix, none could be discovered :—Held, by Turner, L.J. (dissentiente, Knight Bruce, L.J.), that the trustees could not be compelled to execute these trusts without further evidence of the settlor's title to appropriate the fund. *Neale* v. *Davies*, 5 De G. M. & G. 258 ; 23 L. J., Ch. 744 ; 2 Eq. R. 530 ; 2 W. R. 358.

Transfer into Joint Names.]—A person who has accepted, and agrees to permit the transfer of trust stock from the name of the surviving executrix, under the will, into their joint names, and at the same time obtains a copy of the will, is thereby constituted a trustee of the stock, and is not merely the agent for the executrix. And so, where the co-transferee acts with the privity of all parties, in the execution of the trusts of the will, though no declaration of trust has been executed, he is a trustee, and not removable at the pleasure of the persons interested in the trust property. *Cocks* v. *Smith*, 2 L. J., Ch. 205.

Partial Acceptance of Trusts.]—In 1823, E., by his consent, was with X. and Z. named a trustee of a marriage settlement, which comprised various sums. The deed was executed by the co-trustees of, but not by, E. X. died in 1826 insolvent. In 1829 an account was rendered which showed the sums subject to the trusts of the settlement, and that Z. had received a sum belonging to the trusts. Z. afterwards, as the administrator of his father, became possessed of a large sum of residue, not administered by the executrix, and trust funds, part of this residue, he applied to his own use ; but in 1830 he, by request, invested a portion of the residue in the names of himself and E., upon the trusts of the settlement, as such trustees thereof, and indorsed

a memorandum thereon to the effect that it was so much of the within-mentioned and assigned sums as were subject to the trusts thereof. This memorandum Z. signed previously to 1842. In 1845 E. made inquiries of one of the cestuis que trust relating to the trusts vested in him, and required to be satisfied as to the property comprised in the settlement. He was then informed that he was a trustee thereof, and a receipt of the stock bought in his and Z.'s names was inclosed. This receipt E. retained; and in March, 1847, he for the first time saw the settlement, and on that occasion he signed the memorandum indorsed thereon. Z. died in 1852 insolvent. E. received the dividends on the stock, and regularly paid them over to the tenant for life. In 1854 inquiries were made, which resulted in a bill being filed, praying that an account might be taken of all sums which had been received by E., either alone or jointly with his co-trustees, or which, without his wilful neglect and default, might have been received; and that E. might be decreed to make good all losses which had been sustained, particularly so much of the property as was subject to the trusts of the settlement:—Held, that E.'s liability must be confined to the amount comprised in the memorandum signed by him; and that, so far as the bill sought to make him liable for more than that amount, it must be dismissed. *Mulzy* v. *Edge*, 2 Jur. (N.S.) 80; 4 W. R. 213.

b. Disclaimer.

By Instrument.]—As to disclaimer of office of trustee by simple instrument, and disclaimer by conveying to other trustees. *Nicloson* v. *Wordsworth*, 2 Swanst. 369; 19 R. R. 86. And see *Crewe* v. *Dicken*, 4 Ves. 97.

Semble, disclaimer in court on petition not sufficient to divest an estate; disclaimer should be by deed or of record. *Ellison's Trust, In re*, 2 Jur. (N.S.) 62.

A trustee of a will, who had formally renounced that character by a deed which purported (but ineffectually) to appoint a successor, being applied to eleven years afterwards to join with his original co-trustee in a deed purporting to be an exercise of a discretionary power, which could only be exercised by the two trustees of the will for the time being, refused to do so without an indemnity, but ultimately, on being indemnified, executed the deed:—Held, that he could not resume his position as trustee for such a purpose, and that, even if he could, his execution of the deed under the circumstances stated, could be regarded only as a mere formal act, and not as an exercise of that discretion which was essential to a due execution of such a power. *Lancashire* v. *Lancashire*, 2 Ph. 657; 17 L. J., Ch. 270; 12 Jur. 363.

Parol.]—Trustee named may disclaim by parol, and then he need not be a party in any conveyance of the legal estate. *Bingham* v. *Glamorris* (*Lord*), 2 Moll. 253.

Declining to take out Probate of Will.]—By the marriage settlement of A. a sum of 8,000*l.* stock was settled upon himself and his intended wife for their joint lives and the life of the survivor, and then for the benefit of their children; and if no children, in trust for the settlor, his executors, administrators, and assigns. After the marriage A. made his will, and thereby gave his real estate to P. and his heirs upon the same trusts, as near as could be, as were declared of the stock by the settlement, and after giving certain pecuniary legacies, he bequeathed all the rest of his moneys and property of any kind to P., his executors, administrators, and assigns, upon trust and for the benefit of the objects of his settlement as he might think best. A. died, leaving his widow, but no issue of the marriage. P. declined to take probate of the will:—Held, that whether the course taken by P. had or had not the effect of depriving him of the discretionary power given him by the will, he could not in the events that had happened, exercise that power so as to affect the rights of the parties interested under the will and settlement, and that the effect of these instruments was to give a life interest to the widow in the real and residuary personal estate impeachable of waste as to the real estate, with the remainder as to the real estate to the testator's heirs, and as to the residuary personal estate to his next of kin. *Ford* v. *Ruxton*, 1 Coll. C. C. 403.

Opinion of Counsel.]—A party, named trustee without his sanction, and called on to disclaim:—Held, authorised to take the opinion of counsel as to the necessity of executing a disclaimer. *Tyron, In re*, 7 Beav. 496.

Trustees Disclaiming — Agent of Trustee Accepting.]—If one of two persons named trustees and executors disclaims and renounces, and afterwards possesses himself of assets as the agent of the other, who has accepted the trust and proved the will, he does not thereby become accountable as a trustee and executor, and ought not to be made a party to a suit for the administration of the estate. *Dove* v. *Everard*, 1 Russ. & M. 231; Taml. 376. S. P., *Lowry* v. *Fulton*, 9 Sim. 115; 8 L. J., Ch. 314; 3 Jur. 454; and *Stacey* v. *Elph*, 1 Myl. & K. 195; 2 L. J., Ch. 50. But see *Montgomery* v. *Johnson*, 11 Ir. Eq. Rep. 476.

—— Not proper Party to Suit to set aside Will.]—A trustee in a will, who released and never acted, ought not to be made a party in a suit to set aside the will on the ground of fraud, and therefore need not answer as to the fraud alleged. *Richardson* v. *Hulbert*, 1 Anstr. 65.

—— Assent to Marriage not Necessary.]—Testatrix bequeathed a chattel property to her daughter on attaining twenty-one, or on day of marriage, "provided that if such marriage be had without the consent of her executors after named, or the survivor of them," then that the property should be vested in the said executors, in trust for her daughter for life, and afterwards for her children, with a limitation over to C. D. The testatrix appointed H. H., P. V., and J. C. her executors. P. V. alone proved the will. The daughter married while under age, with the assent of P. V., and J. C. executed her marriage settlement as a trustee:—Held, that the assent of H. H., who never acted in the trusts of the will, was unnecessary, the power to consent being vested in him in right of his office of executor only. *Boyce* v. *Corbally*, Ll. & G. t. Plunk. 102.

Lease with Option of Purchase—Disclaimer by Devisees in Trust of Lessor—Notice to Infant Heir.]—Land was demised by A. to B. and C. for twenty-one years, with an agreement, that in case B. and C., or either of them, their executors,

administrators, and assigns, should, at any time within the term, wish to purchase the reversion at a stipulated price and should give to A., his heirs or assigns, six months' notice in writing, they should be entitled to be the purchasers of the premises at the price mentioned. A. died within the term, and devised his real estates to trustees. The trustees disclaimed the trusts; and the estates descended upon D., an infant heir-at-law of A. Notice was served upon D. and his guardian by the lessees of their desire to purchase the property pursuant to the option reserved in the lease:—Held, that as A.'s assigns had disclaimed, the notice to purchase was properly served upon the heir, and that a valid contract was thereby constituted. *Woods* v. *Hyde*, 31 L. J., Ch. 295; 6 L. T. 317; 10 W. R. 339.

Costs of Refusal to Execute Disclaimer of Derivative Interest.]—If a party, having a derivative interest under a trustee, refuses to execute a formal disclaimer to the trust property upon the appointment of a new trustee, he will be made to pay the costs of an application to the court. *Primrose, Ex parte*, 26 L. J., Ch. 666; 3 Jur. (N.S.) 899; 5 W. R. 508.

Legal Estate — Disclaimer by Conduct.]—Where land is devised to a trustee, conduct which amounts to a disclaimer of the office of trustee will also amount to a disclaimer of the legal estate. *Birchall, In re, Birchall* v. *Ashton*, 40 Ch. D. 436; 60 L. T. 369; 37 W. R. 387—C. A.

Settlement not communicated to Trustee until after Settlor's Death.]—A settlement whereby lands are assured to a trustee to the use of the settlor for life, and afterwards in trust for volunteers, and which is not communicated to the trustee until after the settlor's death, is valid, notwithstanding the disclaimer of the trustee. A power to appoint new trustees contained in the indenture is therefore exercisable. *Jones* v. *Jones*, 23 W. R. 1.

Deed of Disclaimer.]—Where a testator, seised in fee, devised to three trustees for certain trusts, and one disclaimed by deed:—Held, that such disclaimer was, when matter of record, sufficient to vest a complete title in the two others, and enable them to support a distress for rent upon the premises devised. *Begbie* v. *Crook*, 2 Bing. (N.C.) 70; 2 Scott, 128; 4 L. J., C. P. 264.

Quære, whether a devisee in trust can disclaim by deed after a previous assent to the devise in words. *Doe* d. *Chidgey* v. *Harris*, 16 M. & W. 517; 16 L. J., Ex. 190.

A devisee in trust, on the reading of the will after the testator's death, stated that he ought to have had 5*l.* for being trustee:—Held, that these words were so ambiguous that they ought not to have been left to the jury as evidence of his assent to the devise. *Ib.*

—— **Signing Receipt for Legacy—Loss of Trust Fund.**]—By her will a testatrix, who died in 1866, directed her executors to pay to A. and B. a certain sum of money to be held in trust for the plaintiff, who was at that time an infant. A. and B. gave to the executors of the will a receipt for the legacy on an inland revenue form for presentation to the inland revenue authorities. The legacy was paid to A. and B. by a crossed cheque drawn in favour of both of them, but whether payable "to order" or "to bearer" was not in evidence, nor was there any evidence that either of them had indorsed the cheque. In 1876 A., who was the father of the plaintiff, died in insolvent circumstances. In 1881 B. executed a deed-poll purporting to disclaim the trusts of the will. In 1892 the plaintiff for the first time became aware of the legacy, and called upon B. to account for the same. B. alleged that he had never accepted the trusts of the will, and that the receipt given by him was not intended to operate as an acceptance of the trust, and that he had never received nor in any way dealt with the legacy:—Held, that, although the rule was that a trustee ought to execute a disclaimer without delay, yet there was no rule that a disclaimer must be executed within any particular time; that the evidence showed that B. did not mean to accept the trust, notwithstanding the fact that he signed the legacy duty receipt as well as A.; and that, although it was not necessary for B. to have done that if he were not a trustee, yet the court would be straining matters too far if it were to hold that that act alone constituted B. a trustee. *Jago* v. *Jago*, 68 L. T. 654.

Trustee of Will comprising Property in England and Abroad—Disclaimer as to English Property only—Validity.]—A trustee of a will comprising property in England and abroad cannot disclaim the trusts relating to the property in England only, and unless he disclaims the trusts in toto he remains a trustee for all purposes. *Lord and Fullerton, In re*, 65 L. J., Ch. 184; [1896] 1 Ch. 228; 73 L. T. 689; 44 W. R. 195—C. A.

—— **Appointment of New Trustees under Trustee Acts.**]—*See* post, 5.

—— **Exercise of Powers of Sale where Trustee Disclaims.**]—*See* POWERS.

—— **Costs of Disclaimer.**]—*See* post, I. 8. *c*.

3. ESTATE OF TRUSTEES.

a. When Trustees take Legal Estate.

Devise by Implication.]—A testator devised property to A. for life, remainder to B. and C. in fee upon trusts, and appointed A., B., and C. his executors. By a codicil he revoked the appointment of B. to be a trustee and executor, and appointed A., C., and D. trustees and executors, as fully and effectually to all intents and purposes and in all respects as if they had originally by his will been appointed to be the trustees and executors thereof:—Held, that the legal estate passed to A., C., and D. *Turner, In re*, 2 De G. F. & J. 527; 30 L. J., Ch. 144; 7 Jur. (N.S.) 114; 3 L. T. 573; 9 W. R. 174.

Testator, by will, gives annuity to wife, and legacies to children, knowing he has not sufficient personal estate. He says nothing of his real estate, but appoints certain persons trustees of the inheritance for the execution of his will. Semble, the trustees took an interest in the real estate for the purposes of this will. *Trent* v. *Trent*, 1 Dow, 102. *S. C.*, nom. *Trent* v. *Hanning*, 10 Ves. 495.

Construction in favour of vesting the legal estate in trustees for effecting a limitation to the separate use of a married woman. *Hawkins* v. *Luscombe*, 2 Swanst. 891.

Effect of limitation to trustees and their heirs to the use of them and their heirs in conferring the legal estate on the trustees. *Id.* 392.

Trust to Pay or Permit to Receive Rents.]—Limitation to trustees to stand seised and receive rents and profits to the use of A., is an estate executed in A. *Curwardine* v. *Curwardine*, 1 Eden, 36.

Lands limited to A. in trust for a feme covert, and that A. should receive the rents and apply them as the feme, whether sole or covert, should direct. This is a trust, and not a use, executed by the statute. *Nevil* v. *Saunders*, 1 Vern. 415.

Although a devise to A. and B. upon trust to pay rent to C., or permit him to receive the same during his life, confers a legal life estate on C., a devise to A. and B. upon trust to pay the rents to A. (or B.) or permit him to receive the same during his life, only confers an equitable life estate. *Doe* v. *Biggs* (2 Taunt. 109; 11 R. R. 533) considered. *Tanqueray-Willaume and Landau, In re*, 51 L. J., Ch. 434; 20 Ch. D. 465; 46 L. T. 542; 30 W. R. 801.

Devise to trustees and their heirs during the life of A. B., in trust to lay out the rents and issues thereof in government securities, until A. B. should attain twenty-one, and after that, to suffer her to receive and take the profits during her life, not subject to the debts or control of her husband, her receipt to be a sufficient discharge; and after her decease, to her heirs. Upon a suit for specific performance of an agreement for the purchase of part of the estates, the question was whether A. B. took the legal, or only an equitable interest for life in the property, so as to bring the title within the rule in *Shelley's Case* (1 Co. Rep. 93, b.). The Chief Baron would not compel the defendant to accept the title. *Playford* v. *Hoare*, 3 Y. & J. 175.

Contingent Remainder — Provision for Maintenance.]—A testator devised lands to trustees, their heirs and assigns, to the use of A. for life, with remainder to the use of such child or children of A. as should attain twenty-one, as tenants in common in fee, with remainders over. A. was directed to repair and insure the messuages forming part of the devised estates, and in case of his default the testator authorised his trustees to receive the rents, and thereout effect such repairs and insurance. The testator empowered his trustees to apply the income to which any infant devisee should be presumptively entitled towards his maintenance or for his benefit during his minority. By a codicil of even date with the will the testator devised land which he had contracted to sell to a railway company unto and to the use of his trustees, their heirs and assigns, upon trust to complete such contract. A. died, leaving four children, one of whom, the plaintiff, had not attained twenty-one at his father's death:—Held, that, having regard to the provision for maintenance, the limitation in favour of the children of A. was equitable, and that the contingent devise to the plaintiff therefore took effect. *Berry* v. *Berry*, 47 L. J., Ch. 182; 7 Ch. D. 657; 38 L. T. 474; 26 W. R. 327.

Devise of Freehold Messuage together with Mill Machinery "and other Fixtures."]—By his will a testator devised a certain freehold messuage, mill, tenement, and closes of land, together with the millstones, mill machinery, threshing machine, &c., "and other fixtures," to two trustees, their heirs and assigns, upon trust for A. J. T. for life, upon the express condition that the premises should be kept in good repair, and insured in the names of the trustees, and after the death of A. J. T. in trust for the children of A. J. T. at twenty-one or marriage:—Held, that upon the construction of the will, the trustees had no legal estate vested in them. *Tudball* v. *Medlicott*, 59 L. T. 370; 36 W. R. 885; 52 J. P. 659.

Interest of Executors Commensurate with Objects of Will.]—A testator, after directing his debts to be paid, and setting apart certain sums to provide annuities for his two sons, devised and bequeathed all his real and personal estate to his four daughters, to be equally divided between them: Provided as follows—that the share of his wife should be divided after her death between his four daughters or the survivors and their children; and the testator appointed his wife and T. Davies, his executors, to act jointly in carrying out all the intentions of his will, and to invest his daughters' shares for their benefit and the benefit of their children:—Held, upon an application under the Vendor and Purchaser Act, that the legal estate in freeholds was vested in the executors who could make a good title to a purchaser. *Davies* to *Jones and Evans*, 52 L. J., Ch. 720; 24 Ch. D. 190; 49 L. T. 624; 32 W. R. 460.

Interim Rents.]—A testator devised a freehold to trustees for the benefit of E. for life for her separate use, and after her death upon trusts for such of the children of E., as being sons, should attain twenty-one, or being daughters, should attain that age or marry. E. died after the testator, leaving an infant daughter who did not marry before attaining twenty-one:—Held, that the legal estate was in the trustees, and the daughter of E. took the property on attaining twenty-one, but the interim rents went to the residuary devisee. *Eddels' Will, In re*, 40 L. J., Ch. 316; L. R. 11 Eq. 559; 24 L. T. 223; 19 W. R. 815.

On a petition for payment out of the interim rents which had been paid in under the Trustee Relief Acts, the court decided that the legal estate was in the trustees. *Ib.*

Deed—Estate Pur Autre Vie or in Fee.]—Real estate was assured by deed unto and to the use of a trustee, his heirs and assigns, for a married woman for life to her separate use, and from and after the determination of that estate to stand seised thereof to such uses and upon such trusts as she should by will appoint, and in default of appointment to the use of the heirs and assigns of the married woman:—Held, that the legal fee was vested in the trustee; that all the subsequent limitations were merely equitable, and that, therefore, under the rule in *Shelley's Case* (1 Co. Rep. 93, b.) the wife took an equitable estate in fee, and could with the concurrence of the trustee after her husband's death, make a good title in fee to the property, and one which the court would force on an unwilling purchaser. Distinction in construction of limitation in deeds and will. *Curtis* v. *Price* (12 Ves. 89) commented on. *Cooper* v. *Kynock or Kynoch*, 41 L. J., Ch. 296; L. R. 7 Ch. 398; 26 L. T. 566; 20 W. R. 503.

Devise of Freeholds and Copyholds—Subsequent Appointment by Deed.] — Devise of freehold and copyhold surrendered to the use of the will to trustees and the survivor and his heirs in trust to pay debts and legacies, an annuity to the testator's son, and for other purposes; then on the marriage or attaining twenty-one of his granddaughter to convey to her for life, remainder to trustees, &c., remainder to her first and other sons in tail male, remainder to her daughters in tail general, remainder as he should by deed appoint. The next day by deed poll he directed his trustees, immediately after the death of his granddaughter, and failure of her issue, to convey all his real estate to the first and other sons of his son in tail male, then to his daughters in tail general, then to the right heirs of the survivor of his trustees, his heirs and assigns for ever. No conveyance was made. The granddaughter died without issue; then the son died without issue, leaving one trustee surviving. Under the will alone the trustees have a mere legal estate, and all the equitable interest beyond the express dispositions would result to the son as heir; but the deed was considered as a codicil sufficiently executed to pass copyhold, but not freehold. The last limitation is a contingent remainder to the heir of the surviving trustee, and a conveyance was directed with an insertion of trustees to support that remainder as to the copyhold; the rents and profits of the copyhold during the life of the trustee, and all the freehold, to go to the heir of the testator. *Habergham* v. *Vincent*, 2 Ves. 204; *S. C.*, nom. *Vincent* v. *Stansfeld*, 4 Bro. C. C. 353.

Devise and Bequest of "Estate and Effects."] —A testator devised and bequeathed his "estate and effects" to trustees, their heirs, executors, and administrators, upon trust to sell his trade and the goodwill thereof, and get in and convert all such of his "personal estate" as should not consist of money, and should stand possessed of the money arising from such sale and "the residue of his estate and effects" upon trust to invest, and other trusts:—Held, that the real estate passed to the trustees, but that the beneficial interest resulted to the heirs of the testator. *Longley* v. *Longley*, 41 L. J., Ch. 168; L. R. 13 Eq. 133; 25 L. T. 736; 20 W. R. 227.

Devise of Legal Fee to Trustees—Descent not Broken.]—A. devised real estate to three trustees, one of whom was his heir-at-law, and he directed that during the lives of his wife, his daughters, and their husbands, the income should be applied for the benefit of those persons and their children, and when those persons should be dead the estate should be sold and divided among his grandchildren. This devise of the corpus had been held to fail for remoteness:—Held, that assuming the legal fee to have passed to the trustees, the descent was not broken so as to create a new reversion, but that the heir-at-law took the old estate; and that the character of this equitable reversion was not affected by the devise of the legal fee to the heir as trustee. *Buchanan* v. *Harrison*, 1 J. & H. 662; 31 L. J., Ch. 74; 10 W. R. 118.

Devise on Trust to Receive Rents and Pay Maintenance.]—A testator devised and bequeathed his real and personal estate to his wife and three other persons, and their heirs, executors, &c., for ever, upon trust for his wife to receive the rents for life; and after her decease, upon trust to pay and divide the rents among his children as they attained twenty-one, and after their decease, to pay the principal of their respective shares unto their legal representatives, their executors, administrators, and assigns. He gave power to the trustees to sell, with power of maintenance out of the rents, and advancement out of the principal of their shares; and in case any of his freehold estates should not be sold by his said trustees, then, from and after the decease of his said children, he devised the same unto their respective heirs and assigns, as tenants in common. And he directed that the receipts and conveyances of his said trustees to any purchasers of any part of his estate and effects should be good discharges and assurances:—Held, that the trustees took the legal fee, and that the children were entitled to equitable estates for life, with equitable remainders to their heirs, which united, gave them equitable estates in fee-simple. *Reynell* v. *Reynell*, 10 Beav. 21.

Legal Estate devised to Children—Power to Trustees to Sell in uncertain Event.] —B. desired the residue of his real and personal estate to be divided into eleven equal parts, and he devised and bequeathed to each of his eleven children, his or her heirs, executors, administrators, and assigns, one of the parts. He declared that the share or shares of his daughters should be for their separate use; and as it might probably happen that the arrangements made by his will could not be carried into effect without the sale of the whole, or at least a great portion of his real and personal estate, he recommended great caution in the sale, for he believed that his landed property was daily increasing in value, and he nominated G. and M. executors and trustees of his will for duly carrying the disposition of all the property therein alluded to into proper effect:—Held, that this was not sufficient to divest a legal estate previously devised to children, and to vest it in the trustees, although the words might give a simple power to sell, in an event which might possibly, though not certainly, happen. *L. & S. W. Ry.* v. *Bridger*, 10 Jur. (N.S.) 650; 10 L. T. 689; 12 W. R. 948.

Bare Trustee—Expiration of Trust—Right of Bare Trustee to call for Conveyance.]—A testator being, at the date of his death in 1868, equitably entitled to a freehold house in fee-simple in remainder, devised and bequeathed all his real and personal estate to trustees, upon trust to pay and permit his wife to receive the annual income during widowhood, and then upon trust for his illegitimate son absolutely; and he empowered his trustees, with the consent of his wife during her life, and, after her decease and during the minority of his said son, in their discretion, to change investments and to sell any part of his real or personal estate. The illegitimate son died intestate and without issue in 1880. The widow died in 1886. The remainder fell into possession in 1889:—Held, that, on the death of the widow, the trustees became bare trustees for the illegitimate son, and that, consequently, the surviving trustee was not entitled to call for a conveyance of the legal estate of the house. *Lashmar, In re, Moody* v. *Penfold*, 60 L. J., Ch. 143; [1891] 1 Ch. 258; 64 L. T. 333—C. A.

Copyholds—Tenure for Life with Power to

nominate Successor—Devise to Trustees.]—By the custom of the manors of Y., P., and S., the tenant of the copyhold tenement held only for life, with a power to nominate by writing one or more successors, but so that if there were more than one, they held concurrently for their lives or the life of the survivor, who had power to nominate a successor to himself. A copyhold tenant of these manors by his will devised all his copyholds to three trustees to the use of his grandson A. for life, with remainder to the use of the trustees to preserve the contingent remainders, with remainder to the use of the children of A. and their heirs as tenants in common, with remainder to the use of the plaintiffs. By a codicil the testator, after reciting that he had ascertained that his "copyhold estates" were held of the manors of P. and S., directed that "all his copyhold estates within the manors of P. and S." should be held by his trustees to the uses and upon the trusts in his will declared, if and so far as the custom of the respective manors would warrant or authorise: and if the custom of the manors or either of them did not warrant or authorise the entail created by his will, then and in that case his grandson A. and his assigns, or his successor or successors, should have and hold his copyhold estates according to the custom of the manors. A. was admitted tenant for his life, and nominated the defendant as his successor, who was admitted accordingly:—Held, that the trustees took the legal estate in the copyholds held of the manor of Y., and ought to have been admitted instead of A., and that all the beneficial limitations in the will were equitable interests. *Allen* v. *Bewsey*, 7 Ch. D. 453; 37 L. T. 683—C. A.

Mixed Devise of Freeholds and Copyholds to Trustees—Doctrine of Attraction]—Devise of freeholds and copyholds to A. and B., to hold the same to A. and B., their heirs, executors, administrators, and assigns, upon trust during the life of J. to receive the rents and pay the same to J. for life, or otherwise to permit J. to receive them; followed by a devise after J.'s decease, to the use of the heirs of his body. The testator appointed A., B., and J. executors of his will, and declared that the receipts of his trustees and executors for any money payable under the will should be a sufficient discharge to any person paying the same:—Held, that J. took a legal estate tail in the freeholds, and an equitable estate for life in the copyholds. *Baker* v. *Parson* (infra) not followed; *Houston* v. *Hughes* (6 B. & C. 403; 9 D. & Ry. 464; 5 L. J. (O.S.) K. B. 315; 30 R. R. 372) commented on. *Baker* v. *White*, 44 L. J., Ch. 651; L. R. 20 Eq. 166; 33 L. T. 347; 23 W. R. 670.

Devise (after 1837) of copyholds and freeholds to trustees to hold unto them and their heirs on trust to pay unto or permit A. to receive the rents during his life, and after his death to the use of the heirs of his body, with a gift over in case he died without leaving issue:—Held, that A. took an equitable estate for life with a legal remainder to the heirs of his body in both the freeholds and copyholds. *Baker* v. *Parson*, 42 L. J., Ch. 228.

The Statute of Uses not applying to copyholds, on a devise of freeholds and copyholds together, the legal estate in the copyholds attracts that in the freeholds and makes it vest in the first devisee. *Ib.*

Devise of Copyholds—Subsequent Covenant to Surrender not carried out by Testator.]—A. devised copyholds to trustees in fee, upon trusts in the will mentioned. A. afterwards executed a voluntary conveyance of the same lands to the same trustees, upon similar trusts to those declared by the will, and covenanted to surrender the copyholds to the trustees, on the trusts declared by the deed, and that until such surrender, and the trustees should be admitted to the copyholds covenanted to be surrendered, A. and her heirs would hold the lands in trust for the trustees, their heirs and assigns, and dispose of the same as they should direct and appoint. A. died without having executed any surrender:—Held, that the legal estate in the lands was in the devisees in trust under the will, and not in A.'s customary heir. *Steele* v. *Waller*, 28 Beav. 466; 6 Jur. (N.S.) 1004; 3 L. T. 74.

Costs and Expenses—Charge upon Corpus—Power to Sell Corpus.]—By a private act of parliament it was enacted that certain copyhold property should be vested in trustees, their trustees and assigns, to the uses and upon the trusts declared therein, which were to grant building leases; and every lease was to contain certain specified covenants; and the trustees were to sell the materials of a house already standing on the premises, and apply the proceeds in payment of the costs and charges attending the preparing, soliciting, and obtaining the act of parliament, and preparatory and incidental thereto, and the residue of such costs and expenses were to be paid out of the rents and profits of the premises so to be demised, and were to be charged upon the premises:—Held, that the legal estate in the copyholds was vested in the trustees; that the costs incidental to obtaining the act of parliament were a charge upon the corpus of the estate, and that the court had power to direct a sale of the corpus for payment of such costs. *Dixon* v. *Wilkinson*, 1 Eq. R. 556; 22 L. J., Ch. 981; 1 W. R. 513.

Equitable Estate—Attaining Twenty-one.]—A testator devised freeholds and chattels together to trustees on trust to permit his wife to reside on the property, and have the use of the chattels until his youngest son attained twenty-one, when the whole was to be divided among his three children, they paying the wife an annuity if then living:—Held, that the interests of the children in the freehold after the youngest attained twenty-one were equitable. *Fowke* v. *Draycott*, 52 L. T. 890; 33 W. R. 701.

—— Payment of Rents to Married Woman—Direction to Trustees to Repair.]—A testatrix by her will directed her trustees to stand possessed of the net rents of her real estate, upon trust to pay the same to Mrs. W., a married woman, for life, for her separate use, her receipt alone to be a sufficient discharge to the trustees; and the testatrix directed her trustees, out of the rents of her real estate, to keep in repair all the buildings on the estate during the period of their trust, and also the chancel of P. church. No power of sale or leasing was contained in the will:—Held, that, notwithstanding the direction to the trustees with respect to repairs, Mrs. W. was equitable tenant for life of the settled land, and, as such, was entitled to be let into the possession and management of the estate, upon her

undertaking to see to the repairs. *Bentley, In re, Wade* v. *Wilson*, 54 L. J., Ch. 782; 33 W. R. 610.

b. Quantity of Estate of Trustees.

i. *General Principles.*

Devise to Trustees without the Word "Heirs."]—A legal fee will pass without the word "heirs," where a trust of land can be satisfied in no other way. *Villiers* v. *Villiers*, 2 Atk. 72.

The word "heirs" is not necessary to give an inheritance to trustees, if a less estate would not answer the purpose of the trust. *Gibson* v. *Montford* (*Lord*) or *Rogers*, Amb. 93; 1 Ves. sen. 485; 4 Ves. 288, n.

Where an estate is devised, without any limitation of the quantity of interest, to trustees in trust for a limited purpose, with remainder to persons to whom the beneficial interest is given, the legal estate given to the trustees will cease on the satisfaction of the limited purpose, and will vest in the persons beneficially entitled in remainder. *Heardson* v. *Williamson*, 1 Keen, 33; 5 L. J., Ch. 165. S. P., *Doe* d. *White* v. *Simpson*, 5 East, 162; and *Doe* d. *Player* v. *Nicholls*, 1 B. & C. 336.

An estate created for the purpose of certain trusts, remains vested in the trustees, so long as any object of the trust may spring up, though for the present all the purposes of the trust have been satisfied. *Darker* v. *Darker*, 2 L. J. Ex. Eq. 22.

The court will not make a declaration that a person is entitled to a legal estate in fee, unless there is also some trust to be performed. *Brooke* v. *Turner*, 4 L. J., Ch. 48.

No person can be a trustee in law unless he has a vested interest in the thing given. *Owen* v. *Owen*, 1 Atk. 496.

Conveyance to Trustees and their Heirs.]—It is not a sufficient ground for restricting an estate limited in a deed to a trustee and his heirs, to an estate for life, that the estate given to the trustee seems to be larger than was essential to its purpose, or that the limitation has been unnecessarily repeated. *Colmore* v. *Tyndall*, 2 Y. & J. 605.

A., seised in fee, conveyed lands to B. and C., and the survivor of them, and the heirs of the survivor, to the use of A. for life, and after his death, to the use of B. and C., and the survivor, and the heirs of such survivor, upon trust to permit and suffer D. to receive a jointure, and after the death of D., to the use of the right heirs of A.:—Held, that B. and C. took a legal estate in fee in remainder. *Fowler* v. *Lightburn*, 11 Ir. Ch. R. 495.

Conveyance to Trustees for Charitable Purposes—Adverse Claim.]—The necessary funds having been subscribed by certain parties, a piece of land was purchased and conveyed by deed to trustees, for a charitable purpose. Under this deed the trustees entered into and continued in possession for several years; and, with the acquiescence of all the subscribers, including some not parties to the deed, a considerable expenditure was made, and heavy liabilities were incurred:—Held, that, even assuming the subscribers not parties to the deed had an equitable interest in the land in respect of the moneys subscribed by them, yet they would not be heard to assert a title to the land adverse to that of the trustees. *Att.-Gen.* v. *Munro*, 9 Jur. 461.

Devise to Trustees and their Heirs.]—A general devise to trustees and their heirs, primâ facie, gives the fee, and it lies on the parties alleging that they take a less estate to show what less estate they take. *Collier* v. *Walters*, 43 L. J., Ch. 216; L. R. 17 Eq. 252; 29 L. T. 868; 22 W. R. 209.

A trust to set and let, and a direction to sell timber, are grounds for not cutting down the estate. *Ib.*

A devise which, if taken alone, would convey the legal estate, may be qualified and controlled by a subsequent devise to trustees inconsistent with that estate, if such qualification necessary to enable the trustees to perform the duties of the trust. *Anthony* v. *Rees*, 2 C. & J. 75; 2 Tyrw. 100; 1 L. J., Ex. 44.

Copyholds are to the same extent as freeholds, subject to the rule that the legal estate in the trustee shall be construed to be the smallest estate necessary for the execution of the trust. *Baker* v. *Parson*, 42 L. J., Ch. 228.

A devise to trustees and their heirs:—Held, to confer an estate co-extensive only with the trusts they had to perform. *Ward* v. *Burbury*, 18 Beav. 190.

Devise of freeholds to trustees "and their heirs," upon trust to receive the rents and pay them to E. W., a feme covert, for her separate use; and after her death, upon trust to sell and divide amongst her children; and in default, to apply the rents towards the education of J. W., until he attained twenty-one; and (continued the testator) "when J. W. shall so have attained that age," I devise to him and his heirs all my real and personal estate:—Held, on the death of E. W. without issue, that J. W. took the legal estate in fee. *Ib.*

Devise to trustees and their heirs upon divers trusts in succession, some requiring the legal estate to remain in the trustees, and others which, in themselves, would not do so,—the whole legal fee remains in the trustees. *Brown* v. *Whiteway*, 8 Hare, 145.

Under a devise to A. and B., and their heirs, to the use of a son for life, with remainder in trust that the trustees apply the rents for maintenance of the children of the son during their minority, and after they attained twenty-one, to the use of them in fee:—Held, that the son took the legal estate for his life, with remainder to A. and B. for a chattel interest with remainder to the children in fee. *Tucker* v. *Johnson*, 16 Sim. 341.

Devise, subject as to part to a devise to trustees and their heirs for debts in aid of the personal estate, and as to part to mortgages in fee, to sons and a daughter, and their respective issue male in strict settlement, &c.; with power to the sons respectively, when in possession, to convey or appoint all or any part to trustees on trust by the rents and profits to raise a rent-charge as and for a jointure for any wife or wives for each such wife's natural life only; and also to charge portions by deed, and to lease for twenty-one years. Execution of the power by conveyance to trustees and their heirs on trust by the rents and profits to raise and pay a jointure during the wife's natural life only; and charging portions; with covenant for title, and for quiet enjoyment by the trustees during the natural life only of the wife. As to the estate of the trustees at law, quære, the court of king's bench certifying that they took an estate in fee, and the court of common pleas that they took no estate whatsoever. *Wykham* v. *Wykham*, 18 Ves. 395. And see *Venable* v. *Morris*, 7 Term

Rep. 438; *Doe* d. *Burne* v. *Martyn*, 2 Man. & Ry. 485; 8 B. & C. 487; 7 L. J. (o.s.) K. B. 60.

Where a party who, by writing obligatory (without any penal sum), had bound himself to pay to A. B. an annuity of 20*l.* a year for her life, devised his estates to trustees upon certain trusts, until his son should attain the age of twenty-one years:—Held, that the estate of the trustees ceased upon the death of the son under the age of twenty-one, all the purposes of the trust being then at an end; and that the trustees were only liable to pay to A. B. such arrears of the annuity as became due before the son's death. *Morrant* v. *Gough*, 1 Man. & Ry. 41; 7 B. & C. 206; 6 L. J. (o.s.) K. B. 14.

Devise to Trustees in Remainder.]—B. devised to his only son E. for life, remainder to his issue in tail, remainder to B.'s two daughters in tail, remainder to B.'s right heirs; the two daughters suffered recoveries to the use of E.; and by an act of parliament reciting the will, the recoveries, and that E. had no issue, trustees were empowered to sell the estates devised, and to lay out the purchase money in the purchase of other estates, to be settled to such of the uses in the will of B. as should be existing, undetermined, or capable of taking effect at the time of the sale; the trustees sold, and bought with the purchase money an estate which, by a conveyance reciting the will of B. and the act, was conveyed by them to such of the uses in the will of B. as were then existing, undetermined, and capable of taking effect:—Held, that under the conveyance the trustees took a fee. *Wortham* v. *Mackinnon*, 8 Bing. 564; 1 M. & Sc. 543.

Devise of Leases for Lives renewable for ever.]—A testator being seised of lands under leases for lives renewable for ever, in 1824 devised his freehold leases to trustees, and the heirs of the survivor of them, in trust, after payment of the head rents, to apply the clear yearly rents amongst his three daughters during their respective lives, in equal shares, for their sole and separate use; and in case any of his daughters should die leaving lawful issue, then in trust, as to the share of such daughter so dying, for the use of such issue, as she should by deed or will appoint, and in default of such appointment to the use of such issue equally, share and share alike; and if any of his daughters died without issue, he directed that her share of the rents should be paid to the survivors or survivor for the increase of her and their respective shares, to their separate use, and to go to their lawful issue, subject to the like power of appointment among such issue; and in case of the death of all his daughters without leaving lawful issue, then in trust to pay the rents to his nephew during his life; and after the death of his nephew, in case he should die leaving lawful issue, in trust, as to one-half of his freehold and leasehold interests, to the use of the children of his sister, in equal shares, and to their lawful issue; and in case his nephew should happen to die without issue, then, as to the whole of his freehold and leasehold interests, to the use of the said children of his sister, in equal shares, and to their lawful issue; and in case they should be then dead, then, as the whole, in trust for the issue of his nephew; and in case of the deaths of his nephew and the children of his sister without issue, in trust to assign over the freehold and leasehold interests to his own right heirs; and a power was given to the trustees to lease from time to time as they should remain seised and possessed by virtue of the trusts in the will contained, with the consent of the person or persons then entitled:—Held, first, that the legal estate was devised to the trustees during the existence of the entire series of limitations. *Sherwin* v. *Kenny*, 16 Ir. Ch. R. 138.

Held, secondly, that the daughters of the testator took equitable estates in quasi tail in their respective shares. *Ib.*

Devise to Trustees, "as also their Heirs and Assigns."]—A testator, by codicil, after appointing two persons trustees, as also their heirs and assigns, to his will and codicil, desired that his sister A. should do what she pleased with his remaining property after payment of certain legacies, excepting a tenement at W. and stock, of which she should only receive the interest and rent during her life, and afterwards to his sister's eldest son, on his taking the name of M.; but should he refuse to take the name of M., or his sister depart this life without a son, then the tenement at W. and the stock should go to P. on his taking the name of M., and so on to his heirs, each taking the name of M., none of them being allowed to touch the principal; and no one after his sister A. inherit the said property or enjoy the interest who did not take or possess the name of M.—Held, that the trustees took an estate in fee by virtue of their appointment, and that A. was entitled to an estate for life in the tenement and stock, with a remainder in fee in the tenement, and an absolute interest in the stock, to the first-born of A. vested in his birth and baptism by the name of M. *Bennett* v. *Bennett*, 2 Dr. & Sm. 266; 34 L. J., Ch. 34; 11 L. T. 362; 13 W. R. 66.

See also ESTATE.

Trustees to Preserve Contingent Remainders.]—*See* VESTED, CONTINGENT AND FUTURE INTERESTS.

Whether Estate of Cestui que Trust co-extensive with Estate of Trustees in Wills or Deeds.]—*See* WILL.

ii. *Direction to Pay Debts or Legacies.*

Devise to Trustees and their Heirs to Pay Debts and Legacies.]—A general devise to trustees and their heirs primâ facie gives the fee, and it lies on the parties alleging that they take a less estate to show what less estate they take. *Collier* v. *Walters*, 43 L. J., Ch. 216; L. R. 17 Eq. 252; 29 L. T. 868; 22 W. R. 209.

A testator, by will, dated in 1827, devised his estate to trustees and their heirs upon trusts that they and their heirs should stand seised of the same during the life of C., and until the whole of the testator's debts and the legacies were paid, upon trust, to set and let the same, and apply the rents and yearly profits, and the value of whatever timber might be considered at its best growth, from time to time, in discharge of his debts and legacies until they were paid, and from thenceforth to pay the rents to C. during his life; and after his death, and payment of the debts and legacies and expenses, the testator devised the estate to the heirs of the body of C., and for default of such issue, to his own right heirs. In 1830 the trustees by deed reciting that the debts and legacies were paid, conveyed the estates to C. for his life. C. shortly afterwards

suffered a common recovery, and then mortgaged the estate in fee to W. In 1861 C., the father, and W., his mortgagee, had filed a bill for a conveyance of the fee against the heir of the surviving trustee and the son (C.'s heir-apparent). The son, instead of asking to be dismissed as not being heir during his father's lifetime, put in an answer disputing the plaintiff's title. In 1865 a decree was made for the conveyance of the fee to the plaintiff. The father had since died. This suit was instituted in 1873 by the son against the mortgagee:—Held, first, that the trustees took a legal fee under the will, that the rule in *Shelley's Case* (1 Co. Rep. 93, b) therefore applied, and that the son acquired a good equitable fee by the recovery. *Ib.*

Held, secondly, that if they had only taken a life estate, their conveyance of it to the father, enabled him to suffer a recovery and bar the contingent remainders at law and in equity, and was no breach of trust. *Ib.*

Held, thirdly, that the son, having chosen to answer in the former suit, was bound by the decree. *Ib.*

The decision on the same will in *Collier* v. *M'Bean*, infra, that the trustees took a fee determinable when the debts were paid, disapproved of. *Ib.*

A testator devised his real estate to trustees and their heirs, in trust, during the life of his brother, and until payment of his debts and legacies, to apply the rents in payment of his debts and legacies, and then to pay them to his brother for life; and after the death of his brother, and such payments, he devised the estate to the heirs of the body of his brother, and in default to his own right heirs:—Held, first, that the trustees took the legal fee, determinable upon the death of his brother and payment of the debts and legacies. *Collier* v. *M'Bean*, 34 Beav. 426; 6 N. R. 192; 34 L. J., Ch. 555; 11 Jur. (N.S.) 592; 13 W. R. 766.

Held, secondly, that the brother took an equitable estate for life, with a legal remainder to the heirs of his body. *Ib.*

The trustees having conveyed to the brother the legal estate for his life, and he having suffered a recovery:—Held, thirdly, that the heirs of the body were not barred, because the legal estate to the brother for life, and the legal remainder to the heirs of his body, had become vested by different instruments, and also because it was the duty of the trustees to preserve the contingent estates, and therefore it was a breach of duty in them to convey the estate to the brother. *Ib.*

Held, on appeal, that the title under the recovery was too doubtful to force on a purchaser. *S. C.*, 35 L. J., Ch. 144; L. R. 1 Ch. 81; 13 L. T. 484; 14 W. R. 156.

Chattel Interest—Devise to Let and Apply Rents in Payment of Mortgages.]—Devise to two trustees and the survivor, his executors and administrators, in trust, to let and apply the rents in payment of mortgages, until the whole debt should be paid off by the rents, and afterwards to other parties. The trustees take a chattel interest only. *Hrardson* v. *Williamson*, 1 Keen, 33; 5 L. J., Ch. 165.

—— **Devise out of Rents to Pay Annuities and Legacies.**]—Devise of real and personal estates to trustees, their executors, &c., out of rents and profits to pay certain annuities and legacies:—Held, a trust, not a chattel interest in the trustees. *Gibson* v. *Montfort* (*Lord*) or *Rogers*, Amb. 93; 1 Ves. sen. 485; 4 Ves. 288, n.

Devise to Trustees and their Heirs to Pay Debts.]—Devise to trustees and their heirs to pay debts and legacies; and then as to one moiety, to use of B. for life, sans waste; remainder to trustees during B.'s life, to preserve, &c.; remainder to use of heirs of body of B.; and ultimate remainder to testator's own right heirs:—Held, that B. took only an estate for life, that the estate devised to B. was not a use executed, but a mere trust in equity, and that the whole fee being devised to trustees, no legal fee could be limited upon it, and that he could take no legal estate. *Bagshaw* v. *Spencer*, 2 Atk. 577; 1 Ves. sen. 142.

Gift to Executor to Pay Debts, Funeral Expenses, and Bequests.]—A testator, in 1825, left all his property to his executor for the purpose of paying the following bequests, first paying debts and funeral expenses. He then bequeathed lands for ever to his illegitimate son T., giving him power to will and dispose of same if he had a family, but if he should die without issue, then to go to the use of his daughter J., also illegitimate:—Held, that the executor took the fee in the lands, and that T. took an estate tail, the limitation over being not an executory devise, but a remainder, and that this limitation conferred the fee upon J. on indefinite failure of issue of T., J. taking the entire estate remaining in the executor. *Ormsby* v. *Anderson*, 14 W. R. 379.

Devise to Trustees and the Survivor and his Heirs to Pay an Annuity—Residue of Rents to be applied for Payment of Debts.]—A testator, in 1772, devised to trustees, and the survivor and his heirs, all his real and personal estate upon trust to pay an annuity to his daughter, Lady A.; the residue of the rents to be applied to the payment of his debts; and, after her decease, in trust to permit the second son of Lady A., by J. B., her husband, afterwards Earl Ormonde, and the heirs male of his body to receive the same in preference to her eldest son, it being testator's meaning that such second son "do take and be preferred, &c., until he shall become an eldest, and so shall each and every second and younger son or sons take place and enjoy the said estates according to seniority, &c., and the heirs male of the body of such second son." In default of such issue, the estates were to go to the use of the daughters of Lady A., as tenants in common in tail, &c., with ultimate remainder to testator's trustee in fee. Lady A. had issue four sons by J. B.—Walter, John, James, and Charles, all of whom had been born during testator's lifetime, and John was second son living at date of the will, and of testator's death. In 1793 John joined his father and mother in a recovery of the W. estates so devised by the testator, and executed a deed declaring the uses thereof to Lady A. for life; remainder to John for life, with remainder to John's sons in tail; remainder successively to James and Charles for life, and their issue respectively in tail male; and said deed contained a proviso for shifting the W. estates from John to James, and from James to Charles, in the event of the O. estates of their father coming to John or James. In

1796 John died. J. B. died in 1795, whereupon Walter became entitled and suffered recoveries of the O. estate, and died in 1822, Marquis of O. James then became Marquis. Lady A. died in 1830, and in 1834 James filed his bill against Charles, and the present plaintiff, and the heir of surviving trustee, whereby he claimed the W. estates as tenant in tail, under the will of 1772, or as tenant for life, with remainder to his eldest son in tail male, under the deed of 1793. Charles answered the bill, and issue had been joined and publication passed when the plaintiff, James, Marquis of O., died. In 1838 the present plaintiff filed his bill against Charles and his three sons, setting out all the charges contained in the former bill, and the several proceedings had thereon, and claiming to be entitled to the W. estates, either as issue in tail under the will of 1772, or as tenant in tail under the deed of 1793, and the recoveries. The bill stated that Charles and his sons claimed some interest in the said estates, and in the subject matter of this suit, and in that respect were necessary parties. The bill prayed that plaintiff might have the benefit of the said former proceedings, &c., and that the trusts of the will might be carried into execution, &c. To this bill the three sons of Charles demurred for want of equity; no grounds were assigned on the record. At the bar one of the causes of demurrer was, that the plaintiff showed no title to the W. estates:—Held, that Lady A. took no estate under the will; that the devise to the second son of Lady A., and the heirs male of his body, was an executory devise to such son as should answer that description at the time of the death of Lady A.; and, therefore, that the recoveries suffered in 1793 and 1795 were bad for want of a tenant to the præcipe, so as to bar the remainders over limited by the will, even supposing that, on the death of John, James, the late marquis, took an estate tail, by way of executory devise. It was also held, that the limitation to the trustees and the survivor, and his heirs, vested in them the legal estate in fee. *Ormonde* v. *Wandesforde*, 1 Ir. Eq. R. 238.

Direction to Pay Debts—Contingent Remainder—Failure of particular Estate.]—A testator, by his will made in 1838, directed his debts to be paid. And he devised specific real estate to four persons (whom he afterwards named as his executors), their heirs and assigns, upon trust and for the intents and purposes thereinafter mentioned, viz., upon trust during the minority of his daughter D., to receive the rents and apply the same for her benefit till she should attain twenty-one, and, on her attaining twenty-one, to pay to or permit and suffer her to receive the rents during her life for her separate use, without the power of anticipation. And, from and after her death, upon trust for, and the testator thereby gave and devised the property to the issue, children or child, of the daughter who should live to attain twenty-one, in equal shares if more than one, and to their respective heirs and assigns, with remainders over. And, after making other specific devises and bequests, the testater devised and bequeathed the residue of his estate and effects (subject to and charged with the payment of his debts) to one of his trustees absolutely, for his own use and benefit. The daughter D. survived the testator, and she afterwards married and had three children, but she died before any of them had attained twenty-one:—Held, that, by reason of the direction that the testator's debts should be paid, the trustees took the whole legal estate in fee simple in the specifically-devised estate, and consequently that the contingent remainder to the children of the daughter had not failed by reason of the determination of her life estate before the happening of the contingency. *Festing* v. *Allen*, (12 M. & W. 279) distinguished. *Creaton* v. *Creaton*, infra, followed. *Marshall* v. *Gingell*, 51 L. J., Ch. 818; 21 Ch. D. 790; 47 L. T. 859; 31 W. R. 63.

A testatrix, after directing her debts to be paid by her executors, devised real estate to them upon trusts, which, apart from the above direction, would have carried the legal estate to the cestuis que trust:—Held, that the executors took the legal estate. *Creaton* v. *Creaton*, infra, *Spence* v. *Spence*, infra, and *Marshall* v. *Gingell*, supra, discussed and followed. *Brooke, In re*, *Brooke* v. *Brooke*, 63 L. J., Ch. 159; [1894] 1 Ch. 43; 8 R. 24; 70 L. T. 71; 42 W. R. 186.

—— **Rule in Shelley's Case—Equitable Fee.**]—A testator, by will, subsequently to 7 Will. 4 & 1 Vict. c. 26, after directing that his debts and funeral and testamentary expenses should be paid by his executors as soon as conveniently might be after his decease, devised all his real and personal estate to trustees (whom he afterwards appointed his executors), in trust to pay the rents and proceeds thereof to his son J. for his natural life; and from and after the death of J., in trust for the right heirs of him, J., for ever:—Held, that by reason of the direction to them to pay debts, the trustees took the legal estate in fee, and therefore, inasmuch as the estate for life and the estate in remainder were both equitable estates, the rule in *Shelley's Case* applied, and J. took an equitable estate in fee. *Spence* v. *Spence*, 12 C. B. (N.S.) 199; 31 L. J., C. P. 189; 6 L. T. 538; 10 W. R. 605.

—— **Devise of Copyholds.**]—C., after desiring that all his just debts, &c., should be in the first place paid, devised to three trustees, and the heirs of the survivor, a copyhold estate, upon trust to pay the rents and profits thereof, in equal moieties, to his two daughters, for their separate use for life; and after the decease of either, upon trust to pay the whole of such rents, &c., to the survivor for life; and after the decease of the survivor, C. devised the estate, in equal moieties, to the heirs of the bodies of his daughters respectively; and in default of issue of either daughter, he gave the entirety of the estate to the heirs of the body of such daughter who should leave such issue; and in default of issue of both daughters, he gave the estate to the right heirs of the surviving daughter. The trustees were appointed executors of the will, and they were duly admitted to hold to the uses of the same. Both the testator's daughters died without having ever been married. The estate was of gavelkind tenure. Both the customary co-heirs and the heir-at-law of the surviving daughter claimed the estate. On demurrer by the latter:—Held, that the general charge of debts, coupled with the legal estate devised to the trustees, made the estate of the devisee in remainder an equitable estate; and the demurrer was overruled. *Creaton* v. *Creaton*, 3 Sm. & G. 386; 26 L. J., Ch. 266; 2 Jur. (N.S.) 1223; 5 W. R. 123.

Where, by a will, there was a general charge of debts, and a devise to trustees upon certain

trust:—Held, that the extent of the estate vested in the trustees could not be measured by the length or continuance of the equitable interests given to two tenants for life; but semble, if there had been no charge of debts, the estate of the trustees would have determined with the life of the surviving tenant for life. *Ib.*

Semble, where the subject of a devise is copyhold, the right of the trustees to be reimbursed moneys paid in fees of court will not of itself prevent the determination of the estates vested in them, or affect the quality of the estates limited in remainder. *Ib.*

Devise to Trustees in Trust to pay an Annuity.]—A testator, after the 4 Will. 4, c. 22, devised freehold lands to two trustees, their heirs and assigns, to pay thereout to his widow an annuity for her life, and after her decease for A. and B., their heirs and assigns, as tenants in common:—Held, that the legal estate in the trustees was not restricted to the life of the widow. *Fenwick* v. *Potts*, 8 De G. M. & G. 506.

A devise before 1838 to trustees in trust to pay a life annuity, with power to raise it by distress or sale as for rent in arrear, gives them the legal fee. *Whittemore* v. *Whittemore*, 38 L. J., Ch. 17; 19 L. T. 236.

iii. *Power or Trust for Sale.*

Devise to Trustees to Sell.]—A devise to trustees and their "heirs" carries the whole fee in law; and a devise to sell will carry a fee, though the word "heirs" be not mentioned. *Bagshaw* v. *Spencer*, 2 Atk. 578; 1 Ves. Sen. 142.

Where testator's intent appears plain, court will construe the words "heirs of the body" to be words of purchase. *Ib.*

"Heirs of the body" have, at law, been considered as words of purchase, even in a deed. *Ib.*

Power to Trustee, his Heirs and Assigns, to Sell.]—By the will of W. S., real estate was devised unto and to the use of W. T., his heirs and assigns for ever, upon trust to pay M.S. an annuity during her life, and to apply the surplus during the life of M. S. to the testator's daughter, C. N.; and after the death of M. S., the testator directed that the premises should be and remain unto W. T., his heirs and assigns, to the use of the said C. N. and her assigns for her life, with remainder to W. T. to support contingent remainders; and after the decease of C. N., to the use of B. N. and his assigns during his life, with remainder to W. T. to support contingent remainders; and after the decease of B. N., in case he should survive C. N., to the use of all and every the child and children of C. N., with cross-remainders between them, with the ultimate remainder to the testator's cousin, M. S., in fee. The will contained a power to W. T., his heirs and assigns, to sell the trust premises at the request of B. N. and C. N., or the survivor of them, and directed the proceeds of such sale to be laid out in the purchase of other estates to be settled to the same uses as the estates sold:—Held, taking into consideration the various duties prescribed by the will to be performed by W. T., that the intention was manifest, and that the words were large enough to give to W. T. a legal estate in fee. *Rackham* v. *Siddall*, 1 Mac. & G. 607; 2 Hall & Tw. 44.

A testator, without expressly devising his real estate, empowered his trustees and executors to manage and to sell and invest the proceeds. He directed them, under the management of his wife, to carry on his farm for the maintenance of his family, and subject to that trust directed his real and personal estate to be held on trust for his children equally, some of whom were to bring into hotchpot property of their own:—Held, that the trustees had the legal estate in the realty, and on the death of the wife, though the children were all of age, could sell and convey. *Cooke* v. *Simpson*, 46 L. J., Ch. 463.

A testator, by will made in 1851, after appointing his wife executrix, and B. executor and trustee of his will, devised his real estate to his wife for life, in case she continued his widow; but in case she married again, he devised the real estate to the use and intent that his wife should receive an annuity of 20*l*., with powers of entry and distress. After the decease of his wife the testator directed his trustee to sell his real estate in such manner as he should deem right, with power to execute such deeds and assurances as should be requisite for effecting the sale of his real estate:—Held, that the trustees took a contingent estate pur autre vie during the life of the widow, in the event of her subsequent marriage. *Boyce, In re*, 4 De G. J. & S. 205; 3 N. R. 396; 33 L. J. Ch. 390; 10 Jur. (N.S.) 138; 9 L. T. 670; 12 W. R. 359.

Private Act of Parliament.]—Effect of a private act of parliament declaring an estate vested in trustees and their heirs, in trust to sell discharged from the trusts of a settlement, devesting the legal fee outstanding under a prior settlement. *Bullock* v. *Fladgate*, 1 V. & B. 471; 12 R. R. 270.

U. devised lands by will to trustees. The will contained no power of sale. In 1873 a private act was passed, reciting that it was desirable that the lands should be sold, and enacting "from and after the passing of this act the legal estate in the lands and hereditaments devised by the will of U. shall, for the purposes of this act, vest in W. M., J. M., and R. K." The act went on to give the trustees power to sell all or any part of the lands:—Held, that the legal estate was vested in the trustees for all purposes, and not merely for the purpose of selling the lands, so that they could maintain an action of ejectment. *Underwood* v. *Pennington*, 37 L. T. 320.

—— **New Trustees appointed under Act.**]—In 1874 an amendment act was passed by which "all the trusts, powers, and authorities by the act of 1873, vested in or conferred upon the trustees of the act, and all matters and things incident thereto, shall be vested in the trustees and two other trustees, to be appointed as hereinafter mentioned":—Held, that the new trustees were on exactly the same footing as the others, and that the legal estate was in them all. *Ib.*

See also POWERS.

c. Devolution of Trust Estates.

i. *Devise in General Terms.*

General Devise.]—Trust estate will pass by a general devise. *Hawkins* v. *Obeen*, 2 Ves. sen. 559. S. P., *Marlow* v. *Smith*, 2 P. Wms. 198.

A general devise by a trustee did not pass the trust estate. *Att.-Gen.* v. *Buller*, 5 Ves. 339.

By a devise in general terms, a trust estate will pass; unless an intention to the contrary can be collected from expressions in the will or

purposes or objects of the testator. *Braybroke (Lord)* v. *Inskip*, 8 Ves. 417 ; 7 R. R. 106.

The rule that a trust estate will pass by a general devise is confined by objects, appearing upon the will inconsistent with that intention. *Morgan, Ex parte*, 10 Ves. 101.

A devise by testator "of all the lands and hereditaments vested in him as trustee or mortgagee in fee" :—Held, to pass trust estates vested in the testator, but not in fee. *Greenwood* v. *Wakeford*, 1 Beav. 576 ; 8 L. J., Ch. 333.

A testator devised all his real estates (except the hereditaments thereinafter particularly devised), including all estates vested in him upon trust or by way of mortgage, to trustees upon certain trusts ; in a subsequent part of his will, he devised his farm in A., in the possession of T. H., to T. R. He had two farms in A., called respectively S. and M., both of which were in the possession of T. H., but at different rents. On a question being raised which of the two farms the testator intended to give to T. R.: —Held, that the devise must be taken to have been made to T. R. for his personal advantage, and not upon trust ; and if, therefore, it could be ascertained that one of the farms was subject to a trust, or that the testator supposed or treated it to be so, it must then be inferred that such farm was not the one intended to be devised, but that the other was the one referred to by the testator. In the present case, it was sufficiently established by the evidence, that during the lives of the testator and his father the proceeds of the farm S. had been regularly paid to a Roman Catholic priest, and that the testator had uniformly dealt with it in conformity with a real or supposed trust affecting it for this purpose :—Held, therefore, that he must be taken to have intended to comprise it in the general devise of trust estates, and that consequently the farm M. was the one devised to T. R. *Blundell* v. *Gladstone*, 3 Mac. & G. 692. Reversing 14 Sim. 83.

General Residuary Devise.]—A general residuary devise and bequest of real and personal property, for such estate and interest as the testator had therein ; the personal estate to be subject to the testator's debts :—Held, to pass the legal estate in real property of which the testator was merely trustee, the will creating no inconsistent trust thereof. *Langford* v. *Auger*, 4 Hare, 313.

—— **To Use and Behoof.**]—Under residuary disposition by will to a natural son, his heirs, executors, administrators, and assigns for ever, to and for his and their own use and behoof, a trust estate did not pass. *Brettell, Ex parte*, 6 Ves. 576.

—— **Use and Benefit.**]—Trustee, after devising certain real estates to different persons, gave and devised all his real estates not before disposed of by his will to A. B., his heirs, executors, administrators, and assigns, according to the tenure and nature thereof respectively, to and for his and their own use and benefit :—Held, that under this devise the trust estate passed. *Bainbridge* v. *Ashburton (Lord)*, 2 Y. & C. 347; 6 L. J., Ex. Eq. 73. S. P., *Sharpe* v. *Sharpe*, 17 L. J., Ch. 384 ; 12 Jur. 598.

Own Absolute Use and Benefit.]—A testator devised all his property to his wife, her heirs, executors, administrators, and assigns, for all his estate and interest therein, for her own absolute use and benefit, and to be disposed of by deed or will as she should think fit :—Held, that a trust estate in fee passed by the devise. *Shaw, Ex parte*, 8 Sim. 159 ; 5 L. J., Ch. 378.

A testator being seised of trust estates, by his will, after reciting that he was or might at the time of his death be seised, or possessed, or entitled to real and personal estate, devised all and singular his said real and personal estate to H., her heirs, executors, administrators, and assigns, for her and their sole and absolute use and benefit. H. was a feme sole :—Held, that the devise to H. included the trust estates, and that the words did not create a separate estate. *Lewis* v. *Matthews*, 35 L. J., Ch. 638 ; L. R. 2 Eq. 177 ; 12 Jur. (N.S.) 542 ; 14 W. R. 682.

Testator gave all his property, whatsoever and wheresoever the same might be at his decease, to his wife for her absolute use for ever :—Held, that an estate vested in the testator as a trustee did not pass by the devise. *Lindsell* v. *Thacker*, 12 Sim. 178 ; 10 L. J., Ch. 348 ; 5 Jur. 603.

Charge of Legacies.]—Trust estates held to pass under a general devise notwithstanding a charge of legacies ; the devise passing all the real estate vested in the testator whether on trust or beneficially, and the charge affecting only such estate as belongs to him beneficially. *Brown and Sibly's Contract, In re*, 3 Ch. D. 156 ; 35 L. T. 305 ; 24 W. R. 782. But see *Packman and Moss, In re*, 1 Ch. D. 214.

A testator gave various pecuniary legacies, and all the rest and residue of his estate, real and personal, he gave, devised, and bequeathed to his wife, her heirs, executors, administrators, and assigns, absolutely :—Held, that the legacies were charged on the real estate, and therefore that the general devise did not pass property of which the testator was seised in fee as trustee. *Bellis's Trusts, In re*, 46 L. J., Ch. 353 ; 5 Ch. D. 504 ; 36 L. T. 644 ; 25 W. R. 456.

Charge of Debts and Legacies.]—Trust estates will not pass under a general devise where there is a charge of debts, or of legacies, or of debts and legacies. *Brown and Sibly's Contract, In re*, supra, dissented from.

A testator, who was mortgagee in fee of an estate to secure a sum of money of which he was trustee, devised and bequeathed his residuary real and personal estate unto and to the use of his wife, her heirs, executors, administrators, and assigns, in trust, either to leave the same in existing investments, or sell and convert the same, and out of the proceeds to pay his debts, funeral and testamentary expenses, and certain legacies, and invest the residue and retain the income thereof, for her life ; and subject as aforesaid, such residue to remain in trust for C. There was no express devise of trust or mortgaged estates :—Held, that the legal estate in the mortgaged property did not pass under the will. *Smith's Estate, In re*, 4 Ch. D. 70 ; 35 L. T. 890 ; 25 W. R. 294.

Quære, whether the legal estate would have passed had the mortgage money belonged to the testator in his own right. *Ib.* But see *Martin* v. *Laverton*, 39 L. J., Ch. 166 ; L. R. 9 Eq. 563 ; 22 L. T. 700 ; 18 W. R. 561.

Charge of a Legacy.]—A trustee devised "all his real estates, whatsoever and wheresoever,"

charged with a legacy :—Held, that the trust estates did not pass. *Hope* v. *Liddell*, 21 Beav. 183 ; 25 L. J., Ch. 90 ; 2 Jur. (N.S.) 105 ; 4 W. R. 145 S. P., *Rackham* v. *Siddall*, 16 Sim. 297 ; 12 Jur. 640. And see *S. C.*, 1 Mac. & G. 607 ; 2 Hall & Tw. 44, ante, col. 535.

Securities for Money.]—A testator gave and bequeathed all his stock in trade, book debts, securities for money, money in the funds, and all his household goods, &c., to his wife. He also gave and bequeathed whatever money he had in the bank, or invested on any security, and also the residue of his personal and testamentary estate, goods, chattels and credits, to his trustees upon certain trusts therein mentioned :—Held, that the legal estate in certain messuages, which were conveyed to the testator upon trust to pay himself a sum of 300*l.*, and to pay the surplus to the person conveying the same, did not pass by the will. *Gorfett's Trust, In re*, 19 L. J., Ch. 173 ; 14 Jur. 53.

Devise to Persons as Tenants in Common.]—A devise to trustees of certain copyhold estate, and all other the real estate of the testatrix, and a declaration of the trusts of the moneys to arise from the sale of such copyhold estate, and a general devise of all other her real estate to three persons as tenants in common :—Held, not to pass the legal estate of the testatrix in certain copyholds, of which she was merely trustee. *Morley's Will, In re*, 10 Hare, 293 ; 1 W. R. 90.

Heir-at-Law — Devise to Unascertained Class.]—A devise by a testator of all his real and personal estate to his nephews and nieces, who were a numerous and unascertained class :—Held, not to pass estates vested in the testator in trust or on mortgage, but that such estates descended to his heir-at-law. *Finney's Estate, In re*, 3 Giff. 465 ; 8 Jur. (N.S.) 965 ; 6 L. T. 745.

—— **Death of Trustees of Charity Devise in Testator's Lifetime.**] — Where the trustees of a charity devise die in the life of the testator, the conduct shall go to his heir-at-law. *Att.-Gen.* v. *Downing*, Amb. 571.

Where by neglect the number of trustees in a trust to present to a living was not filled up at the time of an avoidance, the court would not by injunction prevent the effect of a presentation under the legal title of the heir of the surviving trustee, without a special ground ; but the court will take care as to the future, that the trust shall be properly filled up. *Att.-Gen.* v. *Litchfield* (*Bishop*), 5 Ves. 825.

Real Estate Contracted to be Sold.]—An estate which the testator had contracted to sell, held to pass by a devise of all his real and personal estate to trustees, in trust to sell. *Wall* v. *Bright*, 1 J. & W. 494 ; 21 R. R. 219.

In 1874 the plaintiffs entered into a contract for the purchase of real estate. After the title had been accepted, and before completion, the vendor died, having by his will (dated 1873) given his personal estate to E., whom he appointed executor, and devised all his real estate to H. and M. upon trust for sale, and having also devised to H. alone all the real estate which at his death might be vested in him as trustee :—Held, that the real estate contracted to be purchased by the plaintiffs passed to H. under the devise of trust estates. *Wall* v. *Bright*, supra, commented on and explained. *Lysaght* v. *Edwards*, 45 L. J., Ch. 554 ; 2 Ch. D. 499 ; 34 L. T. 787 ; 24 W. R. 778.

—— **Tenancy in Common with Accruer.**]—Testator agreed to sell land to B., but died before the purchase was completed. By his will he had given the residue of his real and personal estate (which included the land agreed to be sold) to his children, equally to be divided between them as tenants in common, with a proviso that if any of them died under twenty-one without leaving issue, then, as well as to the respective estate and interest and share to which any such child so dying would otherwise have been entitled under any of the devises, bequests or dispositions therein contained, as to any accruing share, testator gave and devised the same unto the others of them ; and if more than one, equally as tenants in common :—Held, that the legal estate in the property agreed to be sold had not passed by the devise, but descended upon the heir-at-law of the testator. *Thirtle* v. *Vaughan*, 2 W. R. 632.

—— **Costs of Suit for Completion of Contract.**] —Where, after contracting to sell land, the vendor devises to parties, some of whom are infants at his decease, his estate must bear the costs of the suit which he has thus voluntarily rendered necessary to a completion of the contract, and a mere devise of trust estates does not in such a case avoid the necessity of a suit. *Purser* v. *Darby*, 4 K. & J. 41.

Distinction in this respect between suits rendered necessary by the voluntary act of the deceased, and those caused by the mere act of God, as where the deceased has died intestate, leaving an infant heir. *Ib.*

—— **Direction to Trustees to Complete Contract—Receipt of Executor.**]—Testator devised his estates to trustees in trust to sell, and declared their receipts to be sufficient discharges : and he directed his trustees to complete any contracts for the sale of his estates, entered into during his lifetime, and remaining incomplete at his death :—Held, that his executor was the proper party to give receipts for the purchase-moneys of the estates contracted to be sold by the testator. *Eaton* v. *Sanxter*, 6 Sim. 517 ; 3 L. J., Ch. 197.

Devise of Mortgaged Estates.]—*See* WILL.

ii. *Assignment or Specific Devise.*

Devise of Copyholds.]—Trust of copyhold passes by unattested will. *Tuffnell* v. *Page*, Dick. 76 ; 2 Atk. 37 ; Barnard. 12. But see *Wagstaff* v. *Wagstaff*, 2 P. Wms. 261.

Devise by Sole Surviving Trustee.]—Semble, where a trust estate is limited to trustees and the survivors and survivor, and the heirs of the survivor, the surviving trustee does not commit a breach of trust by not permitting the trust estate to descend, or by devising it to proper persons on the trusts to which it was subject. *Titley* v. *Wolstenholme*, 7 Beav. 425 ; 13 L. J., Ch. 410.

A testator devised real and personal estate upon trusts, which, as held, the testator intended to be performed by the trustees and the survivors, and the heirs and assigns or executors of the survivor. There was no power to appoint new trustees. The surviving trustee devised and

bequeathed the trust estates to A., B., and C., upon the trusts of the first will:—Held, that this devise, and the appointment of A., B., and C. as trustees, were valid. *Ib.*

A devise by a sole surviving devisee in trust of all estates which at his decease might be vested in him as trustee, and which he could devise without breach of trust to A. W., her heirs and assigns, upon the trusts affecting the same respectively:—Held, to pass the trust estates to the devisee A. W. *Beasley* v. *Wilkinson*, 13 Jur. 649.

Where the surviving trustee of a will devised the trust estate upon the same trusts on which he held:—Held, that the cestuis que trust were entitled to have new trustees appointed of the original will. *Ockleston* v. *Heap*, 1 De G. & Sm. 641.

Semble, that *Cooke* v. *Crawford* (13 Sim. 91; 11 L. J., Ch. 406) has been misunderstood; a trustee can, and it may often be his duty to devise a trust estate, to prevent the legal estate from vesting in a lunatic or a person out of the jurisdiction, or in any other person who ought not to be a trustee. *Wilson* v. *Bennett*, 5 De G. & Sm. 475; 21 L. J., Ch. 741; 16 Jur. 966.

Bequest by Surviving Trustee—Leaseholds given to Trustees, their Executors and Administrators.]—Bequest to A. and B., their executors and administrators, upon trust. B., the surviving trustee, by his will bequeathed his trust estates to C. and D., their heirs, executors, administrators, and assigns, on the trusts; and he appointed C., D., and E. executors of his will:—Held, that C. and D. took only the legal estate, and that neither C. and D. by themselves, nor C., D., and E. were capable of executing the trusts. *Burtt's Estate, In re*, 1 Drew. 319.

—— **No Power in Will to appoint New Trustees.**]—The survivor of two executors and trustees bequeathed the trust property to A., upon the trusts declared by the original testator, expressing by the same instrument his wish that A. would execute the trusts with fidelity. No direction was given by the will of the original testator as to the appointment of new trustees. On a bill by the cestuis que trust for that purpose:—Held, that A., though legally in the possession of the trust property, was not a trustee properly constituted, and that the cestuis que trust were entitled to have new trustees appointed by the court. *Mortimer* v. *Ireland*, 6 Hare, 196; 16 L. J., Ch. 416; 11 Jur. 721.

Action against Trustee — Assignee Necessary Party.]—Bill against a trustee who has assigned his trust; the assignee ought to be made a party as the decree should be first against him, and the trustee to stand as a security. *Burt* v. *Dennet*, 2 Bro. C. C. 225.

Assignment of Nomination of Preacher.]—A., being impropriator of a parish, demised part of the tithes to certain parishioners as trustees for 1,900 years, who re-demised it to him for 999 years under the yearly rent of 50*l.*, payable to the trustees as a provision for a preacher, to be nominated by the trustees. The heir of A. afterwards sold the rectory to B., and the representative of the surviving trustee was prevailed upon to assign to B. the right of nominating a preacher. From the date of the original demise, and for forty years after the latter transaction, the preacher was constantly nominated by the parishioners; but upon a contest between them and B. it was held that the right of nomination was absolutely in the trustees, and that the assignment of that right was a breach of trust; and directions were given by the house of lords for the re-establishment of the trust in trustees, to be impartially chosen. *Foley* v. *Att.-Gen.*, 7 Bro. P. C. 249.

—— **Nomination to Church.**]—A., seised of the manor and patronage of W. by his will gives 100*l.* per annum rent-charge, and the advowson to six trustees, and those trustees, when reduced, to choose others; B., the only surviving trustee, assigns his trust to others who nominate to the church, being a donative: decreed, the assignees of the trust, though the assignment was made by one only who survived, had the right to nominate to the church, and not the owner of the manor. *Att.-Gen.* v. *Floyer*, 2 Vern. 748.

Of Trusts for and Powers of Sale.]—*See* POWERS.

iii. *Under Statute.*

Statute.]—*Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 30; *Trustee Act*, 1893 (56 & 57 Vict. c. 53), s. 12.

Bare Trustee—Vendor and Purchaser Act, 1874—Land Transfer Act, 1875.]—When a surviving trustee of real estate had died intestate after the passing of the Vendor and Purchaser Act, 1874, 37 & 38 Vict. c. 78, and prior to the commencement of the Land Transfer Act, 1875, 38 & 39 Vict. c. 87, the legal estate vested in his heir-at-law notwithstanding the provision of the Vendor and Purchaser Act, 1874, s. 5. *Christie* v. *Ovington*, 1 Ch. D. 279; 24 W. R. 204.

Semble, a person to whose fiduciary office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his cestui que trust, be compellable in equity to convey the estate to them, or by their direction, is a bare trustee within the meaning of s. 48 of the Land Transfer Act, 1875. *Ib.*

A trustee with a beneficial interest in the trust estate is not a "bare trustee" within the Land Transfer Act, 1875, s. 48. *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582.

—— **Unpaid Vendor.**]—Thus a vendor of freeholds who let the purchaser into possession before payment of the purchase-money and execution of the conveyance was, by reason of his having a lien on the property for his purchase-money and not being bound to convey until payment, held not to be a "bare trustee" within the act, so that upon his death, the money still remaining unpaid and the conveyance unexecuted the legal estate passed to his heir-at-law. *Ib.*

Quære, whether a trustee without any beneficial interest in the trust estate, but having active duties to perform in relation thereto, is a "bare trustee" within the act. *Ib.* And see *Cunningham* v. *Frayling*, post, col. 556.

Declaration of Trust by Equitable Mortgagor—Power to Remove Mortgagor and Appoint New Trustees—Legal Mortgagee—Notice of Trust.]—A declaration in an equitable mortgage that the mortgagor, in whom the legal estate is vested, will hold all his estate and interest in trust for the equitable mortgagee,

followed by an authority to the equitable mortgagee to remove the mortgagor from being a trustee, appoint new trustees, and vest all the mortgagor's estate and interest in them by declaration, enables the equitable mortgagee, by virtue of s. 12 of the Trustee Act, 1893, to divest the legal estate out of a subsequent legal mortgage with notice of the trust, and to set it up against a prior incumbrancer of whose charge the equitable mortgagee has only received notice since the date of his own equitable mortgage. *London and County Banking Co.* v. *Goddard*, 66 L. J., Ch. 261 ; [1897] 1 Ch. 642 ; 76 L. T. 277 ; 45 W. R. 310.

Section 12 of the Trustee Act, 1893, applies to bare trustees. The exception of mortgages for securing trust money from the operation of s. 12, and the exclusion of "the duties incident to an estate conveyed by way of mortgage" from "trust," as defined by s. 50, explained. *Ib.*

4. Retirement and Removal of Trustees.

a. Retiring Trustees.

Statute.]—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 11.

i. *In General.*

No Person ready to accept Trust.]—A trustee who is entitled to be discharged from his trust is bound to show that there is some person ready to accept the trust. If no person will accept the trust, the court may be obliged to keep the trustee before it, and not discharge him ; but it will take care that the trustee shall not suffer thereby. *Courtenay* v. *Courtenay*, 3 Jo. & Lat. 519 ; 9 Ir. Eq. R. 329.

Whether a trustee who has accepted the trust, and committed no breach, can, by filing a bill, get discharged if no other fit person can be found to act, and cestui que trust will not consent to his discharge, quære. *Ardill* v. *Savage*, 1 Ir. Eq. R. 79.

Trustee Withdrawing.]—Trustee cannot, by any act of his own, denude himself of that character till he has performed his trust. *Chalmers* v. *Bradley*, 1 J. & W. 68.

A trustee cannot withdraw from his trust unless under a provision to that effect. *Manson* v. *Baillie*, 2 Macq. H. L. 80.

Mere Caprice—Costs.]—A trustee cannot, from mere caprice, retire from the performance of his trust without paying the costs occasioned. But circumstances arising in the administration of a trust which have altered the nature of his duties, justify him in leaving it, and entitle him to his costs. *Forshaw* v. *Higginson*, 20 Beav. 485.

Want of Confidence in Co-Trustee.]—The want of confidence in a co-trustee is a ground for asking to be relieved from the administration of trusts. *Ib.*

A trustee was desirous of retiring, and was justified in so doing, though from private circumstances ; his cestui que trust having prevented him retiring, he instituted a suit to administer the trusts. He was allowed his costs. *Ib.*

The costs of evidence arising out of personal transactions between trustees will not be allowed to them, or charged on the trust fund. *Ib.*

The personal costs of the cestuis que trust in respect of this evidence must be borne by themselves ; but in a case where no one objected, they were allowed out of the trust fund. *Ib.*

A trustee desirous of retiring, by reason of his want of confidence in his co-trustee, cannot safely effect his object by getting such co-trustee to appoint a new trustee in his place, under a power vested in him for that purpose. *Ib.*

Unexpected Questions Arising.]—Trustees are not entitled as against the trust estate capriciously to refuse to continue ; but if they find the trust estate involved in complicated questions, not in contemplation when they undertook the trust, they have a right to come to the court to be relieved from it. *Greenwood* v. *Wakeford*, 1 Beav. 576 ; 8 L. J., Ch. 333.

Bill by Trustee to be Removed.] — The trustees of a marriage settlement, being desirous of retiring from the trusts in consequence of the responsibility to which they were exposed by the acts of the tenant for life, in repeatedly charging the trust estates and funds with annuities and other incumbrances, filed a bill to be discharged from the trusts, and for the appointment of new trustees under the direction of the court. The court granted the relief sought by the bill, and ordered the costs to be paid out of the interest of the tenant for life. *Coventry* v. *Coventry*, 1 Keen, 758 ; 6 L. J., Ch. 275.

A trustee thirty years after his appointment, when one of his colleagues, the acting trustee, had died, was, upon a bill filed by him :—Held, entitled to be relieved from the trusts of the settlement. *Gardiner* v. *Downes*, 22 Beav. 395 ; 25 L. J., Ch. 881 ; 2 Jur. (N.S.) 847 ; 4 W. R. 621.

Held, also, that he was, as trustee, entitled to the costs of the suit, as between solicitor and client, and also to his costs, charges, and expenses. *Ib.*

Bill by trustee to be removed filed against cestui que trust. In England a trustee after he has acted is never removed at his own desire. It is done in Ireland, but the trustee must do it at his own expense. He must pay the costs of the suit. *Hamilton* v. *Fry*, 2 Moll. 458.

—— **Trustee desiring to be Discharged on Account of Failing Health.**]—A trustee of a marriage settlement (which contained the usual power for the appointment of new trustees in place of any desiring to be discharged, &c.) applied, on account of his failing health, to the donee of the power to appoint a new trustee in his place. He neglected to do so for sixteen months, alleging that no person willing to act could be found. No embarrassment had arisen in the execution of the trusts :—Held, that he was entitled to be discharged, but that failing health alone, where the trusts were of a formal character, was not a sufficient reason for his seeking to resign so as to entitle him to costs. *Richardson* v. *Grubb*, 16 W. R. 176 :—Held, also, that he must pay the costs of being released from his trusteeship and of the petition. *Ib.*

—— **No Reason given for Resignation.**] — By deed, a mortgage debt, being money invested by the settlor upon the security of the estate of his nephew, was assigned to the plaintiff and two other persons, who were a brother and a brother-in-law of the mortgagor, upon trust for the settlor for life, and then for the children of the mortgagor. The settlement contained a power of appointing new trustees in the place of any desiring to be discharged. The plaintiff claimed to be discharged by the court, and that

a new trustee should be appointed in his place. His co-trustees had refused to exercise the power, and now appeared by counsel, and refused to act with any other trustee in the plaintiff's stead, and if he retired, desired to retire also:—Held, that the plaintiff and his co-trustees were entitled to be discharged, but as the plaintiff had shown no reason, in the circumstances of the trust, for his resignation, no costs of his application were given to him. Costs of the other trustees out of the estate. *Porter* v. *Watts*, 21 L. J., Ch. 211; 16 Jur. 737. And see *Howard* v. *Rhodes*, 1 Keen, 581; 6 L. J., Ch. 196.

ii. *Rights of Retiring Trustees.*

To have Accounts Taken.]—When a trustee retires, and new trustees are appointed by the court, the retiring trustee is entitled to have the accounts taken. *Nott* v. *Foster*, 15 Jur. 3.

Money in the funds belonging to wards of the court cannot be transferred into the name of the accountant-general, to the credit of the cause, until the account is taken by a master, and his report made. This does not mean that such a transfer cannot be made, but that it could not operate as an acquittance and discharge of the trustees until they had passed their accounts. *Bencraft* v. *Rich*, 1 Bro. C. C. 56, and note there.

Copy of Settlement and Deed of Appointment.]—A retiring trustee is not entitled to an attested copy of the settlement under which he was a trustee, or to a duplicate of the deed of appointment of new trustees (except at his own expense). The defendant in this case was the executor of the surviving trustee of a settlement of 1821. The plaintiffs were by a deed of 1851 duly appointed new trustees. The defendant refused to transfer the settled funds to the new trustees, unless an attested copy of the original settlement and a duplicate of the deed of 1851 were given him at the expense of the estate, though he had had a copy of the latter deed, which he had compared with the original:—Held, that he was not entitled to make the demand, and he was refused his costs. *Warter* v. *Anderson*, 1 Eq. R. 266; 11 Hare, 301; 1 W. R. 493.

Quære, whether if the trustee offered to pay for the duplicate copy, and the means of furnishing it existed, but the request was refused, the court would not say the request was reasonable. *Ib.*

Effect of Assignment.]—Where executors and trustees have made an assignment on the appointment of a new trustee, they lose their character of executors, and become trustees only. *Smith* v. *Smith*, 1 Dr. & Sm. 384; 7 Jur. (N.S.) 652; 4 L. T. 44; 9 W. R. 405.

iii. *Liabilities of Retiring Trustees.*

Material Facts not brought to Notice of Court.]—The existence of a suit in which an appointment of trust funds made in execution of a power is before the court, and directions consequential thereto have been obtained, and the trustees retire and are succeeded by others, but in which material facts connected with such appointment of the trust funds are not brought to the knowledge of the court, does not protect the retiring trustees from the liabilities which result from such facts if they involve a breach of trust, but, on the contrary, renders such breach of trust inexcusable. *Harrison* v. *Randall*, 9 Hare, 397; 21 L. J., Ch. 294; 16 Jur. 72.

Assigning to a Continuing Trustee.]—Where a settlement requires that a retiring trustee should assign the property to the continuing trustee, and that a new trustee should be chosen in the place of the retiring trustee, and there is no power to appoint a sole trustee, then, if a retiring trustee assign the trust property to a continuing trustee, and he, in abuse of his trust, dispose of it, the retiring trustee is answerable. *Wilkinson* v. *Parry*, 4 Russ. 272.

Incomplete Appointment of New Trustee.]—The incomplete appointment of a new trustee will leave the retiring trustee responsible for any breach of trust committed by the intended new trustee. *Pearce* v. *Pearce*, 22 Beav. 248; 25 L. J., Ch. 893; 2 Jur. (N.S.) 843.

A retiring trustee is not justified in signing a power of attorney for the transfer of stock to a continuing and new trustee before the appointment has been completed. *Ib.*

A trustee not duly appointed who joins in doing acts which enable a breach of trust to be committed, will be responsible to the extent of the money which has come to her hands. *Ib.*

Breach of Trust by New Trustees.]—Where trustees denude themselves of a trust under circumstances that warrant a reasonable belief of the insecurity of the trust funds in the hands of those to whom they commit them, they will not be considered as having validly discharged themselves of the custody of the trust funds, or released themselves from responsibility; it is, however, the duty of the court to protect them, unless there be a case proved by incontrovertible testimony of their negligence or misconduct. *Webster* v. *Le Hunt*, 8 Jur. (N.S.) 345; 4 L. T 72; 9 W. R. 918.

A bill was filed against the retiring trustees of a marriage settlement, seeking to make them liable for a breach of trust committed by the new trustees, who had, immediately after the trust had been transferred to them, sold out certain stock, and paid the proceeds to the tenant for life. It was alleged that the retiring trustee had been cautioned that the tenant for life had concocted a scheme with the new trustees to obtain possession of the fund, and the fact that such caution was so given was deposed to by the tenant for life. Kindersley, V.-C., made a decree holding the retiring trustees responsible for the loss of the fund. On appeal, the decision was reversed on the ground that there was no evidence to corroborate the testimony of the tenant for life, and, as he was a party to the fraud no reliance ought to be placed on his unsupported statement. *Ib.*

Assignment of Policy to Single New Trustee.]—By a marriage settlement the husband assigned a policy of assurance on his life to the two trustees of the settlement, and covenanted to pay the premiums. One trustee disclaimed, and the other, by assigning the policy to a single new trustee, enabled the husband to mortgage and dispose of the policy and a bonus thereon:—Held, that such breach of trust being an act of commission and not of omission only, the trustee so assigning to the new trustee was liable to pay to the trust estate the money actually received

for the policy. *Kingdon* v. *Castleman*, 46 L. J., Ch. 448; 36 L. T. 141; 25 W. R. 345.

Trustee Retiring to Enable Breach of Trust to be Committed.]—In order to fix a trustee with the consequences of a breach of trust on the ground that, though himself refusing to be a party to it, he has retired in order to enable it to be committed, the particular improper act which was in contemplation at the date of his retirement must be committed, and he will not be held liable for another analogous breach of trust which the parties in whose favour he retires may immediately on his retirement commit or sanction. *Clark* v. *Hoskins*, 37 L. J., Ch. 561; 19 L. T. 331; 16 W. R. 1159—L.JJ.

Therefore, where trustees of a settlement which contained a power to raise money on the security of the settled estates for repairs refused a request of the tenant for life to exercise the power on the ground that the money was wanted, not for the repairs, but for the general purposes of the tenant for life, but retired in favour of more accommodating trustees, who did not raise any money under the settlement, but delivered the title-deeds to the tenant for life in order that she might deal with the estate as her own, and suppress the settlement, and she borrowed money accordingly of the plaintiff:—Held, that the retiring trustees were not liable to make good the advances of the plaintiff, and a bill to make them liable was, as against them, dismissed with costs. But a decree was made against the tenant for life and the new trustees, and also against the solicitor of the tenant for life, who had advised and participated in what had been done, though avowedly aware throughout of the fraudulent nature of the transaction. *Ib.*

Trustee Retiring on False Representation as to Sum due on Bond.]—H. W., as trustee of a marriage settlement, held a bond to secure 1,200*l.* W., his brother, who was a specialty creditor of the obligor, obtained possession of the obligor's assets, and applied them in payment of his own debt and of simple contract debts before administration, which was afterwards granted to the obligor's widow, the sister of W., who was entirely guided by his advice and under his control. Subsequently W. represented to H. W. that only the sum of 600*l.* was forthcoming on foot of the bond. H. W., acting on this statement, retired from the trust, and a memorandum was endorsed on the trust deed, signed by the administratrix and the tenant for life of the trust fund, stating that the sum of 600*l.* only was available to pay the bond, and W. was appointed trustee of the marriage settlement in place of H. W. The assets of the obligor would have been, if properly administered, sufficient to pay the bond in full:—Held, that W. and H. W. were both liable to the full amount of the bond, but that W.'s assets (he having died) were primarily answerable, as he had received the trust fund. *Fetherstone H.* v. *West*, Ir. R. 6 Eq. 86.

Held, also, that in such a state of facts it was not necessary to take an account of the assets of the obligor. *Ib.*

D. gave his estates real and personal to A., B. and C., upon trust to hold the proceeds after conversion as to one-fourth part of the net residue for his daughter Ann, afterwards the wife of B., for her separate, inalienable use during her life, remainder for her children as she should appoint, and failing appointment among the children equally, and as to another one-fourth part of the residue for the testator's daughter Susan, afterwards the wife of A., for her separate use during her life, remainder for her children as she should appoint, and failing appointment among such last-mentioned children equally. A., the surviving trustee of a fund, one moiety of which was settled upon his wife and children, and the other moiety upon the wife and children of B., in exercise of a power in the settlement, appointed B. sole trustee of the fund, taking an indemnity from him, and retained the other half in his own name. B. sold out and misapplied the moiety of the fund transferred to him, and became bankrupt. A.'s solicitor, D., advised him against the appointment of B. as sole trustee, but prepared the deeds of appointment and indemnity, and was even present at the transfer of the funds from A. to B., the husband of Ann. P. had approved the deed of appointment on behalf of B. and wife, but was not otherwise acquainted with the trust. On a bill filed by Ann's children against A., D. and P.:—Held, that P. was not liable, that D. was not liable, but that A. was liable to replace the principal. *Barnes* v. *Addy*, 43 L. J., Ch. 513; L. R. 9 Ch. 244; 30 L. T. 4; 22 W. R. 505.

b. Removal of Trustees.

Statutes.]—*Trustee Act*, 1893, *s.* 25; *Judicial Trustee Act*, 1896, *s.* 1.

By Court—Under Trustee Acts.]—Where A. was nominated trustee and executor of a will, upon a petition presented for his removal under 1 Will. 4, c. 60, s. 22, stating that the will had been produced and shown to A., and read by him previously to its having been executed by the testator in his lifetime; and that A. had thereupon approved thereof and consented to act as such trustee, but that subsequently to the testator's death he had declined to interfere in the trusts of the will, the court made an order for his removal, and referred it to the remembrancer to approve of a proper person to be appointed trustee in his place. *Crook* v. *Ingoldsby*, 2 Ir. Eq. R. 375.

The court has not power under the 13 & 14 Vict. c. 60, s. 32, to remove a trustee. *Garty's Settlement, In re*, 3 N. R. 636; 10 L. T. 331.

The 13 & 14 Vict. c. 60, does not, by s. 32, give power to the court of chancery to remove a trustee who is unwilling to retire; but such a trustee is entitled to have his accounts taken in the presence of all parties interested, so that they may be bound, and to have any balance due to him ascertained and paid in the same manner as before the act. *Blanchard, In re*, 3 De G. F. & J. 131; 30 L. J., Ch. 516; 7 Jur. (N.S.) 505; 4 L. T. 426; 9 W. R. 647.

The court will not under the trustee act order the removal of a trustee merely on the ground of his having gone out of the jurisdiction. *Mais, In re*, 21 L. J., Ch. 875; 16 Jur. 608.

General Jurisdiction of Court.]—There is a jurisdiction in courts of equity to remove old trustees and substitute new ones in cases requiring such a remedy. The main principle on which such jurisdiction should be exercised is the welfare of the beneficiaries and of the trust estate. The court below refused to remove certain trustees on the application of the cestui

que trust. On appeal :—Held, that the trustees must, in the special circumstances of the case, be removed without costs of appeal, the appellant having persisted in charges of fraud which the evidence did not sustain. *Letterstedt* v. *Broers*, 53 L. J., P. C. 44 ; 9 App. Cas. 371 ; 51 L. T. 169—P. C.

—— **Solicitor Trustee — Summary Jurisdiction.**]—A trustee who is a solicitor cannot be removed under the jurisdiction of the court of chancery over solicitors, that jurisdiction being exercised only in respect of acts done by a solicitor in that character, or in some relation immediately arising out of it. *Blanchard, In re*, and *Le Doulcet's Mortgage, In re*, 3 De G. F. & J. 131 ; 30 L. J., Ch. 516 ; 7 Jur. (N.S.) 505 ; 4 L. T. 426 ; 9 W. R. 647.

—— **Failure of Duty from Misunderstanding.**]—Failure of duty from misunderstanding not a ground of removal. *Att.-Gen.* v. *Coopers' Co.* 19 Ves. 492.

—— **Trustee of Lunatic renewing Lease.**]—If trustee of lunatic renews lease for his own benefit, it is a breach of trust, and he will be discharged. *Phelp, Ex parte*, 9 Mod. 357.

—— **Dissension between one Cestui que Trust and Trustee.**]—The mere fact of there being a dissension between one of several cestuis que trust and the trustee is not sufficient ground for removing the trustee from the trust. *Forster* v. *Davies*, 4 De G. F. & J. 133 ; 31 L. J., Ch. 276 ; 8 Jur. (N.S.) 65 ; 5 L. T. 532 ; 10 W. R. 180.

The expression attributed to the lord chancellor, in *Att.-Gen.* v. *Hardy* (1 Sim. (N.S.) 338) with respect to the removal of dissentient trustees observed upon. *Att.-Gen.* v. *Clapham*, 4 De G. M. & G. 591 ; 3 Eq. R. 702 ; 24 L. J., Ch. 177 ; 1 Jur. (N.S.) 505 ; 3 W. R. 158.

A reason for not appointing a person to be a trustee may not be a ground to remove him if already appointed. *S. C.*, 10 Hare, 613 ; 2 Eq. R. 91 ; 23 L. J., Ch. 70 ; 2 W. R. 28.

—— **Corporation Trustee of Debenture Trust-deed.**]—The defendant corporation was the trustee of a debenture trust-deed. A large majority of debenture holders brought an action to have the corporation removed from being trustee. The corporation had suggested that their salary should be increased, but had withdrawn the suggestion on the objection of the company. Petitions had been presented to wind up the corporation, who had been in financial difficulties, but their difficulties had been surmounted and the petitions withdrawn, and they were now solvent and working efficiently, and it did not appear that the interest of the debenture-holders had suffered or been in danger :—Held, that no sufficient cause had been shown for removing the corporation from being trustee. *Assets Realisation Co.* v. *Trustees, Executors, and Securities Insurance Corporation*, 65 L. J., Ch. 74 ; 44 W. R. 126.

—— **Woman who had Married a Foreigner.**]—Decree discharging from a trust a woman who had married a foreigner, though the answer denied any intention of quitting the kingdom, and stating her desire of continuing the trust. *Lake* v. *De Lambert*, 4 Ves. 592.

—— **Refusal to Concur in Sale or to Retire.**]—The defendant was one of two trustees for sale of an estate, the produce of which was divisible amongst persons sui juris. He refused to concur in a sale agreed upon by his cestuis que trust until he had been furnished with deeds, &c., relating to another and an independent trust, and to which the court held that he was not entitled. He also refused to retire from the trusts to facilitate the sale. Upon a bill by the other trustees and the persons beneficially interested, he was removed from the trusts and ordered to pay the costs of the suit. *Palairet* v. *Carew*, 32 Beav. 564 ; 32 L. J., Ch. 508 ; 9 Jur. (N.S.) 426 ; 8 L. T. 139 ; 11 W. R. 449.

Trustee and Executor—No Personal Estate remaining Unadministered.]— The fact that a trustee is also one of the executors of the settlor does not prevent his removal from the trust, where there is no personal estate remaining unadministered, and the executors have converted themselves into trustees, and hold no property by virtue of their office of executor. *Stamford (Earl) In re, Payne* v. *Stamford*, 65 L. J., Ch. 134 ; [1896] 1 Ch. 288 ; 73 L. T. 559 ; 44 W. R. 249.

—— **Retirement of Trustee and Appointment by him of excluded Trustee for a Consideration.**]—A testator appointed two trustees and executors of his will, but by a codicil he excluded them, and appointed two other persons. One of these retired in consideration of 75*l.* paid to him by one of the excluded trustees, and executed a deed appointing the excluded trustee in his room. The court directed the new trustee to be removed and the deed to be cancelled, declared the conveyance to be void, and directed the 75*l.* to form part of the assets. *Sugden* v. *Crossland*, 3 Sm. & G. 192 ; 25 L. J., Ch. 563 ; 2 Jur. (N.S.) 318 ; 4 W. R. 343.

—— **Wanton Refusal to Act and Receive Dividends—Costs.**]—Where the representative of a deceased trustee made a suit necessary by a wanton refusal to act in the trust, and to receive the dividends of the trust fund :—Held, she was entitled to the costs of a bill filed to remove her and appoint other trustees. *Legg* v. *Mackrell*, 2 De G. F. & J. 551 ; 4 L. T. 568. Reversing 1 Giff. 165 ; 5 Jur. (N.S.) 1154.

Removal of Bankrupt Trustees.]—*See* BANKRUPTCY.

—— **Charity Trustees.**]—*See* CHARITY.

Practice.]—In an action to remove a trustee, the defendant having failed to file an affidavit of documents, his defence was struck out, and an order was afterwards made, on motion for judgment as in default of pleading, removing him from the office of trustee, and vesting his estate in the other trustees. *Fisher* v. *Hughes*, 25 W. R. 528.

Charges of vexatious conduct, as a ground for the removal of a trustee, must be made by bill, and not by petition. *Bridgman, In re*, 1 Dr. & Sm. 164 ; 2 L. T. 560 ; 8 W. R. 598.

In a bill for the removal of a trustee, it is not scandalous or impertinent to challenge every act of trustee's misconduct. *Portsmouth (Earl)* v. *Fellows*, 5 Madd. 450 ; 21 R. R. 335.

Nor to impute to him any corrupt or improper motive in execution of trust. *Ib.*

Nor to allege that his conduct is the vindic-

tive consequence of some act on the part of the cestui que trust, or of some change in his situation. *Ib.*

But it is impertinent, and may be scandalous, to state any circumstances as evidence of general malice or personal hostility. *Ib.*

No prayer for the removal of trustees is necessary to give the court authority to remove them. *Att.-Gen.* v. *Drummond*, 3 Dr. & War. 162; 2 Con. & L. 98.

The court will not, upon petition, remove a trustee who has accepted the trust but refuses to continue to act. A bill must be filed for the purpose, the costs of which will be cast on the trustee if it appear that he has improperly refused to act. *Anon*, 4 Ir. Eq. R. 700.

5. Appointment of New Trustees.

a. Under Powers in Settlement.

i. *Who may Exercise Power.*

Appointment by Recital in Deed.]—A will contained a power for the trustees or trustee thereof to appoint new trustees. The trust property comprised a renewable release. After the death of the testator a renewal of the lease was granted to four persons, who had not been appointed trustees of the will, but who in the lease granted to them were described as "the present trustees" of the will. The surviving trustee and executor of the will was a party to this deed, and the demise was expressed to be made by his direction:—Held, on the authority of *Poulson* v. *Wellington* (2 P. Wms. 533), that this statement in the renewed lease operated as an appointment of the four lessees to be trustees of the will. *Farnell's Settled Estates, In re*, 33 Ch. D. 599; 35 W. R. 250.

A settlement contained a proviso that in case either of the trustees should die or become unwilling to act in the trusts, it should be lawful for the acting trustees or trustee for the time being, or the executors or administrators of any surviving trustee, to nominate any fit person to supply the place or places of the trustee or trustees respectively so dying or becoming unwilling to act. On the death of one trustee, the survivor executed a deed reciting that he was desirous of retiring from the trust, and that he had appointed another person to be a trustee in his place, and conveying the trust property to such new trustee:—Held, that the surviving trustee had power to nominate a sole trustee to act in his place, and that the appointment by recital was good. *Miller* v. *Priddon*, 1 De G. M. & G. 335; 21 L. J., Ch. 421.

Refusal of Sole Trustee to appoint Co-trustee.]—A sole continuing trustee under a will which contained a power to appoint new trustees so worded as to contemplate the possibility of there being a sole trustee, was held justified in refusing to appoint a co-trustee with himself, although required to do so by a cestui que trust; and a trust fund which, under an order of the court below, he had paid into court, was ordered to be paid out to him alone. *Peacock* v. *Colling*, 54 L. J., Ch. 743; 53 L. T. 620; 33 W. R. 528—C. A.

Alienation of Interest by Donee of Power.]—A power to appoint new trustees may be exercised by a tenant for life after alienating his interest. By a settlement, property partly real and partly personal was conveyed to trustees upon trust to provide an annuity for A., a widow, for life, and subject thereto, for B., her son, absolutely. The settlement provided that B. during his life, and after his death the trustees or trustee for the time being, or the executors or administrators of the last acting trustee, should have power to appoint new trustees, if necessary. B. mortgaged his whole interest under the settlement, and the real estate (subject to A.'s annuity) was sold by the mortgagees to C. The personal estate was not sold by the mortgagees:—Held, that B. could still exercise the power to appoint new trustees, without the consent of C. *Hardaker* v. *Moorhouse*, 53 L. J., Ch. 713; 26 Ch. D. 417; 50 L. T. 554; 32 W. R. 638.

Surviving Trustee Residing Abroad.]—Under a power enabling a surviving or continuing trustee to appoint a new trustee in the place of a trustee dying, going to reside abroad, becoming incapable of acting, &c., the surviving trustee, although himself residing abroad, may appoint another trustee in the place of the one deceased. *O'Reilly* v. *Alderson*, 8 Hare, 101.

Married Woman entitled under Marriage Articles.]—A lady being entitled to a sum, payable at a future time, out of her father's estates, it was agreed, by articles on her marriage, that in the settlement to be made in pursuance thereof a power should be inserted for her father in his lifetime, or his executors within six months after the sum should be payable, to invest that sum in the names of the trustees to be appointed for the purpose, and for the trustees, with the consent of the husband and wife, or the survivor, or of their own authority, as the case should happen, to change the securities, the trusts of the fund being for the husband for his life, then to the wife for her life, then to the children. No settlement was executed, and the father and the husband died before the fund was invested, leaving the wife surviving and four children:—Held, that the wife had no power to appoint a trustee to receive the funds. *Brasier* v. *Hudson*, 9 Sim. 11.

Trustees Declining to Act.]—A power for the surviving or continuing trustees to appoint new trustees in the stead of any trustees dying or declining to act, does not authorise declining trustees to appoint new ones in their own stead. *Nicholson* v. *Wright*, 26 L. J., Ch. 312; 3 Jur. (N.S.) 313; 5 W. R. 431.

A trustee who had paid money into court under the 10 & 11 Vict., c. 96:—Held, to have retired from his trust, and a new trustee held to have been duly appointed in his stead, under a power for that purpose to arise in the event of a trustee "refusing or declining to act in the trusts of the settlement." *Williams, In re*, 4 K. & J. 87.

Acting Executors.]—A power in a settlement to a party, his executors, &c., to appoint new trustees, may, on the renunciation of one executor, be exercised by the remaining acting ones. *Granville (Earl)* v. *M'Neile*, 7 Hare, 156; 18 L. J., Ch. 164; 13 Jur. 252.

Disclaiming Trustees—Appointment by continuing Trustee.]—The testator appointed A., B. and C. executors and trustees of his will, providing that if either of them, or any succeeding

trustee or trustees, should die, or refuse or neglect or become incapable to act in the trust, it should be lawful to and for the survivor of them, the said A., B. and C., and such new trustee or trustees to be nominated in their or either of their stead, to appoint a new trustee or new trustees instead of the said A., B. and C., or either of them, or any future trustee or trustees so dying or desiring to be discharged, or refusing or neglecting or becoming incapable to act as aforesaid. A. having disclaimed the trust, and B. having died, C. alone, though not the survivor of A., B. and C., appointed new trustees under the power:—Held, that the new trustees were well appointed. *Cafe* v. *Bent*, 5 Hare 24; 9 Jur. 653.

—— **Subsequent Exercise of Power by Renouncing Trustee.**]—A trustee of a will who had formally renounced that character by a deed which purported (but ineffectually) to appoint a successor, being applied to eleven years afterwards to join with his original co-trustee in a deed purporting to be an exercise of a discretionary power which could only be exercised by the two trustees of the will for the time being, refused to do so, without an indemnity, but ultimately, on being indemnified, executed the deed:—Held, that he could not resume his position as trustee for such a purpose, and that, even if he could, his execution of the deed, under the circumstances stated, could be regarded only as a mere formal act, and not as an exercise of that discretion which was essential to a due execution of such a power. *Lancashire* v. *Lancashire*, 2 Ph. 657. Affirming 1 De G. & Sm. 288; 11 Jur. 1024.

—— **Settlement in Scotch Form—One Trustee Disclaiming.**]—Estates were vested by a settlement, in the Scotch form, in two trustees, each of whom was empowered to nominate any other person to succeed him in the trust after his decease. One trustee disclaimed; the other trustee appointed by his will three persons to succeed him:—Held, that they were duly appointed. *Sands* v. *Nugee*, 8 Sim. 130; 5 L. J., Ch. 329.

Retiring Trustees.]—A settlement contained a power for the tenant for life during his life, and after his decease for the surviving or continuing trustees or trustee, or the executors or administrators of the last acting trustee, to appoint any other person or persons to be a trustee or trustees, in the stead of any trustee or trustees dying, or desiring to be discharged, &c. There were two trustees named in the will, both of whom were desirous of being discharged after the death of the tenant for life. They accordingly executed an indenture whereby they appointed two new trustees in their place, and conveyed the trust property to them accordingly:—Held, that the power had not been properly executed. *Stones* v. *Rowton*, 17 Beav. 308; 1 Eq. R. 427; 22 L. J., Ch. 975; 17 Jur. 750; 1 W. R. 499.

A testator appointed three trustees, and empowered "the surviving or continuing trustee or trustees" to appoint new trustees. Two of the trustees disclaimed; the third acted, and by deed, reciting that he "now declined to act," appointed new trustees:—Held, that such retiring trustee was not a surviving or continuing trustee within the power, and that the appointment was invalid. *Travis* v. *Illingworth* 2 Dr. & Sm. 344; 5 N. R. 427; 34 L. J., Ch. 481; 11 Jur. (N.S.) 215; 12 L. T. 134; 13 W. R. 489. And see *Coates* to *Parsons*, *In re*, post, col. 568.

Two trustees were originally appointed by a settlement, which contained a power that if the trustees or either of them should be desirous of being discharged, the tenant for life, "and after his decease, the surviving or continuing trustees or trustee," might appoint any other person or persons to be a trustee or trustees, in the stead of the trustee or trustees so desiring to be discharged:—Held, that this did not authorise the two original trustees, after the death of the tenant for life, to retire together and appoint two new trustees in their stead. *Ib.*

New Trustee.]—A testator, after devising real estate to two trustees and bequeathing his personal estate to his wife and the same two trustees, declared that if any of the trustees thereby appointed, or to be appointed as thereinafter mentioned, should depart this life, or decline or become incapable to act, it should be lawful for the surviving or continuing trustee for the time being, or the executors, &c., of such survivor, but with the consent of his (the testator's) said wife during her widowhood, to appoint one or more person or persons to be a trustee or trustees in the room of the trustee or trustees so dying, or declining or becoming incapable to act; and thereupon the said trust estates, moneys and premises should be vested in the same trustee or trustees, solely or jointly with the continuing trustee or trustees as occasion should require; and that such new trustee should have the same powers, &c., as if he or they had been originally nominated a trustee or trustees. A new trustee having been appointed in the place of one who died, and having survived the widow and the other original trustee:—Held, that he was authorised under the power to appoint two new trustees. *Hillman* v. *Westwood*, 3 Eq. R. 142; 24 L. J., Ch. 57; 3 W. R. 41.

By a marriage settlement, a policy and moneys thereby assured were assigned to four trustees on the trusts of the settlement, with power to the husband and wife, on and after the death of the survivor, or the continuing trustee, or, in case there should be no continuing trustee, for the retiring trustee, in case the trustees should die, or desire to be discharged, to appoint new trustees; and the estate should thereon be assigned, so as to vest in such trustee jointly with the former trustees; and in case there should be no former continuing trustee, then in such new trustee or trustees only. Two of the trustees being dead and two desirous of retiring, three new trustees were appointed, of whom one being afterwards desirous of retiring, a new trustee was appointed:—Held, a valid exercise of the power. *Emmet* v. *Clarke*, 3 Giff. 32; 30 L. J., Ch. 472; 7 Jur. (N.S.) 404; 4 L. T. 319; 9 W. R. 515.

E. M. N. and his wife, under a power in their marriage settlement, directed the trustees, after the decease of the survivor of them, to receive a sum of 3,000*l.*, and pay it to their three daughters equally. F. M. N., one of the daughters, upon her marriage with S. D., assigned all her interest in the appointed fund, by way of settlement, to C. R. and T. L. Upon C. R. requiring to be discharged from being a trustee, T. L., who had never accepted the trusts, executed a deed of disclaimer, upon which

B. W. N. and J. N. were appointed trustees in the place of C. R. and T. L., and C. R. assigned the trust fund to them; but the trustees of the original settlement alleged that T. L. had accepted the trusts, and that B. W. N. and J. N. were not trustees, and they refused to pay the share of F. M. N. to them:—Held, upon a bill filed by B. W. N. and J. N., that they were duly appointed trustees; and upon an objection for want of parties, that the cestuis que trust and T. L. were not necessary parties to the suit; that the capital and dividends of F. M. N.'s share ought to be transferred to the trustees; that the costs of the suit ought to be paid out of the trust funds; and that the defendant was not entitled to any costs of the objection for want of parties, but that the plaintiffs were entitled to their costs out of the trust funds. *Noble* v. *Meymott*, 14 Beav. 471; 20 L. J., Ch. 612.

Disclaimer of Trust except Power of Nominating Trustees.]—A testatrix gave real and personal property to trustees, with a proviso, that if the trustees thereby appointed or to be appointed should die or decline to act, it should be lawful for the then surviving or continuing trustee, or if there should be no surviving or continuing trustee then for the trustee so declining to act, by deed to substitute or appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying or declining to act. One of the two trustees died in the lifetime of the testatrix: the other survived her, and by deed disclaimed the trust, except the power of nominating other persons to be trustees; and by the same deed he appointed two persons to be trustees in the place of the trustee who had died before the testatrix and of himself:—Held, that the power had been properly executed. *Hadley, Ex parte* and *In re*, 5 De G. & Sm. 67; 21 L. J., Ch. 109; 16 Jur. 98.

Power for "Other Trustee or Trustees" to appoint—Sole Surviving Trustee himself Retiring.]—Power for "the surviving or continuing or other trustee or trustees" to appoint new trustees:—Held, that under the words "other trustee or trustees" new trustees were well appointed by the sole surviving trustee, although he was himself retiring at the same time. *Camoys (Lord)* v. *Best*, 19 Beav. 414.

Trustee Dying in Testator's Lifetime.]—Where the testator gave 300*l.* to each of three trustees who should prove and act, but if any one should die without having acted, or should refuse to act, the legacy should go to such trustees as, under the powers of the will, should be appointed in their place, two died in the testator's lifetime, and, under a decree in a suit for administration, two others having been proposed by the survivor and appointed by the master:—Held, that they were not entitled to the legacies, the power of appointing new trustees by the will being in the surviving trustee or trustees, who were to nominate, &c., and that thereupon the estate, &c., vested in the trustee dying or refusing to act, should become vested in the new trustee. &c. Quære, whether the estate, never having vested in the trustees dying in the testator's lifetime, new trustees could be appointed by the survivor under the power. *Walsh* v. *Gladstone*, 14 Sim. 2; 8 Jur. 51.

A new trustee cannot be appointed under the usual powers, in the place of one appointed by the will, who died in the lifetime of the testator. *Winter* v. *Rudge*, 15 Sim. 596.

A testator empowered his wife (who was a cestui que trust under his will) during her life, and after her death the then surviving or continuing trustee of his will, to appoint any new trustee or trustees as often as any of his first or future trustees should die, &c. One of the trustees named in the will died before the testator:—Held, that the power did not authorise the widow to appoint a new trustee in the place of the deceased. *Ib.*

A testator appointed A., B. and C. to be trustees of his will, and declared that if the trustees thereby appointed, or any of them, should happen to die, it should be lawful for the surviving trustee or trustees to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, and that, on such appointment, the trust premises should be conveyed, so that the same should be vested in the surviving trustees and such new trustees, or in such new trustees solely, on the same trusts. A. died in the lifetime of the testator:—Held, that it was the intention of the testator that there should be three trustees of his will, and that a new trustee might be appointed in the place of A. *Lonsdale (Earl)* v. *Beckett*, 4 De G. & Sm. 73; 19 L. J., Ch. 342.

Co-heiresses of last Surviving Trustee.]—By an indenture dated the 23rd of November, 1836, freehold hereditaments were conveyed to W. D. and T. P. upon trust for sale, and in the event of the death of any of the trustees thereby appointed or to be appointed as thereinafter mentioned, a power of appointing new trustees was limited to certain named persons, and, after the decease of the survivor of them, to "the acting trustees or trustee for the time being, or the executors or administrators of the last acting trustee." W. D. died in 1849. T. P. died in 1855 intestate as to trust estates, leaving T. H. P. his heir-at-law. T. H. P. died intestate in 1857, leaving T. S. H. P. his heir-at-law. T. S. H. P. died intestate in 1876, leaving three daughters his co-heiresses-at-law. None of the persons named in the deed exercised the power of appointing new trustees, and the last survivor of them died in 1889. By a deed dated the 7th of June, 1890, the three co-heiresses of T. H. S. P. appointed new trustees, who contracted to sell the property under the trust for sale. The co-heiresses did not otherwise act as trustees of the indenture of 1836:—Held, on a vendor's summons under the Vendor and Purchaser Act, 1874, that T. S. H. P. having active duties to perform was not a "bare trustee" within the meaning of section 48 of the Land Transfer Act, 1875; that the legal estate devolved upon the co-heiresses; that they were acting trustees for the time being, and consequently that their appointment of new trustees was a valid exercise of the power. *Cunningham and Frayling, In re*, 60 L. J., Ch. 591; [1891] 2 Ch. 567; 64 L. T. 558; 39 W. R. 469.

Sale of Trusteeship by Trustee.]—A testator by his will appointed S. and C. trustees of certain property therein comprised, which appointment he afterwards revoked by codicil, substituting H. and B. in their room. The will contained the ordinary clauses authorising the appointment by the continuing trustees or trustee of a new trustee or new trustees in the place of any dying or desiring to be discharged. Shortly after the

death of the testator, C., one of the excluded trustees, paid 75*l.* to H. upon the understanding that H. should retire and that he, C., should be appointed a new trustee in his place. This arrangement was assumed to be carried into effect by an indenture made between H., B. and C., in which the pecuniary consideration was not disclosed :—Held, that this attempted execution of the power of appointment was fraudulent and void. The deed was directed to be cancelled, and the sum of 75*l.* to be paid over by H. to the cestui que trust. *Sugden* v. *Crossland*, 3 Sm. & G. 192 ; 25 L. J., Ch. 563 ; 2 Jur. (N.S.) 318 ; 4 W. R. 343.

Informality in Appointment of Trustees—Election of Vicar.]—By deed of trust of 1682 for the appointment of a vicar, it was declared that upon the death of any of the trustees the survivors should from time to time, when and as often as they should think fit, before the number of trustees should be reduced to the number of five, or within three months after they should be reduced to the number of four, appoint new trustees, and convey the premises to them, so as to complete the number of nine trustees. It appeared that from the date of the deed to the election of a clerk in 1840 this clause had never been strictly acted upon, though the number of trustees had generally been kept up to nine :—Held, that the informality in the appointment of the trustees did not vitiate the election. *Att.-Gen.* v. *Cuming*, 2 Y. & C. C. C. 139 ; 7 Jur. 187.

Bankruptcy of Trustee—"Unfit to Act."]—When there was a power in a settlement to appoint new trustees, in case any of the trustees therein "should become incapable, or unfit to act in the trust thereof" :—Held, that by the bankruptcy of a trustee he became "unfit to act" within the meaning of the power. *Roche, In re*, 2 Dr. & War. 287 ; 1 Con. & L. 306.

—— **Absconding Trustee—"Incapable" of Acting.**]—A power to appoint a new trustee in the place of a trustee who should become incapable to act, contemplates the personal incapacity of such trustee ; and, therefore, a trustee who had become bankrupt, and been indicted for not surrendering to the fiat, and had absconded, was held not thereby to have become "incapable" of acting in the trust within the meaning of the power. *Watts's Settlement, In re*, 9 Hare, 106 ; 20 L. J., Ch. 337 ; 15 Jur. 459.

—— **"Person nominated for the Purpose."**]—Under a marriage settlement dated March 16, 1864, a power of appointing new trustees in case any of the trustees should "die or desire to be discharged from, or refuse, decline, or become incapable to act in the execution of the trust," was given to the husband and wife or the survivor of them. One of the trustees was adjudicated bankrupt and absconded. The husband, who had survived the wife, purported in 1895, in exercise of the power given to him by the settlement and by the provisions of the Trustee Act, 1893, to appoint a new trustee in the place of the absconding trustee :—Held, that the husband, not being a person nominated to make an appointment of a new trustee in the particular event which had happened, was not "the person nominated for the purpose of appointing new trustees of the setttlement by the instrument creating the trust," within the meaning of section 10 of the Trustee Act, 1893, and therefore that the appointment which he had purported to make was invalid. *Wheeler and De Rochow's Settlement Trusts, In re*, 65 L. J., Ch. 219 ; [1896] 1 Ch. 315 ; 73 L. T. 661 ; 44 W. R. 270.

Lunacy of Trustee—Appointment by other Trustees.]—A power of appointing new trustees provided that if any trustees or trustee should die, or become unwilling or unable to act, the trustees or trustee for the time being, whether continuing or declining to act, might appoint a new trustee or trustees. One of the three trustees became of unsound mind, but was not so found by inquisition, and the other two appointed a new trustee in his room :—Held, that the power was well exercised. *East, In re, Bellwood's Trusts, In re*, 42 L. J., Ch. 480 ; L. R. 8 Ch. 735.

—— **Service of Petition.**]—A petition for an order vesting the trust estate in the continuing trustees and the new trustee having been presented :—Held, that service on the trustee of unsound mind was not necessary. *Ib.*

Trustee going out of the Jurisdiction—Incapable to Act.]—A power to appoint a new trustee on an existing one becoming incapable to act does not apply to the case of a trustee going to reside abroad. *Withington* v. *Withington*, 16 Sim. 104.

A trustee going out of the jurisdiction is not thereby incapable, unwilling, or unable to act within the terms of the power to appoint new trustees, and an application to the court is proper. But if a breach of trust has been committed, this court, though it sanctions the appointment of a new trustee, will make no order as to the trust property. *Harrison's Trust, In re*, 22 L. J., Ch. 69 ; 1 W. R. 58.

—— **Domicile Abroad.**]—In a deed of settlement of property in the city of London, it being declared, that if either of the trustees should die, or decline or become incapable to act, it should be lawful to appoint a trustee in his room. One trustee having for several years been domiciled in New York, as a bookseller :—Held, he was incapable of acting within the meaning of the deed. *Mesnard* v. *Welford*, 1 Sm. & G. 426 ; 1 Eq. R. 237 ; 22 L. J., Ch. 1053 ; 17 Jur. 815 ; 1 W. R. 443.

—— **Simple Residence Abroad.**]—Semble, that a power in a settlement to appoint a new trustee in the place of a trustee incapable to act applies to personal incapacity, and not to simple residence abroad. *Blanchard, In re* (3 De G. F. & J. 131 ; 30 L. J., Ch. 516 ; 7 Jur. (N.S.) 505 ; 4 L. T. 426 ; 9 W. R. 647), distinguished. *Bignold's Settlement, In re*, 41 L. J., Ch. 235 ; L. R. 7 Ch. 223 ; 26 L. T. 176 ; 20 W. R. 345.

—— **Temporary Departure.**]—New trustees of a charity were to be appointed in lieu of those who should depart the United Kingdom, from whatever cause or motive, or under whatsoever circumstances ; and every such trustee so departing the United Kingdom was immediately upon his departure to be, and be considered to be, discharged from the trusts of the charity. A temporary departure from the United Kingdom held insufficient to vacate the office of trustee. *Moravian Society, In re*, 26 Beav. 101 ; 4 Jur. (N.S.) 703 ; 6 W. R. 851.

"Be Abroad."]—The power to appoint a new trustee of a will was exercisable (inter alia) in case a trustee should "be abroad." One of the trustees had taken the lease of a house in Normandy for about five years, and was residing there, and intended to continue to reside there until the expiration of his lease. He was within a day's post of London, and could reach London in about sixteen hours. He was continuing to act in the management of the trust, and attended nearly all the meetings of the trustees:—Held, that he was "abroad" within the meaning of the power, and the power to appoint a new trustee had arisen. *Stamford (Earl), In re, Payne* v. *Stamford*, 65 L. J., Ch. 134; [1896] 1 Ch. 288; 73 L. T. 559; 44 W. R. 249.

Appointment of New Trustee—Duplicate Instruments.]—A testator devised his estates to four trustees, with a power of sale, and directed that in case any trustee should die or retire from the trust the continuing trustees should "nominate" a fourth within two months, by any deed or writing properly attested. One trustee died, and an indenture was executed in duplicate on the same day by two of the trustees in England and by the third in Ireland under which a fourth trustee was simply "nominated," but no conveyance of the estate was executed to him. A contract was entered into for the sale of the estate; the purchaser refused to complete, and the four trustees filed a bill for specific performance:—Held, upon demurrer for want of equity, that a trustee might be appointed by two deeds as well as by one, but that, as no conveyance of the legal estate was effected, the new trustee was not properly appointed; that, nevertheless, the three continuing trustees might execute the power of sale, and that it was competent for all four to file the bill, the fourth trustee being joined for the sake of conformity. *Warburton* v. *Sandys*, 14 Sim. 622; 14 L. J., Ch. 431; 9 Jur. 503.

ii. *Exercise of Power Pending Suit.*

Institution of Administration Suit—Control of Court.]—The institution of a suit against trustees for the administration of the trust estate under the direction of the court, does not preclude the exercise of the discretion given to the trustees by the will of the testator, as to the appointment of new trustees, or the management of the trust; but the trustees are required, after the institution of the suit, to act under the control of the court. *Cafe* v. *Bent*, 3 Hare, 245; 13 L. J., Ch. 169; 8 Jur. 141.

The appointment of a new trustee under a power, pending a suit for administration, is not necessarily invalid. *Graham* v. *Graham*, 16 Beav. 550; 22 L. J., Ch. 937; 17 Jur. 569.

—— **After Judgment.**]—After judgment in an action for the administration of the trusts of a will, the person having by the terms of the will or by statute the power of appointing new trustees, retains such power so far as it does not conflict with the order which has been made, but subject to the control of the court; and the proper course is for such person, before exercising the power, to submit the name of the proposed new trustee to the chief clerk in chambers for approval. *Hall, In re, Hall* v. *Hall*, 54 L. J., Ch. 527; 51 L. T. 901; 33 W. R. 508.

A decree for the administration of the trusts of a will directed "that some proper person be appointed" a trustee of the will in the place of a deceased trustee. The power of appointing new trustees was given by the will to the surviving trustee, who was the defendant. The plaintiff took out a summons to have A. B. appointed trustee, and the defendant a summons to have C. D. appointed. The summonses were adjourned into court, and Bacon, V.-C., appointed the nominee of the plaintiff:—Held, on appeal, that the decree did not take away from the defendant the power of appointing new trustees, though after decree he could only exercise it subject to the supervision of the court; that if he nominated a fit and proper person, such person must be appointed, and the court would not appoint some one else on the ground that such other person was, in the opinion of the court, more eligible; and that if he nominated a person whom the court did not approve the court would not itself make the choice, but would call on him to make a fresh nomination:—Held, therefore, that the appointment of A. B. must be discharged. *Middleton* v. *Reay* (infra) distinguished. *Gadd, In re, Eastwood* v. *Clark*, 52 L. J., Ch. 396; 23 Ch. D. 134; 48 L. T. 395; 31 W. R. 417.

In a suit for the appointment of new trustees, occasioned by the refusal of the surviving trustees to exercise a power of appointment, reference was made to the master to approve of proper persons. Exceptions to his report, on the ground that he had not regarded the right of nomination given to the surviving trustee by the instrument creating the power, but not raising any objections to the fitness of the persons nominated by the master, were overruled. *Middleton* v. *Reay*, 7 Hare, 106; 18 L. J., Ch. 153; 13 Jur. 116.

If the party's right of nomination is to be preserved, there should be special directions to the master, semble. *Ib.*

Action for Appointment of New Trustee.]—Real estate was settled by will on D. for life, with remainders over, and the will appointed two trustees, and empowered them to sell at the request and by the direction of the person entitled to the actual freehold, with the usual provisions for re-investment in land and interim investment in other securities. The will also gave a power to appoint new trustees vested in the same person. One of the trustees was dead. D., who was over eighty years of age, proposed to sell the estate. The remaindermen brought this action for the appointment of a new trustee, and to restrain the sale as improper, adducing evidence to show that the estate would sell to better advantage at a future date, owing to the existence of minerals at present unworked, and a projected railway which would pass through the estate. D. had no re-investment in land in view, and proposed to invest in consols. After action brought, the Settled Land Act 1882 came into operation; and shortly before the action came on for trial, D., under the power in the will, appointed a new trustee without referring the the appointment to the court. The trustees consented to the proposed sale:—Held, that D. was entitled to sell the estate as well under the power in the will as under the Settled Land Act. *Thomas* v. *Williams*, 52 L. J., Ch. 603; 24 Ch. D. 558; 49 L. T. 111; 31 W. R. 943.

Held, also, that the new trustee was properly appointed, notwithstanding the pending action. *Ib.*

iii. *Duty in Exercise of Power.*

Control of Court.]—Court controls trustee in the exercise of power to appoint new trustees, though given in very large words. *Webb* v. *Shaftesbury (Earl)*, 7 Ves. 480; 6 R. R. 154.

Appointment to keep Trust Property in Hands of Solicitor.]—Trustees ought not to exercise a power of selecting new trustees for the mere purpose of continuing the trust property under the management of a particular solicitor. *Marshall* v. *Sladden*, 4 De G. & Sm. 468; 7 Hare, 428; 19 L. J., Ch. 57; 14 Jur. 106.

Communication with Cestuis que Trust.]—Circumstances in which it is improper for a retiring trustee to appoint a new trustee, without communication with the cestuis que trust. *Ib.*

It is the duty of trustees having power to appoint new trustees, to make such appointment impartially, as between the cestuis que trust, and not without communication with them. *O'Reilly* v. *Alderson*, 8 Hare, 101.

Sale of Trusteeship.]—S., in 1852, appointed B. and C. trustees of his will, which contained a power of appointing new trustees. By a codicil made in the same year he revoked the appointment of B. and C., and appointed D. and E. in their place as trustees. After the death of the testator, C., in consideration of 75*l.* paid by him to D., who retired from the office of trustee, was by deed, purporting to be an appointment under the power, appointed in his place:—Held, that the deed was fraudulent and void, and that no estate passed to C. under it. The court ordered the deed to be delivered up to be cancelled, and the 75*l.* to be repaid by D. for the benefit of the parties beneficially interested under the will. *Sugden* v. *Crossland*, 3 Sm. & G. 192; 25 L. J., Ch. 563; 2 Jur. (N.S.) 318; 4 W. R. 343.

Special Power—Intervention of Trustees.]—When a person having a special power of appointment over a fund of personalty appoints trustees for the objects of the power, the court, though recognising the validity of such an appointment, will not, as a matter of right, transfer the fund to the trustees appointed by the donee of the power. *Busk* v. *Aldam*, 44 L. J., Ch. 119; L. R. 19 Eq. 16; 31 L. T. 370; 23 W. R. 21.

iv. *Who may be Appointed New Trustees.*

Trust for Sale—New Trustee Person to exercise Discretion fairly.]—Where trustees for sale have taken various steps with a view to the execution of their trust, and, one of them retiring shortly before the sale, a new trustee is, under a power contained in the trust deed, appointed in his stead, the new trustee must be a person who can and will exercise his discretion fairly and beneficially for all persons, and as fairly and beneficially as the retiring trustee could have done. *Roberts* v. *Bozon*, 3 L. J. (O.S.) Ch. 113.

American Trustees.]—Upon the marriage of an English woman with a citizen of the United States, who was temporarily resident in England, the fortune of the wife, consisting of stock in the British funds, was assigned to trustees, who were Englishmen and relatives of the wife, upon certain trusts for the husband and wife and the issue of the marriage. By the settlement, power was given to the trustees, with the consent of the husband and wife, to invest the trust property in the names of the trustees or trustee for the time being in the public funds of Great Britain or America, or upon real securities in England, Wales, or America; and power was also given to the husband and wife or the survivor, in case the existing trustees should be desirous of being discharged from the trusts, to appoint new trustees. After the marriage, the husband and wife lived for about five years in England, and then went to reside permanently in America, having, previously to their departure, appointed three Americans to act as trustees in the room of the original trustees, the trust property being at the same time transferred by the English trustees into the American funds in the names of the three American trustees:—Held, that this appointment of American trustees, though not expressly authorised by the settlement, was valid. *Meinertzhagen* v. *Davis*, 1 Coll. C. C. 353; 13 L. J., Ch. 457; 8 Jur. 973.

Donee of Power appointing himself.]—A power to appoint new trustees is a fiduciary power and the appointor cannot appoint himself. *Newen, In re, Newen* v. *Barnes*, 63 L. J., Ch. 763; [1894] 2 Ch. 297; 8 R. 309; 70 L. T. 653; 43 W. R. 58; 58 J. P. 767.

—— **"Other" Person or Persons.**]—By a marriage settlement property belonging to the wife was settled on trusts in favour of the wife, her children, appointees, and next of kin, and if any trustee should die, or go to reside abroad, or desire to retire from, or refuse or become incapable to act in, the trusts, the husband and wife, or the survivor, and after the decease of such survivor, the continuing trustees or trustee, or, if no continuing trustee, the retiring or refusing trustees or trustee, or the executors or administrators of the last acting trustee, were empowered to appoint any "other" person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or going to reside abroad, or desiring to retire, or refusing, or becoming incapable, to act. The husband and wife, in exercise of the power, purported to appoint the husband and another person to be trustees in the place of retiring trustees. Upon a summons raising the question whether the retiring trustees might transfer the trust property to the persons so appointed:—Held, that a power of appointing new trustees being fiduciary, the donee of such a power cannot appoint himself. *Skeats' Settlement, In re, Skeats* v. *Evans*, 58 L. J., Ch. 656; 42 Ch. D. 522; 61 L. T. 500; 37 W. R. 778.

Held, also, that the terms of the power required that the trustee or trustees to be appointed should be some person or persons "other" than the person or persons making the appointment, and therefore, upon both these grounds, that the appointment was invalid. *Ib.*

Settled Land—Solicitor of Tenant for Life.]—It is the rule of the court not to appoint as trustee of a settlement for the purposes of the Settled Land Act the person who is solicitor to the tenant for life under the settlement, nor to sanction such an appointment; but that rule of practice does not prevent a tenant for life who is the donee of the power of appointment of new trustees from so exercising the power, and the court will not declare such an appointment invalid merely because the person appointed is solicitor to the

tenant for life. *Stamford (Earl), In re, Payne* v. *Stamford*, 65 L. J., Ch. 134; [1896] 1 Ch. 288; 73 L. T. 559; 44 W. R. 249.

—— **Appointment of Trustees for Purposes of Act—Infant absolutely entitled Resident in British Colony—Trustees in Colony.**]—The court has jurisdiction upon an appointment of trustees of a settlement for the purposes of the Settled Land Acts to appoint persons who are domiciled and resident in a British colony. Such jurisdiction is properly exercised upon an appointment of trustees to carry out the sale of land which is settled land by reason of the person entitled thereto being an infant, where the infant is domiciled and resident in a colony. *Simpson, In re, and Whitchurch, In re*, 66 L. J., Ch. 166; [1897] 1 Ch. 256; 76 L. T. 131; 45 W. R. 277—C. A.

Form of Order.]—Trustees appointed under s. 38 of the Settled Land Act, 1882, should be appointed trustees of "the settlement effected by the instrument in question for the purposes of the Settled Land Acts." Form of order in *Wright's Trusts, In re* (53 L. J., Ch. 139; 24 Ch. D. 662), adopted. *Ib.*

And see SETTLED LAND.

v. *Number of New Trustees.*

Statute.]—*Trustee Act*, 1893, *s.* 10, *sub-s.* (2).

Appointment of a Single Trustee.]—Where, by the terms of a settlement, it appears to be the intention of the parties that there should at all times be two trustees of the property comprised in the settlement, the appointment of a single trustee in the place of two original trustees, and the transfer by them of the trust property to such single trustee, is a breach of trust, and the original trustees are responsible accordingly. *Hulme* v. *Hulme*, 2 Myl. & K. 682.

By a settlement, lands were assured to A. and B. upon certain trusts, with a power in case they or either of them, or any trustee or trustees to be appointed under the power, should die or become unwilling to act, for the settlor during his life, and after his decease, for the acting trustees or trustee for the time being, or for the executors or administrators of any surviving trustee, to nominate any fit persons or person to supply the place of the trustees or trustee so dying or becoming unwilling to act. A. never executed the deed, nor acted. After A.'s death, B., being desirous of retiring, nominated C. to be a new trustee, and conveyed to C. all the trust estate. Afterwards, on account of doubts as to the validity of this appointment, the executor of B. executed a deed, appointing C. and D. to be trustees of the settlement in the place of the original trustees; and by the same deed C. conveyed the property to the use of himself and D. They then sold the trust estate under a power of sale in the settlement:—Held, that the survivor of the original trustees had not been guilty of a breach of trust in appointing only one new trustee, and that the two new trustees were well appointed, and had validly exercised the power of sale, so as to exonerate the purchasers from responsibility. *Miller* v. *Priddon*, 1 De G. M. & G. 335; 21 L. J., Ch. 421.

The bill contained an allegation that the new trustee was, when the sales were made, the sole trustee of the settlement. Semble, that this allegation would not have precluded the plaintiff from insisting upon the invalidity of the appointment of that trustee, if the appointment had been invalid. *Ib.*

A testator appointed A., B. and C. to be trustees of his will, and declared that if the trustees thereby appointed or any of them should happen to die, it should be lawful for the surviving trustee or trustees to appoint any other person or persons to be a trustee or trustees, in the place of the trustees or trustee so dying: and that, on such appointment, the trust premises should be conveyed, so that the same should be vested in the surviving trustees and such new trustees, or in such new trustees solely, on the same trusts. A. died in the lifetime of the testator:—Held, that it was the intention of the testator that there should be three trustees of his will, and that a new trustee might be appointed in the place of A. *Lonsdale (Earl)* v. *Beckett*, 4 De G. & Sm. 73; 19 L. J., Ch. 342.

The power of appointing new trustees given by s. 27 of the act 23 & 24 Vict. c. 145, authorises a retiring trustee, one of two originally appointed, to appoint a single trustee in place of himself, the other original trustee having previously disclaimed without acting. *West of England & South Wales District Bank* v. *Murch*, 52 L. J., Ch. 784; 23 Ch. D. 138; 48 L. T. 417; 31 W. R. 467.

Reduction of Original Number.] — By an indenture of settlement three trustees were appointed. The settlement contained a power for the cestuis que trust, in case the trustees therein named, or either of them, should die, or be desirous of being discharged from the trusts, to appoint any other person or persons to be a trustee or trustees in the place of any such trustee or trustees so dying, or being desirous to be discharged. One trustee died, and the other two were desirous of being discharged, upon which two new trustees only were substituted. The two continuing trustees refused to transfer the fund to the new trustees, upon the ground that the appointment was not properly executed, and paid the trust fund into court under the Trustee Act:—Held, upon petition for payment of the money out of court, that it was competent for the cestuis que trust to appoint two trustees only, and that the old trustees were not justified in paying the money into court, and they were ordered to pay costs thereby occasioned, and their costs of the petition. *Fagg's Trust, In re*, 19 L. J., Ch. 175.

Where three trustees were named in a settlement, with a power to the cestuis que trust, to nominate, substitute, or appoint any person or persons in the place of the said present or other trustee or trustees who should die, &c.:—Held, that an appointment of two persons only in the room of the three original trustees, was a valid appointment. *Bathurst's Estate, In re*, 2 Sm. & G. 169; 18 Jur. 568.

Trustees of a deed had a discretionary power of distribution over a fund amongst a class of children, who in default took equally. There were originally five trustees, one of whom was a member of the class. After the death of the surviving trustee, three new trustees were appointed under a power, one of whom (A.) was a member of the class. These three apportioned the fund, except a minute portion, amongst the three survivors of the children, equally, including

A. :—Held, that the appointment of three trustees, instead of five, was not void ; and, secondly, that the appointment of the fund was good. *Reid* v. *Reid*, 30 Beav. 388.

Increase of Original Number.]—Where, by a settlement, a certain number of persons are appointed trustees, and power is given, upon the death or retirement of a trustee or trustees, to appoint any other person or persons to be a trustee or trustees in his or their room, an appointment of a greater than the original number of trustees is not a valid exercise of the power. *Davis, Ex parte, Clark, In re*, 2 Y. & C. C. C. 46 ; 3 Mont. D. & D. 304 ; 12 L. J., Bk. 38 ; 7 Jur. 430.

Upon the construction of the power for appointing new trustees contained in a marriage settlement :—Held, that the appointment of three new trustees in the room of the two original trustees of the settlement, was valid. *Meinertzhagen* v. *Davis*, 1 Coll. C. C. 353; 13 L. J., Ch. 457 ; 8 Jur. 973.

Semble, that the appointment of more than one trustee in the place of one dead or retiring trustee, cannot be justified without express words indicating the intention of the settlor. *Stones* v. *Rowton*, 17 Beav. 308 ; 1 Eq. R. 427 ; 22 L. J., Ch. 975 ; 17 Jur. 750 ; 1 W. R. 499.

vi. *Rights and Liabilities.*

Statute.]—*Trustee Act*, 1893, s. 10, sub.-s. (3).

Right of Surviving Trustee to Co-operation of New Trustee.]—When, in the inception of a trust, the funds are vested in two trustees, and one of them dies, the survivor is entitled to have the advice and co-operation of a new trustee before dealing with the principal of the trust funds in any way which involves a question of discretion. *Livesay* v. *O'Hara*, 14 Ir. Ch. R. 12.

Settlement of Policies—Refusal of Old Trustees to Execute Conveyance.]—By a marriage settlement, certain policies of assurance effected by the husband upon his life were assigned to trustees upon trust to pay the proceeds to the wife for life, and then to divide the capital between the children of the marriage. The settlement also contained a covenant on the part of the husband to pay the premiums, and hand over the receipts to the trustees. There was also a power for the husband and wife jointly to appoint new trustees, with a proviso that on such appointment the old trustees should convey to the new trustees. The husband and wife jointly executed the power of appointing new trustees ; the old trustees refused to execute a conveyance of the trust property, upon which a bill was filed to compel them to do so : —Held, that there was nothing vested in the trustees ; consequently there was nothing for them to do, and nothing for the court to direct them to do : and the bill was dismissed with costs. *Dodson* v. *Powell*, 18 L. J., Ch. 237.

Bankruptcy of Surviving Trustee — Transfer to New Trustee.]—When the power to appoint new trustees directs the property to be vested in the new trustees jointly with the surviving or continuing trustee, and the surviving trustee had become bankrupt :—Held, that, notwithstanding, a valid appointment of and transfer of the estate to the new trustee might be made under the power. *Roche, In re*, 2 Dr. & War. 287 ; 1 Con. & L. 306.

Refusal by Husband Separated from Wife to Exercise Joint Power of Appointment of New Trustees.]—Where there is a joint power of appointing new trustees in a settlement, and the parties are separated and cannot agree, and the husband refuses to appoint or approve of a person nominated by the wife merely for that reason, a claim by him dismissed with costs. *Fry* v. *Watson*, 1 W. R. 282.

Refusal of New Trustees to Execute Trust without Evidence of Settlor's Title.]—An executrix, by a deed reciting that she intended to appropriate a part of her testator's assets in payment of a debt due from him to her, declared trusts of the fund intended to be thus appropriated. She died without making the appropriation, which was made after her decease by her executors. New trustees of the deed, subsequently appointed, executed a declaration of trust (contained in the deed appointing them) whereby they declared that they would hold the fund upon the trusts. On inquiring, before their appointment, for evidence in verification of the recital as to the existence of the debt from the testator to the executrix, none could be discovered :—Held, that the trustees could not be compelled to execute these trusts without further evidence of the settlor's title to appropriate the fund. *Neale* v. *Davies*, 5 De G. M. & G. 258 ; 2 Eq. R. 530 ; 23 L. J., Ch. 744 ; 2 W. R. 358.

—— Power of Assent annexed to Office.]—Marriage articles authorised the tenant for life to withdraw the fund from the settlement, with the assent of the "under-signed trustees" :—Held, that the power of assent was annexed to the office, and might therefore be exercised by new trustees appointed by the court. *Byam* v. *Byam*, 19 Beav. 58 ; 24 L. J., Ch. 209 ; 1 Jur. (N.S.) 79 ; 3 W. R. 95.

New Trustees—Notice to Original Trustees—Constructive Notice.]—Persons appointed new trustees under a will or settlement are bound to inquire what the trust property consists of, and what the trusts are, and to look into the trust documents to see what incumbrances their predecessors had notice of. But if there was nothing among the trust documents which would have given them notice of an incumbrance, they will not be held liable for loss arising from their ignorance of it, even though they have in fact omitted to look into those documents. *Hallows* v. *Lloyd*, 58 L. J., Ch. 105 ; 39 Ch. D. 686 ; 59 L. T. 603 ; 37 W. R. 12.

Semble, it is the duty of a trustee parting with a fund to a new trustee to inform him of all notices he has received affecting the fund. *Booth's Settlement Trusts, In re*, 16 Jur. 965 ; 1 W. R. 444.

Semble, that new trustees of trust funds in settlement are not bound to inquire of the old trustees whether they have received notice of any incumbrance. *Phipps* v. *Lovegrove*, 42 L. J., Ch. 892 ; 16 L. R., Eq. 80 ; 28 L. T. 584 ; 21 W. R. 590.

Liability for Breaches of Trust.] — As to liability of new trustees for breaches of trust. See *Geaves, Ex parte, Strahan, In re*, 8 De G. M. & G. 291 ; 25 L. J., Bk. 53 ; 2 Jur. (N.S.) 651 ; 4 W. R. 536.

b. Under Statutory Powers.

Statutes.]—*Trustees Appointment Act*, 1890 (53 & 54 Vict. c. 19). *Trustee Act*, 1893, *s.* 10.

Husband and Wife.]—A settlement executed in 1878 contained no express power to appoint new trustees, but there was a declaration that the husband and wife during their joint lives, and the survivor of them during his or her life, "shall have power to appoint new trustees or a new trustee for this settlement." There was no express reference to the power of appointing new trustees conferred by s. 27 of Lord Cranworth's Act, which was then in force:—Held, that after the commencement of the Conveyancing Act, 1881, the husband and wife were the proper persons to exercise the power conferred by s. 31 of that act of appointing a new trustee in place of one of the trustees who had remained out of the United Kingdom for more than twelve months, though s. 27 of Lord Cranworth's Act did not provide for, and the parties when they executed the settlement probably did not contemplate, the occurrence of a vacancy in that event. *Walker and Hughes' Contract, In re*, 53 L. J., Ch. 135; 24 Ch. D. 698; 49 L. T. 597. And see *Mara* v. *Browne*, 65 L. J., Ch. 225; [1896] 1 Ch. 199; 73 L. T. 638; 44 W. R. 330.

Personal Representative of Trustee Predeceasing Testator.]—Where all the trustees named by a testator predecease him the legal personal representative of the last survivor has not power, under s. 31 of the Conveyancing Act, 1881, to appoint new trustees. *Nicholson* v. *Field*, 62 L. J., Ch. 1015; [1893] 2 Ch. 511; 3 R. 528; 69 L. T. 299; 42 W. R. 48.

Representative of Sole Trustee.]—The power of appointing new trustees given by s. 31 of the Conveyancing Act, 1881, to "the personal representatives of the last surviving or continuing trustee" includes the case of an executor of a sole trustee. *Shafto's Trusts, In re*, 54 L. J., Ch. 885; 29 Ch. D. 247; 53 L. T. 261; 33 W. R. 728.

The representative of a deceased trustee is not bound at the request of the cestuis que trust to exercise the power of appointing new trustees given by the Conveyancing and Law of Property Act, 1881, and the refusal to do so is not a sufficient reason for ordering the executors to pay the cost of a petition for the appointment of new trustees. *Knight's Trust*, or *Will, In re*, 53 L. J., Ch. 223; 26 Ch. D. 82; 49 L. T. 774; 32 W. R. 336.

"Personal Representatives" of Surviving Trustee—Appointment of Special and General Executors by Will of Surviving Trustee—Probate granted to "general" Executors.]—Section 31 of the Conveyancing and Law of Property Act, 1881, does not enable a sole surviving trustee of a will to appoint by his will, in continuation to himself, trustees of the will of the original testator. *Parker's Trusts, In re*, 63 L. J., Ch. 316; [1894] 1 Ch. 707; 70 L. T. 165.

The sole surviving trustee of a will by his will appointed general executors, and also purported to appoint special executors, for the purpose of executing, in continuation to himself, the trusts of the will of the original testator. The general executors obtained a grant of probate of the will of the trustee to themselves as "general executors," without any reservation of power to the special executors to come in and prove, and proceeded by deed to appoint two persons to be trustees of the will of the original testator. Subsequently probate of the will of the trustee, limited to the trust estates of the original testator, was granted to the persons named as special executors:—Held, that the will of the trustee did not operate as an exercise of the power of appointing new trustees conferred by s. 31 of the Conveyancing and Law of Property Act, 1881; but that as the general executors were, at the time when the deed of appointment was executed, in possession of a general grant of probate, which was the only probate then in existence, they were "personal representatives" of the last surviving trustee within the meaning of the section, and therefore the deed was a valid appointment of trustees. *Ib.*

Executor of Surviving Trustee.]—When an express power contained in a will for the appointment of new trustees by the surviving or continuing trustees had not been acted on, the court refused to compel the legatees to acquiesce in an appointment by the executor of the last surviving trustees, under 23 & 24 Vict. c. 145, s. 27. *Jackson's Trusts, In re*, 18 L. T. 80; 16 W. R. 572.

Surviving Trustee.]—One of the trustees of a deed of separation which contained no power of appointment of new trustees having died:—Held, that the power was vested in the surviving trustee by 23 & 24 Vict. c. 145, s. 27, and a petition by the husband claiming the right of selection was dismissed. *Soulby's Trusts, In re*, 21 W. R. 256.

"Continuing Trustees"—"Contrary Intention"—Conveyancing Act, 1881, s. 31.]—On a summons under the Vendor and Purchaser Act, 1874, an objection was taken by a purchaser from trustees that an appointment of one of their number, under the power given by s. 31 of the Conveyancing Act, 1881, in the place of a trustee who had been abroad for more than twelve months, was invalid because that trustee had not joined in making the appointment:—Held, that there being no evidence that the absent trustee was either willing or competent to join in making the appointment, the objection could not be sustained. *Coates to Parsons, In re*, 56 L. J., Ch. 242; 34 Ch. D. 370; 56 L. T. 16; 35 W. R. 375.

The instrument creating a trust cannot be taken to have expressed a contrary intention within sub-s. 7 of s. 31 of the Conveyancing Act, 1881, merely because it does not provide for filling up a vacancy in the number of the trustees upon the happening of an event not contemplated by the parties to that instrument. *Ib.*

—— Provision in Private Act—Approbation of the Court.]—A private act, passed in the year 1869, enacted that s. 27 of Lord Cranworth's Act should be deemed and taken to apply to the trusteeship of the "Manchester estates" comprised therein; "provided that every new trustee of the said estates shall be appointed with the approbation of the court of chancery." In the year 1886, a deed was executed by the continuing trustees appointing new trustees

under the power "vested in them by statute." This deed contained the usual declaration vesting the estates in the new trustees; but the appointment was not made with the approbation of the court:—Held, that the deed must be construed as if the special provision contained in the private act had formed part of Lord Cranworth's Act; that, as Lord Cranworth's Act had been repealed, the court could not add that special provision to the general power of appointment given by the Conveyancing Act, 1881; and that, therefore, the new trustees were well appointed. *Lloyd's Trustees, In re*, 57 L. J., Ch. 246.

—— **Consent of Persons beneficially Interested.**]—A settlement of real estate of which there were four trustees, provided that if the trustees thereby appointed, "or any future trustee or trustees to be appointed in the place of them or any of them as hereinafter mentioned," should die or be desirous of being discharged, &c., it should be lawful for "the surviving or continuing trustee or trustees for the time being," with the consent of the tenant for life or in tail for the time being entitled in possession, to appoint a new trustee or new trustees in the place of the trustee or trustees so dying, &c. In 1872, four new trustees were appointed under the Trustee Act, 1850, in the place of two deceased and two retiring trustees. After this a decree was made for carrying the trusts of the settlement into execution. Two of the trustees of 1872 being dead, and another desiring to retire, the plaintiff, who was an infant tenant in tail in possession, took out a summons to appoint new trustees. W., the continuing trustee, took out a summons, asking that he might be at liberty to appoint new trustees. A reference to chambers being directed, W. proposed new trustees whom the court considered to be proper persons, but to whom all the persons beneficially interested objected:—Held, that the persons nominated by W. must be appointed, though the tenant in tail in possession did not consent, for that as the power in the settlement only applied to filling up vacancies in the number of original trustees, or trustees appointed under the power, it had come to an end when new trustees were appointed by the court in 1872, and that the fetter imposed by the settlement on the exercise of that power did not apply to the new power given to the continuing trustee by the Conveyancing and Law of Property Act, 1881, which enabled him to fill up vacancies in a body of trustees not coming within the scope of the power in the settlement. *Cecil* v. *Langdon*, 54 L. J., Ch. 313; 28 Ch. D. 1; 51 L. T. 618; 33 W. R. 1—C. A.

—— **Retiring Trustee joining in Appointment.**]—Semble, that if a trust deed contained a power to appoint new trustees expressed in the same words as sub.-s. 1 of s. 31, without anything more, it would not be necessary that a retiring trustee should join in the appointment of his successor. In such a case the words "continuing trustee" would mean only a trustee who is to continue to act in the trusts after the completion of the appointment. *Travis* v. *Illingworth* (supra, col. 553), and *Norris, In re* (infra), approved. Opinion of Bacon, V.-C., in *Glenny and Hartley, In re* (infra), dissented from. *Coates to Parsons, In re*, supra.

A trustee who has made up his mind to retire, may be a "continuing" trustee, until he has executed the deed appointing new trustees. By a settlement in 1867 (Lord Cranworth's Act having been passed in 1860), it was declared that it should be lawful for "the surviving or continuing trustees," in the event of any trustees declining to act, to discharge such trustees, and to appoint any new trustees; and it was provided that nothing should authorise the discharge of the only continuing trustees without the substitution of others. Of three original trustees, one having died, the other two by deed in 1874, after reciting that they themselves "declined to act" and "desired to be discharged," and had "determined to appoint" three other persons to be trustees, "in exercise of the power for this purpose vested in them" by the settlement, appointed the three persons "to be trustees in the place of" themselves and the deceased trustee respectively:—Held, that the appointment was good. *Travis* v. *Illingworth* (2 Dr. & Sm. 344) not followed. *Glenny and Hartley, In re*, 53 L. J., Ch. 417; 25 Ch. D. 611; 50 L. T. 79; 32 W. R. 457.

When a power of appointing new trustees authorises the continuing trustee or trustees to appoint a new trustee or trustees in the place of a trustee or trustees becoming unwilling to act, an appointment by a sole continuing trustee, in the place of a trustee who desires to retire, is valid; it is not necessary that the retiring trustee should join in making the appointment. *Glenny and Hartley, In re* (supra), commented on. *Travis* v. *Illingworth* (supra) approved, and followed. *Norris, In re, Allen* v. *Norris*, 53 L. J., Ch. 913; 27 Ch. D. 333; 51 L. T. 593; 32 W. R. 955.

c. Appointment by the Court.

Statutes.]—*Trustee Act*, 1893, *s.* 25. *Judicial Trustee Act*, 1896, *s.* 1.

i. *In General.*

Colony—Australia—Appointment by Master—Vesting Order.] — Sections 30 and 32 of 16 Vict. (No. 19) authorise the supreme court to appoint a new trustee where it is expedient to do so, and "either by the same or by any subsequent order," to vest the trust property in the trustee so appointed. It is competent to the court under these sections to refer the appointment to the master, and at the same time to make an order vesting the trust property in the trustee whom the master shall appoint. It is not necessary that in case of appointment by the master the court should make a subsequent vesting order. *Plomley* v. *Richardson*, 64 L. J., P. C. 18; [1894] A. C. 632; 11 R. 324; 71 L. T. 377—P. C.

Suit for Appointment of New Trustees.]—Although the proper course is to proceed under the Trustee Act for the appointment of new trustees, a bill might be resorted to for the same purpose. *Legg* v. *Mackrell*, 4 L. T. 568.

A suit for the removal of the trustee of a settlement, and the appointment of new trustees; and for the payment of certain moneys comprised in the settlement, and which had been lent to the husband, to such new trustees out of a sum of money belonging to the husband which had been paid into court under the Trustee Relief Act; and for general administration of the trusts of the settlement—may be sustained. *Thorp* v. *Thorp*, 1 K. & J. 438.

How parties beneficially interested, where one executor and trustee has disclaimed, and the other is dead, are to obtain an appointment of new trustees for the purpose of executing the trusts of the will. *Wood* v. *Stane*, 8 Price, 613.

When the interest of a money fund, vested in two trustees, was payable to H. and his wife for their lives, remainder, as to the principal sum, to F. and his wife, and the deed contained a power of appointing a new trustee in case of the death of one of the present trustees, and one of the trustees had died:—Held, that a bill to appoint a new trustee by F. and his wife was maintainable, although there was no proof that the other parties had refused to appoint under the power. *Finlay* v. *Howard*, 2 Dr. & War. 490.

The representatives of a surviving trustee who had concurred with his co-trustee in a breach of trust by lending to the tenant for life on his promissory note, were held entitled to file a bill against such tenant for life, and the other cestuis que trust for replacing the funds, and the appointment of new trustees, with costs against the tenant for life, or out of the fund. *Greenwood* v. *Wakeford*, 1 Beav. 576; 8 L. J., Ch. 333.

Where the surviving trustee of a will devised the trust estate upon the same trusts on which he held:—Held, that the cestuis que trust were entitled to have new trustees appointed of the original will. *Ockleston* v. *Heap*, 1 De G. & Sm. 641.

The survivor of two executors and trustees bequeathed the trust property to A., upon the trusts declared by the original testator, expressing by the same instrument his wish that A. would execute the trusts with fidelity. No direction was given by the will of the original testator as to the appointment of new trustees. On a bill by the cestuis que trust for that purpose:—Held, that A., though legally in the possession of the trust property, was not a trustee properly constituted, and that the cestuis que trust were entitled to have new trustees appointed by the court. *Mortimer* v. *Ireland*, 6 Hare, 196; 16 L. J., Ch. 416; 11 Jur. 721.

A testator gave a legacy to a trustee in trust to invest it for the benefit of E. S., independent of the control of her husband. On a bill by the husband and wife against the trustee to have it declared that the wife was absolutely entitled to the fund, and to have the same transferred to her or to her husband by her direction or in her right, it was held, that the wife was entitled to the entire disposal of the fund, but that the husband could not obtain it in that suit; and it was referred to the master to approve of a trustee, to whom the fund might be transferred, upon the trust declared in the will, and to approve of a deed declaring that trust. *Simons* v. *Horwood*, 1 Keen, 7.

A trustee, by his answer, declined to act, and on the hearing it was referred to the master to appoint new trustees; the original trustee afterwards agreed to act: and, on application to the court that the trustee might be at liberty to amend his answer in this respect, so as to enable the court, on a re-hearing, to vary that part of the decree, the court refused to do this, but thought the master was at liberty, on statement of these circumstances, to decline the appointment of new trustees. *Miles* v. *Neale*, 1 Cox, 159.

Bill Filed by one Director of a Company.]—On a bill filed by one director of a company on behalf of the company, praying a transfer of the fund to new trustees, the court will, without having the new trustees before the court, direct the transfer. *Wilson* v. *Parker*, 10 Jur. 979.

Inquiry as to Notice of Incumbrances.]—Semble, it has never been the practice of the court on appointing new trustees of funds to inquire whether the old trustees have received notices of incumbrances. *Phipps* v. *Lovegrove*, 42 L. J., Ch. 892; L. R. 16 Eq. 80; 28 L. T. 584; 21 W. R. 590.

ii. *Under the Trustee Acts*, 1850 *and* 1852.

Death of Trustee—No Administration to Surviving Trustee.]—Where a surviving trustee has been dead for many years, and no administration has been taken out to him, and there is therefore no existing trustee, the court will appoint a new trustee, upon petition, under s. 32 of the Trustee Act, 1850, and s. 9 of the Trustee Extension Act, 1852. In such a case it is expedient to appoint a new trustee, but it cannot be done without the aid of the court. *Davis* v. *Chanter*, 27 L. J., Ch. 577; 4 Jur. (N.S.) 272; 6 W. R. 416.

—— **Question in whom Legal Estate Vested.**]—Where the trustees of a will are dead, and there is a question as to the party in whom the legal estate is vested, the court will appoint new trustees, notwithstanding that a receiver has been appointed in the suit, and continue the receiver. *Reeves* v. *Neville*, 10 W. R. 335.

—— **Trustee in Bankruptcy.**]—When the proceedings in a bankruptcy have been suspended by a resolution of the creditors, passed under the Bankruptcy Act, 1861, s. 110, and the trustee appointed by the creditors to wind up the estate and effects of the bankrupt has died, the court of chancery has jurisdiction, under the trustee acts, to appoint new trustees. *Raphael, In re*, 39 L. J., Ch. 200; L. R. 9 Eq. 233; 18 W. R. 247.

—— **Pending Sale under Settled Estates Act.**]—Pending the proceedings for carrying out a sale directed by an order made under the Settled Estates Act, one of the trustees, who were the conveying parties, died. The court directed a petition to be presented for the appointment of a new trustee in the place of the deceased trustee. *Scott* v. *Heisch*, 33 L. T. 498; 24 W. R. 108.

—— **Objection that Separation Deed Void.**]—Upon a petition to appoint new trustees of a separation deed, on the death of the sole trustee, it was objected that the deed was void, in consequence of the father's thereby abandoning his right to the custody of his children. The court declined deciding as to its validity, but appointed new trustees to protect the property. *Matthews, In re*, 26 Beav. 463; 28 L. J., Ch. 295; 5 Jur. (N.S.) 184; 7 W. R. 244.

Disclaimer of Trustee.]—Two trustees of real estates named in a will disclaimed. On a petition by of a person entitled to a pecuniary legacy charged on the estates, to appoint two persons named in the petition as

trustees in their place, it was suggested that s. 32 of Trustee Act, 1850, authorised the court to appoint trustees in substitution for or in addition to existing trustees only, and that the heir of the testator had become the existing trustee :—Held, that the distinction was too narrow ; and the court, upon affidavits of the fitness of the proposed trustees, appointed them in substitution for the trustees who had disclaimed. *Tyler's Trust, In re*, 5 De G. & Sm. 56 ; 21 L. J., Ch. 16 ; 15 Jur. 1120.

Application for the direction of the court as to the appointment of a third trustee in the room of a disclaiming trustee. The parties in whom the power of appointment was vested were in India ; they, supposing that only two trustees had disclaimed, appointed two. It appeared that the third had also disclaimed. The petition was ordered to be amended by intituling it in the Trustee Act, 1850, and by introducing the above facts ; the court would then appoint under the power in the Trustee Act. *Humphry's Estate, In re*, 1 Jur. (N.S.) 921.

Upon a petition for the appointment of new trustees by the court, it is not necessary that a disclaiming trustee who has never acted should disclaim by deed, but a disclaimer by his counsel at the bar is sufficient. *Forster* v. *Dawber*, 1 Dr. & Sm. 171 ; 8 W. R. 646.

M. and C. being trustees and executors under a will, C. simply renounces, and M. then dies, having left devisees in trust. A petition is presented to appoint new trustees, and for a direction that such devisees might convey. C., by affidavit on the petition, disclaimed ; and on the doubt whether the devisees in trust of M. had the legal estate :—Held, that a vesting order would obviate the difficulty. *Skinner's Trust, In re*, 2 W. R. 130.

Semble, disclaimer in court on petition not sufficient to divest an estate ; disclaimer should be by deed or of record. *Ellison's Trust, In re*, 2 Jur. (N.S.) 62.

And semble, disclaimer by petition is no more than a parol disclaimer, and not like a disclaimer by bill, as a bill is entered of record. *Ib.*

Refusal to Act—Petition of Person having only a Contingent Interest.]—Where estates were given to trustees, upon trust (after a trust for one for life, with remainder for his children) to convey to a person in the event of the death of the tenant for life without issue, the court, under the 13 & 14 Vict. c. 60, appointed trustees in the place of original trustees who refused to act. *Sheppard's Trusts, In re*, 4 De G. F. & J. 423 ; 1 N. R. 76 ; 32 L. J., Ch. 23 ; 9 Jur. (N.S.) 59 ; 7 L. T. 377 ; 11 W. R. 60.

—— **Administrator of Naturalised British Subject.**]—Where three executors and trustees of the will of a naturalised British subject renounced probate, and declined to act, the court, on the petition of the administrator, and of the persons who would, but for the fact of their being aliens, be co-heirs at law, made an order, the crown not opposing, for the appointment of new trustees, and vesting the real estate in such new trustees. *Martinez, In re*, 22 L. T. 403.

—— **Voluntary Settlement not communicated to Sole Trustee—Death of Settlor.**]—A settlor made a voluntary settlement of real estate, but did not communicate the fact of the settlement to the sole trustee during his lifetime. After the settlor's death the trustee refused to undertake the trusts of the settlement. The settlement contained a covenant for further assurance, and a power to appoint new trustees :—Held, that this was a case in which the court would appoint new trustees. *Jones* v. *Jones*, 31 L. T. 535.

Infant.]—Devise to an adult and infant trustee upon trust to sell. New trustee appointed in place of the infant under s. 32 of the Trustee Act, 1850, and vesting order granted in favour of the old and new trustees. *Porter's Trusts, In re*, 25 L. J., Ch. 482 ; 2 Jur. (N.S.) 349 ; 4 W. R. 417.

The court will on petition appoint a new trustee in the room of an infant appointed trustee by the testator together with two other persons, and who has himself a beneficial interest. *Gartside's Estate, In re*, 1 W. R. 196.

Where the court, with a view to carrying out the trusts of a testator's will, appoints a new trustee in the room of an infant trustee nominated by the testator himself, the appointment should be without prejudice to any application by the infant to be restored to the trusteeship on his coming of age. *Shelmerdine, In re*, 33 L. J., Ch. 474 ; 11 L. T. 106.

Trustee out of Jurisdiction.]—Where one of two trustees was residing out of the jurisdiction of the court, the court refused to appoint another trustee in his stead under ss. 22 and 32 of the 13 & 14 Vict. c. 60. *Mais, In re*, 21 L. J., Ch. 875 ; 16 Jur. 608.

A surviving trustee of a settlement of stock having died, his widow took out administration with the will annexed in Ireland. There was no representative in England. A petition was presented for the appointment of new trustees, and for a vesting order, under the statute 13 & 14 Vict. c. 60, but the order was refused. *Frost's Trust, In re*, 20 L. J., Ch. 112 ; 15 Jur. 644.

Order appointing trustees of a settlement, one one of the trustees named in it residing permanently abroad, and the other having been wrongly described in the settlement. *Irwin's Trust, In re*, 9 L. R., Ir. 19.

The court has power, under the Trustee Act, 1850, s. 32, to appoint a new trustee in place of a trustee who is permanently residing abroad, without his consent. *Blanchard, In re* (3 De G. F. & J. 131 ; 30 L. J., Ch. 516), distinguished. *Bignold's Settlement, In re*, 41 L. J., Ch. 235 ; L. R. 7 Ch. 223 ; 26 L. T. 176 ; 20 W. R. 345.

Semble, that a power in a settlement to appoint a new trustee in the place of a trustee incapable to act applies to personal incapacity, and not to simple residence abroad. *Ib.*

A new trustee appointed in the place of a trustee who had become bankrupt, had never surrendered, and had not been heard of for several years. *Renshaw's Trusts, In re*, L. R. 4 Ch. 783 ; 17 W. R. 1035.

Appointment under one petition in lunacy and chancery of new trustees, in the place of a person of unsound mind, not so found by inquisition, and of a deceased trustee and a trustee resident abroad. *Stewart, In re*, 8 W. R. 297, 425. And see *Davidson, In re*, 20 L. J., Ch. 644.

—— **Vesting Order where one Trustee Abroad.**]—Where there are several trustees, one of whom is out of the jurisdiction, and a new trustee is appointed by the court in his place under the

Trustee Act, 1850, an order vesting the trust estate in the new and continuing trustees will, under s. 10 of that act, have the effect of severing the joint tenancy, semble. *Watt's Settlement, In re*, 9 Hare, 106; 20 L. J., Ch. 337; 15 Jur. 459.

Where one of several trustees of real estates is out of the jurisdiction, and it is sought to get another trustee appointed in his place, and to vest the trust property in the new trustee and the continuing trustees, the proper course is, not to apply for a vesting order for that purpose, but for an order appointing a proper person to concur with the continuing trustees in conveying the property, so as to vest it in themselves and the new trustee. *Plyer's Trust, In re*, 9 Hare, 220; 20 L. J., Ch. 529; 15 Jur. 766.

Form of order appointing a trustee in the place of a trustee out of the jurisdiction, where there is another and continuing trustee, and the vesting order is not made. *Ib.*

Where one of several trustees is out of the jurisdiction, and a new trustee is appointed in his place, the court will make an order vesting the estate in the continuing trustees and the new trustee. *Watt's Settlement, In re* (supra), overruled. *Smith* v. *Smith*, 3 Drew. 72; 3 Eq. R. 126; 24 L. J., Ch. 229; 18 Jur. 1047; 3 W. R. 95.

Under s. 10 of the 13 & 14 Vict. c. 60, the court will make an order vesting lands in a new trustee, jointly with continuing trustees, notwithstanding the doubts suggested in *Watt's Settlement, In re*, and *Plyer's Trust, In re* (supra). *Bute's Will* (*Marquis*), *In re*, Johns. 15; 5 Jur. (N.S.) 487.

The property comprised in a settlement consisted of money lent upon a mortgage of freeholds vested in the two surviving trustees, and of a sum of consols standing in their names. One of these two surviving trustees was a lunatic, and the other was resident out of the jurisdiction; and under a power in the settlement two persons were appointed new trustees in their places. Upon a petition by these two new trustees, and by all the beneficiaries praying for an order reappointing the new trustees as trustees of the settlement, and vesting in them the trust property:—The court declined to reappoint the new trustees, but under s. 3 of the Trustee Act, 1850, vested the lands subject to the mortgage in the new trustees, and under s. 5 of the same act vested the mortgage debt and the right to call for a transfer of the consols in the trustee of sound mind resident out of the jurisdiction, and, it appearing that he was out of the jurisdiction, vested the mortgage debt and the right to call for a transfer of the consols in the new trustees. *Batho, In re*, 58 L. J., Ch. 32; 39 Ch. D. 189; 59 L. T. 882—C. A.

The master of the rolls has no jurisdiction under the trustee acts to appoint, or to make an order vesting the trust fund in, a new trustee in the place of a trustee found a lunatic in England, and residing there. *Smith's Trusts, In re*, Ir. R. 4 Eq. 180.

No Original Trustees.]—The court has inherent jurisdiction in a cause to appoint trustees of a will in a case where no trustees were originally appointed by the testator. *Dodkin* v. *Brunt*, L. R. 6 Eq. 580.

Executors of a will, which contained no appointment of trustees, set apart a sum of money to answer a legacy; the fund was standing in the name of the surviving executor:—Held, that he was a constructive trustee within the trustee acts, and new trustees were appointed on petition. *Davis's Trusts, In re*, 40 L. J., Ch. 566; L. R. 12 Eq. 214; 19 W. R. 944.

The court will appoint trustees of a will by which property is limited in such a manner as contemplates the intervention of trustees, although none may have been appointed by the testator. *Gillett, In re*, 25 W. R. 23.

Where a testator had, by his will, left all his property to his wife for life and appointed her his sole executrix, and had also left legacies of considerable amount to be paid after her death, but had not constituted any persons trustees thereof:—Held, upon petition intituled in an administration action commenced for the purpose and in the Trustee Act, 1850, that upon the retirement of the widow the court had jurisdiction, under the Trustee Act, 1850, to appoint in her place a trustee or trustees to perform the duties incident to the office of an executor. *Moore, In re, McAlpine* v. *Moore*, 21 Ch. D. 778; 30 W. R. 839.

No existing Trustees.]—The court has no jurisdiction under the Trustee Act, 1850, to appoint a new trustee of a term of which there is no subsisting trustee. *Hazeldine, In re*, 16 Jur. 853.

—— Death of Trustee in Lifetime of Testator.]—When a testatrix devised real estate on trust for sale, but there had never been a trustee of the will, in consequence of the death in the testatrix's lifetime of the sole trustee named in the will, and it was not known who was the heir of the testatrix:—Held, that the court had no jurisdiction under the Trustee Act, 1850, in the absence of the heir, to appoint a trustee and to make an order vesting in him the real estate descended. *Gunson* v. *Simpson*, L. R. 5 Eq. 332; 18 L. T. 78; 16 W. R. 782.

Where a sole trustee for sale of a will had died in the lifetime of the testator, a petition was presented by the administrator of the testator, and the executors and trustees of the trustee of the will who had died, asking for the appointment of two new trustees and for a vesting order:—Held, that s. 31 of the Conveyancing Act, 1881, did not apply, and that therefore the petition was necessary. *Ambler's Trusts, In re*, 59 L. T. 210.

The court, sitting in lunacy, has power under s. 9 of the Trustee Extension Act, 1852, to appoint new trustees of the will of a deceased lunatic, where the trustees appointed by the lunatic have died in his lifetime, for the purpose of getting rid of the funds standing in court to the credit of the lunacy. *Orde, In re*, 52 L. J., Ch. 832; 24 Ch. D. 271; 49 L. T. 430; 31 W. R. 801.

When all the trustees of real estate named in a will have predeceased the testator, new trustees may be appointed if the heir of the testator is before the court. *Smirthwaite's Trusts, In re*, 40 L. J., Ch. 176; L. R. 11 Eq. 251; 23 L. T. 726; 19 W. R. 381.

A suit having been instituted for the purpose of obtaining an order for the transfer, with the consent of all parties, of a fund standing in the books of the Bank of England in the name of an incorporate body, which had ceased to exist, the court, having ordered the decree to be intituled in the matter of the Trustee Act, 1850, appointed two trustees, and empowered and directed them

to transfer the fund. *Hanover (King)* v. *Bank of England*, L. R. 8 Eq. 350; 21 L. T. 106.

Contract for Sale—Old Trustee not Party.]—The court refused to appoint a new trustee on petition, where the object of the parties was to convey an estate to a purchaser, pursuant to a contract for sale, to which the old trustee ought to have been but was not a party. *Lloyd, In re*, 3 Jo. & Lat. 255.

Trustees de facto.]—Held, that this court has no power, under the Trustee Act, 1850, to appoint trustees, where there are trustees de facto acting as such. *Hadley's Trusts, In re*, 5 De G. & Sm. 67; 21 L. J., Ch. 109; 16 Jur. 98.

Power in Settlement Insufficient—Incapable of Acting.]—Where a trustee, a bankrupt, had not surrendered, and was proclaimed, the court refused to appoint a new trustee in his place under a power, in which were the words, "refuse or become incapable to act." *Turner* v. *Maule*, 15 Jur. 761.

New trustee appointed by the court where the power to appoint new trustees only contained the words, "die, or decline, or become incapable to act," and where a trustee who had acted was anxious to retire. *Armstrong's Settlement, In re*, 5 W. R. 448.

New trustee appointed by the court where the power to appoint new trustees only contained the words, "shall die, or become incapable, or be unwilling to act," and where two trustees who had acted desired to be discharged from the trusts. *Woodgate's Settlement, In re*, 5 W. R. 448.

The words "unable to act," do not apply to the case of a trustee going out of the jurisdiction. *Harrison's Trust, In re*, 22 L. J., Ch. 69; 1 W. R. 58.

By residence for twenty years in America, and establishing himself in trade there, a trustee held to "become incapable" of acting in respect of leasehold property in England. *Mesnard* v. *Welford*, 1 Sm. & G. 426; 1 Eq. R. 237; 22 L. J., Ch. 1053; 17 Jur. 815; 1 W. R. 443.

In 1824 A. was appointed a trustee of leaseholds, situate in Middlesex; and the deed by which he was appointed contained a power for B. to appoint a trustee in the place of A., if A. "should die, or decline, or become incapable to act in the execution of the trusts aforesaid." In 1832 A. went to the United States of America, and had never since returned to this country, and was now settled in trade at New York. B. had appointed a trustee in the place of A. without A.'s consent:—Held, that A. was "incapable to act" as a trustee of the leaseholds in question, and the new trustee was declared to have been properly appointed. An order was made vesting the leaseholds in the new trustee. *Ib.*

A settlement contained a power to appoint a new trustee in case any trustee should become incapable of acting. A trustee became of unsound mind. Upon petition, under the Trustee Act, 13 & 14 Vict. c. 60, the court made an order for appointing a new trustee, and empowering the continuing trustee to transfer the trust fund. *Cooper's Settlement, In re*, 25 L. J., Ch. 685; 4 W. R. 729.

A testator appointed A. (the tenant for life) and B. trustees. The will contained no power to appoint new trustees. B. having disclaimed, A., under 23 & 24 Vict. c. 145, s. 27, appointed a single trustee in his place:—Held, that the other cestuis que trust were entitled to have a third trustee appointed, and that the statute did not take away the jurisdiction of the court to increase the original number of trustees. *D'Adhemar* v. *Bertrand*, 35 Beav. 19.

—— **Rectification of Deed.**]—Where deed does not provide for appointment of new trustees, court will not add such a power. *Southwell* v. *Ward*, Tam. 314.

Where a bill is filed seeking to rectify an instrument, and for the appointment of new trustees, the court, though it may not be able to rectify the instrument, will grant relief so far as to appoint new trustees. *Barber* v. *Barber*, 4 Drew. 666; 29 L. J., Ch. 49; 5 Jur. (N.S.) 1197; 1 L. T. 21; 8 W. R. 16.

Therefore, where a bill was filed to rectify a settlement in a foreign form, and praying the appointment of new trustees, and the defendant demurred to the bill for want of equity, and for want of jurisdiction, the court overruled the demurrer, but without costs; the plaintiff not satisfying the court that he would be entitled, at the hearing, to have the settlement rectified. *Ib.*

—— **Effect of Conveyancing Act, 1881, s. 31.**]—Sect. 31 of the Conveyancing Act, 1881, having given a power to appoint new trustees in every case where a trust is subsisting, it is now improper to apply to the court for the appointment of new trustees under the Trustee Act, 1850, s. 32, unless there is some reason to make it "difficult, inexpedient, or impracticable to appoint them without the assistance of the court" other than the mere absence of a power to do so in the instrument creating the trust. *Gibbon's Trusts, In re*, 45 L. T. 756; 30 W. R. 287.

Donee of Power willing to Appoint.]—Where under a subsisting power of appointment the donee of the power is able and willing to appoint new trustees under s. 31 of the Conveyancing Act, 1881, the court has no jurisdiction to make an appointment under the trustee acts. *Higginbottom's Trusts, In re*, 62 L. J., Ch. 74; [1892] 3 Ch. 132; 3 R. 23; 67 L. T. 190.

The court has not jurisdiction, under the Trustee Act, 1850, to take away the power of appointing new trustees from the donee of the power, where the donee is capable of exercising, and willing to exercise, the power, although such donee may have disclosed an intention or desire to exercise his power corruptly. *Hodson's Settlement, In re*, 9 Hare, 118; 20 L. J., Ch. 551; 15 Jur. 552.

Lunatic—Consent to Appointment by Committee.]—A will contained a power of appointment of new trustees exercisable with the consent of the tenant for life. The trustees having died, the tenant for life, who had been found lunatic, presented a petition in lunacy and chancery by the committee of her estate as next friend for the appointment of new trustees:—Held, that there was no jurisdiction in lunacy to appoint new trustees, and that the only proper application in lunacy was to ask for an order authorising the committee to consent on behalf of the lunatic to an appointment of trustees under the power. *Garrod, In re*, 55 L. J., Ch. 311; 31 Ch. D. 164; 54 L. T. 291; 34 W. R. 157—C. A.

The court has power, notwithstanding s. 137,

16 & 17 Vict. c. 70, to make an order for the appointment of new trustees, where the power of appointment was vested in a tenant for life, a lunatic, but it declined to do so in the absence of the committee of the lunatic. *Parke's* or *Parker's Trust, In re*, 32 Beav. 580; 9 Jur. (N.S.) 998; 8 L. T. 378; 11 W. R. 655.

A power for the appointment of new trustees contained in a settlement became vested in a person who had been found lunatic by inquisition. The committee of the person and estate petitioned, under the 16 & 17 Vict. c. 70, for leave to exercise the power for him, and the same was ordered. *Bowmer, In re*, 3 De G. & J. 658; 28 L. J., Ch. 618; 5 Jur. (N.S.) 348; 7 W. R. 313.

When the person having power to appoint a new trustee is a lunatic, found so by inquisition, an order appointing a new trustee may be made in chancery under the Trustee Act, 1850, s. 32. *Sparrow, In re*, L. R. 5 Ch. 662; 18 W. R. 1185.

Order made under the Trustee Act, 1850, appointing a new trustee, and vesting the trust premises in him jointly with the continuing trustees, in a case where one of three trustees was lunatic, and though the will contained a power to appoint new trustees. *Davis, In re*, 3 Mac. & G. 278.

Property was left by will to trustees in trust for a person for her life, with remainder as therein mentioned. In the clause providing for the appointment of the trustees the power of appointment was vested solely in the tenant for life during her life. The tenant for life having become lunatic, and one of the trustees of the will having died, the court on the petition of the surviving trustee for the time being and the committee of the lunatic's estate, appointed a new trustee in the stead of the trustee who had died. *Heaphy, In re*, 18 W. R. 1070.

The court of chancery will not take upon itself to inquire into the fact whether a lunatic is a trustee within the meaning of the Trustee Act, 1850; there must be a reference to the master to make that inquiry, according to the former practice. *Ramshay, In re*, 15 Jur. 96.

—— **Denial of Lunacy—Jurisdiction.**]—The court will not, on a petition under the Trustee Act, 1850, remove a trustee against his wish. Where the ground for a petition for the appointment of a new trustee is the alleged insanity of a trustee, and the insanity is denied by him, the court will not try the question whether the trustee is of sound mind, nor will it (under s. 52) direct a commission in the nature of a writ de lunatico inquirendo to issue concerning such person, the proper mode of establishing the lunacy in such a case being on a petition in lunacy or in an action in the high court to remove the trustee. *Combs, In re*, 51 L. T. 45—C. A.

"Person of Unsound Mind."]—The clause in s. 2 of the Trustee Act, 1850, which declares that the expression "person of unsound mind" shall mean "any person, not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs," must be construed as referring to a person who, although not found a lunatic, is nevertheless in such a state of mind as to render him liable to be so found if an inquisition were held upon him. The case of a trustee who is, from great age and its infirmities, practically incapable of transacting business (though not otherwise of unsound mind) is within s. 32 of the Trustee Act, 1850. *Phelps' Settlement Trusts, In re*, 55 L. J., Ch. 465; 31 Ch. D. 351; 54 L. T. 480—C. A.

A paralytic deprived of the power of speech, and unable to read or write or attend to business, but apparently not suffering from any mental disease, is not a person of unsound mind within the Trustee Act, 1850. *Barber, In re*, 57 L. J., Ch. 756; 39 Ch. D. 187; 58 L. T. 756; 37 W. R. 182—C. A.

A person is of "unsound mind" within the meaning of the Trustee Act, 1850, where from permanent incapacity of mind he is incapable of managing his affairs, though his state of mind is not such that he would be found lunatic on inquisition. *Phelps' Settlement Trusts, In re* (supra), not followed. *Martin's Trusts, In re*, 56 L. J., Ch. 695; 34 Ch. D. 618; 56 L. T. 241; 35 W. R. 524—C. A.

In an action in the chancery division, the court gave a judgment removing a trustee of unsound mind, and appointing a new trustee in his place, but declined to make an order under s. 34 of the Trustee Act, 1850, vesting the estate in the new trustee, considering that it ought to be applied for in lunacy. The lords justices sitting in lunacy made the vesting order. *Ib.*

The court has jurisdiction, under s. 32 of the Trustee Act, 1850, to appoint a new trustee in the place of a trustee who has become incapable, as, for instance, through age and infirmity, of acting in the trusts. *Lemann's Trusts, In re*, 52 L. J., Ch. 560; 22 Ch. D. 633; 48 L. T. 389; 31 W. R. 520.

A will contained a power for the trustees, or the survivors of them, to appoint a new trustee in the place of any trustee who should be "incapable to act." One of the surviving trustees, the testator's widow, having become, through age and infirmity, incapable of acting in the trusts, or of concurring in the appointment of a new trustee, or in a transfer of the trust estate, the court appointed a new trustee in her place and made a vesting order. *Ib.*

Where a trustee, from ill health, was unequal to the exertion of signing the necessary papers for effecting a transfer into court of a sum of stock, the court appointed new trustees of such sum of stock, they undertaking, within a given time, to transfer such sum of stock into the name, and with the privity, of the accountant-general of this court, pursuant to the provisions of the Trustee Relief Act. *Dawson's Trusts, In re, Broome, In re*, 3 N. R. 39—L.JJ.

iii. *Under the Trustee Acts prior to* 1850.

Construction of Act.]—Construction of 11 Geo. 4 & 1 Will. 4, c. 60, s. 22. *Faireswell, In re*, 2 Jur. 987.

A trustee and executor was not within the 11 Geo. 4 & 1 Will. 4, c. 60, s. 22. *Clarke* v. *Wilson*, Hay & J. 424.

General Rule.]—The court would not appoint new trustees under the 11 Geo. 4 & 1 Will. 4, c. 60, s. 22, except in a plain case, or where there had been a recent creation of trust, and the court had jurisdiction by reason of disability, or the like. The insecure nature of the property was no ground for the interference of the court. *Whitley* v. *Fishbourne*, Ll. & G. t. Sugd. 23.

The court had no power to appoint new trustees under the 11 Geo. 4 & 1 Will. 4, c. 60,

unless a case of disability in the present trustees was established. *Pennefather, In re*, 2 Dr. & War. 292. *Harte* v. *Ffrench (Lord)*, *Ib.*, 292.

The court would not appoint a new trustee under s. 22 of the 11 Geo. 4 & 1 Will. 4, c. 60, where no bill had been filed, and there was no power to do so in the instrument creating the trust, unless a disability existed such as was pointed out by the previous sections of the act, viz. infancy, lunacy, &c. *Fitzgerald, Ex parte*, Ll. & G. t. Sugd. 20.

Before the court had jurisdiction under s. 22, there must have been a case where the party might apply by petition, under the former sections of the act. *Ib.*, 21. S. P., *Humble, Ex parte*, 4 L. J., Ch. 21.

Death of Trustee.]—Leasehold, as well as freehold, charity estates were within s. 23 of 11 Geo. 4 & 1 Will. 4, c. 60, where all the trustees were dead; and a direction would be made under that section for the appointment of new trustees; and that a proper person be appointed to convey and assign the estates accordingly. *St. Antholin Trust Estates, In re*, 7 L. J., Ch. 269.

The court made the usual order of reference to the master to appoint new trustees of the will, under the 11 Geo. 4 & 1 Will. 4, c. 60, s. 22, the devise to the trustees being to them and the survivors of them, and the heirs and assigns of such survivor; and it appearing that the trustees named were both dead, that they had never acted, but had never declined, nor were ever called upon to act, and the heir-at-law of the survivor was resident in Canada. *Legg, In re*, 1 Ir. Eq. R. 374.

The court refused to appoint new trustees, under the 11 Geo. 4 & 1 Will. 4, c. 60, in the room of trustees who had died, where the trust property consisted both of stock and real estate, no administration having been taken out to the survivor of the said trustees (who died intestate), and his heir-at-law being out of the jurisdiction. *Anderson, In re*, Ll. & G. t. Sugd. 27.

It was not intended by ss. 9 and 10 to supply the want of a personal representative of a trustee of a chattel interest, or stock. *Ib.*

Where the sole trustee in a will, to whom a term was demised, died in the testator's lifetime, the court referred it to the master to appoint a new trustee, and to approve of a like demise. *Devey* v. *Peace*, Tam. 78.

Refusal to Act.]—The mere refusal of the trustee to act in the trusts would not bring the case within the 11 Geo. 4 & 1 Will. 4, c. 60. *Hartford, In re*, 1 Con. & L. 394; 2 Dr. & War. 292.

This court would not appoint a new trustee, under the 11 Geo. 4 & 1 Will. 4, c. 60, s. 22, instead of a person who appeared never to have accepted the trust and refused to act. *Mitchell* v. *Nixon*, 1 Ir. Eq. R. 155.

The court would not appoint a new trustee, under the 11 Geo. 4 & 1 Will. 4, c. 60, s. 22, where the old trustee had acted and was within the jurisdiction, but refused to act any longer. *Hossford, In re*, 1 Jones, 550.

The court would not appoint a new trustee, under the 11 Geo. 4 & 1 Will. 4, c. 60, s. 22, in the place of a person, who though named as trustee, had never accepted the trust. *Quinlan, In re*, 1 Jones, 549. S. P., *Clerk, In re*, 1 Jur. 737.

A trustee of chattels real and of stock, having acted in the trusts, died, and appointed executors resident within the jurisdiction, who proved his will, but never acted and refused to act in the trusts, which were still continuing:—Held, that the court had jurisdiction to appoint new trustees under the 11 Geo. 4 & 1 Will. 4, c. 60, s. 22. *Muley* v. *Smiths*, 3 Ir. Eq. R. 497; Longf. & T. 241.

The original trustee having committed a breach of trust, the court appointed new trustees, the executors of the old trustee undertaking to replace the trust fund. *Ib.*

Where the executor of the survivor of three trustees declined to prove his will:—Held, that the case was within the stat. 11 Geo. 4 & 1 Will. 4, c. 60; and, upon the usual reference, new trustees were appointed. *Huggar, Ex parte*, 1 Beav. 98.

An estate was devised to A., subject to a charge of 5,000*l.*, payable to the executors in a suit to which A. was a party; the estate was sold, and all proper parties were ordered to join in the conveyance. A., refusing to execute the deed, was declared a trustee for the purchaser, under the 11 Geo. 4 & 1 Will. 4, c. 60, and another person was directed to convey in his stead. *Robinson* v. *Wood*, 5 Beav. 246.

One of three trustees under a will had disclaimed, and another had become lunatic:—Held, upon the petition of the sole acting trustee and the cestui que trust, in the matter of the lunacy, that the court had no jurisdiction to appoint a new trustee in the place of the disclaiming trustee; but the court appointed two persons trustees in the place of the lunatic. *Smith, In re*, 17 L. J., Ch. 415.

A person was named as a trustee in a marriage settlement of the year 1821, but did not execute or act in the trusts of it. After the death of his co-trustee, he, in 1844, refused to act in the trusts. The court, upon the petition of the tenant for life, under the 11 Geo. 4 & 1 Will. 4, c. 60, s. 22, refused to appoint a new trustee in his place. After such a lapse of time, it must, in a petition matter, be presumed that the trustee accepted the trust. *Uniacke, In re*, 1 Jo. & Lat. 1.

The stat. 11 Geo. 4 & 1 Will. 4, c. 60, was not intended to sanction a trustee resigning his trust rather than do an act which he deemed improper. A trustee in a marriage settlement refused to join in lending the trust moneys, because he disapproved of the security. The wife pursuant to a power for the purpose removed him, and appointed a new trustee in his place; and the husband and wife then presented a petition under the act to compel the old trustee to transfer the funds to the new trustee. The court refused the application. *Pepper* v. *Tuckey*, 2 Jo. & Lat. 95; 7 Ir. Eq. R. 572.

By marriage settlement a judgment was vested in trustees; and it was declared, that if the wife should, with the consent of her husband, think it advisable to call in the sum secured thereby, the trustees were to permit her to use her discretion as to the re-investment of same. One trustee died; the other was out of the jurisdiction. The wife, with the consent of her husband, called in the money, and she and her husband assigned the judgment to a third person, who advanced the money; but the surviving trustee refused to execute the assignment, and desired to be discharged from the trusts. The court, thinking that the real object of the parties was not to continue the money in settlement, but,

under colour of the power, to get it out of settlement, refused to appoint new trustees. *Molony, In re*, 2 Jo. & Lat. 391.

Where a trustee, who did not labour under any disability, declined to act, an application by petition for a new trustee was granted, although some of the cestuis que trust were minors, the funds being small. *Plunket* v. *Smith*, 8 Ir. Eq. R. 523.

Trustees out of the Jurisdiction.] — The court appointed new trustees under 11 Geo. 4 & 1 Will. 4, c. 60, s. 22, where the trustees were out of the jurisdiction, and declined to act, although the deed creating the trusts contained no power to appoint new trustees. *Mayo (Earl), In re*, Ll. & G. t. Plunk. 118, 126.

In every case in which a petition for conveyance could be presented under a previous section, the court had power, under s. 22, to appoint new trustees. *Ib.*

Three trustees, two of whom were creditors of A., joined in making promissory notes for securing to the other creditors of A. a composition on the respective debts, and took a conveyance and assignment of the real and personal estate of A. upon trust, after paying the costs and charges, to indemnify the three trustees in respect of the promissory notes, and then to pay the two trustees, who were creditors, a like composition on their respective debts, and to pay the surplus to A. After two of the trustees had received part of the personal estate of A., and had paid the promissory notes to a larger amount than they had received, the other trustee (who was one of the creditors) went out of the jurisdiction of the court. There was no power in the deed to appoint new trustees:—Held, on the petition of the two trustees, that the trustee out of the jurisdiction was a trustee within the act 11 Geo. 4 & 1 Will. 4, c. 60, for the petitioners and himself, and the court, without directing a bill to be filed, appointed another trustee in his stead. *Ryley, In re*, 3 Hare, 614.

Where a rent-charge was, by indenture of 1634, granted to trustees for charitable uses, the last survivor being unknown, the court, under 11 Geo. 4 & 1 Will. 4, c. 60, s. 23, on the petition of parties who had administered the rent-charge until it ceased to be paid, appointed new trustees, and a party to convey the rent-charge to them. *Nightingale's Charity, In re*, 3 Hare, 336; 8 Jur. 1005.

The court would not direct the appointment of a trustee to convey, in the room of a trustee who was abroad, without a reference to the master, although there might be affidavits of the absence of the trustee. Inquiry also directed whether the absent party was a trustee, although appointed such by the duchy court of Lancaster. *Fazekerly* v. *Gillebrand*, 7 Jur. 1123.

One of two trustees absconded: the other was ordered to transfer the fund into his own name, and that of another appointed. *Friendly Society, In re*, 1 Sim. & S. 82.

Semble, that neither bankruptcy nor occasional residence abroad disqualified a testamentary trustee to whom the testator had unconditionally confided a large personal discretion in the administration of the trusts, together with power to appoint a receiver of the rents of the trust estates. *Archbold* v. *Charitable Bequests Commissioners*, 2 H. L. Cas. 440.

Form of the order for the appointment of a new trustee, under 11 Geo. 4 & 1 Will. 4, c. 60, in the room of a trustee resident out of the jurisdiction, where the trust fund consisted merely of government stock in the Bank of Ireland. *Chambers, In re*, 3 Dr. & War. 496.

A testator, who gave a legacy for charitable purposes to be executed in a foreign country, named as one of the trustees of the charity an officer created by act of parliament, describing him by his office, and not by his name. The act of parliament having been repealed, and the office abolished, the court referred it to the master to approve of a proper person to be a trustee in his stead. *Att.-Gen.* v. *Stephens*, 3 Myl. & K. 347.

One of the three trustees, dismissed under an act of parliament, being gone abroad, and having released, there being no provision for the change of trustees, upon a bill, it was referred to the master to appoint a new trustee. *Buchanan* v. *Hamilton*, 5 Ves. 722.

The residence of a party interested in trust funds being out of the jurisdiction does not authorise the court to appoint new trustees without notice being given to such party. *Hardman, Ex parte, Molyneux, In re*, 3 Mont. D. & D. 559.

Power to Appoint in Settlement.]—Testator directed a new trustee to be appointed, if either should die or become incapable of acting; one absconded, charged with forgery; but was not outlawed; referred to the master to appoint a new trustee. *Millard* v. *Eyre*, 2 Ves. 94.

Where a deed declaring trusts contained a power to appoint new trustees in case of death, desire to be discharged, or refusal to act of the trustees, and the trustee went to America, and his residence could not be discovered:—Held, that a new trustee might be appointed, under s. 22 of 11 Geo. 4 & 1 Will. 4, c. 60, on petition. *Ledwich, In re*, 6 Ir. Eq. R. 561.

Although taking up his permanent residence abroad, in a case where there was a power to appoint a new trustee in place of one going to reside abroad, did not ipso facto deprive a trustee of his office, yet it was such a disqualification as entitled the cestui que trust to have a new trustee appointed in his place. *O'Reilly* v. *Alderson*, 8 Hare, 101.

The act 11 Geo. 4 & 1 Will. 4, c. 60, did not apply to a case where the event upon which the appointment of new trustees was sought had been provided for by the settlement. *Laffan, In re*, 1 Con. & L. 395. And see *Ib.*, 396, n.

The court might appoint new trustees under 11 Geo. 4 & 1 Will. 4, c. 60, s. 22, although the instrument creating the trust contained a power to appoint new trustees. *Fauntleroy, In re*, 10 Sim. 252; 8 L. J., Ch. 367; 3 Jur. 673. S. P., *Foxhall, In re*, 2 Ph. 281; 16 L. J., Ch. 498. And see *Brooks* v. *Mills*, 14 Jur. 1080.

Lunatic Trustee.]—The vice-chancellor had no authority to make an order of reference, under the 11 Geo. 4 & 1 Will. 4, c. 60, with respect to a lunatic trustee. *Shorrocks, In re*, 1 Myl. & Cr. 31.

The vice-chancellor had no jurisdiction, under 11 Geo. 4 & 1 Will. 4, c. 60, in cases of lunatic trustees or mortgagees, beyond directing the reference to the master in the first instance. *Anon.*, 5 Sim. 332; 3 L. J., Ch. 240.

Where a trustee was of unsound mind, but not found a lunatic, a reference, under 11 Geo. 4 & 1 Will. 4, c. 60, to appoint a new trustee, could be

made only by the lord chancellor. *Mount, In re*, 12 L. J., Ch. 95.

On a petition under the act 11 Geo. 4 & 1 Will. 4, c. 60, the court never interfered in the administration of the trusts, but merely substituted a trustee in the place of the lunatic. *Ward, In re*, 2 Mac. & G. 73.

New trustees appointed on petition, under the act 11 Geo. 4 & 1 Will. 4, c. 60, in the stead of a lunatic, not found such by inquisition, to whom, together with two other persons since deceased, a sum of money charged by will upon real estates in the West Indies, and another sum secured by a bond, had been assigned by a deed, dated 1802, upon certain trusts. A person at the same time appointed to assign the sums of money to the new trustees. *Welch, In re*, 3 Myl. & Cr. 292 ; 7 L. J., Ch. 169.

When it did not appear that the old trustee, though incapable of managing his affairs, was a lunatic, the court would not appoint a new trustee, under s. 22 of the 11 Geo. 4 & 1 Will. 4, c. 60. *Wakeford, In re*, 1 Jo. & Lat. 2.

Upon a reference made on a petition for the appointment of a new trustee in the place of an original trustee, who had left this country, the master found that another of the original trustees had become lunatic. An order was afterwards made for the transfer of the trust funds by the committee, without a second reference in the matter of the lunatic under the 11 Geo. 4 & 1 Will. 4, c. 60. *Buckle, In re*, 15 L. J., Ch. 289.

One of the trustees under a will had disclaimed and another had become a lunatic :—Held, upon the petition of the sole acting trustee and the cestuis que trust in the matter of the lunacy, that the court had no jurisdiction to appoint a new trustee in the place of the disclaiming trustee ; but the court appointed two persons trustees in the place of the lunatic. *Smith, In re*, 17 L. J., Ch. 415.

iv. *Persons appointed New Trustees.*

General Principle.]—The rules adopted by the court in appointing new trustees are, first, the court will have regard to the wishes of the person by whom the trust has been created, if expressed in the instrument creating the trust, or clearly to be collected from it : secondly, the court will not appoint a person to be a trustee with a view to the interests of some, and in opposition to that of others of the cestuis que trust ; thirdly, the court will have regard to the question whether the appointment of a proposed person will promote or impede the execution of the trust. *Tempest, In re*, 35 L. J., Ch. 632 ; L. R. 1 Ch. 485 ; 12 Jur. (N.S.) 539 ; 14 L. T. 688 ; 14 W. R. 850.

A trust deed between father and son contained a power for the appointment of new trustees ; this power was given, in the first instance, to the father and son during their joint lives, and after the death of either of them to the survivor. A suit was instituted after the death of the son by the father against the representative of the trustee for a conveyance of the legal estate in the trust premises to new trustees nominated by the father. A reference having been made to the master to appoint a proper person to be trustee, he instituted an inquiry as to the relative fitness of the persons proposed by the father and the party representing the interest of the son, and reported against the nominee of the father :—Held, upon exceptions to this report, that the right of nomination rested with the father, and that the master ought to have selected his nominee, except he was objectionable. *Kennedy* v. *Turnley*, Dr. 415 ; 6 Ir. Eq. R. 399.

Principles upon which the court acts in the appointment of trustees in such cases. *Ib.*

Interested Parties.—Beneficiaries.]—On a petition for the appointment of a new trustee of a will in substitution for one who had died, the court (declining to lay down any hard-and-fast rule that under no circumstances will a cestui que trust and one of the donees of a power to appoint new trustees be appointed as trustee) directed the appointment as trustee of one of several persons beneficially interested in the estate of the testator, who had nominated as trustees of his will persons to whom he had given beneficial interests, and on their death or retirement had empowered the persons beneficially entitled for the time being "to appoint one or more persons to supply the vacancy." *Tempest* v. *Camoys (Lord)*, 58 L. T. 221 ; 52 J. P. 532.

Where the trusts of a settlement were of a complicated nature, and no stranger could be found willing to accept the office of trustee, the court, departing from its usual practice, appointed as trustees two of the parties beneficially interested. *Clissold's Settlement, In re*, 10 L. T. 642.

Where the trusts are onerous, and other persons cannot be found to undertake them, the court will appoint one of the cestuis que trust to be trustee. *Clutton, Ex parte*, 17 Jur. 988.

Under special circumstances, the court will appoint one of the cestuis que trust as trustee of an estate. *Conybeare's Settlement, Ex parte*, 1 W. R. 458.

Cestuis que trust residing out of the jurisdiction of the court appointed trustees of real estate under peculiar circumstances. *Custis's Trust, In re*, Ir. R. 5 Eq. 429.

The original trustees of a will being dead, a petition was presented for the appointment of new trustees, and for a vesting order. The persons proposed to be appointed were both beneficially interested under the will, but it was found impossible to obtain the services of independent persons. All the beneficiaries, except one who was abroad, were co-petitioners, and were desirous that the persons proposed as trustees should be appointed. The court made the order, subject to an undertaking by the new trustees that if either became sole trustee he would use every endeavour to obtain the appointment of a co-trustee ; and dispensed with service on the absent beneficiary. *Lightbody's Trusts, In re*, 52 L. T. 40 ; 33 W. R. 452.

—— **Remainderman.**]—The court refused to appoint as trustee the remainderman entitled on the death of an infant tenant in tail in possession, the powers being very wide. *Paine's Trusts, In re*, 54 L. J., Ch. 735 ; 28 Ch. D. 725 ; 52 L. T. 323 ; 33 W. R. 564.

—— **Near Relative of Beneficiaries.**]—The master of the rolls will not appoint a near relative of the cestuis que trust a trustee, unless he finds it absolutely impossible to get some one unconnected with the family to undertake the office. *Wilding* v. *Bolder*, 22 Beav. 222.

—— **Husband of Beneficiary.**]—Where it was not possible to get another person, the court,

with the consent of a lady who was interested under a will for her separate use, appointed her husband one of two new trustees of the will, the order containing a direction that if he became sole trustee there should be a new trustee appointed. *Parrott, In re*, 30 W. R. 97.

The husband of a cestui que trust being appointed a trustee by the court, was required to undertake to apply for the appointment of an additional trustee as soon as he became a sole trustee. *Hattatt, In re*, 21 L. T. 781; 18 W. R. 416.

—— **Feme Sole.**]—The court declined making an order allowing a feme sole to propose herself to be trustee, on the ground that, on her marriage, her husband might interfere with the trust. *Brook* v. *Brook*, 1 Beav. 531.

An unmarried lady of education and position, and having independent means, was appointed a co-trustee of a will. *Campbell's Trusts, In re*, 31 Beav. 176; 31 L. J., Ch. 821; 8 Jur. (N.S.) 1199; 10 W. R. 640.

The court appointed an unmarried lady, aged twenty-seven, who was a relation of the cestuis que trust under a will, to be a trustee, there being a difficulty in finding any other suitable person to accept the office. *Berkley, In re, Berkley* v. *Berkley*, 43 L. J., Ch. 703; L. R. 9 Ch. 720; 31 L. T. 365.

Part of a testator's estate consisted of shares upon which there was an unlimited liability. Upon a petition to appoint a new trustee, an order was made that one of the continuing trustees, in whose name the shares stood, should sell them, and invest the proceeds in the names of himself and the other trustees. *Ib.*

Solicitor Trustee appointing Son.]—On the retirement of one of two trustees of a will, the continuing trustee, who was the solicitor to the trustees, appointed his son, who was his partner in his business, to be a new trustee. The trusts of the will were being administered by the court:—Held, that, without any reference to the personal fitness of the son, by reason of his position the appointment was one which the court ought not to approve, though it would not have been invalid if the court had not been administering the trusts. *Norris, In re, Allen* v. *Norris*, 53 L. J., Ch. 913; 27 Ch. D. 333; 51 L. T. 593; 32 W. R. 955.

Persons out of the Jurisdiction — Beneficiaries all out of Jurisdiction.]—Where all the cestuis que trust are resident out of the jurisdiction, the court will appoint new trustees resident out of the jurisdiction. *Liddiard, In re*, 49 L. J., Ch. 373; 14 Ch. D. 310; 42 L. T. 621; 28 W. R. 574.

Consols stood settled upon a trust for a married woman for life to her separate use, without power of anticipation, with remainder as she should by will appoint, with remainder to her executors or administrators. She and all her family resided in Ireland:—Held, that the court would appoint two persons residing in Ireland, though out of the jurisdiction. *Austen's Settlement, In re*, 38 L. T. 601.

—— **Two Trustees out of, and One within, the Jurisdiction.**]—The cestuis que trust (some of whom were infants) under a settlement of freehold farms in Wales (dated in 1840) were all resident out of the jurisdiction either in Canada or the United States. The settlement contained a power of sale exercisable with the consent of the equitable tenant for life, and a power of appointing new trustees exercisable by the surviving or continuing trustee, or the heirs or assigns of the last surviving or continuing trustee. In 1874, when both the original trustees of the settlement were dead, the executrix of the last surviving trustee, erroneously believing herself empowered in that behalf, purported to appoint two persons resident in Canada to be trustees of the settlement. These two persons, believing themselves to be duly appointed, had acted as trustees since 1874, and had employed an English agent to receive the rents of the farms, paying him a commission for so doing. The heir of the last surviving trustee could not be found, and there was no one capable of exercising the power of appointing new trustees contained in the settlement. Upon a petition by all the cestuis que trust for the appointment by the court of the two Canadians and the English agent as new trustees, and for authority to pay the English trustee a commission on the rents while acting as manager and receiver, the court appointed the two persons resident in Canada and the English agent to be new trustees of the settlement, but required an undertaking by the trustees out of the jurisdiction, in case the power of appointing new trustees should become exercisable by them, or either of them, not to appoint any new trustee resident out of the jurisdiction without the consent of the court. *Freeman's Settlement Trusts, In re*, 57 L. J., Ch. 160; 37 Ch. D. 148; 57 L. T. 798; 36 W. R. 71.

The court also, subject to the production of evidence as to the number of the holdings, the rents and dates of payment, the necessity of paying a commission for collecting the rents, and that the proposed remuneration was proper, sanctioned the payment of a commission to the English trustee. *Ib.*

—— **Canadian.**]—A father gave six separate sums in trust for six daughters respectively for life, with remainder for the benefit of their children respectively at twenty-one or marriage, with ultimate gifts over for the benefit of all his children in certain contingencies. He gave a general power of appointment of new trustees. One of the six daughters married a Canadian; her children were Canadians, and had attained twenty-one or married, and the investments of the sum of money for her benefit were mostly Canadian. One of the trustees of the will retiring as far as regarded that sum, the court appointed a Canadian trustee of the same jointly with the other trustee of the will. *Cunard's Trusts, In re*, 48 L. J., Ch. 192; 27 W. R. 52.

—— **Persons Resident in Paris.**]—By a deed-poll, declaring the trusts of certain sums of stock, power was reserved to the trustees to invest the trust moneys in the French funds. The trustees, although applied to by the tenant for life to make such investment, refused to do so, and paid the trust funds into court under the Trustee Relief Act. Upon a petition presented by the tenant for life, praying for the appointment of three foreigners resident in Paris as trustees in the room of the old ones, and the transfer of the trust funds to them accordingly, the court refused to make the order. *Guibert's Trust, In re*, 16 Jur. 852.

—— **Persons Resident in New Zealand.**]—

Trustees having a power of advancement for the benefit of children, were authorised by the court to make an advancement for the passage and outfit of the children with their parents to New Zealand, for the sake of their health, each child's share contributing equally to the passage and outfit of their parents. *Long's Settlement, In re*, 38 L. J., Ch. 125; 19 L. T. 672; 17 W. R. 218.

The court declined to sanction the transfer of the trust funds to new trustees resident in New Zealand. *Ib.*

v. *Number of New Trustees.*

One Trustee a Discharged Bankrupt—New Trustee substituted.]—One of the two trustees of a will had been adjudicated a bankrupt, but had obtained his discharge. The other trustee, who was beneficially entitled also to one-third of the trust estate, petitioned for the removal of the trustee who had been bankrupt, and the appointment of a new trustee. The application was opposed by beneficiaries entitled to greater shares than the petitioner:—Held, that the bankruptcy being a recent one, the trustee must be entirely impecunious; and that it was expedient under s. 147 of the Bankruptcy Act, 1883, to appoint a new trustee in the place of the one who had been bankrupt, notwithstanding that he had obtained his discharge. *Foster's Trusts, In re*, 55 L. T. 479.

Suit for Removal of Surviving Trustee—Original Number appointed.]—Where a suit was instituted for the administration of the trusts of a will, for an account of the funds, and for the removal of the surviving trustee, and at the hearing all parties waived all the prayer, except the appointment of new trustees, and stated that all parties interested were before the court, a petition was directed to be presented, supported by a proper affidavit of the fitness of the intended new trustees, and an order to be made for the appointment of the same number as were appointed by the will, without a reference. *Burkley* v. *Buckley*, 14 Jur. 189.

A., B., and C. were trustees under a will. A. died; B. and C. became bankrupt. Three new trustees were appointed by the court in the place of A., B., and C. *Vaughan, Ex parte, Clarke, In re*, 13 L. J., Bk. 22.

Out of four trustees of a settlement one was a lunatic, so found by inquisition, and another was, through ill-health, unfit to act. The court appointed two new trustees in their room, and made an order that the real estates subject to the settlement should vest in the new trustees jointly with the continuing old ones, and that the right to call for a transfer of some stock also subject to the settlement should vest in the same persons. *Chauncy, In re*, 14 W. R. 849.

Additional Trustees—Trustee Act, 1850, s. 32.]—The sole trustee of a will who had acted, and was in no way personally disqualified from continuing to act, in the trusts, was desirous of being discharged from the trusts of a particular fund, forming portion of the trust property, and had expressed his intention of lodging such fund in court unless new trustees were appointed in respect of it, whom he declined to appoint himself:—Held, not to be a case of expediency for the appointment of additional trustees within s. 32 of the Trustee Act, 1850. *Nesbitt's Trusts, In re*, 19 L. R. Ir. 509—C. A. (Ir.)

Under s. 32 of the Trustee Act, 1850, the court has jurisdiction to appoint an additional trustee, even though there is no vacancy in the trusteeship. *Brackenbury's Trusts, In re* (L. R. 10 Eq. 45) followed. *Gregson's Trusts, In re*, 56 L. J., Ch. 286; 34 Ch. D. 209; 35 W. R. 286.

Semble, that the power conferred by sub-s. 2 of s. 31 of the Conveyancing Act, 1881, to increase the number of trustees, "on an appointment of a new trustee," only arises when an appointment is being made to supply a vacancy in the trusteeship. *Ib.*

It is not contrary to the practice of the court to appoint three trustees in the place of two nominated in a will containing a power to appoint new trustees. *Birch* v. *Cropper*, 2 De G. & Sm. 255.

In appointing new trustees, the court is not limited to the number originally nominated. *Plenty* v. *West*, 16 Beav. 356.

Two trustees appointed, in addition to two existing trustees, in a case where only two trustees were originally appointed, but where the trust property had been very much increased. *Boycott's Settlement Trusts, In re*, 5 W. R. 15.

A testator appointed A. B. (the tenant for life) and C. D. trustees. The will contained no power to appoint new trustees. C. D. having disclaimed, A. B. (under the powers of the 23 & 24 Vict., c. 145, s. 27) appointed a single trustee in his place:—Held, that the cestuis que trust were entitled to have a third trustee appointed, and that the statute did not take away the jurisdiction of the court to increase the original number of trustees. *D'Adhemar (Viscountess)* v. *Bertrand*, 35 Beav. 19.

Several trustees appointed on petition, under the act 1 Will. 4, c. 60, in the stead of a sole surviving lunatic trustee. *Welch, In re*, 3 Myl. & Cr. 292; 7 L. J., Ch. 169.

A testator by his will devised his real estate to one trustee upon certain trusts. The trustee died intestate. Under the stat. 13 & 14 Vict. c. 60, the court appointed two trustees, and made a vesting order. As the property was very small, the appointment was made without a reference on affidavit of fitness of the new trustees. *Tunstall, Ex parte*, 4 De G. & Sm. 426; 15 Jur. 645, 981.

The court can appoint two or more new trustees in place of one becoming bankrupt. *Wilkinson, Ex parte*, 3 Mont. & Ayr. 145.

Where a testator had bequeathed a large fund to a single trustee, the court, at the instance of the tenant for life of the fund, appointed an additional trustee at the cost of the corpus of the trust property. *Grant* v. *Grant*, 6 N. R. 347; 34 L. J., Ch. 641; 11 Jur. (N.S.) 787; 13 L. T. 721; 13 W. R. 1057.

Reduction in Number of Trustees.]—The court will never place a trust fund belonging to persons not sui juris in the power of a sole trustee. *Dickinson's Trusts, In re*, 1 Jur. (N.S.) 724.

The court will not appoint one new trustee to supply the place of more than one originally constituted. *Ellison's Trusts, In re*, 2 Jur. (N.S.) 62. But see *Sitwell* v. *Heron*, 14 Jur. 848.

Under special circumstances two trustees will be appointed where the original number was three. *Bulkeley* v. *Eglinton (Earl)*, 1 Jur. (N.S.) 994.

Where the property settled was very consider-

able, and the original settlor had nominated three trustees, the court required clear proof of the alleged impossibility to find a third person to act with two new proposed trustees. *Ib.*

When there are three trustees, and one dies, another disappears, and the third is desirous of retiring, the court will appoint two in the place of the three. *Marriott, In re*, 16 W. R. 749.

Where one of four trustees of a will had been found lunatic by inquisition, the court made an order vesting his estate in the other three trustees, although the number of trustees was thereby diminished. *Leon, In re*, [1892] 1 Ch. 348; 66 L. T. 390—C. A.

Where one of several trustees is of unsound mind, the court will not re-appoint the other trustees as trustees in the place of themselves and the lunatic trustee, for the purpose of excluding the lunatic trustee from the trust; but a new trustee must be appointed in his place. *Harford's Trusts, In re*, infra, not followed. *Aston, In re*, 23 Ch. D. 217; 48 L. T. 195; 31 W. R. 801—C. A.

The court will not, on petition, on the lunacy of one of several trustees, appoint the other trustees to be new trustees in the place of themselves and the lunatic trustee. *Colyer, In re*, 50 L. J., Ch. 79; 43 L. T. 454.

When a trustee wishes to retire, and a successor cannot be found, the court can appoint the continuing trustees to be sole trustees in the place of the continuing and retiring trustees. *Stokes' Trusts, In re*, 41 L. J., Ch. 290; L. R. 13 Eq. 333; 26 L. T. 181; 20 W. R. 396.

One of the four trustees of a will desiring to retire:—Held, that the court had jurisdiction, under s. 32 of the Trustee Act, 1850, to appoint the remaining three as trustees in the place of themselves and the fourth. *Shipperdson's Trust, In re*, 49 L. J., Ch. 619.

One of the four trustees of a will having absconded:—Held, that the court had jurisdiction, under s. 32 of the Trustee Act, 1850, to appoint the remaining three as sole trustees in place of themselves and the fourth. *Harford's Trusts, In re*, 13 Ch. D. 135; 41 L. T. 382; 28 W. R. 239.

One sole trustee appointed in the place of a lunatic trustee where the trust was shortly to be wound up, and there had been but one trustee originally. *Reynault, In re*, 16 Jur. 233.

Form of order appointing two continuing trustees to be trustees of real and personal estate settled by will, in place of themselves and one retiring trustee. *Northrop, In re, Taylor* v. *Northrop*, 29 W. R. 134.

A testator having devised to two trustees upon trust to sell, and one of the trustees named being an infant, the court declined to make an order vesting the whole estate in the other trustee, being adult, but appointed a person to be trustee in the room of the infant, and vested the whole estate in such new trustee with the original adult trustee jointly. *Porter's Trusts, In re*, 25 L. J., Ch. 688; 2 Jur. (N.S.) 349; 4 W. R. 443.

vi. *Powers of New Trustees.*

Statute.]—*Trustee Act*, 1893, *s.* 37.

Effect of Order substituting New Trustees for those Named in Will.]—The effect of an order made by a court of equity under the Trustee Act, 1850, substituting new trustees for those named in the will, is to transfer to the new trustees all the rights and power of the old ones. The court, therefore, granted administration (with will annexed) to the substituted trustees, without requiring the execution of a deed of conveyance to them by the old trustees. *Woodfall, In goods of*, 42 L. J., P. 64; L. R. 3 P. 108; 29 L. T. 248; 21 W. R. 933.

Power to Survivor to Appoint—Surviving Trustees Appointed but not under Power.]—Under a power to the survivor to appoint new trustees:—Held, upon the terms of the power, that surviving trustees, appointed by the court and not under the power, had no authority to exercise it. *Cooper* v. *Macdonald*, 35 Beav. 504; 14 W. R. 755.

By deed, power was given to the trustees or trustee for the time being, at their or his entire discretion, to pay certain rents for the benefit of one, two, or more of the children of A. B., the tenant for life, and there was a power to the surviving or continuing trustee to appoint new trustees. The trustees all died without appointing new trustees, and new trustees were appointed by the court:—Held, that they had the discretionary power given to the original trustees. *Bartley* v. *Bartley*, 3 Drew. 384.

Tenant for Life authorised to withdraw Fund with Assent of "Undersigned Trustees."]—Marriage articles authorised the tenant for life to withdraw the fund from the settlement, with the assent of the "undersigned trustees":—Held, that the power of assent was annexed to the office, and might therefore be exercised by new trustees appointed by the court. *Byam* v. *Byam*, 19 Beav. 58; 24 L. J., Ch. 209; 1 Jur. (N.S.) 79; 3 W. R. 95.

Trust for Purchase of Estates in England or Scotland—Power to Heir to Appoint New Trustees.]—A testator bequeathed the residue of his personal estate to three persons, their executors, administrators, and assigns, in trust that they or the survivor of them, or the executors, administrators, or assigns of such survivor, should invest it in the purchase of estates in England or Scotland, such estates, if in England, to be settled according to the limitations of the same will as to his own English estates, which were thereby limited to one for life, with remainder to his first and other sons in tail, and, if in Scotland, according to the limitations of a Scotch deed of strict entail, to which his own Scotch estates were then subject, and, until such purchase could be found, should pay the income of the residuary fund to the person who would be entitled to the rents of the English estates so to be purchased in case the same were actually purchased. And the will contained a power to such person, or, in case of his minority, to his guardian, to appoint new trustees, who were to have all the powers and capacities of those in whose room they should be substituted. The three trustees invested the greater part of the residue in Scotch estates: and all died during the lifetime of the tenant for life. On his death, his son, who was entitled under the Scotch deed to the Scotch estates, as well as under the will to the English estates, conceiving himself entitled absolutely to what remained of the residuary fund, executed disentailing deeds both of the money and of the English estates, and obtained payment of the fund to himself; but his right

to do so being disputed on his death by the next Scotch heir of entail :—Held, that he had no such right ; but that he was entitled only to the income of the fund during his life, and that upon his death, there being then no one by whom new trustees could be appointed under the power in the will, and the court being of opinion that the discretionary power of selecting between English and Scotch investments would not extend to trustees appointed by the court, the fund became divisible in equal moieties, one-half belonging to the personal representatives of the deceased, and the other half to be invested in Scotch estates, to the uses of the Scotch deed. *Fordyce* v. *Bridges*, 2 Ph. 497 ; 2 G. Cooper, 326 ; 17 L. J., Ch. 185. Varying 10 Beav. 90 ; 16 L. J., Ch. 81 ; 10 Jur. 1020.

Trust confined to Executors personally.]—One by will gives annuities, and directs residue of her estate to be disposed of in charity to such persons and in such manner as her executors or survivor may think fit. On the death of them new trustees were appointed to sustain the annuities, but they could not dispose of the residue, it being a trust confined to the executors personally. *Hibbard* v. *Lamb*, Amb. 309.

Fine.]—A fine might have been levied by a trustee, substituted for a missing trustee, under 6 Geo. 4, c. 75, s. 5. *Jackson* v. *Warde*, 9 Bing. 399 ; 2 M. & Sc. 566. *S. C.*, nom. *Jenkyn* v. *Ward*, 2 L. J., C. P. 38.

Power to Appoint toties quoties.]—The court, in decreeing the appointment of new trustees, will not direct a power to be inserted in the deed for appointing new trustees toties quoties. *Bowles* v. *Weeks*, 14 Sim. 291.

—— **Insertion of Power to Appoint New Trustees.**]—The power of appointing new trustees in a settlement provided that the new trustees so to be appointed from time to time should have the same power as the trustees named in the settlement. The power was incapable of being exercised in consequence of neither of the trustees acting. On new trustees being appointed in the suit :—Held, that the court could not give them the power of appointing new trustees. Specified persons were appointed by the court new trustees without a reference. *Oglander* v. *Oglander*, 2 De G. & Sm. 381 ; 17 L. J., Ch. 439 ; 12 Jur. 786.

Power was given to trustees and their successors to appoint new trustees. The court, being called on to appoint new trustees, declined to enable such new trustees to appoint successors. *Holder* v. *Durbin*, 11 Beav. 594 ; 18 L. J., Ch. 479. S. P., *Att.-Gen.* v. *Madden*, 2 Con. & L. 519 ; *Brown* v. *Brown*, 3 Y. & C. 395.

Where the deed does not provide for the appointment of new trustee, the court will not add such a power. *Southwell* v. *Ward*, Tam. 314.

On bill for appointment of new trustee, the decree directed, although not prayed, a proviso to be inserted in the deed authorising the parties from time to time thereafter to appoint new trustees. *Joyce* v. *Joyce*, 2 Moll. 276.

—— **New Trustees of a Charity.**] — On a petition for the appointment of new trustees of a charity, the court directed that, in the deed appointing the trustees, a power should be inserted for appointing new trustees in future. 52 *Geo.* 3, *c.* 101, *In re*, 12 Sim. 262.

—— **Where Trustees Appointed in place of Trustees Dying in Lifetime of Testator.**] — Trustees appointed by the court in the place of others whose appointment had failed by their deaths in the lifetime of the testator, authorised to appoint future trustees in the manner and under the circumstances mentioned in the will. *White* v. *White*, 5 Beav. 221 ; 6 Jur. 160.

vii. *Separate Sets of Trustees.*

Statutes.]—*Trustee Act*, 1893, *s.* 10, *sub-s.* 2 (*b*)—*Trustee Act*, 1850—*Conveyancing Act*, 1882.

Distinct Trusts.]—Under the trusts of a will different parts of the testator's property were subject to distinct trusts, but in a certain event the trusts would coalesce :—Held, that there was power to appoint separate sets of trustees for the different parts of the property. *Hetherington's Trusts, In re*, 56 L. J., Ch. 174 ; 34 Ch. D. 211 ; 55 L. T. 806 ; 35 W. R. 285.

Sect. 5, sub-s. 1, of the Conveyancing Act, 1882, authorises the appointment of a separate set of trustees for a part of the trust property held on distinct trusts only when an appointment is being made of new trustees of the whole property. It does not enable the existing trustees of the whole property to retire from the trusts as to part by means of an appointment of new trustees of that part. *Savile* v. *Couper*, 56 L. J., Ch. 980 ; 36 Ch. D. 520 ; 56 L. T. 907 ; 35 W. R. 829. S. P., *Nesbitt's Trusts, In re*, 19 L. R. Ir. 509—C. A. (Ir.)

A testator devised properties in two different parishes in strict settlement in favour of different families, and appointed two trustees of the whole. The powers entrusted to the trustees were very wide. One trustee having died, a petition was presented for the appointment of two new trustees to act with the surviving trustee as to one property only :—Held, that the court had power to make the appointment under the Conveyancing Act, 1882, s. 5, though the surviving trustee was trustee for both properties. *Paine's Trusts, In re*, 54 L. J., Ch. 735 ; 28 Ch. D. 725 ; 52 L. T. 323 ; 33 W. R. 564.

Independently of s. 5 of the Conveyancing Act, 1882, the court has power under the trustee acts to allow trustees to retire from the trusts of a part of the trust property, held upon trusts distinct from those affecting the remainder, and to appoint a separate set of trustees of such part. *Savile* v. *Couper*, supra, considered. *Moss's Trusts, In re*, 57 L. J., Ch. 423 ; 37 Ch. D. 513 ; 58 L. T. 468 ; 36 W. R. 316.

A father gave six separate sums in trust for six daughters respectively for life, with remainder for the benefit of their children, respectively at twenty-one or marriage, with ultimate gifts over for the benefit of all his children in certain contingencies. He gave a general power of appointment of new trustees. One of the six daughters married a Canadian ; her children were Canadians, and had attained twenty-one or married, and the investments of the sum of money for her benefit were mostly Canadian. One of the trustees of the will retiring as far as regarded that sum, the court appointed a Canadian trustee of the same jointly with the other trustee of the will. *Cunard's Trusts, In re*, 48 L. J., Ch. 192 ; 27 W. R. 52.

Where by the same will different estates have been vested in the same trustees upon different trusts, and there is only a single power of appointment of new trustees in the usual form, and all the trustees have died, the court may, with the consent of the representatives of the surviving trustee, appoint new trustees to execute the trusts of one estate without dealing with the other estates. *Dennis's Trusts, In re*, 10 L. T. 688; 12 W. R. 575.

—— **Freeholds and Leaseholds.**]—A testator gave different parts of his property, consisting of freeholds and leaseholds, on substantially similar trusts for different families, with cross-remainders in each case. Many of the cestuis que trust were not sui juris:—Held, the present trustees of the will and all the cestuis que trust who were sui juris consenting, that separate sets of trustees might be appointed for the different divisions of the property. *Grange, In re, Cooper* v. *Todd*, 44 L. T. 469; 29 W. R. 502.

—— **Part of Trust Property Lost.**]—Where it is expedient to do so, the court will, under s. 32 of the Trustee Act, 1850, appoint a separate set of trustees for a part of trust property held on distinct trusts. *Aston's Trusts, In re*, 25 L. R. Ir. 96.

Where one of two trustees of a will had died, and the other had absconded with the residuary trust funds under the will, and could not be found, and the only fund forthcoming was a sum of 381*l.* 9*s.* 9*d.* India 3½ per cent. stock, which was subject to distinct trusts under the said will:—Held, a case in which it was expedient to appoint separate trustees. *Ib.*

Where part of the trust property had been lost, the court in appointing new trustees refused to confine the trust to the remaining property, but directed it to be made of the whole comprised in the settlement, and referred it to the master, whether it would be proper to take proceedings for the recovery of the part lost. *Bennett* v. *Burgis*, 5 Hare, 295; 15 L. J., Ch. 231; 10 Jur. 153.

viii. *Practice.*

a. Present Practice.

Originating Summons.]—Upon an originating summons asking for general administration of an estate and the appointment of new trustees, the court can make an order for the appointment of new trustees, all the parties interested in the appointment being before the court. *Allen, In re, Simes* v. *Simes*, 56 L. J., Ch. 779; 56 L. T. 611.

The court has no jurisdiction upon an originating summons in chambers, to make an order appointing new trustees. *Gill, In re, Smith* v. *Gill*, 53 L. T. 623; 34 W. R. 134.

Service of Petition—Cestuis que Trust out of Jurisdiction.]—Upon a petition presented by the persons entitled to the residue of a testator's estate for the appointment of new trustees of his will in the place of a deceased trustee and a lunatic trustee, the court dispensed with the service of the petition upon one out of four persons entitled to the proceeds of sale of certain real estate devised by the will who was resident in Australia. *Wilson, In re*, 55 L. J., Ch. 632; 31 Ch. D. 522; 54 L. T. 263—C. A. See also *Lightbody's Trusts, In re*, supra, col. 586.

Affidavit of Fitness of New Trustee—Description.]—In support of a petition for the appointment of a new trustee in the place of a trustee who had become lunatic, two affidavits were filed as to the fitness of the person proposed to be appointed. The deponent of one affidavit was described as a "gentleman," the other deponent being described as an accountant. Each affidavit described the proposed new trustee as a "gentleman," but also stated that he was a person of independent means:—Held, that the description of the deponent as a "gentleman" was insufficient, that the position in life of the deponent ought to be stated, so as to enable the court to judge whether his evidence was reliable, but that the other affidavit was sufficient. *Horwood, In re*, 55 L. T. 373—C. A.

Verification of Consent of New Trustee.]—Although the rules of December, 1885, do not apply to lunacy proceedings, and, therefore, when a petition is presented in lunacy for the appointment of new trustees, the consent of the new trustees must be verified by affidavit; yet when a petition is presented intituled in the chancery division and in lunacy, asking for the appointment of new trustees under the jurisdiction of the lords justices as additional judges of the chancery division, and a vesting order under the jurisdiction in lunacy, the rules of December, 1885, apply, and the consent to act is sufficiently verified by the signature of the solicitor. *Hume, In re, Trenchard's Will, In re*, 55 L. T. 414—C. A.

The persons entitled to the residuary estate of a testator presented a petition for the appointment of new trustees of his will in the place of the original trustees, one of whom had died, and the other was a lunatic:—Held, that the signature of a new trustee to his consent to act must in lunacy be verified by affidavit according to the old practice, the Ord. XXXVIII., r. 19a, not applying to proceedings in lunacy. *Wilson, In re*, 55 L. J., Ch. 632; 31 Ch. D. 522; 54 L. T. 263—C. A. S. P., *Needham, In re*, 54 L. T. 263—C. A.

Where a new trustee is appointed in chancery as well as in lunacy, his signature to his consent to act may be verified in manner provided by Ord. XXXVIII., r. 19a, and need not be verified by affidavit according to the old practice. Secus, where the order is made in lunacy only. *Wilson, In re*, supra, explained. *Hume, In re*, 56 L. J., Ch. 1020; 35 Ch. D. 457; 56 L. T. 351; 36 W. R. 84—C. A.

Policy of Life Assurance for Benefit of Wife and Children of Assured—Petition.]—Application for the appointment of trustees of a policy of life assurance, effected under the provisions of the married women's property acts, for the benefit of the wife and children of the assured, may be made by petition. *Atkinson's Policy Trusts, In re*, 13 R. 285.

b. Under the Trustee Acts, 1850 and 1852.

Who may Present Petition.]—A petition to change the trustees in a settlement ought to be presented by the cestui que trust, and not by the proposed trustees. *O'Dell, In re*, Hayes, 257.

A person who has a contingent interest in a trust fund has a locus standi to present a petition for the appointment of new trustees under the

Trustee Act, 1850. *Sheppard's Trusts, In re*, 4 De G. F. & J. 423 ; 1 N. R. 76 ; 32 L. J., Ch. 23 ; 9 Jur. (N.S.) 59 ; 7 L. T. 377 ; 11 W. R. 60.

Creditors who have obtained a decree for the administration of the estate of their deceased debtor, under which a contract for sale of his real estate has been entered into, and the purchase money paid into court, are persons "beneficially interested" in the lands comprised in the contract within the scope of the 13 & 14 Vict. c. 60, s. 37, and entitled to apply thereunder. *Wragg, In re*, 1 De G. J. & S. 356 ; 2 N. R. 49.

Amendment of Petition.]—In some branches of the court a petition might be amended by adding co-petitioners without re-answering. *Curtwright's Trust, In re*, 2 L. T. 262 ; 8 W. R. 492.

Parties to Concur or be Served.]—The master directed to appoint a new trustee, although some of the cestuis que trust were infants, and another was out of the jurisdiction. *Hunter* v. *Gibson*, 16 Sim. 159.

Service of a petition for the appointment of a new trustee on infant cestuis que trust dispensed with. *Young's Trusts, In re*, 21 L. T. 556.

On a petition, under the Trustee Act, 1850, for the appointment of new trustees of a settlement, the beneficial interests under which had been made the subjects of marriage settlements :—Held, that the original cestuis que trust, their husbands and wives, and the trustees of their settlements, sufficiently represented all the parties beneficially interested. *Smyth's Settlement, In re*, 2 De G. & Sm. 781.

Certain persons interested, being desirous of having new trustees appointed of certain articles of settlement, exhibited a statement before the master, under the 13 & 14 Vict. c. 60, s. 38, and the master gave a certificate approving of certain persons as new trustees, all persons interested having appeared before him and consented. On a motion that the certificate might be confirmed, and that an order might be made appointing the persons approved of by the master trustees of the articles of settlement, the other parties interested did not appear, and the question was, whether it was necessary for them to do so, as they had already consented before the master. Lord Cranworth thought they must appear and consent, and made the order on the production of a consent brief from the other parties. *Thomas's Trust, In re*, 15 Jur. 187.

On a petition to appoint new trustees, under the Trustee Act, 1850, in place of two who were advanced in years and anxious to retire :—Held, that the two old trustees and all the cestuis que trust should appear. *Sloper, In re*, 18 Beav. 596.

When a chapel was conveyed to trustees upon trust among other things to allow such person to preach as the Wesleyan conference should appoint :—Held, that the persons representing the conference might join in a petition for the appointment of new trustees. *Harden Wesleyan Chapel, In re*, 1 W. R. 212.

All the cestuis que trust ought ordinarily to be parties to a petition for the appointment of new trustees, infants by their next friends, as well as adults. *Fellows' Settlement, In re*, 2 Jur. (N.S.) 62.

Costs "incidental to and consequent on" inquiry ; the words "incidental to and consequent on" to be struck out. *Ib.*

Persons entitled to six-seventh parts of a trust fund applied to have a new trustee of the fund appointed :—Held, that, primâ facie, all the persons beneficially interested must be before the court, and that though circumstances might render such an application impossible, yet, no such impossibility being suggested, these persons were not entitled to apply, and the court declined to make the order asked, without service on the person entitled to the remaining one-seventh part. *Richard's Trusts, In re*, 5 De G. & Sm. 636.

Demise of lands to trustees for 1,000 years on certain trusts. Petition for the appointment of new trustees :—Held, that the reversioner ought to be served with the petition. *Farrant's Trust, In re*, 20 L. J., Ch. 532.

Petition by tenant for life for a vesting order, to vest property in a new trustee appointed in the place of a trustee out of the jurisdiction, must be served on the remainderman. It must be proved by affidavit, inter alia, that the power has been properly exercised, and that the proposed trustee is a fit and proper person. *Maynard's Settlement Trusts, In re*, 16 Jur. 1084 ; 1 W. R. 15.

A new trustee was appointed under a power in a settlement in the place of a trustee who was a lunatic. An order was made, under the 13 & 14 Vict. c. 60, for vesting the estate in the new trustee, but the committee of the lunatic's estate had not been served. The registrar declined to draw up the order without service, which the court directed to be made. *Saumarez, In re*, 8 De G. M. & G. 390 ; 25 L. J., Ch. 575 ; 4 W. R. 658.

A tenant for life of trust property, with a power of appointing new trustees, was duly found lunatic ; but no committee was appointed. On a petition being presented, under 16 & 17 Vict. c. 70, s. 137, for the appointment of new trustees of the property, the court declined to make an order in the absence of a committee. *Parke's Trust, In re*, 32 Beav. 580 ; 9 Jur. (N.S.) 998 ; 8 L. T. 378 ; 11 W. R. 655.

When a petition is presented for the appointment of a new trustee under the Trustee Act, 1850, in place of a trustee of unsound mind not so found, service on the trustee of unsound mind is not necessary. *Green, In re, Murton, In re*, L. R. 10 Ch. 272 ; 32 L. T. 446 ; 23 W. R. 804.

In petition cases, under the Trustee Act, 1850, arising from trustees being out of the jurisdiction, it should be sworn where the trustee is, as service will be required when the absence is only in England. *Hughes, Ex parte*, 1 Jo. & Lat. 32 ; 6 Ir. Eq. R. 559.

An appointment of a new trustee in place of one permanently residing out of the jurisdiction will be made without service of the petition on the trustee so residing out of the jurisdiction. *Martin Pye's Trusts, In re*, 42 L. T. 247.

The service of a petition for vesting in newly-appointed trustees lands which had descended to the infant heir of the former sole trustee upon the guardian of the infant is not necessary. *Little, In re*, L. R. 7 Eq. 323.

Affidavit of Fitness.]—Two trustees of real estate were appointed by the court in the place of one on petition under the Trustee Act, 1850 ; and, the property being small, without a reference, on an affidavit of the fitness of the two persons proposed as trustees. *Tunstall, Ex parte*, 4 De G. & Sm. 421 ; 15 Jur. 645, 981.

On a petition for the appointment of new trustees under the Trustee Act, 1850, it was asked that the parties named in the petition

might be appointed trustees without a reference to the master, upon an affidavit of their fitness. *Battersby's Trust, In re*, 16 Jur. 909.

The court will not, as a general rule, receive the evidence of the solicitor in the matter, as to the fitness of persons proposed to be appointed new trustees. *Grundy* v. *Buckeridge*, 22 L. J., Ch. 1007 ; 17 Jur. 731.

It is not sufficient to describe a person making an affidavit of the fitness of a new trustee merely as a "gentleman." *Orde, In re*, 52 L. J., Ch. 832 ; 24 Ch. D. 271 ; 49 L. T. 430 ; 31 W. R. 801.

Consent of New Trustees.]—An affidavit by a third party is not sufficient evidence that the proposed trustees will consent to act. Semble, that such consent may be sufficiently shown by the instruction of counsel or by letter. *Parks's Trust, In re*, 1 W. R. 477.

An intended trustee should not appear to consent by counsel, but should merely signify his assent to the petitioner. *Draper's Settlement, In re*, 2 W. R. 440.

Where a trustee declines to act, and it is necessary to appoint a new one in his place, his consent to the new appointment must be obtained. *Garty's Settlement, In re*, 3 N. R. 636 ; 10 L. T. 331.

Order for the appointment of new trustees on the written consent of the parties proposed to be appointed. *Battersby's Trusts, In re*, 16 Jur. 900.

Other Evidence.]—On a petition for appointing new trustees of a will containing gifts to classes, an affidavit of the solicitor was received as sufficient evidence of the persons constituting the classes without the production of baptismal and other certificates. *Hoskins, In re*, 4 De G. & J. 436.

On a petition by the cestui que trust under a will of real estate for the appointment of new trustees, the will not having been proved :—Held, that the production of the affidavit of one of the attesting witnesses, proving the due execution of the will, would be sufficient evidence. *Wickens's Trusts, In re*, 27 W. R. 880.

Affidavits made in a cause allowed to be used as evidence in a petition under the Trustee Act, 1850. *Pickance, In re*, 10 Hare (App.) xxxv.

Order in Lunacy or in Chancery.]—Testator by his will appointed B. his trustee, with a direction after his wife's death to sell his real estate, and to execute the necessary assurances to convey the estate, and gave to his widow a power of appointing new trustees ; but the will contained no devise of the legal estate to B. B. became of unsound mind, though not so found. After the wife's death, a petition in lunacy was presented for the appointment of new trustees, that the power of sale might be exercised :—Held, that the court had jurisdiction, under the Trustee Act, to appoint new trustees ; that an order drawn up in chancery, as well as in lunacy, should be made for their appointment and vesting in them such estate (if any) as was in the former trustee. Semble, such a power in a will would give an estate by implication, to the trustee. *Boyce, In re*, 3 N. R. 396 ; 33 L. J., Ch. 390 ; 10 Jur. (N.S.) 138 ; 9 L. T. 670 ; 12 W. R. 359.

An order for the appointment of four new trustees, in place of three deceased trustees and a surviving trustee of unsound mind, may be made in lunacy only, and need not be made in chancery also. *Boyce, In re*, supra, considered. *Owen, In re*, L. R. 4 Ch. 782 ; 17 W. R. 1034.

Costs.]—A court of equity has no jurisdiction to award costs adversely against third parties cited to appear as respondents upon a petition to appoint new trustees under the 13 & 14 Vict. c. 60. *Primrose, Ex parte*, 23 Beav. 590 ; 26 L. J., Ch. 666 ; 3 Jur. (N.S.) 899 ; 5 W. R. 508. But see *Woodburn's Trusts, In re*, 1 De G. & J. 333 ; 26 L. J., Ch. 522 ; 3 Jur. (N.S.) 799 ; 5 W. R. 642.

Where an order had been made for the appointment of new trustees under the Trustee Act, 1850, and for the payment of the costs out of the trust estate, and it was subsequently shown that the trust estate consisted entirely of realty, the order was amended by the insertion of words authorising the trustees to raise the costs out of the realty by way of mortgage, the mortgage deed to be approved by the judge at chambers. *Crabtree, In re*, 14 W. R. 497.

When a legacy had been bequeathed to a sole trustee for a tenant for life, and then for reversioners absolutely, the costs of a petition by the reversioners for the appointment of an additional trustee were ordered to be paid by the petitioners, and not out of the corpus of the legacy. *Brackenbury's Trusts, In re*, 39 L. J., Ch. 635 ; L. R. 10 Eq. 45 ; 22 L. T. 469.

On petition for the appointment of new trustees under the Trustee Act, 1850, the court has no jurisdiction to order payment into court of the trust funds. The costs of a petition for the appointment of new trustees where the petitioner was the tenant for life directed to be paid out of the corpus of the fund, and as regards persons having legal interests in the funds as between solicitor and client. *Parby's Settlement Trusts, In re*, 29 L. T. (O.S.) 72.

Under a power in a settlement of real estate, a new trustee was duly appointed in the place of a sole trustee, deceased. The heir of the deceased trustee could not be found, and, on petition, an order was made to vest the estate in the new trustee, and that upon consent he might pay the costs of the proceedings, and that such costs, with interest at 4*l.* per cent., might form a charge on the inheritance. *Davies, Ex parte*, 16 Jur. 882.

A bankrupt trustee is entitled to his costs of appearing on a petition for the appointment of new trustees. *Turner* v. *Mollineux*, 3 L. T. 687 ; 9 W. R. 252.

On a petition for appointment of new trustees of two trust funds, the costs ordered to be paid out of the two funds ratably. *Grant, In re*, 2 J. & H. 764.

Where a petition by a married woman by her next friend, for the appointment of new trustees, contained allegations against the husband of misconduct, and his affidavit denied those allegations, and contained other allegations of misconduct on the part of the parties therein referred to, the court ordered the next friend to pay the respondent his costs of answering the charges made against him, and the costs incurred in making those charges, and in reference thereto ; the respondent to pay the costs incurred by the charges which he first introduced, and the trust property to bear the ordinary costs of a petition for the appointment of new trustees. *Wills, In re*, 3 N. R. 107 ; 9 Jur. (N.S.) 1225 ; 9 L. T. 570 ; 12 W. R. 97.

A trustee who makes an improper opposition

to a petition for the appointment of new trustees will have to bear his own costs of the opposition, and will have the costs occasioned to the other parties by his opposition deducted from the costs properly payable to him. *Wiseman, In re*, 18 W. R. 574.

Two petitions were presented on the same day for the appointment of new trustees; the court will order the costs of the more perfect petition only to be paid out of the fund, and notwithstanding that the less perfect petition was presented first. *Pring's Trusts, In re*, 42 L. J., Ch. 473; 28 L. T. 467.

c. Under the Trustee Acts prior to 1850.

Reference to the Master.]—Court will not change a mere trustee for wife under marriage settlement, without sending it first to master to see if a proper person is proposed. *O'Keeffe* v. *Culthorpe*, 1 Atk. 18.

When trustees have a power to appoint new trustees, the court will not, on their application, direct an appointment without a reference. —— v. *Roberts*, 1 J. & W. 251.

In this case a claim was filed for the appointment of new trustees of a will, there being a power in the will for the appointment of new trustees; but one of the trustees was dead, and the survivor refused to act. Order made on the hearing accordingly. *Brooks* v. *Mills*, 14 Jur. 1080.

A new trustee appointed under 11 Geo. 4 & 1 Will 4, c. 60, without a reference to the master, the petitioner being the only person interested in the trust property. *Shick, Ex parte*, 5 Sim. 281.

Upon an application, under 11 Geo. 4 & 1 Will. 4, c. 60, for the transfer of a sum of stock standing in the name of a lunatic trustee, the Lord Chancellor refused to adopt the facts as found in a suit in the exchequer, and directed the usual reference. *Prideaux, In re*, 2 Myl. & Cr. 640; 7 L. J., Ch. 82.

The court never appoints a new trustee without a reference to the master. *Roche, In re*, 2 Dr. & War. 287; 1 Con. & L. 306.

A new trustee will be appointed by the court without a reference, on proof of his fitness, and on his consent. *Robinson's Trust, In re*, 15 Jur. 187. S. P., *Cockell* v. *Pugh*, 6 Beav. 293; *Proctor, In re*, 16 Jur. 233; *Buckley* v. *Buckley*, 14 Jur. 189.

The court will not direct the appointment of a trustee to convey, in the room of a trustee who is abroad, without a reference to the master, although there be affidavits of the absence of the trustee. Inquiry also directed whether the absent party was a trustee, although appointed such by the duchy court of Lancaster. *Fazekerly* v. *Gillebrand*, 7 Jur. 1123.

Where a surviving trustee had assumed by his will to appoint trustees for the will of his testator, which contained no power for the appointment of new trustees, a reference was directed to the master, regard being had to the will of the trustee, and liberty was given to the persons nominated therein to propose themselves. *Anon.*, 4 L. J., Ch. 48.

Where a legacy is given for permanent charitable purposes to trustees, not having a corporate character, the court will not transfer the fund to them, without a reference. *Wellbeloved* v. *Jones*, 1 Sim. & S. 40; 1 L. J. (o.s.) Ch. 11; 24 R. R. 146.

Trustees of a charity are never appointed by the court without a reference, though the amount of the fund be extremely small. *Att.-Gen.* v. *Arran (Earl)*, 1 J. & W. 229.

The court will not make an order for the appointment of particular persons as trustees of a charity without a reference to the master. *Shrewsbury School, In re*, 1 Mac. & G. 85; 13 Jur. 201.

Where the decree, among other things, referred it to the master to appoint a new trustee, a certificate by the master of such appointment was to be considered as a separate report. *Harris* v. *Kemble*, 4 Russ. 474.

Exceptions to Report and Confirmation.]—A trustee, by his answer, declined to act, and on the hearing it was referred to the master to appoint new trustees; the original trustee afterwards agreed to act, and on application to the court, that the trustee might be at liberty to amend his answer in this respect, so as to enable the court on a re-hearing to vary that part of the decree, the court refused to do this; but thought the master was at liberty, on statement of these circumstances, to decline the appointment of new trustees. *Miles* v. *Neave*, 1 Cox, 159.

Where a reference has been made to the master to appoint trustees of a charity, it is the rule of the court to adopt the master's appointments, unless the persons appointed can be shown to be objectionable, and the court will not enter into the question of the fitness of other persons whom the master has refused to appoint. *Norwich Charities, In re*, 2 Myl. & Cr. 275. S. P., *Att.-Gen.* v. *Dyson*, 2 Sim. & S. 528; 4 L. J. (o.s.) Ch. 164.

A person's name had been submitted to the master as a new trustee, and he had been approved by the master, but without any affidavit of his respectability. Such an affidavit was afterwards produced to the Lord Chancellor, and no objection to his respectability was made: —Held, that there was no ground for referring the question of his appointment back to the master. *Ludlow Charities, In re*, 3 Myl. & Cr. 262.

Where a deed gives a power of appointing new trustees to a particular person, the court is bound to adopt his nominee, unless he refuses to nominate any but a person wholly unfit; therefore, when the power of appointing trustees was given to H. K. and J. K., and the survivor of them, and J. K. died, and H. K. nominated new trustees, but, in consequence of the interference of R. K., who had become entitled to J. K.'s interest under the deed, it was necessary to file a bill to procure a conveyance of the legal estate; and the master, under the reference made at the hearing, entered into a general inquiry as to the relative fitness of the nominees of H. K. and R. K., and selected the nominee of the latter:—Held, he was wrong in so doing, although the reference had been made in general terms to select a proper person as trustee. *Kennedy* v. *Turnley*, 6 Ir. Eq. R. 399.

Rules of the court as to controlling the appointment of trustees in such cases. *Ib.*

Where a bill is filed for the appointment of new trustees, the amount of the property being small, the court will make an order for the master to appoint the trustees at once under the reference, without the necessity of coming back to the court. *Clinton* v. *Watkins*, 7 Ir. Eq. R. 489.

In a suit for the appointment of new trustees, occasioned by the refusal of the surviving trustees to exercise a power of appointment, reference was made to the master to approve of proper persons. Exceptions to his report on the

ground that he had not regarded the right of nomination given to the surviving trustee by the instrument creating the power, but not raising any objections to the fitness of the persons nominated by the master, were overruled. *Middleton* v. *Reay*, 7 Hare, 106; 18 L. J., Ch. 153; 13 Jur. 116.

An order of reference, under the 4 & 5 Will. 4, c. 29, as to whether it would be for the benefit of the parties beneficially interested in a settled fund to lend it on the security of freehold estates in Ireland, may be made ex parte; but the court will not confirm the master's report, finding that such a loan would be for the benefit of such parties, unless they all, as well those entitled in remainder as those entitled for life, have either been served with the petition, or appeared before the master. *Kilpatrick's Trust, In re*, 15 Jur. 941.

In this case a reference had been made, under Turner's Act, for the master to approve of a new trustee. The master made his certificate accordingly, and a petition was presented, praying that the master's report might be confirmed. The vice-chancellor stated that he had communicated with the other judges, and it was settled that these applications must be made by motion, and not by petition. *Farmer, In re*, 16 Jur. 634.

Parties.]—A party beneficially entitled to part of the dividends of a sum in the funds held to have a sufficient interest to support a petition, under 11 Geo. 4 & 1 Will. 4, c. 60, for appointment of a new trustee; and by s. 10 the court may appoint one of the bank officers to receive the dividends and pay them over to the new trustee; and although an order has been made under the act, but irregularly, the court has jurisdiction to give costs. *King, In re*, 10 Sim. 605; 9 L. J., Ch. 257.

Upon a petition by a mortgagee for the appointment of a new trustee in the room of the infant heir of a trustee for sale under a mortgage deed, the court, in the absence of the mortgagor, refused the application. *Green, In re*, 2 Coll. C. C. 91; 9 Jur. 704.

On petition, a trustee of lands with a power of sale sufficiently represents the cestui que trust. *Blanchard's Trusts, In re*, 2 N. R. 386; 8 L. T. 603.

Service of Petition.]—Mode in which a petition presented under an act of parliament, by which the court derives its jurisdiction, ought to be intituled. *Law, In re*, 4 Beav. 509; 11 L. J., Ch. 118; 6 Jur. 615.

A petition under the 11 Geo. 4 & 1 Will. 4, c. 60, to obtain a transfer of trust stock from the names of the surviving trustees into the joint names of such trustees and of a new trustee duly appointed, is properly presented by such new trustee. *Ib.*

After a reference to the master, and a report thereupon, on a petition to confirm the report, under the provisions of the stat. 11 Geo. 4 & 1 Will. 4, c. 60, and to transfer funds to new trustees:—Held, that all parties interested in the fund, whether in reversion or otherwise, should be served with notice of the petition. *Yates, Ex parte*, 16 L. J., Ch. 72; 11 Jur. 33.

ix. *Costs.*

New Trustee in Place of Bankrupt.]—On a petition to have a new trustee appointed in the place of the bankrupt, who had misappropriated the trust fund, the court will give the assignees their costs only out of the general estate. *Heelis, Ex parte, Atkinson, In re*, 7 Jur. 684.

Refusal of Trustees of Meeting-House to Retire.] — The trustees of a meeting-house, having by a change of their religious opinions become disqualified for the trust and refused to retire, ordered to pay the costs of the appointment of new trustees incurred in a suit instituted for that purpose on the information of the attorney-general. *Att.-Gen.* v. *Murdoch*, 2 K. & J. 571.

New Trustee made Party by Supplemental Bill.]—The survivor of two trustees being guilty of misconduct, the cestuis que trust filed a bill to remove him, and to appoint a trustee in his place. After the bill was filed, he appointed a new trustee under a power in the settlement, in the place of the deceased trustee, without the consent of the cestuis que trust. The new trustee, who had no notice of the filing of the bill, was made a party by supplemental bill. The court made him pay his own costs of the supplemental bill, but not those of the other parties. *Peatfield* v. *Benn*, 23 L. J., Ch. 497; 2 W. R. 68.

Mode of Appointment provided by Act of Parliament.]—A bill having been filed for the appointment of new trustees in a case where it was proper to have recourse to the mode provided by the provisions of the act of parliament, the costs directed to be paid to the plaintiff. *Thomas* v. *Walker*, 18 Beav. 521.

Executrix of Deceased Sole Trustee refusing to Receive and Pay Dividends.]—An executrix of a deceased and sole trustee having declined to receive and pay the dividends on stock standing in the name of the trustee, the cestui que trust filed a bill against her for the appointment of new trustees, a transfer of the trust fund, and payment of a dividend:—Held, that the executrix was entitled to her costs out of the fund. *Legg* v. *Mackrell*, 2 De G. F. & J. 551.

6. Rights, Powers, Duties and Liabilities.

a. In General.

General Position of Trustee.]—Mere trustee has no right to traverse inquisition. *Sadler, In re*, 1 Madd. 581.

Trustees not to take advantage of their own laches. *Kentish* v. *Newman*, 1 P. Wms. 236.

The court will not take a trust deed out of the possession of the bankrupt's trustees. *Holder, Ex parte*, 3 Deac. & C. 276; 2 L. J., Bk. 64.

Acceptance of Trust—Trustee cannot Dispute Title of Cestui que Trust.]—A person who has accepted property as a trustee, and held it as such, is not at liberty to dispute the title of his cestui que trust, though that title may be doubtful. *Neligan* v. *Roche*, Ir. R. 7 Eq. 332.

It is not competent to a trustee to dispute the title of his cestui que trust; neither does the court listen to imputations of imbecility against a grantor in the absence of those beneficially interested. *Pearson* v. *Lindley*, 2 Jur. 758.

No trustee of property having a right the exer-

cise of which conflicts with his duties as a trustee, can, even with the consent of his cestuis que trust, enforce his own right to their detriment. *Cook* v. *Addison*, 38 L. J., Ch. 322; L. R. 7 Eq. 466; 20 L. T. 212; 17 W. R. 480.

Trustees cannot set up, as against their cestuis que trust, the adverse title of third parties. *Newsome* v. *Flowers*, 30 Beav. 461; 31 L. J., Ch. 29; 7 Jur. (N.S.) 1268; 5 L. T. 570; 10 W. R. 26.

A seceding congregation of a chapel attempted to obtain possession of it by procuring some of their body to be appointed new trustees. In a suit to set aside the appointment:—Held, that the new trustees could not raise as a defence, that the congregation had departed from the original form of worship, and that such an objection could only be made available on an information filed by them and raising the question. *Ib.*

It would be dangerous, where a person enters on the foot of a trust, and never makes any declaration of his having performed the trust in pursuance of the will, to construe this such an entry, as that a fine and non-claim would bar the right of the plaintiff, a remainderman. *Shields* v. *Atkins*, 3 Atk. 560.

Upon a trust in equity, no estate can be gained by disseisin, abatement, or intrusion while the trustee continues in possession of the land, neither will equity suffer a merger of the trust estate. *Hopkins* v. *Hopkins*, 1 Atk. 591; Cas. t. Talb. 44; 1 Vern. 268.

Duration of Trust.]—A trustee cannot, by any act of his own, denude himself of that character till he has performed his trust. *Chalmer* v. *Bradley*, 1 J. & W. 68.

When Majority can Act.]—A trust to apply funds "towards the repairs of the church of W., the payment of the fifteenths, and relief of the poor of W., buying of armour and setting forth soldiers, and repairing Sawbridge bridge, within the parish," is of a public nature; and therefore an act done by a majority of the trustees assembled for that purpose is valid. *Wilkinson* v. *Malin*, 2 C. & J. 636; 2 Tyrw. 544; 1 L. J., Ex. 234.

One of several mortgagees can maintain an action to foreclose the mortgage, making the others co-defendants if they are unwilling to be joined as co-plaintiffs, or have done some act precluding them from being plaintiffs. The act of a majority of trustees cannot bind a dissenting minority nor the trust estate. In order to bind the trust estate the act must be the act of all the trustees. *Luke* v. *South Kensington Hotel Co.*, 48 L. J., Ch. 361; 11 Ch. D. 121; 40 L. T. 638; 27 W. R. 514—C. A.

The manager of a company is not entitled, as such, to sign the firm or name of the partnership. *Beveridge* v. *Beveridge*, L. R. 2 H. L. (Sc.) 183.

The authority of trustees representing three-fourths of the property of a concern held to be insufficient to empower the manager as such, to sign the company's firm, especially when the proceeding was opposed by the representative of the remaining fourth. *Ib.*

Power to Render Property Liable to Third Party.]—Trustees may render the property of their beneficiaries liable to third persons for an act done by them in the exercise of the trust. *Mersey Docks and Harbour Board* v. *Gibbs*, 35 L. J., Ex. 225; L. R. 1 H. L. 93; 12 Jur. (N.S.) 571; 14 L. T. 697; 14 W. R. 872.

A trustee will be restrained from using the legal powers that have been conferred upon him otherwise than for the legitimate purposes of his trust, and therefore a demurrer for want of equity cannot be sustained to a bill seeking such relief, although the plaintiff may have a remedy at law. *Balls* v. *Strutt*, 1 Hare, 146; 5 Jur. 1035.

Where a plaintiff, as a drawer of a bill, indorsed it in trust for himself, and it was again indorsed by the defendant on the like trust, to a person who commenced an action on the bill against the plaintiff:—Held, that the court would restrain a trustee from using the powers conferred on him otherwise than for the real purposes of the trust, and a demurrer to a bill (to restrain the defendant from negotiating, and for having the bill delivered up), for want of equity, overruled, notwithstanding the plaintiff might also have a remedy at law. *Ib.*

Trustee entitled to act on his own Judgment.]—A trustee is entitled to act on his own judgment, and is not bound to follow the opinions of the cestuis que trust. *Selby* v. *Bowie*, 2 N. R. 2; 9 Jur. (N.S.) 432; 8 L. T. 372; 11 W. R. 606.

Power to Change Stocks.]—Trustees with power to change stocks, cannot thereby change cestui que trust's interests. *Lord* v. *Godfrey*, 4 Madd. 455.

Trustees in Possession of Land for Charitable Purposes—Adverse Title to Land.]—The necessary funds have been subscribed by certain parties, a piece of land was purchased and conveyed by deed to trustees, for a charitable purpose. Under this deed the trustees entered into and continued in possession for several years; and with the acquiescence of all the subscribers, including some not parties to the deed, a considerable expenditure was made, and heavy liabilities were incurred:—Held, that, even assuming the subscribers not parties to the deed had an equitable interest in the land in respect of the moneys subscribed by them, yet they would not be heard to assert a title to the land adverse to that of the trustees. *Att.-Gen.* v. *Munro*, 9 Jur. 461.

Non-interference of Trustees—Right to carry Trust into Effect.]—The non-interference of the trustees for a long period does not preclude them or their representatives from sustaining a suit for carrying the trust into effect, so long as the trust subsists. But, semble, on the contrary it is the duty of the trustees or their representatives to take steps for enforcing the trust. *Hughes* v. *Wells*, 9 Hare, 749; 16 Jur. 927.

A trustee has as much the benefit of the pleading of this court as he that has the equitable interest; and a cestui que trust is entitled to have the privilege maintained by the trustee. *Suffolk* (*Earl*) v. *Green*, 1 Atk. 450.

Duty of Trustee—To Preserve Evidence of his Acts.]—A trustee is bound to preserve evidence of his acts. *Aspland* v. *Watte*, 25 L. J., Ch. 53; 3 W. R. 526.

——To Obtain Information as to Trust Fund.]—It is the duty of trustees to obtain information of the disposition of the trust fund. *Walker* v. *Symonds*, 3 Swanst. 58; 19 R. R. 155.

Trustee for Infants under Invalid Deed.]—Position, duty, and liability of a trustee for infants of an estate created by an invalid deed or a deed of doubtful validity, and which is impeached by other parties. *Elsey* v. *Lutyens*, 8 Hare, 159.

Appeal to House of Lords—Right of Cestui que Trust to use Trustee's Name on Indemnity.]—A trustee cannot, upon receiving a proper indemnity, refuse the use of his name to his cestui que trust for the purpose of prosecuting an appeal in the house of lords, on the ground that he thinks such appeal unreasonable, and that he is the solicitor of the party in whose favour the decree appealed from was made. *Pakington* v. *Benbow*, 5 W. R. 670.

Cestui que Trust Heir of Trustee.]—No act of the trustee can vary the right of the cestui que trust, but his situation may; as where the cestui que trust is his heir, and the right to dower depends upon which dies first. *Selby* v. *Alston*, 3 Ves. 341; 4 R. R. 10.

Mistake as to Cestui que Trust.]—A trustee who is in possession of land is so on behalf of his cestuis que trust, and his making a mistake as to the persons who really are his cestuis que trust cannot affect the rights of the cestuis que trust inter se. *Lister* v. *Pickford*, 34 Beav. 576; 6 N. R. 243; 34 L. J., Ch. 582; 11 Jur. (N.S.) 649; 12 L. T. 587; 13 W. R. 827.

Right of Cestui que Trust to Inspect Trust Deed.]—A cestui que trust is entitled to inspection of the deed creating the trust, notwithstanding that the trustee alleges that by the exercise of a power contained in the deed the cestui que trust's interest under it has ceased. *Bugden* v. *Tylee* or *South*, 21 Beav. 545; 26 L. J., Ch. 425; 3 Jur. (N.S.) 783; 5 W. R. 128.

Privileged Communications — Opinion of Counsel.]—A trustee is not bound to produce to his cestui que trust cases laid before counsel with a view of resisting a claim by such cestui que trust, although the trustee is not personally interested. *Thomas* v. *Secretary of State for India*, 18 W. R. 312.

Trustee assenting to Bill in Parliament—Injunction.]—Quære, whether a cestui que trust can have an injunction to restrain his trustees from assenting to a bill in parliament. *Parker* v. *Dunn River Navigation Co.*, 1 De G. & Sm. 192; 11 Jur. 624.

b. Management.

i. *In General.*

Changing Nature of Estate.]—A trustee cannot change the nature of the estate, by turning money into land, or a lease for years into a freehold, et e converso. *Witter* v. *Witter*, 3 P. Wms. 100.

Mixing Trust Funds.]—A trustee, for a particular purpose, must not intermix the trust fund with other trust funds and apply the whole in manner he thinks fit. *Att.-Gen.* v. *Goldsmiths' Co.*, C. P. Cooper, 292.

Letting Cestui que Trust in Possession.]—It is not of course to let the cestui que trust under a will into possession of an estate; it must depend on the testator's intention. *Tidd* v. *Lister*, 5 Madd. 429; 21 R. R. 323.

Power to Lay out Money on Securities.]—Power to trustees to lay out money on securities, includes power to give discharges to borrowers. *Wood* v. *Harman*, 5 Madd. 368.

Payment of Head Rents.]—Quære, whether the trustee of leaseholds settled to separate use of married woman, is bound to see that head rents are paid, or liable as for wilful default, if the premises are evicted for nonpayment of rent. *Booth* v. *Purser*, 1 Ir. Eq. R. 40.

Right of Sporting.]—Where a manor is conveyed to trustees, upon trust to divide the profits of it amongst the tenants of the manor, it is the duty of the trustees not to let the right of sporting to any of the tenants, upon terms advantageous to them as tenants; but to make the best profit they can by letting the right of sporting to all eligible persons, whether tenants or otherwise, and to divide the profit so made ratably amongst the cestuis que trust. *Hutchinson* v. *Morritt*, 3 Y. & C. 547. And see *Webb* v. *Shaftesbury (Earl)*, 7 Ves. 480.

Neglect to Let Farm at Higher Rent.]—A trustee letting a farm originally at a proper rent will not be held personally liable for the difference between that rent and the rent which, at a subsequent period of the tenancy, might have been obtained, merely because he neglected to give notice to quit a few months after there appeared to be a probability that the price of agricultural produce would enable him, with propriety, as between landlord and tenant, to obtain a higher rent. And, semble, that rule would be applicable even to a case in which the tenant was a near relation to the trustee, unless there were some other circumstances to confirm the suspicion of personal favour which that relationship is calculated to excite. *Ferraby* v. *Hobson*, 2 Ph. 255; 16 L. J., Ch. 499.

Abatement of Rent on Lease for Lives.]—In taking accounts against a trustee when he is to be fixed with a personal liability, his good faith is to be considered, and every fair allowance is to be made in his favour, especially if the demand against him is one which arose many years ago, and the beneficiary was at the time cognisant of all the matters connected with it. *M'Donnell* v. *White*, 11 H. L. Cas. 271.

A., being greatly in debt, executed a deed of trust for the benefit of creditors; and among the property assigned under the trust deed was a lease for lives renewable for ever, on which the rent reserved was really a high rack-rent; the tenant complained, and the trustee, with the knowledge of A., though without his consent, but with the full assent of A.'s brother, to whom A. had committed the management of his affairs, received from the tenant an abated rent. A. complained of the abatement, but he took no steps to put an end to it:—Held, that the estate of the trustee could not after the expiration of the trust be called on to make up the deficiency. *Id.*

Assignment of Advowson of Rectory Appendant to Manor.]—Under a devise of manors, lands, &c., to A., his executors, &c., for a term of eleven years, in trust to receive the rents, issues, and profits of the premises that should from time to time accrue and become due, and dispose of the same for the benefit of a certain cestui que trust; A. may, by the directions of the cestui que trust, and for his benefit, assign the advowson of a rectory appendant to a manor to a purchaser

for the said term of eleven years, to the intent that the purchaser may present for the next turn in the case of an avoidance before the expiration of the term, and in case of such avoidance, the purchaser may present accordingly. *Albemarle (Lord)* v. *Rogers*, 7 Bro. P. C. 522.

Direction to Convey Real Estates to Child attaining Twenty-Five—Life Estate only if Conduct not approved by Trustees.]—K., by will, directed his trustees, on R., the eldest son of K., and failing him the next eldest son, attaining twenty-one, to convey certain real estates to K., but in case any of the children conducted themselves so as not to merit the approbation of the trustees, then such children were to have life estates only. K., by codicil directed his trustees to postpone the conveyance to R. till he attained twenty-five. R. at twenty-three married, with the approbation of the trustees, though they were not parties to his marriage settlement, which settlement disposed of his interest under his father's will as if it were an estate in fee. When R. attained twenty-five, the trustees, not being satisfied with R.'s conduct, conveyed to him only a life estate in the premises:—Held, first, that the eldest son was included under the term children: secondly, that the trustees were not bound to declare their dissatisfaction until R. attained twenty-five, and that they could not by having assented to R.'s marriage preclude themselves from discharging the duty of reviewing his conduct when he attained twenty-five. *Weller* v. *Ure*, 15 L. T. 97.

Promissory Note to be Cancelled if Maker behaved to Satisfaction of Trustees in his Business.]—A testator gave all his real and personal estate (after certain specific and pecuniary gifts) to trustees, including therein a promissory note for 3,000*l.* and interest due from J. L. C., upon trust to get in and convert, and divide among certain persons, of whom J. L. C. was one. If J. L. C. behaved to the satisfaction of the trustees in a certain business in which he was placed, the trustees were to cancel the note for the benefit of J. L. C.; but if he did not behave to their satisfaction in the said partnership for six years from the testator's decease, they were to call in the note. Within a year from the testator's decease the partnership, in which J. L. C. was, was dissolved: then J. L. C. became bankrupt: then the trustees (but long within six years after the testator's decease) gave notice to J. L. C. that he had misconducted himself, and called in the 3,000*l.* In their answer, which was also within the six years, the trustees declared that the misconduct referred to was misconduct in the partnership, and within the meaning of the will, and that it had caused the dissolution:—Held, that such notice, although after the bankruptcy, was sufficient, and that the 3,000*l.* should be deducted out of the share of J. L. C. in the residue. *Bird* v. *Johnson*, 18 Jur. 976.

Distinction between a trustee undertaking to make good a debt due to the estate, and actually receiving payment, in the one case being bound to invest it, i.e. if the money be received; but secus, where the trustee merely undertakes to make it good, the debtor not being discharged. *Ib.*

Deposit of Bonds and Money with Bankers to Guarantee Interest to Bondholders.]—An agent of a foreign railway company deposited with the plaintiffs, who were bankers in England, certain bonds of the company, and a sum of 5,000*l.* to guarantee the payment of the interest on the same bonds, which was payable at the plaintiff's bank; and in case of non-payment of the interest the 5,000*l.* was to be forfeited, and divided among the bondholders. The interest was not duly paid:—Held, that the plaintiffs were trustees of the money for an unascertained class of individuals, and that they could not be called upon to ascertain, at their own risk and expense, who was included in that class; and therefore one who claimed to be an unsatisfied bondholder, and had in that character commenced an action against the plaintiffs for part of the 5,000*l.*, was restrained by injunction. *Hankey* v. *Morley*, 4 Jur. (N.S.) 234.

Power to apply Surplus Income in Improvement of Property.]—Trustees of a term with power to apply surplus income in building and improvement were allowed to apply money standing to real estate capital account in building and improvements, including drainage. *Leslie, In re*, 45 L. J., Ch. 668; 2 Ch. D. 185; 34 L. T. 239; 24 W. R. 546.

Trustees of real estate for a term of 1,000 years from the day of the death of the settlor, had powers, during a period of certain lives in being and twenty-one years, to manage the estates, and out of the income to keep down charges and incumbrances, and subject thereto to repair, erect new or additional buildings, and generally to make such outlay for the improvement of the estates as they should think fit or conducive to the general benefit of the estates or the tenants thereof, and hold the surplus as capital, which was to be laid out in the purchase of lands to be settled to the like uses. The settlor having died in 1870, the first tenant for life being in possession, and the income being insufficient, after keeping down charges and incumbrances, to pay for repairs, for the cost of new buildings, and generally for improvement of the property, the court allowed, out of capital, payments in draining upon which the tenants paid 5*l.* per cent., and in erecting new buildings. *Ib.*

Though 32 Geo. 3, after directing trustees to light, cleanse, and improve certain streets, empowers them to sell waste lands in order to defray the expenses, &c. and to expend the surplus in such a manner as they shall deem necessary, it does not authorise them to spend such overplus in opposing a bill in parliament, which, if passed, would be extremely prejudicial to the purposes of the act under which they officiate. *Edwards* v. *Wilson*, 2 Chit. 610.

Duty to enforce Payment of Trust Funds.]—It is the duty of trustees to press for the payment of the trust funds to them, and if they are not paid within a reasonable time, to enforce payment by legal proceedings. And it is especially their duty to take action promptly if by the terms of the trust payment has been deferred to the expiration of a specified time. The only excuse for not taking action to enforce payment is a well-founded belief on the part of the trustees that such action would be fruitless; and the burden of proving the grounds of such belief is on the trustees. *Brogden, In re, Billing* v. *Brogden*, 38 Ch. D. 546; 59 L. T. 650; 37 W. R. 84—C. A.

—— **Property not Lost by Trustees—Indemnity.**]—Trustees are not bound at their own expense to take proceedings for the recovery of trust property not lost by their own default. *Tudball* v. *Medlicott*, 59 L. T. 370; 36 W. R. 886; 52 J. P. 659.

A testator by his will left certain freehold property to trustees in trust for certain beneficiaries; a short time after the testator's death a mortgage of the devised property was discovered, but was suspected by the trustees to be a forgery. They had not funds with which to institute proceedings:—Held, that they were not bound to take proceedings at their own expense to recover the trust estate. *Ib.*

Loss by Non-conversion—Form of Order.]—Where there has been a loss to the trust estate by reason of a non-conversion of a security forming part of the trust property, but the trustees allege that they could at no time have realised the full value of the security, they will be allowed the benefit of an inquiry to show the actual amount which would have been realised by a conversion at the proper time, and their liability will be limited accordingly. *Gainsborough (Earl)* v. *Watcombe Terra Cotta Co.*, 54 L. J., Ch. 991; 53 L. T. 116.

Deposit at Bank—Delay—Failure of Bank.]—A will appointing trustees only authorised them to invest in parliamentary stocks or funds, or in freehold, copyhold, or leasehold hereditaments. The will contained a provision that no trustee should be answerable for any banker, broker, or other person in whose hands any moneys might be deposited for safe custody or otherwise. The trustees left the sum of 500*l.* on deposit at a bank, by way of interim investment, whilst they looked for a mortgage, for fourteen months, when the bank failed. Upon the question whether the trustees were liable for the loss thereby occasioned:—Held, that fourteen months was too long for the trustees to leave trust money on deposit at a bank; that if after six months they could not get a mortgage, they ought to have invested the money in consols; that, from the moment they left it too long on deposit, they became responsible for the consequences of their default, and were therefore liable for the sum lost to the trust estate. *Cann* v. *Cann*, 51 L. T. 770; 33 W. R. 40.

Loss of Trust Money by Reason of Defect in Title—Employment of Solicitor.]—In the year 1838 the trustees of a marriage settlement invested a portion of the trust funds on an assignment of an appointed share of a fund. The appointment purported to be made in execution of a joint power by a husband and wife, but the deed had not been executed by the wife. The trustees had employed a solicitor to act for them in preparing the assignment, and to transact the legal business connected with it:—Held, that the trustees were not liable for the loss occasioned by the non-execution of the power of appointment. *Rochfort* v. *Seaton*, [1896] 1 Ir. R. 18.

Retaining Assets for Payment of Legacies—Insufficiency.] — Trustees are not insurers, and if they have and retain in their hands assets which, fairly valued, are sufficient to meet legacies which are not payable, but have to be held in trust, they are justified in paying other legacies payable pari passu with them, but payable at once. And trustees making such payments are not personally responsible to the unpaid legatees if the assets retained for them should in the result prove insufficient to pay them in full. The conduct of trustees ought to be regarded with reference to the facts and circumstances existing at the time when they had to act and which were known, or which ought to have been known, by them at that time. *Hurst, In re, Addison* v. *Topp*, 67 L. T. 96—C. A.

Pressure by Trustee for Money due to Estate.]—A testator who died in 1872 by his will bequeathed a legacy of 1,000*l.* in trust for J. By a codicil after reciting that he desired his widow after his death to enter into the business then carried on by him in partnership with D., and that the bulk of his property was invested as capital in the said business, the testator empowered his trustees to invest or continue invested, moneys in their hands as trustees, in the aforesaid business or any other business in which they in their uncontrolled discretion might think fit, without being liable for loss. The widow entered into partnership with D. for ten years, during which term the 1,000*l.* was left in the business. After the expiration of ten years the widow left the business, and D. filed a petition, and a composition of 10*s.* in the pound was agreed to, payable by three instalments. Only one instalment was received by the trustees which was not invested, but placed on deposit at a bank. No pressure was made for payment of the other instalments. J. commenced an action against the trustees, seeking relief on the ground of breaches of trust:—Held, that the not calling in the 1,000*l.* on the widow's retirement from the business was not a breach of trust, but that, on the construction of the codicil, the power was not restricted to lending to any particular partners in the business:—That the not calling in or pressing for payment of the two unpaid instalments was not a breach of trust, for the trustees were not guilty of negligence but had acted honestly in the belief that pressure would not have resulted in benefit to the estate, and had reasonable grounds for acting as they had done:—That as the loss of income by the non-investment of the first instalment was very small, and as there was a probability of another instalment being shortly received, when both might be invested together, no order would be made against the trustees, who had acted on the advice of their solicitor in placing the money on deposit instead of investing it. *Earl, In re, Johnson* v. *Davies*, 39 W. R. 107.

Trust for Sale—Carrying on Business—Advances—Right of Creditor against Trust Funds.]—By a marriage settlement a lunatic asylum was assigned to trustees on trust at the request of the husband and wife to sell and stand possessed of the proceeds of the sale for the benefit of the wife and children; but the trustees were to allow the husband to carry on the business of the asylum without paying any rent, but paying certain premiums and other moneys. The husband became bankrupt, and thereupon the surviving trustee of the settlement entered into possession of the asylum and carried on the business until the asylum was sold for a large sum of money. A tradesman had supplied the trustee with goods for the use of the asylum, and brought an action claiming payment out of the trust funds of the settlement:—Held, that, whether the trustee would or would not have been entitled to

be indemnified for moneys advanced by him for the purposes of the asylum, the tradesman had no right to recover his debt out of the trust funds, no special part of the estate having been appropriated for carrying on the asylum. *Garland, Ex parte* (10 Ves. 110), considered. *Strickland* v. *Symons*, 53 L. J., Ch. 582; 26 Ch. D. 245; 51 L. T. 406; 32 W. R. 889—C. A.

—— **Conversion—Direction to postpone Sale—Profits of Business.**]—A direction in a will empowering trustees to postpone the sale and conversion of any part of the testator's property for such period as to them should seem expedient, justifies the trustees in postponing the sale of the testator's business, and in carrying on the business with a view to benefit the tenant for life who is entitled to the profits till sale. *Crowther, In re, Midgley* v. *Crowther*, 64 L. J., Ch. 537; [1895] 2 Ch. 56; 13 R. 496; 72 L. T. 762; 43 W. R. 571.

—— **Power to Postpone Sale—Power to Carry on Business.**]—A testator gave all his residuary estate to trustees upon trust with all convenient speed to sell; and particularly with all convenient speed to sell his business of a pawnbroker. The testator empowered his trustees to postpone the sale of his estate, or any part thereof, for so long as they should think fit:—Held, that this power did not authorise the trustees to carry on the business for an indefinite time. But, under the circumstances, they were authorised to carry it on for two years from the death of the testator. *Smith, In re, Arnold* v. *Smith*, 65 L. J., Ch. 269; [1896] 1 Ch. 171; 74 L. T. 14; 44 W. R. 280.

Increase of Capital—Mortgage.]—*See Dimmock, In re*, 52 L. T. 494, post, col. 629.

West Indian Estates—Expenses of Cultivation—Advances by Consignee.]—D., the consignee of the produce of a West Indian plantation, carried on by T., as executor and trustee of his father, advanced money to T. to be expended on the estate, on the agreement that T. should bind the future profits of the estate to repay the same, which T. had power to do under the will. The agreement was not in writing, but was bona fide acted on by D., who advanced moneys accordingly:—Held, that the agreement being part performed was binding. *Daniel* v. *Trotman*, 1 Moore, P. C. (N.S.) 123; 9 Jur. (N.S.) 583; 8 L. T. 522; 11 W. R. 717. And see *Morison* v. *Morison*, post, col. 645.

A West Indian plantation is a species of trade, and cannot in general be carried on without advances from a consignee in this country, to be reimbursed out of the future proceeds. This difference between West Indian estates and landed estates here, affects the mode in which courts view the dealings and conduct of trustees, and even the construction of wills and instruments relating to the former estates. Semble, the consignee advancing money to carry on a West Indian plantation has an implied lien on the future profits for such advances. *Ib.*

Administration of Trusts—Payment by Trustees.]—A father devised his real estate to trustees to pay an annuity of 6,000*l.* a year to his daughter, and subject thereto upon trust to accumulate the rents for twenty-one years, and out of the accumulated fund from time to time to pay his debts, legacies, and the incumbrances on the estates, and invest the residue in the purchase of lands to be held on the same trusts; and he directed the estates, on the expiration of the trusts for accumulation, to be settled in strict settlement. He directed that as soon as the incumbrances were paid off, the annuity should be increased to 8,000*l.* He gave his residuary personal estate to his trustees to pay off the incumbrances, and apply the surplus in the same way as the accumulated rents and profits. He died leaving personalty which, within a month after his death, was ascertained to be amply sufficient to pay off his debts, legacies, and incumbrances. The trustees, however, retained a considerable part of the personal estate, as it was producing a high rate of interest; and they did not for several years pay off all the incumbrances:—Held, that the trustees were right in paying the annuity at the rate of 8,000*l.* a year from the testator's death, and must be allowed it in their accounts. *Astley* v. *Essex* (*Earl*), L. R. 6 Ch. 898; 25 L. T. 470.

A widow, who was by the terms of the will to be allowed money by the trustees during the minority of an infant—her son—abandoned the child, for whom other guardians were appointed by the court, and afterwards having cohabited with a married man, and by him had several illegitimate children, lived with them in a house to the use of which she was entitled under the will. The trustees under these circumstances refused to make her any allowance out of the trust moneys:—Held that she could not compel the trustees so to do, but was disqualified from making any claim by her abandonment of the child, independently of other misconduct. *Mellor* v. *Mellor*, 20 W. R. 51.

—— **Overpayment to Beneficiary—Costs.**]—A testator devised and bequeathed his residue to his wife and two sons, his executrix and executors, on trust for his wife for life, and after her death as to one-fourth for each of his two sons, and as to the other two-fourths respectively on trust for each of his two daughters and their children. The widow and sons proved the will during the life of the widow. She managed the estate; she paid sums of money in respect of each fourth by anticipation, one son received more than was paid in respect of the other shares. It turned out after her death that the estate was insufficient to bring up the other shares to an equality with what such son had received:—Held, in an action to administer the testator's estate, that, it not being shown that the deficiency had not arisen from subsequent wasting of the estate, neither son was liable as trustee to make good the deficiency of the other shares, and the son who had received the excess was not liable as beneficiary to refund; but that he could not be paid his separate costs as beneficiary because he had already received more in excess of his proper share than the amount of such costs. *Winslow, In re, Frere* v. *Winslow*, 60 L. J., Ch. 20; 45 Ch. D. 249; 63 L. T. 485; 39 W. R. 120.

—— **Sums Voluntarily added to Share—Erroneous Construction of Will.**]—Where the trustees of a will had voluntarily added certain sums to the settled share of a beneficiary under an erroneous impression as to the true construction of the will, and the will was subsequently construed by the court adversely to their impression:—Held, that there was nothing on the evidence to show that the trustees held the contributed fund on the trusts of the will as construed by the court,

but only that they held the money for the benefit of the beneficiary under the will. *Walters, In re, Neison* v. *Walters*, 63 L. T. 328—C. A.

Partnership — Money of deceased Partner left as Loan—Expenses of Audit and Stocktaking.]—Testator, on retiring from business, left his share of the capital as a loan at interest to his late firm without security, upon the terms of an agreement under which the annual balance sheets of the firm were to be shown to him, and he had at all times access to, and liberty to inspect the stock and books of the business. The money was to become immediately repayable in certain events, the happening of many of which could not be ascertained without an audit of the firm's books and a stocktaking. The testator, by his will, gave his personal estate upon trust for certain persons for life, with remainder to others absolutely :—Held, first, that the discretion of the trustees of the will as to how often there should be an examination of the books and stock of the firm ought not to be fettered, but, in the absence of special circumstances, it should be made once a year. Held, secondly, that the expenses of such examinations should be paid out of the capital of the testator's estate, and not out of the income. *Bennett, In re, Jones* v. *Bennett*, 65 L. J., Ch. 422 ; [1896] 1 Ch. 778 ; 74 L. T. 157 ; 44 W. R. 419—C. A.

Trust to receive Rents and manage Estate —Salary.]—Where estates were devised to a near relative and a family solicitor until B. attained the age of twenty-eight years, upon trust to receive the rents and manage the estate, and the will empowered any trustee being a solicitor to charge and be paid for all business done by him as a solicitor in respect of such estate, and a legacy of 100*l.* was given to each trustee, and the trustees managed the estates consisting of 2,000 acres partly unlet for fifteen years, paying themselves a salary of 100*l.* a year each for the trouble of such management, amounting in all to 3,000*l.*; on an originating summons on behalf of the tenant for life and the infant remainderman :—Held, that such payments of 200*l.* a year were unauthorised by the will; the trustees might at any time have applied to the court, but they neglected to do so ; that it was not a case to follow the course adopted in *Marshall* v. *Holloway* (2 Swanst. 432), where an inquiry was directed as to whether any and what sum should be allowed to the trustees for their trouble. The salary was disallowed, and an order made for payment into court, without interest, within six months. *Bedingfield, In re, Bedingfield* v. *D'Eye*, 57 L. T. 332. See also *Freeman's Settlement Trusts, In re*, 57 L. J., Ch. 160 ; 37 Ch. D. 148 ; 57 L. T. 798 ; 36 W. R. 71.

Solicitor-Trustee—Power to Charge for Professional Services, and also for Work done as Trustee.]—A testator, having by his will appointed a solicitor one of his executors and trustees, and bequeathed 200*l.* to him if he should accept the office, declared that he and "every other person to be thereafter appointed a trustee of his will who might be a solicitor should be entitled to receive his usual professional costs and charges as well by way of remuneration for business transacted (including all business of whatever kind not strictly professional, but which might have been performed by a trustee not being a solicitor) as costs and charges out of pocket in the same manner as if he had not been a trustee, but had been employed by the trustees in the matter of the trusts " :—Held, that notwithstanding the legacy of 200*l.* the defendant was entitled to charge not only for his professional services, but also for his trouble as a trustee for what was not properly solicitor's work. *Fish, In re, Bennett* v. *Bennett*, 62 L. J., Ch. 977 ; [1893] 2 Ch. 413 ; 2 R. 467 ; 69 L. T. 233—C. A.

Settlement of Accounts between Co-trustees—Beneficiaries' right to investigate Accounts.]—In the absence of special powers or authority contained in the trust deeds, trustees cannot settle their accounts against the estate by agreeing the amount with their co-trustees, so as to bind the beneficiaries ; the latter are entitled to have such accounts re-opened and investigated. *Ib.*

Effect of Administration Decree.]—After an administration decree has been made, all powers of management of the estate which may be vested in trustees are subject to the control of the court ; and the judge who exercises such control must be personally satisfied of the propriety of the course proposed to be adopted by the trustees. *Bethel* v. *Abraham*, 43 L. J., Ch. 180 ; L. R. 17 Eq. 24 ; 29 L. T. 715 ; 22 W. R. 179.

Trustees having power to invest certain moneys belonging to a testator's estate at their discretion, and having power also to continue or change securities from time to time, as to the majority should seem meet, applied to the court in a suit for the administration of the trust estate for liberty to invest the moneys in and to convert securities into American funds or railway stocks. Infants were interested in the trust estate :—Held, that if the trustees had the discretion they claimed (which was doubtful), the court ought not, in a case where infants were interested, to permit them to exercise that discretion in the way they proposed. *Ib.*

After trustees have invoked the aid of the court in administering an estate, and a decree has been made, they cannot act in the matter of the administration except under the sanction of the court. *Minors* v. *Battison*, 1 App. Cas. 428 ; 46 L. J., Ch. 2 ; 35 L. T. 1 ; 25 W. R. 27—H. L. (E.)

Mines and Mining Leases.]—*See* MINES AND MINERALS.

Timber.]—*See* WASTE AND TIMBER.

And see SETTLED LAND.

ii. *Power to Mortgage.*

General Rule—Power to Sell or Borrow.]—All that the law requires from a trustee who has power to sell or borrow, is that he shall follow the dictates of ordinary prudence in adopting the one course or the other ; and the question, whether he did or did not act prudently, is one of fact to be solved according to the circumstances of each case. *Binnie* v. *Broom*, 14 App. Cas. 576—H. L. (Sc.)

——Furniture given to Widow for Life—Maintenance of Children out of Capital.]—The defenders, or those they represented, were appointed, under a settlement, with directions to pay debts and to pay a certain portion of the free income of the settled property to the widow of the settlor for

the support, education, and putting out in the world of the children; and after the youngest child (then not born) reached thirty, to sell or divide the estate, which consisted of house property in Glasgow, and to make such further advances for the maintenance and education of the children as the trustees should consider expedient. The trustees entered into office in 1857, and in 1858 borrowed a large sum to pay off, inter alia, a bond debt. The trust was sequestrated in 1867, all the creditors not being paid in full. The testator's furniture was life-rented by the widow; she pledged it, and it was lost to the estate. In 1886 the pursuer and other children of the testator sought to make the trustees liable for not having sold the property instead of borrowing:—Held, that the trustees were authorised to make payments to the widow and children, although those payments were out of capital; and that they were not liable for the loss of the value of the furniture. *Ib.*

A trust "to make sale and dispose of" the testator's real estate, does not authorise a mortgage where an intention appears that the whole real estate should be converted, as in the case of a trust to apply the moneys arising from such sale in payment of debts, and then upon further trusts for the benefit of wife and children. *Haldenby* v. *Spofforth*, 1 Beav. 390; 8 L. J., Ch. 238; 3 Jur. 241. And see *Saxby* v. *Thomas*, post, col. 629.

To pay Debts.]—Trustees, to pay debts, may fairly raise by sale or mortgage without waiting for a decree. *Bath* (*Earl*) v. *Bradford* (*Earl*), 2 Ves. Sen. 590.

Where a term for years was by settlement vested in trustees to raise, by sale or mortgage, money to discharge the debts of the tenant for life, who soon after with his own money pays the debts, without taking assignments of the securities; a mortgage of it by the trustees, several years after, by direction of the tenant for life is a due execution of the trust. Tenant for life has, during his own life, a right to call for an execution of the trust, and to stand in the place of creditors. After an express declaration of the tenant for life to charge, it cannot, from the debts being paid by him, from no assignment of the securities being taken, or from length of time, be presumed he intended to exonerate the estate. *Redington* v. *Redington*, 1 Ball & B. 131; 12 R. R. 5.

A. directed his trustees to raise by mortgage of all or any part of his devised estate, any sum or sums of money, not exceeding 20,000*l.*, and to apply the same in liquidation of such of the debts of M., as to them should seem expedient or proper. The trustees having refused to raise the money without the sanction of the court, suits were instituted by the creditors and trustees for the purpose of obtaining the benefit of the trust, and obtaining the sanction of the court to the raising of the money:—Held, first, that the trustees had not, by their refusal to raise the money without the sanction of the court, abandoned their power of selection among the creditors. *Joel* v. *Mills*, 30 L. J., Ch. 354; 7 Jur. (N.S.) 389; 3 L. T. 882; 9 W. R. 298.

Held, secondly, that the power of selection among the creditors was not confined to debts in existence at the death of the testator. *Ib.*

Held, thirdly, that debts which at the time of his death were barred by the statute of limitations, were excluded from the benefit of the trust. *Ib.*

To Pay Off Incumbrances.]—A. devised his estates at Blackacre to trustees for a term of 1,000 years, upon trust to pay off all incumbrances for the time being secured on his "settled and unsettled estates." At the date of his will, amongst his settled estates was a renewable leasehold property at Whiteacre, which was settled upon him for life, remainder to his eldest son absolutely. Subsequently to the date of his will he purchased the reversion expectant upon the determination of the lease of Whiteacre, and he and his eldest son joined in a mortgage to secure a part of the purchase money. The equity of redemption in the mortgage was limited to A. and his eldest son as joint tenants, and the surplus moneys, in case the mortgagee sold under his power of sale contained in the deed, were directed to be paid to the testator and his son, according to their interests:—Held, that the subsequent dealings, by way of mortgage, with Whiteacre did not amount to a re-settlement, but that the same was, at the death of the testator, to be considered as one of his settled estates, and that the mortgage upon it was raisable by the trustees out of Blackacre, under the 1,000 years' term. *Hastings* (*Lord*) v. *Astley*, 10 W. R. 73.

To Pay Off Charges.]—Limitation of estates to successive tenants for life, with remainders in tail, subject to a term vested in trustees, the trusts of which were, in the first place, by cutting and selling timber of full growth, or by demising, mortgaging, or selling the estate (except the mansion-house), for all or any part of the term, or by all or any of the said ways, or any other reasonable ways, to raise 30,000*l.*, and pay the same to the parties therein mentioned:—Held, that, as between the tenants for life not impeachable for waste and the remaindermen, the corpus of the estate must bear the charge; and that the interest of the charge must be paid by the tenant for life in possession, who, in the meantime, was entitled (as part of the profits of the estate) to the timber, which, as such tenant for life, he had a right to cut. *Marker* v. *Kekewich*, 8 Hare, 291; 19 L. J., Ch. 492; 14 Jur. 544.

The trustees of the term in such a case have not an unlimited discretion to raise the charge in such a manner as they may think fit; and it does not follow that, because their discretion in a mode of raising the charge has been honestly exercised, the charge will be left to be finally borne by those parties upon whom their act might chance to throw it. *Ib.*

By a marriage settlement, the father of the intended husband agreed to settle a money bond and certain real estates on the intended husband and wife, during their joint lives, and after the death of the husband, if the wife should survive, on her for life, and after her decease or second marriage, upon the children; and it was agreed, that if the husband should die before his wife, three trustees should be appointed to take care of the property for the child or children of the marriage. The marriage was solemnised, and there was issue of it. The husband's father died, leaving his son, the husband, the sole executor, who thereupon took possession of the bond, and deposited it with his bankers, who had no notice of the settlement, to secure a loan

from them. The husband then died insolvent, leaving his wife surviving. In a suit concerning the trust property, trustees thereof having been appointed by the court:—Held, that they might redeem the bond by raising money for that purpose out of other parts of the property included in the settlement. *Sharshaw* v. *Gibbs*, Kay, 333; 23 L. J., Ch. 451; 18 Jur. 330; 3 Eq. R. 314.

Devise of real estates to trustees in fee, upon trust, "out of the rents, issues, and profits" thereof, to pay two annuities, "and by the same ways and means, or by such other ways and means (except a sale or sales) as they may think proper, to levy and raise" sufficient to pay off the charges on the estate, and, subject to the trusts aforesaid, to A. for life, with remainders over:—Held, that the trustees could not raise the charges either by sale, by mortgage, or by leases on fines, but that they must be raised out of the rents and profits of timber and mines, the trustees exercising a discretion, so as not to exhaust the whole income, and leave nothing for the tenant for life. *Bennett* v. *Wyndham*, 23 Beav. 521; 3 Jur. (N.S.) 1143; 5 W. R. 410.

Absolute Discretion to Mortgage for Purchase of Real Estate.]—Where absolute discretion has been given to trustees as to the exercise of a power the court will not compel them to exercise it, but if they propose to exercise it, the court will see that they do not exercise it improperly or unreasonably. Where the power is coupled with a trust or duty the court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their bonâ fide exercise of it. *Tempest* v. *Camoys* (*Lord*), 51 L. J., Ch. 785; 21 Ch. D. 571.

A testator gave his trustees a power to be exercised at their absolute discretion of selling real estates, with a declaration that the proceeds should be applied, at the like discretion, in the purchase of other real estates. He also gave them power at their absolute discretion, to raise money by mortgage for the purchase of real estates. A suit having been instituted for the execution of the trusts of the will, and a sum of money, the proceeds of the sale of real estate, having been paid into court, one of the trustees proposed to purchase a large estate and to apply the fund in court in part payment of the purchase money, and to raise the remainder of the purchase money by mortgage of the purchased estate. The other trustee refused to concur in the purchase:—Held, that the court could not control the dissentient trustee in the exercise of his discretion in refusing to make the purchase, or in refusing to exercise his power of raising money by mortgage for the proposed purpose. *Ib.*

Power "to make any Sales and Arrangements they shall judge expedient."]—A testator appointed Hignett and Jones executors and trustees of his will, and directed that the trustees or trustee for the time being of his will should have full power to settle his accounts and wind up his affairs as they or he should think fit, and, in so doing, "to make any sales and arrangements they or he shall judge expedient." And the testator devised all his real estate unto and to the use of his trustees upon the trusts therein declared. After the testator's death, Jones (Hignett having renounced probate and disclaimed the trusts of the will), in order to meet some pressing claims against the estate, borrowed a sum of 500*l.* upon the security of a mortgage of a portion of the real estate:—Held, that, under the terms of the will, Jones being both executor and trustee, had power to mortgage the testator's real estate. *Jones, In re, Dutton* v. *Brookfield*, 59 L. J., Ch. 31; 61 L. T. 661; 38 W. R. 90.

—— **Carrying on Business.**]—A testator bequeathed a pecuniary legacy and a life annuity to his widow, and gave all his real and personal estate to his trustees upon certain trusts. He empowered his trustees to continue his business of a brick manufacturer, and to increase or diminish his real or personal estate therein at his death:—Held, that the trustees could not create a paramount charge by mortgaging the real estate to raise moneys for the discharge of debts incurred by them in carrying on the testator's business. *Webb, In re, Leedham* v. *Patchett*, 63 L. T. 545.

Power to Mortgage Chapel.]—The trust deeds of certain Wesleyan Methodist chapels contained powers of raising money by mortgage for the purposes of the trusts:—Held, that any of the trustees of the chapels might be mortgagees under this power, and that, if they were such mortgagees, they might exercise all the rights of mortgagees, although in opposition to the trusts. *Att.-Gen.* v. *Hardy*, 1 Sim. (N.S.) 338; 20 L. J., Ch. 450; 15 Jur. 441.

The court will, on motion ex parte, restrain trustees of a chapel from mortgaging it for a small sum where there appears no necessity for such mortgage to be created; the plaintiff undertaking to abide by such order as the court might think fit in respect of payment of the debts then due. *Rigall* v. *Foster*, 18 Jur. 39.

Borrowing on Future Tolls.]—Personal liability of the trustees of a turnpike road who exceed the powers given them by their act in borrowing money on the credit of future or expected tolls. *Wilson* v. *Goodman*, 4 Hare, 62.

Lands to be Mortgaged for Particular Purpose.]—Where lands are vested in trustees by act of parliament, to be mortgaged for a particular purpose, it is incumbent on the mortgagee to see the money applied accordingly. *Cotterel* v. *Hampson*, 2 Vern. 5.

Suit for Foreclosure.]—In a suit for foreclosure of a mortgage created by trustees, demurrer allowed on the ground that they had no power to mortgage, but the plaintiff allowed to amend for the purpose of claiming a lien on the interest of a cestui que trust who was a party to the deed. *Page* v. *Cooper*, 16 Beav. 396; 1 W. R. 136.

Duty to obtain Transferee—Transfer of Mortgage—Costs of Transfer.]—F. devised a real estate to trustees for a term of 2,000 years upon trust to raise money in aid of his personal estate, and subject thereto in strict settlement. Large sums of money were raised under this trust, and amongst others a sum of 10,000*l.* by a mortgage to M. In 1890 M. called in the mortgage. At this time the estate of the tenant for life under the will had been assigned to the L. Society; the tenant in tail in remainder was an infant. An order was then made on a

summons taken out by the infant tenant in tail by his next friend, to which the trustee of the term was the only defendant, that the trustee should be at liberty to raise the sum of 10,000*l.* which M. had called in by way of transfer of the hereditaments comprised in the said mortgage, except a small portion thereof, which should be released, and that the costs of all parties of the transfer should be raised by a mortgage of the part so released for the remainder of the term. The costs were accordingly raised by a mortgage of the excepted portion by the trustee, and the mortgagee now took out a summons for foreclosure and a receiver. The L. Society opposed:—Held, that the trustee of the term had not discharged all his duties, as a sum of 1,600*l.* might still have to be raised under the trusts thereof, besides which he had a right to redeem the mortgage for 10,000*l.* and had a duty to his cestui que trust under the term to preserve the equity of redemption, and therefore the mortgage to raise the costs of the transfer was binding on the tenant for life and his assignees, apart from the order for the amount of the taxed costs of such transfer. *Sewell* v. *Bishopp*, 62 L. J., Ch. 985; 69 L. T. 68.—C. A.

And see POWERS.

iii. *Power of Leasing.*

Lease by Tenant for Life—Release of Mortgage by Trustee.]—A., tenant for life, with power of leasing, agreed to grant a lease of a house, subject together with other property to a mortgage which was vested in a trustee, and in which A.'s wife and unborn children were interested. To enable A. to grant a valid lease, the trustee of the mortgage and A.'s wife joined in releasing the house from the mortgage:—Held, that it was a breach of trust on the part of the trustee to release the house from the mortgage; but that the trustee and A. might have joined in granting a valid lease, without discharging the premises from the mortgage. *Dawes* v. *Betts*, 17 L. J., Ch. 315; 12 Jur. 709.

Mining Lease.]—Upon a special case presented under 22 & 23 Vict. c. 35, and the 23 & 24 Vict. c. 38, the court declined to give power to trustees to grant leases of real estate for a term not exceeding ten years. *Shaw's Trusts, In re*, L. R. 12 Eq. 124; 25 L. T. 22; 19 W. R. 1025.

The trustees of a will, by which two contiguous estates were devised to them upon distinct trusts, obtained from the court an order giving them power to grant mining leases in conformity with and subject to the provisions of the Settled Estates Act, 1856 (19 & 20 Vict. c. 120), s. 10, and with the consent of the respective tenants for life for the time being. The trustees and the tenants for life of the two estates afterwards entered into an agreement to grant a mining lease of the two estates for forty years, rents and royalties being reserved as if the two estates were one property. On a bill by the trustees to enforce specific performance of the agreement:—Held, that the trustees had no power to grant such a lease of the two estates, and that the bill therefore must be dismissed. *Tolson* v. *Sheard*, 46 L. J., Ch. 815; 5 Ch. D. 19; 36 L. T. 756; 25 W. R. 667—C. A.

To "Person or Persons"—Corporation.]—Trustees of a will had power to grant leases to any "person or persons" they should think fit:—Held, that this authorised them to grant a lease to a limited company. *Jeffcock's Trusts, In re*, 51 L. J., Ch. 507.

Tenancy from Year to Year.]—A trustee in whom the legal estate is vested, and who has active duties to perform, may, without any express leasing power, make a yearly or other reasonable letting of tenantable lands. *Naylor* v. *Arnitt* (1 Russ. & M. 501) followed; *Wood* v. *Patteson* (10 Beav. 541), and *Shaw's Trusts, In re*, supra, explained and distinguished. *Fitzpatrick* v. *Waring*, 11 L. R., Ir. 35—C. A.

Authority of trustees to let from year to year, apportionment of rent. *Monson* v. *Essex* (*Lord*), 8 L. J. (O.S.) 169.

Repairing Lease—Tenant to do Necessary Repairs.]—A settlement of house property gave power to the trustees to demise or agree to demise all or any of the messuages "to any person or persons who shall improve or repair the same, or covenant or agree to improve or repair the same, or shall expend or agree to expend such sum or sums of money in improvements thereof respectively, as shall be thought adequate for the interest therein respectively." The trustees agreed to let a house on the terms of a letter by which the tenant undertook "to do necessary repairs":—Held, by Chitty, J., that the agreement did not satisfy the terms of the power, and that specific performance of it could not be decreed at the suit of the trustees. But held, by the court of appeal, that the agreement imposed upon the tenant the burden of doing all repairs which were requisite during the term, and that it satisfied the requisitions of the power. *Doe* v. *Withers* (2 B. & Ad. 896) doubted. *Truscott* v. *Diamond Rock Boring Co.*, 51 L. J., Ch. 259; 20 Ch. D. 251; 46 L. T. 7; 30 W. R. 277; 46 J. P. 486—C. A.

—— **Rights of Trustees of Leaseholds where Tenant for Life does not Repair in Accordance with Covenant.**]—When leasehold houses are vested in trustees on behalf of a tenant for life and remaindermen, it is the duty of the trustees to keep the property free from the risk of forfeiture by a breach of the covenants of the lease, and they are entitled to have the rents applied in keeping the houses in a proper state of repair. The trustees are not bound to be content with the setting apart of a sum of money in the joint names of themselves and the tenant for life as an indemnity against the consequences of a breach of the covenants of the lease, but are entitled to require the covenants to be specifically performed. When a tenant for life of leasehold houses is allowed by the trustees to receive the rents, and the houses are not kept in a proper state of repair according to the covenants of the lease, the court will, at the instance of one of the trustees, appoint a receiver of the rents, for the purpose of enforcing the proper repair of the houses. *Fowler, In re, Fowler* v. *Odell*, 16 Ch. D. 723; 44 L. T. 99; 29 W. R. 891.

Building Lease—Trust for Sale.]—An unrestricted power of leasing includes a building lease. *James, In re, James* v. *Gregory*, 64 L. J., Ch. 686; 73 L. T. 1—C. A.

A testator, entitled on his death to city freeholds, devised his real estate upon trust after the death of his widow to sell at such times and in such manner as his trustees should think fit, and

until sale he empowered his trustees in the widest possible terms to let the same on lease or otherwise. Upon proof that the testator's real estate could be most profitably realised by first putting up the property to auction to be let on a building lease to the highest bidder and then selling the reversion, and that the ground rent to be obtained from the building lease would not be less than the rent of the property in its existing condition, the court authorised the trustees to realise in the manner proposed. *Ib.*

—— **In Accordance with Terms Agreed on by Previous Tenant for Life.**]—A tenant for life had entered into a binding agreement for a building lease under a power, and the intending lessee had done everything requisite to entitle him to require the tenant for life to grant him a lease. The tenant for life died, leaving an infant tenant in tail, during whose minority the trustees had a power of leasing:—Held, that the trustees had a power to grant a lease in accordance with the agreement. *Davis* v. *Harford*, 52 L. J., Ch. 61; 22 Ch. D. 128; 47 L. T. 540; 31 W. R. 61.

Lease by Corporation at Gross Under-value.]—A right of pasture over certain of his lands was granted by an archbishop of C. to the corporation of C., for the use of the corporation and the inhabitants of C. The corporation subsequently, by some means unexplained, became seised absolutely of part of these lands:—Held, that they were so seised in trust for the town of C., and that therefore a lease for ninety-nine years made by them at a gross under-value should be set aside; and that, though the absolute ownership might have been acquired by usurpation, the trusts would nevertheless have attached. *Att.-Gen.* v. *Cashel Corporation*, 2 Con. & L. 1; 3 Dr. & War. 294.

Underlease by Executor or Administrator with Option of Purchase.]—In selling or subletting the leaseholds of a testator or intestate, an executor or administrator stands to the beneficiaries, or next of kin, in the same relation as a trustee to his cestui que trust. Therefore, for an executor or administrator to grant an underlease with the option of purchase to be exercised by the sub-lessees at a future time, at a price now fixed, is ultra vires, and a breach of trust. Such a transaction cannot be supported as against the beneficiaries or next of kin, however advantageous the transaction may have been to their estate. *Oceanic Steam Navigation Co.* v. *Sutherberry*, 50 L. J., Ch. 308; 16 Ch. D. 236; 43 L. T. 743; 29 W. R. 113; 45 J. P. 238—C. A.

—— **Agreement for Underlease.**]—An agreement by trustees of a will to grant an underlease of the testator's property is primâ facie inconsistent with a trust for sale of it. There may, however, be circumstances to justify the agreement, but the court cannot enter into the consideration of those circumstances in a suit for specific performance between the trustees and the underlessee, the cestuis que trust not being parties to it. *Evans* v. *Jackson*, 8 Sim. 217; 6 L. J., Ch. 8.

iv. *Renewed Leases.*

Statute.]—*Trustee Act*, 1893, s. 19.

Duty of Trustee to Renew.]—Where a renewable lease is vested in trustees, upon trust, to pay the rent and renewal fines, they are guilty of a breach of trust if they permit the tenant for life to take and use the rents, and neglect to take out renewals as the lives fall in. *Townley* v. *Bond*, 2 Con. & L. 393; 4 Dr. & War. 240.

When, under the provisions of a settlement, the trustees were to renew, and to pay the renewal fines out of the rents and profits, and they neglect to renew, and the tenant for life takes the rents, he will be liable to answer to the trustees for any damages they might sustain in consequence of their breach of trust. *Ib.*

Testator bequeathed a leasehold for years upon certain trusts; and gave a sum of money to his executor to extend the interest in the lands, if same could be accomplished. The executor did not make any attempt, during the continuance of the term, to obtain an extension of the lease. After it had expired, the master reported that an extension of the interest could have been obtained:—Held, that the money should go according to the trusts of the term. *O'Shea* v. *Howley*, 1 Jo. & Lat. 391; 7 Ir. Eq. R. 56.

Settlement of a renewable lease in trust out of the rents and profits to pay the fines and charges of renewing, and subject thereto for husband and wife successively for life; remainder to the first son at twenty-one. The trustees, not having renewed in the lives of the tenants for life, answerable as for a breach of trust, though not deriving any benefit from it. *Montford (Lord)* v. *Cadogan (Lord)*, 17 Ves. 485; 19 Ves. 635; 2 Mer. 3; 13 R. R. 270; 16 R. R. 135.

—— **Covenant to obtain Renewal.**]—Trustees of a messuage and premises, partly freehold and partly leasehold, for a term, of which fourteen years were unexpired, but which lease was renewable by custom on paying a fine, granted a lease to W. of the whole for fourteen years, and covenanted to use their best endeavours to obtain a renewal of the lease, and thereupon to grant him a lease for a further term of seven years from the expiration of his tenancy, at a like rent. The trustees' power was to lease at a rack rent for any term not exceeding twenty-one years. Before the expiration of W.'s lease new trustees had been appointed, and the reversion in fee had become vested in other persons, who would not renew the lease on the old fine, the property having much increased in value:—Held, that the trustees had no power to enter into a covenant to grant a further term at a like rent on the renewal of the lease, and that the covenant did not bind the new trustees. *Salamon* v. *Sopwith*, 35 L. T. 826.

On a bill for specific performance of an agreement entered into by the testator to grant a lease to the plaintiff of certain premises for twenty-one years, which lease was to contain a covenant for the renewal of the lease for two further successive terms of twenty-one years each:—Held, that a devisee in trust, who had no beneficial interest, could not be compelled to enter into any covenant for renewal of the lease, nor to enter into any other than the usual trustee's covenant, that he had done no act to encumber. *Worley* v. *Frampton*, 5 Hare, 560; 16 L. J., Ch. 102; 10 Jur. 1092.

—— **Trustee of Lunatic Renewing Lease for his Own Benefit.**]—Trustee of lunatic renewing lease for his own benefit, declared guilty of breach of trust, and discharged. *Phelps, Ex parte*, 9 Mod. 357.

—— **Discretion of Trustees — Imperative Trust.**] — A testator gave his leaseholds to trustees for legatees in succession, and upon trust, if the trustees "should think it proper or advantageous, as to those which were customarily or might be renewed," to endeavour to renew. And in order thereto should, "if they in their discretion should think fit or expedient, but not necessarily or peremptorily," insure the lives of the cestuis que vie, and apply the insurance money in renewing, and out of the rents and profits raise sufficient money to renew so often as a renewal should be advisable, and he gave a power to mortgage for the same purpose:—Held, first, that this was an imperative trust, and that the trustees were bound to renew, if they could do so on reasonable terms; secondly, that if the trustees refused, the court would exercise it; and, thirdly, that they were bound to raise the necessary funds in such a mode as would be most beneficial to all parties interested. *Mortimer* v. *Watts*, 14 Beav. 616; 21 L. J., Ch. 169.

A renewable lease not inconsistent with a covenant to let and manage to the best advantage; with reference to the subject, the trust for creditors. *Kirkham* v. *Chadwick*, 13 Ves. 547.

On demurrer:—Held, that trustees to whom a discretionary power was given of renewing leases, had not an arbitrary power of renewal, but must renew when most for the benefit of the cestui que trust. *Milsington* v. *Mulgrave*, 3 Madd. 491.

Tenant for Life of Leasehold—Liability on Covenants—Fine on Renewal.]—Trustees of a will held a renewable lease upon trust for successive life tenants, with remainders over, and the residuary personal estate of the testator upon trust out of the income to pay all the costs, charges, and expenses of executing the trusts of the will, with divers trusts of the residue:—Held, that the trustees, and not the life tenants, were the persons liable to observe the covenants and to pay the rent and outgoings which, on the true construction of the will, should be paid by them out of the income, and that the fine and expenses of renewal of the lease should be borne by the beneficiaries ratably, according to their enjoyment of the lease, to be ascertained by actuarial valuation. *Baring, In re, Jeune* v. *Baring*, 62 L. J., Ch. 50; [1893] 1 Ch. 61; 3 R. 37; 67 L. T. 702; 41 W. R. 87.

And see ante, B. 5. *c.*

Leases Settled on Persons in Succession.]—*See* ESTATE.

v. *Power of Sale.*

Statute.]—*Trustee Act*, 1893, ss. 13–17.

Improvident Contract for Sale.]—A contract to sell improvidently entered into by a trustee will not be cancelled, but the court will not execute it. *Turner* v. *Harvey*, Jacob, 178.

Consent of Tenant for Life—Incumbrances on Life Estate — Bankruptcy — Concurrence of Trustee and Incumbrancers.]—The trustees of a settlement of real estate were empowered to sell and sold the property comprised therein, with the consent of the tenant for life. The tenant for life was bankrupt, and had encumbered his life estate:—Held, that the concurrence of the incumbrancers and the trustee in bankruptcy of the tenant for life was essential in order to make a good title. *Bedingfield and Herring, In re*, 62 L. J., Ch. 430; [1893] 2 Ch. 332; 3 R. 483; 68 L. T. 634; 41 W. R. 413.

Trust for Sale—Married Woman—Real Estate—Conveyance to Purchaser—Concurrence of Husband.]—Real estate vested in a married woman (married since the commencement of the Married Women's Property Act, 1882) jointly with other persons upon trust for sale cannot be effectually conveyed to a purchaser without the concurrence of her husband and a separate acknowledgment by her. *Harkness and Allsopp's Contract, In re*, 65 L. J., Ch. 726; [1896] 2 Ch. 358; 74 L. T. 652; 44 W. R. 683.

Legacies charged on Realty—Devise to Trustees—Concurrence of Beneficiaries.] — Where residuary realty charged with the payment of debts and legacies is given to trustees with an unlimited power of sale, and is subsequently devised absolutely to beneficiaries, the trustees can exercise the power of sale and confer a good title upon a purchaser without the concurrence of the beneficiaries, so long as the exercise of the power is necessary in order to perform the trusts of the will. *Dyson and Fowke's Contract, In re*, 65 L. J., Ch. 791; [1896] 2 Ch. 720; 74 L. T. 759; 45 W. R. 28.

Duration and Determination—Intention of Settlor.]—A power given to the trustees of a settlement or will to sell land comprised in it can be exercised by them after the property has, under the trusts, become absolutely vested in persons who are sui juris, if on the construction of the instrument it appears to be the intention of the settlor or testator that it should be then exercised, provided that the power in its creation was not obnoxious to the rule against perpetuities, and that the cestuis que trust have not put an end to the trusts by electing to take the property as it stands. *Cotton's Trustees and the London School Board, In re*, 51 L. J., Ch. 514; 19 Ch. D. 624; 46 L. T. 813; 30 W. R. 610.

It is a question of intention whether a power of sale of real estate given to trustees of a deed or will can be exercised by them after the beneficial interest in fee has vested absolutely; and the court has to look through the instrument to ascertain whether such an intention is manifested. *Sudeley and Baines' Contract, In re*, 63 L. J., Ch. 194; [1894] 1 Ch. 334; 8 R. 79; 70 L. T. 549; 42 W. R. 231.

Where an intention is shown that the power should be exercised for the purpose of division of the estate among the persons absolutely entitled, the power does not determine on the death of the last tenant for life, but remains exercisable for a reasonable time afterwards for that purpose, and, being so exercisable, does not infringe the rule against perpetuities. Dictum of Jessel, M.R., in *Peters* v. *Lewes and East Grinstead Ry.* (50 L. J., Ch. 839; 18 Ch. D. 429; 45 L. T. 234; 29 W. R. 875), adopted. *Ib.*

In pursuance of a power contained in a marriage settlement, lands were appointed, subject to life estates, among the five children of A., one-fifth to each of four as tenants in common, and the remaining fifth to E., the other child, for life, with remainder to the first four. E. was of unsound mind, not so found by inquisition:—Held, that a power of sale contained in the settlement was not destroyed by the appointment. *Brown's Settlement Trusts, In re*, 39

L. J., Ch. 845; L. R. 10 Eq. 340; 18 W. R. 945.

The trustees of a settlement having power to sell the fee at the request of the tenant for life can, by an exercise of the power upon his request made, after he has alienated his particular interest, confer on the alienee a good title to the fee. *Alexander* v. *Mills*, 40 L. J., Ch. 73; L. R. 6 Ch. 124; 24 L. T. 206; 19 W. R. 310.

An estate was conveyed to a trustee in fee, upon trust for A. for life; then as A. should appoint; and, in default of appointment, the trustees to convey and assure the same to the right heirs of A. A general power of sale was given to the trustee. A. died, not having made any appointment; and, after her death, the trustee conveyed to another trustee, who sold the premises. Primâ facie, the heir has a right to set aside the sale. *Jefferson* v. *Tyrer*, 9 Jur. 1083.

Jurisdiction of Court to Interfere with Discretion.]—If a trustee, having discretion to sell trust property, submit to a decree for sale, the court is not therefore bound to carry the sale into execution. *Polley* v. *Seymour*, 2 Y. & C. 708; 7 L. J., Ex. Eq. 12; 1 Jur. 958.

—— **Infants' Property.**]—Two trustees having power to sell the freehold property of an infant at the request of the guardians, and one trustee having declined upon such request to exercise the power of sale, the court refused to control the discretion of the trustees by ordering them to sell the estate—there being no absolute necessity for raising money and the existing income being sufficient to keep down the charges upon the estate—notwithstanding that the effect of the sale would be to increase very considerably the income of the property. *Camden* (*Marquis*) v. *Murray*, 50 L. J., Ch. 282; 16 Ch. D. 161; 43 L. T. 661; 29 W. R. 190. *And see* ante, B. 7. *b.*

Death of Parties to Concur.]—Real property was vested in trustees upon trust at the request of A. and B. and the survivor, and after their death at discretion, to sell and hold the proceeds upon trust for A. and B. successively for life, and then for the children equally. After the deaths of A. and B. there were three adult children:—Held, that the trust for sale was not spent, but was exercisable by the trustees without the concurrence of the beneficiaries. *Tweedie and Miles, In re*, 54 L. J., Ch. 71; 27 Ch. D. 315; 33 W. R. 133.

Bequest of Leaseholds with Directions to Executor to Sell and Pay himself a Debt.]—A testator bequeathed certain leaseholds to his son, whom he also appointed his executor, with directions to sell, and reimburse himself a debt, &c. due to him from the testator, and to stand possessed of the surplus, if any, upon the trusts of the will. The son never proved the will, but took possession of the leaseholds in satisfaction of his debt, and afterwards bequeathed them to the plaintiff. Upon a bill filed by the latter twenty years after the death of the elder testator, to recover the said leaseholds:—Held, that the trusts of the will must be performed, and the leaseholds sold, and accounts taken; the balance, if any, to be made good out of the son's estate. *Smith* v. *Bakes*, 20 Beav. 568.

Sale to Tenant for Life.]—It is a well settled rule that where trustees of a settlement have a power of sale and exchange over the settled estates, to be exercised at the request, or with the consent, of the tenant for life, they may sell to the tenant for life just as they may to any other person. *Dicconson* v. *Talbot*, L. R. 6 Ch. 32; 24 L. T. 49; 19 W. R. 138.

The reason for that rule is that the consent of the tenant for life to the exercise of the power is required for his own benefit, and does not place him in any fiduciary relation to the persons entitled in remainder. *Ib.*

Provided a sale by trustees to a tenant for life is bona fide and at a fair price, it is immaterial what was the object for which he made the purchase. *Ib.*

A power of sale and exchange vested in the trustees of a settlement, may be exercised by the trustees upon a sale to, or an exchange with, the tenant for life of the settled estates. Where, upon the exercise of such a power, it is declared that the estate shall be vested in the purchaser, the purchase being made in the name of a trustee, an appointment to the trustee, in trust for the purchaser, is a valid execution of the power. *Howard* v. *Ducane*, Turn. & R. 81; 1 L. J. (o.s.) Ch. 85; 23 R. R. 190.

Long Term of Years—Suit to compel Sale for Remainder of Term—Reversioner Unknown—Liberty to Cestui que Trust to Bid.]—A bill was brought by one of several cestuis que trust to compel trustees to sell part of the trust property which consisted of a term of 200 years, of which only nine months remained unexpired. It was not known who was entitled to the reversion expectant on the determination of the term, and the plaintiff was anxious to buy up the residue himself. The court decreed a sale, giving all the cestuis que trust liberty to bid, and also directing advertisements to be made for the representatives of the original lessor, who were to be at liberty to come in under the suit. *Edmonds* v. *Foley* (*Lord*) 9 W. R. 859.

Authority to Trustees and Executors to Adjust and Pay Claims—Charge of Debts on Real Estate.]—A testator devised his real estate to trustees upon trust to pay the rents thereof together with the income of his personal estate to his wife for life, and after her death upon trust to sell his real estate and such part of his personal estate as should not consist of money, and to invest the proceeds, and he authorised his trustees to release or compound any debts to him or to his estate, and "to adjust and pay all claims" made upon his estate. During the life of the testator's widow his trustees, who were also executors of his will, contracted to sell the real estate. The purchaser objected that they had no power of sale, and repudiated the contract:—Held, that the authority to the trustees to adjust and pay claims did not create a charge of debts upon the real estate, and that the trustees had no power of sale during the life of the widow. *Head's Trustees and Macdonald, In re*, 59 L. J., Ch. 604; 45 Ch. D. 310; 63 L. T. 21; 38 W. R. 657—C. A.

Extinguishment — Disentailing Deed.]—An estate was devised to uses to secure certain annuities, and subject thereto in strict settlement, with power to the trustees to sell at the request of the tenant for life under the will. The estate was disentailed and resettled (the

existing life estate being postponed to certain charges, and the powers of the will being expressed to be kept alive) :—Held, that the trustees for sale and the tenant for life could make a good title. *Wright to Marshall*, 54 L. J., Ch. 60 ; 28 Ch. D. 93 ; 51 L. T. 781 ; 33 W. R. 804.

Power of Executrix to Apply Proceeds of Sale for her own Benefit — Agreement to Sell Part for her own Benefit and Settle Remainder — Power to Mortgage Part which she had Power to Sell under the Agreement,] — R. by his will appointed his wife sole executrix, with power to appoint another person to assist her in carrying out the trusts of the will, and gave her certain leasehold houses during her widowhood, with power to sell, mortgage, or lease any part thereof, and to apply the money to her own use, and subject thereto he gave the same on certain trusts in favour of his children. R. died in 1883. By indenture of the 31st October, 1887, between the widow and other beneficiaries under the will, it was agreed that the widow should appoint another person to act with her in the trusts of the will, and that she should, prior to such appointment, sell the leaseholds and apply the money as therein mentioned. The leaseholds were not sold according to this agreement, but the widow, by indenture of the 8th December, 1887, appointed W. to act with her as co-trustee, and vested the leaseholds in themselves jointly, and by indenture dated the 19th May, 1888, they mortgaged the leaseholds to the defendant. He afterwards contracted as mortgagee to sell a part of the leaseholds to the plaintiff, who refused to complete the purchase, and sued the defendant for the return of his deposit :—Held, that the widow and W. had power to mortgage the leaseholds, and that the defendant could make a good title to them. *Saxby* v. *Thomas*, 64 L. T. 65—C. A.

Sale or Surrender of Life Policy—Inability of Settlor to pay Premiums—Power of Court.]—Where, upon the occasion of a marriage, a policy of insurance has been settled, and the settlor (the husband) is unable to perform his covenant to keep up the policy, the court can authorise the trustees to sell or surrender the policy, and obtain a fully paid-up policy in lieu thereof, even though there are funds out of which the premiums may be and have been paid by the trustees, provided it is satisfied that the sale or surrender of the policy would be for the benefit of the wife and infant child of the marriage. *Steen* v. *Peebles*, 25 L. R., Ir. 544.

—— Price not Beneficial to Cestui que Trust.]—Under the circumstances, the sale by trustees of a policy of insurance for a price which at the time seemed to be beneficial for the cestui que trust :—Held, to be a discreet exercise of their power, although it eventually turned out that the sale was prejudicial to the interest of the cestui que trust. *Hanchett* v. *Smith*, 1 L. J., Ch. 218.

Power to Increase Capital Employed in Business—Mortgage to Secure Business Debts.]—A testator, who died in 1866, devised and bequeathed all his real and personal estate upon trust for sale and conversion, and empowered his trustees to carry on his business for such time as they should see fit, and to employ in the business all the capital which might be invested therein at the time of his decease, and the profits thereof, and to increase or abridge the business and his capital therein, and generally to transact all matters and concerns respecting the business, and to do all acts relative thereto, in the same manner as if they were absolutely entitled to the same. The personal estate of the testator comprised nearly the whole of the capital of the business. His real estate consisted of the manufactory and buildings upon which the business was carried on, and for which he received a rent. The trustees carried on the business after the testator's death in partnership with other persons ; but the firm ultimately became bankrupt. In 1869 one of the trustees advanced to his co-trustees 2,000*l.*, and the title deeds relating to the manufactory and premises were deposited with him for securing the repayment of the advance with interest. The money was applied for the purposes of the business. This transaction had not been disclosed. In January, 1882, an action was commenced for the administration of the testator's estate. In pursuance of an order made in that action, the business was sold in 1883. In September, 1882, certain of the beneficiaries mortgaged all their respective shares under the will to secure the repayment to a banking company of 4,600*l.* The banking company applied by petition for leave to intervene in the action, and obtained payment of their debt. The question raised was, whether the trustees had power to make an equitable mortgage of real estate, which did not form part of the assets employed in the business for the purposes of the business :—Held, that power to employ other assets in the business was conferred upon the trustees by the authority to increase the capital of the business ; that, as they could have sold the real estate and used the proceeds in the business, they were not wrong in using the property itself to assist in carrying on the business ; and that the mortgage of 1869 had priority over the mortgage of 1882. Held also, that, as the banking company were not creditors of the testator, they had taken the most convenient course in applying to intervene by petition. *Dimmock, In re, Dimmock* v. *Dimmock*, 52 L. T. 494.

Appointment of New Trustee — Pending Action.]—Real estate was settled by will on D. for life, with remainders over, and the will appointed two trustees, and empowered them to sell at the request and by the direction of the person entitled to the actual freehold, with the usual provisions for reinvestment in land and interim investment in other securities. The will also gave a power to appoint new trustees, vested in the same person. One of the trustees was dead. D., who was over eighty years of age, proposed to sell the estate. The remaindermen brought this action for the appointment of a new trustee, and to restrain the sale as improper, adducing evidence to show that the estate would sell to better advantage at a future date, owing to the existence of minerals at present unworked, and a projected railway which would pass through the estate. D. had no re-investment in land in view, and proposed to invest in consols. After action brought, the Settled Land Act, 1882, came into operation ; and shortly before the action came on for trial, D., under the power in the will, appointed a new

trustee without referring the appointment to the court. The trustees consented to the proposed sale:—Held, that D. was entitled to sell the estate as well under the power in the will as under the settled land act. *Thomas* v. *Williams*, 52 L. J., Ch. 603; 24 Ch. D. 558; 49 L. T. 111; 31 W. R. 943.

Held, also, that the new trustee was properly appointed, notwithstanding the pending action. *Ib.*

Breach of Trust—Adoption of Sale by Beneficiaries.]—A testator devised certain lands to his wife and his eldest son as trustees in trust for his wife for life, and after her decease in trust to sell and divide the proceeds amongst his children. After the testator's death, his eldest son as beneficial owner mortgaged part of the lands to a solicitor who had notice of the contents of the will, to secure a sum advanced to him and the testator's widow; after her death, the solicitor sold under the mortgage; in an action against the eldest son and the solicitor by the beneficiaries:—Held, that they might adopt the sale, and that the solicitor must repay to them the purchase money less such part of the sum secured by the mortgage as he could show was advanced by him for the benefit of the trust estate. *Champion, In re, Dudley* v. *Champion*, 62 L. J., Ch. 372; [1893] 1 Ch. 101; 2 R. 162; 67 L. T. 694—C. A.

—— **Property Purchased in Breach of Trust—Concurrence of one Beneficiary.**]—Trustees under a will which contained a power to sell real estate, but no power of investing the trust funds in real estate, bought real estate, and had it conveyed to the trusts of the will:—Held, that they could sell and make a good title to the real estate wrongfully purchased with the trust funds on obtaining the concurrence in the sale of one of the persons beneficially interested in the trust funds. *Patten and Edmonton Union, In re*, 52 L. J., Ch. 787; 48 L. T. 870; 31 W. R. 785.

—— **Improper Investment — Sale of Trust Funds—Liability of Trustees to Replace Stock Sold.**]—The trustees of a settlement had power to invest in real securities, and to vary investments. In 1875 they sold a sum of consols, forming part of the trust funds, and invested the proceeds of sale on a contributory mortgage of real estate subject to a jointure and portions. It was admitted that this mortgage was an improper investment. The tenant for life having died, the money on mortgage was called in. The whole of the principal was forthcoming, so that no loss would follow directly from the investment, but remaindermen, who were entitled to the capital, claimed that the trustees ought to replace the sum of consols sold in 1875, which at that time stood at a much lower price than the then present value:—Held, that, as the sale was made for the purpose of effecting another investment, if that purpose was improper, then the sale was improper also; and that consequently the trustees were in this case liable either to replace the stock or to repay the proceeds of sale at the option of the cestuis que trust. *Massingberd's Settlement, In re, Clark* v. *Trelawney*, 60 L. T. 620.

Minerals apart from Surface—Beneficiaries—Service.]—Petition under the confirmation of sales act by trustees with an absolute power of sale for the sanction of the court to the sale of minerals apart from the surface. The beneficiaries, who were all infants, were not made parties to the petition. The court made the order without directing service on the beneficiaries. *Wadsworth's Trust, In re*, 63 L. T. 217.

Depreciatory Conditions of Sale.] — When trustees sell property with depreciatory conditions, which render the sale liable to be impeached by the cestuis que trust, the trustees cannot maintain an action for specific performance against the purchasers. *Dunn* v. *Flood*, 54 L. J., Ch. 370; 28 Ch. D. 586; 52 L. T. 699; 33 W. R. 315—C. A.

Trustees for sale under a will put up for sale by auction certain lands in numerous small lots, with conditions providing, inter alia, that the title should commence with the conveyance to the testator ten years before; that every recital in any abstracted document should be conclusive evidence of the fact stated; and that the lots were sold "subject to the existing tenancies, restrictive covenants, and all easements and quit-rents (if any) affecting the same," and that the purchasers were to indemnify the vendors against the breach of any restrictive covenants contained in the abstracted muniments of title. The sale was made also subject to certain general conditions restricting the occupation of the land. The abstracted documents contained no other restrictive covenants than those comprised in the general conditions; and the vendors stated that they knew of no other restrictive covenants, and of no existing tenancies, easements, or quit-rents affecting the property:—Held, that the condition as to existing tenancies and restrictive covenants was depreciatory, and that the objection was a good defence to an action for specific performance by the trustees against a purchaser. *Ib.*

But, semble, the condition limiting the title to ten years, having regard to the number and smallness of the lots, was not unreasonable. *Ib.*

Trustees for sale sold by auction certain leasehold properties. One of the conditions of sale stipulated that no objection should be made if any lease was an underlease, or that the premises were held on the same lease with other property, or that the same were liable to superior rents or covenants. A purchaser objected to this condition as depreciatory:—Held, that the solicitor who prepared the conditions should have ascertained whether the leases were underleases or not; that there should have been a statement of fact as to each lot, and not, as this was, a statement which might apply to any of the lots; and that this was a depreciatory condition, and ought not to have been inserted by the trustees. *Rayner's Trustees and Greenaway, In re*, 53 L. T. 495.

—— **Lost Deed.**]—Trustees having power to sell under such special or other conditions or stipulations as they should think fit, sold by auction with a condition limiting the title to commence in 1858 (fourteen years previously). The next convenient root of title was a deed of 1819, from which a good title could be deduced, but the trustees could not find this deed, and had only recitals of its contents. There was also a condition that all recitals and statements in the deeds and particulars should be accepted as conclusive evidence:—Held, that the sale under such conditions was a breach of trust, and

an injunction was granted at the suit of a cestui que trust to restrain completion. *Dance* v. *Goldingham*, 42 L. J., Ch. 777; L. R. 8 Ch. 902; 29 L. T. 166; 21 W. R. 761.

The bill was filed in the name of an infant having a very small interest:—Held, that the court could not look into the motives of the next friend. *Ib.*

Such a suit can be maintained by one cestui que trust without making the other parties. *Ib.*

And see Trustee Act, 1893, s. 14.

Implied Power — Discretionary Power to Invest Estate.]—A testator devised and bequeathed the residue of his estate and effects to trustees upon certain trusts; and he declared that it should be lawful for his trustees, at their absolute and uncontrolled discretion, to continue the whole or any part of his estate in the firm in which he was a partner, or "to invest, re-invest, and lend any part" of his estate to the firm on such terms as the said trustee should, at such discretion as aforesaid, think proper:—Held, that there was no implied power to sell the real estate. *Holloway, In re, Holloway* v. *Holloway*, 60 L. T. 46; 37 W. R. 77.

Free from Portions.]—A tenant for life and a tenant in remainder, having power under a settlement to appoint to uses, by a deed-poll indorsed on the settlement, appointed that the settlement should be read and construed as if the words "with any gross sum or sums (other than portions)" had been inserted after the word "charging." The intention was to enable the trustees of the settlement to sell any part of the land free from portions charged on the estate by the tenant for life:—Held, that the tenants for life and in remainder having power to appoint to new uses, the deed-poll operated as a due exercise of such power, and that therefore the trustees of the settlement had power to sell the lands, the subject of a certain contract, free from portions. *McAuliffe and Balfour, In re*, 50 L. T. 353.

Sale of Trust Property to Stranger—Subsequent Purchase by Trustee—Validity.]—In 1854 the trustees of certain property sold it at an adequate price. Shortly after one of them bought it from the purchaser at a slightly increased price, and in 1874 sold it at a large profit. In 1866 certain beneficiaries commenced an action against the executors of the trustee claiming the increased price received, alleging that the purchaser in 1854 was put forward by the trustee, and that there was an understanding between them that the trustee should afterwards purchase the property:—Held, that considering the number of years since the sale took place, that the parties were dead, and that the facts were capable of a reasonable explanation consistent with the validity of the transaction, the court would not presume it was not valid merely because some facts were suspicious. *Postlethwaite, In re, Postlethwaite* v. *Rickman*, 60 L. T. 514; 37 W. R. 200; 53 J. P. 357—C. A.

Executor of Surviving Trustee—Conveyancing Act, 1881, s. 30.]—A testator appointed A. and B. executors and trustees of her will, and devised certain specified properties, and all other estates or interests belonging to her in Ireland, to and to the use of A. and B., upon trust for sale of such part or parts thereof as might in their judgment be necessary for the discharge of debts and legacies, and as to the remainder thereof upon trust that they, or the survivors of them, should receive the rents, and pay them to A. for life, and after his death, sell the same and divide and pay the proceeds to or among her nieces. A. died before the testatrix, B. survived her, and died without exercising either trust for sale:—Held, that B.'s executors could not give a good title, notwithstanding the Conveyancing and Law of Property Act, 1881, s. 30. *Ingleby and Norwich Union Insurance Co., In re*, 13 L. R. Ir. 326.

Receipt of Purchase Money—Power to Delegate.]—On the sale of land by trustees with power of sale, the purchasers made a requisition that either the vendors should attend personally to receive the purchase money, or the purchase money should be paid into a bank to the joint account of the vendors under a written direction, to be signed by them and given to the purchasers. The vendors refused to comply with the requisition, alleging that it was inconvenient so to do, and proposed that one of them should attend and receive the purchase money under a written direction to that effect, to be signed by them all:—Held, that the purchasers were entitled to insist upon their requisition. *Flower and Metropolitan Board of Works, In re*, 53 L. J., Ch. 955; 27 Ch. D. 592; 51 L. T. 257; 32 W. R. 1011.

See now Trustee Act, 1893, s. 17.

Beneficiaries' Freehold Interest.] — By a deed made between three persons, described as trustees, of the one part, and thirty-four other persons, described as beneficiaries, of the other part, a rent-charge in fee of 120*l.* a year, of which the trustees had become possessed under a grant to them, was subdivided by them into fifty-four parts or shares, one of which was purchased, and the price of 52*l.* 5*s.* paid by each of the thirty-four beneficiaries; and the trustees covenanted with them respectively to stand seised of an undivided equal fifty-fourth part of the rent of 120*l.*, and the power and remedies for enforcing payment, and the benefit of the covenants contained in the original grant, in trust for each of the beneficiaries, his heirs and assigns absolutely. The remaining twenty shares were retained by the trustees, in trust for themselves, their heirs and assigns, as tenants in common. The deed also contained a covenant by each of the beneficiaries with the trustees that, if the former should be desirous of selling his share of the rent-charge, it should be first offered to the trustees at a price to be ascertained, in case of dispute, by two arbitrators; and a similar covenant as to the shares of the trustees. Then came a declaration or proviso that the trustees, or the survivor of them, should respectively have "an absolute power of sale over the rent and premises, exercisable at their or his discretion, without any further consent on the part of any person:"—Held, that the power of sale reserved to the trustees did not cut down the freehold interest which was created in the beneficiaries by the earlier part of the deed, inasmuch as it could only be exercised by the trustees for the benefit of the beneficiaries; and consequently, that the latter had such a freehold interest as would entitle them to be registered as voters for the county. *Ashworth* v. *Hopper*, 45 L. J., C. P. 99; 1 C. P. D. 178; 33 L. T. 667; 24 W. R. 187.

And see POWERS.

vi. *Payments to and Receipts by Trustees.*

Statute.]—*Trustee Act*, 1893, s. 20.

In General.]—Payment of money to a trustee, with notice of the trust, is a mis-payment, though the trustee had judgment and execution against the person that paid the money. *Pritchard* v. *Langher*, 2 Vern. 197.

A. and B., being trustees of money for the separate use of a feme covert, lend to C., who gives a bond to the trustees, and the trust is declared in the condition. The bond is kept by the feme, and, B. having received money for C., they settle an account, and B. gives C. a receipt for 100*l.* as received for the use of the feme. B. becomes insolvent: whether C. is well discharged of this 100*l.*, quære. *Baldwin* v. *Billingsley*, 2 Vern. 539.

A., on her marriage, assigned a debt due to her from B. to three trustees, upon trust, when requested by her to call it in and invest it, and hold in trust for A., her husband, and children. B., with full notice, but without such request, paid part of the money to the husband by order of the trustees, and other part to the trustees for the express purpose of being advanced to the husband in breach of trust. The money was lost:—Held, that B., as well as the trustees, was responsible for the breach of trust. *Andrews* v. *Bousfield*, 10 Beav. 511.

The obligor of a bond, which had been afterwards assigned to a trustee, of which assignment the obligor of the bond had notice, but not of the particular terms of the trust, was held not liable for payments not warranted by the trust made by him under the direction of the trustee, but only for such payments as he had made without such direction. *Roberts* v. *Lloyd*, 2 Beav. 376.

Mortgage to Trustees to Secure Re-transfer of Stock—Receipt in Cash.]—Where a mortgage was made to secure a sum of stock, which was for the purpose sold by trustees who had power to give receipts for moneys and power to vary securities, the mortgage was held, as between vendor and purchaser, not to be sufficiently discharged on payment of a sum of money to the trustees, the money not appearing to have been again invested in stock or upon security. *Pell* v. *De Winton*, 2 De G. & J. 13; 27 L. J., Ch. 230; 4 Jur. (N.S.) 225; 6 W. R. 179.

Payment to One Trustee—Solicitor Dealing with Trust Estate.]—A firm of solicitors having been employed by the trustees of a will to receive the proceeds of the testator's real estate, which had been taken by a railway company, paid over the money to one of such trustees without the receipt or authority of the other. The money having been lost to the estate by the insolvency and death of the trustee to whom it was paid:—Held, that the receipt of one trustee only (though also an executor) was not a sufficient discharge to the solicitors for the money which they had received by the authority of the two, and that they were personally liable to make good the loss which had resulted to the trust estate from such improper payment. *Lee* v. *Sankey*, or *Ginder* v. *Sankey*, L. R. 15 Eq. 204; 27 L. T. 809; 21 W. R. 286.

—— **Bankers.**]—Payment by bankers to one of several trustees, of the proceeds of stock sold out under a joint power of attorney from the trustees, does not discharge the bankers as against the other trustees, unless previously authorised by them. *Stone* v. *Marsh*, Ry. & M. 364.

—— **Purchaser.**]—Trustees, with a power to sell and to invest the proceeds in government or real securities, sold the estate, and received only part of the purchase money, but executed a conveyance to the purchaser, on the back of which was endorsed a receipt for the whole sum, which was signed by them all. This deed and the other deeds they retained as a security for the unpaid purchase money, with interest, and they entered into a written agreement with the purchaser that the deeds should remain with them as such security, and that he should, if required, execute a proper mortgage. This agreement was signed by the purchaser, and by the trustee in whose custody the deeds were placed. Eight years afterwards the purchaser paid the principal and interest of his debt to this trustee, and received from him the deeds, including the conveyance, with the receipt indorsed:—Held, that by such payment the purchaser did not discharge himself of his liability incurred by participation in the breach of trust, and the trustee who received the money, having misapplied it and absconded, the purchaser was made to pay it over again. *Webb* v. *Ledsam*, 1 K. & J. 385; 1 Jur. (N.S.) 775.

Testator devised his real and personal estate to trustees, to be sold for the benefit of his children, and directed that their receipts should be sufficient discharges. The children filed a bill to have the will established and the trusts performed. At the hearing, the bill was dismissed against the heir, and the court did not establish the will, but made a decree affecting the personal estate only. The suit afterwards became abated, and was not revived. On the death of the surviving trustee, another suit was instituted for the appointment of new trustees, which was done. The new trustees then sold part of the testator's real estates to the plaintiff, who filed a bill for a specific performance:—Held, that the former suit having been dismissed as against the heir, without the will being established, no suit was pending for the administration of the testator's real estates; and that the new trustees had the same power of giving receipts as the original trustees had. *Drayson* v. *Pocock*, 4 Sim. 283.

Legacy Ordered to be Paid to Trustees of Chapel.]—Legacy to a chapel directed to be paid to the trustees of the chapel. *De Windt* v. *De Windt*, 23 L. J., Ch. 776; 2 Eq. R. 1007; 2 W. R. 648.

Income—Form of Order.]—It is not desirable as a general rule to order income to be paid to trustees, "or either of them," according to the form in Seton on Decrees, p. 88, s. 4, No. 2. *Clinton, In re* (8 W. R. 492), not followed. *Carr, In re, Carr* v. *Carr*, 36 W. R. 688.

And see POWERS.

vii. *Preservation, Repair, and Improvement of Premises.*

Settlement—Infant Tenant in Tail—Capital Money within Settled Land Act—Repairs—Proposed Expenditure on Objects not Authorised by

Settled Land Acts — Original Jurisdiction—Salvage.]—Whatever original jurisdiction the court possessed to sanction the expenditure by trustees of an infant's money on his property for purposes other than those authorised by the settled land acts for the application of capital money still remains, and has not been impliedly taken away by the settled land acts, though the provisions of the acts are of great use as a guide to the court in the exercise of such jurisdiction. *Hawker's Settled Estates, In re*, 66 L. J., Ch. 341 ; 76 L. T. 286 ; 45 W. R. 440.

Semble, that under the original jurisdiction the court may, on behalf of an infant actually entitled as tenant in tail, with the concurrence of the next remainderman, authorise trustees in a proper case on the principle of salvage to expend capital money on repairs to buildings which are necessary to enable the property to remain let. *Ib.*

The extent and limits of the original jurisdiction considered. *Conway* v. *Fenton*, infra, and *De Teissier's Settled Estates, In re*, infra, discussed. *Ib.*

Land and money were vested in the trustees of a settlement for the benefit of the husband and wife for their lives, and after their deaths for their children. The buildings on a farm on the land were so much out of repair as to make the farm untenantable ;—Held, that the court had power under its original jurisdiction to sanction the expenditure of part of the money in repairing the farm buildings. *Conway* v. *Fenton*, 58 L. J., Ch. 282 ; 40 Ch. D. 512 ; 59 L. T. 928 ; 37 W. R. 156.

—— **Expenditure of Trust Money—Tenant for Life in Possession—Infant—Remainderman—Salvage.**]—Real estate, including a mansion house, was settled to the use of several tenants for life in succession (the last of whom was an infant), without impeachment for waste, with remainders over. Divers repairs and improvements were considered necessary to make the house habitable, including the repair of the damage caused by dry rot. On an application by the trustees of the will :—Held, that the circumstances did not amount to a case of salvage or preservation of the inheritance, and the court had no inherent jurisdiction to charge or sell an infant's estate upon the notion that such a proceeding would be beneficial to the infant. *Hibbert* v. *Cooke* (1 Sim. & S. 552) followed. *Jackson, In re* (21 Ch. D. 786) and *Conway* v. *Fenton*, supra, distinguished. *De Teissier's Settled Estates, In re, De Teissier* v. *De Teissier*, 62 L. J., Ch. 552 ; [1893] 1 Ch. 153 ; 3 R. 111 ; 68 L. T. 275 ; 41 W. R. 186.

—— **Money to be invested in Land—Permanent Repairs—Tenant for Life and Remainderman.**]—A testator bequeathed all his real and personal estate to trustees upon trust to settle his real estate upon L. for life without impeachment of waste, with remainder to her second son (an infant) in tail male, with remainders over ; and to lay out his personal estate in the purchase of lands to be settled in the same manner as his real estate, and he empowered his trustees to postpone the getting in and investment of his personal estate, and to make out of the income or capital thereof any outlay for the benefit of his estate. The tenant for life applied under the general jurisdiction of the court that the trustees might be directed out of moneys in their hands representing personal estate to pay for permanent repairs to the mansion-house, amounting to the construction of a new roof, rendered necessary by dry rot :—Held, that the court had no jurisdiction to direct such an application of capital, and that it was not authorised by the power in the will. *De Tabley (Lord), In re, Leighton* v. *Leighton*, 75 L. T. 328.

—— **Rebuilding Houses—Infant Remaindermen—Jurisdiction.**]—The court has no jurisdiction to authorise trustees of a settlement to raise money by mortgage of the settled property for the purpose of pulling down and rebuilding houses forming part of such property in a case where the rebuilding, though beneficial to the persons interested, is not necessary for the salvage of the property in question. *Montagu, In re, Derbishire* v. *Montagu*, 66 L. J., Ch. 541 ; [1897] 2 Ch. 8 ; 76 L. T. 485 ; 45 W. R. 594—C. A.

And see LANDS CLAUSES ACT—SETTLEMENT.

Power as to Repair.]—By his will a testator gave to his trustees his house and all the furniture, &c. therein at the time of his death in trust to permit B. to use and occupy the house and furniture for and during her life, free of all rent or compensation for the same, and free from all obligation to repair or insure (which he expressly directed his trustees to do), and free of all rates, taxes and other outgoings (all of which he directed his trustees to discharge) ; and after the death of B., the house and furniture were to fall into and form part of his residuary estate :—Held, that the trustees were not bound to do more than repair and insure the premises, and pay the rates, taxes, tithes, and other outgoings during B.'s life ; but that, if in their opinion it should be necessary to do more than this to prevent the property from becoming deteriorated, their proper course would be to come to the court for direction. *Colyer, In re, Millikin* v. *Snelling*, 55 L. T. 344.

A testatrix gave "all my real and personal estate" to trustees "upon trust at their discretion to sell all such parts thereof as shall not consist of money," and out of the produce to pay her debts and funeral and testamentary expenses, and invest the residue, "and shall stand possessed of such real and personal estate, moneys, and securities" upon trust "to pay the rents, interest, and dividends and annual produce thereof" to T. during her life, with a clause of forfeiture on alienation, and after the decease of T. the testatrix devised and bequeathed "my said real and personal estate and the securities on which the same may be invested unto and to the use of V. C., his heirs, executors, administrators and assigns for ever, according to the nature and quality thereof respectively." At her death she was entitled in fee to the P. estate, which was unincumbered. Some time after her death a remainder in fee to which she was entitled in the B. estate, which was subject to mortgages made by prior owners and was out of repair, fell into possession, and its income was only sufficient to pay the interest on the mortgages. The trustees took out a summons for directions as to interest and repairs. The tenant for life contended that she could disclaim the B. estate ; the remainderman contended that the rents of the P. estate were liable for the interest on the mortgages of the B. estate and for repairs of that estate :—Held, that the will did not create a trust for conversion, but only gave a

power of sale; that no power of management and applying rents in repairs was conferred on the trustees; that T. as equitable tenant for life was not bound to repair; and that the rents of the P. estate could not be applied by the trustees in repairing the B. estate, though the court, if applied to, could sanction the doing such repairs as were expedient on terms which would be equitable as between the tenant for life and the remainderman. Held, further, that under a trust of this nature the trustees had a discretionary power to apply, if expedient, the income of the unincumbered estate in paying such part of the interest on the mortgages as the rents of the mortgaged estate were insufficient to pay, but whether in case of their doing so there would not be equities to be adjusted between the tenant for life and the remainderman, quære. *Hotchkys, In re, Freke* v. *Calmady*, 55 L. J., Ch. 546; 32 Ch. D. 408; 55 L. T. 110; 34 W. R. 569—C. A.

Certain property, comprising freeholds and leaseholds, was settled on trust for a married woman for life for her separate use without power of anticipation, with power of appointment by deed with the consent of the trustees. The settlement also provided that the trustees should at their discretion, inter alia, direct repairs to be done to the property, and that all expenses properly incurred by the trustees in carrying out the trusts or powers of the settlement should constitute a charge on the premises in their favour. The plaintiff, at the direction of the tenant for life, did certain repairs to the property:—Held, that the trustees were bound to carry out any repairs directed by the tenant for life, provided the cost of them did not exceed the value of the property. *Skinner* v. *Todd*, 51 L. J., Ch. 198; 46 L. T. 131; 30 W. R. 267.

Held, also, that the tenant for life herself directing the repairs to be done was in substance an exercise of her power to direct the trustees to do them. *Ib.*

Held, also, that the trustees must raise the amount of the plaintiff's bill for the repairs, by way of charge on the property, and pay it to him. *Ib.*

Repairs to Leaseholds—Income or Corpus—Annuities payable out of Rents subject to Expenses of Performance of Trust.]—Where a testator gave the residue of his leasehold houses and property to trustees upon trust to receive the rents and profits thereof, and to pay thereout certain annuities, but directed the trustees before making any payments on account of the annuities, to pay out of such rents and profits all costs, charges, and expenses incurred in the performance of the trusts, and the trustees in consequence of a notice from the lessor expended on repairs a sum of money that exceeded the value of the unexpired term under the lease, which had then only about eight years to run, the expenses of such repairs are, in the absence of evidence that the houses were out of repair at the testator's death, payable out of the income of the residue. *Debney* v. *Eckett*, 13 R. 207; 71 L. T. 659; 43 W. R. 54.

—— **Appointment of Receiver of Rents to Enforce Repairs.**]—When leasehold houses are vested in trustees in behalf of a tenant for life and remaindermen, it is the duty of the trustees to keep the property free from the risk of forfeiture by a breach of the covenants of the lease, and they are entitled to have the rents applied in keeping the houses in a proper state of repair. The trustees are not bound to be content with the setting apart of a sum of money in the joint names of themselves and the tenant for life as an indemnity against the consequences of a breach of the covenants of the lease, but are entitled to require the covenants to be specifically performed. When a tenant for life of leasehold houses is allowed by the trustees to receive the rents, and the houses are not kept in a proper state of repair according to the covenants of the lease, the court will, at the instance of one of the trustees, appoint a receiver of the rents, for the purpose of enforcing the proper repair of the houses. *Fowler, In re, Fowler* v. *Odell*, 16 Ch. D. 723; 44 L. T. 99; 29 W. R. 891.

Action against Tenant for Life for Non-repair.]—A testator gave his real estate to trustees upon trust for his widow for life, with remainder over, in events which happened, to A. for life, &c. The will contained a direction that each tenant for life should during such estate keep the buildings thereon in substantial repair, and if any such person should neglect to effect such repairs within six months after being requested so to do by the trustees, the trustees should be at liberty to effect such repairs. The widow of the testator was in possession of the premises till her death, and she had omitted to repair the buildings. A claim was carried in against her estate in an administration action, in respect of the omission to repair, the claimants being the trustees of the will, and the then equitable tenant for life. The claim was resisted, on the ground that the right to recover, if any, was in the remainderman, and that therefore the claim was preferred by the wrong parties:—Held, that as the trustees had an interest in protecting the ultimate equitable estate, the claim was properly brought by them. *Williames, In re, Andrew* v. *Williames*, 54 L. T. 105—C. A.

A trustee to whom real property is devised in trust for one for life, cannot interfere with the possession of the equitable tenant for life, because he neglects to keep the property in repair; but if the tenant for life is committing active waste, it seems that the trustee may, and probably ought to interfere, at least if the persons entitled in remainder are under disability; therefore such a trustee is not liable to the remainderman for the neglect of the tenant for life to repair. *Powys* v. *Blagrave*, Kay, 495; 2 Eq. R. 375; 18 Jur. 462; 2 W. R. 289, 359.

Repairs to Mansion House—Rebuilding Farmhouses.]—A testator directs his trustees out of the rents and profits of his estate, to keep the mansion house and messuages in good repair, and, if necessary, to rebuild any farm building from time to time. The buildings being in a dilapidated state at the testator's death, a question arises between the tenants for life and those in remainder, as to the construction of the will in this respect:—Held, that the mansion house and messuages must be repaired out of the annual rents and profits. That the rebuilding applies to farmhouses, and then only in case of their being incapable of repair, or in case of the expense of rebuilding being no greater—regard being had to the nature, age, dimension, and structure—than the cost of putting them into good repair. *Cooke* v. *Cholmondeley*, 4 Drew.

326; 27 L. J., Ch. 826; 4 Jur. (N.S.) 827; 6 W. R. 802.

—— **Re-building Mansion House.**] — A testator, after devising a mansion house and farm at W., directed that all persons who should come into possession of W. should take the name of K., it being his wish that the family of K. should be re-established there, and empowered his trustees to deduct sufficient to keep all the premises in repair, and to make such improvements, by draining, walling, binding, liming, or manuring the land, at the expense of his estate, as they might think proper, or by planting for shelter or ornament. The mansion house at W. was at the decease of the testator, and still continued, in such a want of repair as to necessitate re-building:—Held, that the power did not extend to authorise re-building against the consent of the cestuis que trust, being of full age; and that the word "building" must be confined to building for agricultural purposes. *Bleazard* v. *Whalley*, 2 Eq. R. 1093; 18 Jur. 869; 2 W. R. 608.

Direction to Trustees to erect Mansion House—Garden and Pleasure Grounds.]—A testator directed his trustees to erect a mansion house, and suitable offices fit for the residence of the owner of his estates (which were worth about 15,000*l.* per annum), on some convenient spot:—Held, that under this direction the trustees were empowered to lay out a garden and pleasure grounds around the mansion, in addition to the houses and offices, in such a manner as the master should direct. *Lombe* v. *Stoughton*, 17 Sim. 84; 18 L. J., Ch. 400.

Borrowing Money to Rebuild Mansion House burnt down.]—A testator devised his mansion house and other real estate to trustees for the term of 1,000 years, upon certain trusts, and, subject thereto, he devised the same upon legal limitations, under which the plaintiff was tenant for life. Shortly after the testator's death the mansion house was burnt down. The sole acting trustee had expended, in addition to insurance moneys, the sum of 2,000*l.* in rebuilding the mansion house, which amount he had borrowed on his own personal security and on a charge of the estate. It was admitted that this expenditure was very beneficial to the estate, and that the value thereof was increased. There were in court sums of consols, arising from the sale of part of the estate, and such sums were liable to be re-invested in land. By the decree in the action an inquiry had been directed as to what sum was necessary to complete the restoration of the mansion house, and how the same ought to be raised, but no formal order was made sanctioning the raising of a loan for the purpose. A petition was presented by the personal representative of the trustee, asking that the funds in court might be sold, and that such further sum as, with the proceeds of such sale, would make up the 2,000 borrowed by the trustees, might be raised by mortgage or sale of the settled estate, in order to enable such loan to be repaid:—Held, that the court had no jurisdiction to order a mortgage or sale of the settled estate, or to authorise the expenditure for the proposed purpose, even of moneys which were subject to a trust for re-investment in land; but it appearing that the estate had been benefited by the outlay of the trustee to the full amount of the funds in court, and that the outlay had been bonâ fide made under the impression that it would be repaid out of the estate, the court would, although considering the conduct of the trustee irregular, order that he should be recouped his outlay to the extent of the funds in court but no further. *Jesse* v. *Lloyd*, 48 L. T. 656.

Investment of Personalty in Rebuilding.]—When under a will real and personal estate was settled upon a person as tenant for life, with remainder to his children, but the will contained no power for investing the personal property in improving the realty, the court, on its being shown to be beneficial for all parties, sanctioned the investment of part of the personalty in rebuilding the house, which was in an uninhabitable condition. *Pearson, In re*, 28 L. T. 57; 21 W. R. 401.

Allowances for Rebuilding.] — Charges by trustees for money laid out in luxuries under colour of maintenance, and for money unnecessarily expended in pulling down and rebuilding a house, disallowed. *Bridge* v. *Brown*, 2 Y. & C. C. C. 181.

Circumstances under which allowances will be made for maintenance, repairing, and furnishing considered. *Griggs* v. *Gibson*, 21 W. R. 818.

Money Standing to Real Estate Capital Account.]—Trustees of a term with power to apply surplus in building and improvement were allowed to apply money standing to real estate capital account in building and improvements, including drainage. *Leslie's Trusts, In re*, 45 L. J., Ch. 668; 2 Ch. D. 185; 34 L. T. 239; 24 W. R. 546.

Costs of Inquiry as to Additional Expenditure.]—Trustees of a charity having in carrying into effect a scheme for building exceeded the amount of the estimate which had been sanctioned by the court, were made to pay their own costs of the inquiry before the master as to the propriety and beneficial nature of the additional expenditure. *Att.-Gen.* v. *Armistead*, 19 Beav. 584.

Power to Apply Rents only in Repairs—Borrowing Money to Repair.] — A power to apply the rents of real estate in repairing does not imply a power to borrow money for repairing on the security of the estate. *Fazakerley* v. *Culshaw*, 24 L. T. 773; 19 W. R. 793.

The trustee of real estate, on which a dwelling-house was situate, who was empowered to lay out the rents in repairing the house, but was not empowered to borrow money for the purpose, pulled down and rebuilt the house, and borrowed money at interest for the purpose, which he afterwards repaid out of the rents:—Held, that his claim for interest on the sum borrowed must be disallowed. *Ib.*

When a small estate was settled in strict settlement, and the settlement contained power for the trustees during minorities to repair and rebuild, and to pay the expenses out of the rents and profits, but no power to borrow on mortgage, the court, on being satisfied that it was for the benefit of all parties, and notwithstanding that some interested were infants, gave the trustees leave to borrow money on mortgage, not exceeding a sum fixed by the court, to rebuild the house, as no repairs would render it habitable. *Frith* v. *Cameron*, 40 L. J., Ch. 778; L. R. 12 Eq. 169; 24 L. T. 791; 19 W. R. 886.

Deposit of Title Deeds.]—Trustees for building a chapel, having expended thereon money, bor-

rowed on their own security with a deposit of the chapel deeds made on their own authority, and having been compelled to re-pay the amount:—Held, to have a lien on the deeds, but not to be entitled to a sale of the property to re-imburse the outlay. *Drake* or *Darke* v. *Williamson*, 25 Beav. 622; 4 Jur. (N.S.) 1009; 6 W. R. 824.

Trustees having power, during the minorities of tenants for life or in tail, to superintend the management of an estate, cut timber, erect, pull down, and repair houses, and do various other things of a more or less similar character, "and generally to deal with the premises, as they or he might do if they or he were the absolute beneficial owners or owner, without being answerable for any loss or damage which might happen thereby," deposited with a bank the title deeds of the estate to secure an advance of money to be employed in the erection of buildings under the power:—Held, that the bank had no valid title under the power. *Broom* v. *Sheffield & Rotherham Bank*, 24 W. R. 948.

Improvements—Cotton Mill.]—Part of the property of a testator consisted of a cotton mill which he directed his trustees not to sell, nor to work themselves, but to let. The will also contained a direction to the trustees not to lend any of the personal estate on mortgage, and prescribed strict modes of investment. The cotton mill being out of repair could not be let as it then stood; the trustees, therefore, entered into a provisional agreement with a firm of cotton spinners, by which the latter agreed to take a lease of the mill for twenty-one years, and to spend large sums of money in machinery and repairs, provided the trustees advanced to them, on the security of the machinery, rather more than half the sum required for such machinery and repairs, and also spent a considerable sum in the erection of steam boilers and other landlord's fixtures. Under the terms of the will the trustees could not comply with such proposals; but, upon it being clearly proved that such an arrangement would be highly beneficial to the trust estate, and was one which it was not unusual for lessors in similar cases to enter into, the court sanctioned the agreement, and directed the costs of all parties to the application to come out of the testator's residuary personal estate. *Lee's Trusts, In re*, 32 L. T. 298.

—— **Building of Labourers' Cottages.**]—Where a testator directed his trustees to lay out money for the improvement of his estates and the erection of farmhouses and out-buildings, the court sanctioned the building of labourers' cottages. *Rivers (Lord)* v. *Fox*, 2 Eq. R. 776.

—— **Drainage and New Buildings.**]—Trustees of real estate for a term of 1,000 years from the day of the death of the settlor, had powers, during a period of certain lives in being and twenty-one years, to manage the estates, and out of the income to keep down charges and incumbrances, and subject thereto to repair, erect new or additional buildings, and generally to "make such outlay for the improvement of" the estates as they should "think fit or conducive to the general benefit of" the estates "or the tenants thereof," and hold the surplus as capital, which was to be laid out in the purchase of lands to be settled to the like uses. The settlor having died in 1870, the first tenant for life being in possession, and the income being insufficient, after keeping down charges and incumbrances, to pay for repairs, for the cost of new buildings, and generally for improvement of the property, out of capital, the court allowed payments in draining upon which the tenants paid 5*l.* per cent., and in erecting new buildings. *Leslie's Settlement Trusts, In re*, 45 L. J., Ch. 668; 2 Ch. D. 185; 34 L. T. 239; 24 W. R. 546.

—— **Surplus Rents.**]—Trustees under a will of real estates, the surplus rents and profits of which, during minority, &c., were to be invested in the purchase of other real estates, to go as the devised estates, expended very large sums of the surplus rents and profits in repairing houses, building houses, draining and fencing farms, and other similar improvements:—Held, that they were entitled to be allowed those sums in their discharge; the will containing this general direction, "that, during minority, &c., the said trustees or trustee, for the time being, of the said term, do and shall, generally, superintend the management of the same manors, hereditaments, and premises, and appoint such stewards, bailiffs, agents, and collectors, and with such salaries as they shall think proper," &c. *Bowes* v. *Strathmore*, 8 Jur. 92.

—— **Mixed Fund of Realty and Personalty.**]—The trustees of a mixed fund of realty and personalty laid out 1,600*l.*, part of the personalty, upon the erection of a house on the real estate, for the bonâ fide purpose of increasing the value of the whole as building land:—Held, that the trustees should not be entirely disallowed the sum so expended, but if the cestuis que trust desired it, they should be ordered to take the house themselves at the price of 1,600*l.*, and the value of the site as unbuilt upon. *Vyse* v. *Foster*, 42 L. J., Ch. 245; L. R. 8 Ch. 309; 27 L. T. 774; 21 W. R. 207—L.JJ.

—— **Right of Executor to Charge Expenditure on Testator's Estate.**]—S. was, at the time of his death, seised of a plot of ground, upon which he had commenced to build certain houses. By his will he devised and bequeathed all his real and personal property to J. for life, upon trust, as to one moiety of the rents and profits, for himself, and, as to the other, for other purposes, with remainder over. J. became the personal representative of S., and after S.'s death expended large sums in building the houses:—Held, that J. was not entitled to a charge upon the plot of ground for moneys expended by him, either as tenant for life, trustee, or personal representative of S. *Gilliland* v. *Crawford*, 18 W. R. 60; Ir. R., 4 Eq. 35.

Power to Insure Buildings.]—*See* TRUSTEE ACT, 1893, s. 18.

viii. *Allowance of Payments and Advances.*

Bonâ fide Payment not Authorised by Trust.]—A trustee, who, acting in the bonâ fide exercise of his discretion, makes a payment which, though not authorised by the terms of the trust, is in his opinion necessary to enable him to execute the trust, will be allowed such payment in passing his accounts; though he does not act prudently in assuming the responsibility of such a payment without the sanction of the court. *Forshaw* v. *Higginson*, 8 De G. M. & G. 827; 26 L. J., Ch. 342; 3 Jur. (N.S.) 476; 5 W. R. 424—L.JJ.

A., by will, charged his real estate with debts, and gave a legacy to B. in terms which made it an arguable question whether it was not charged on the real estate. Afterwards the estate was conveyed to trustees for sale by a deed to which the legatee was not a party. The trustees entered into a contract for sale of part of the estate on very advantageous terms. The purchaser required evidence that the legacy had been paid, but no such evidence could be found, and it appeared probable that it never had been paid. The purchaser insisting on the objection, the trustees, acting under legal advice, and considering the most advantageous course for the trust estate, paid the legacy:—Held, that the amount so paid must be allowed them in passing their accounts. *Ib.*

Retainer of Balance Due from Tenant for Life.]—Upon marriage, certain stock was settled in trust for the husband for life, remainder to the wife for life, with remainder to the children of the marriage. After the death of the husband, A. and B. became trustees of the fund; and an account was opened between B. and the widow, in respect of certain receipts and payments and bills of costs, upon which account there was an apparent balance due to B. B. as trustee, received the dividends of the trust funds, to which the widow was entitled for her life:—Held, that B. was entitled to retain, out of such dividends, the balance due to him from the widow. *Russel* v. *Buchanan*, 9 L. J., Ch. 129.

A., who is a trustee for B. of 1,000*l.* South Sea stock, at the desire of B. borrows 1,000*l.* on this stock of the company, and B. receives the money; A. pays the 10 per cent. upon 7 Geo. 1, sess. 2, s. 7, to be discharged of the loan: though B. forbade the payment, yet he is liable. *Balsh* v. *Hyham*, 2 P. Wms. 453; 2 Eq. Cas. Abr. 741, pl. 8.

Augmentation of Salaries of Master and Usher of School.]—A testator, after devising lands on trust to constitute a grammar school, directed that the trustees should have the management of it, and should appoint a master and usher, and pay to them respectively 50*l.* a year, and 30*l.* a year; the trustees established a school, which, however, from mistake was not conducted as a free grammar school, and, the rents of the charity lands having increased, an augmentation was made to the salaries of the master and usher:—Held, that the trustees were entitled to have the sums paid in receipt of this augmentation allowed them in their accounts, notwithstanding their error in the application of the charity, and the mention of salaries of a specified amount in the bill. *Att.-Gen.* v. *Christchurch* (*Dean*), 2 Russ. 321.

Advances on West Indian Estates.]—West India estates were devised upon trust for sale, and distribution of the proceeds among the testator's children absolutely. In a suit for the administration of the trust consignees were appointed, and pending the suit settlements were made of the children's shares, by which interests for life and in reversion were limited. In making payments which had been sanctioned by the court, the consignees became in advance to the trust estate:—Held, that these advances were a charge upon the corpus of the trust estate. *Morison* v. *Morison*, 7 De G. M. & G. 214; 3 Eq. R. 557; 1 Jur. (N.S.) 1110; 3 W. R. 383. And see *Daniel* v. *Trotman*, ante, col. 613.

Money Expended in Maintaining Children.]—A husband being held liable at the suit of the children of his wife's first marriage, to replace the trust funds received by him, claimed a large sum expended in maintaining the children after the second marriage. The claim was disallowed. *Grove* v. *Price*, 26 Beav. 105.

Stock obtained by Infant by Fraud.]—An infant fraudulently concealing his age, and obtaining from trustees part of stock which he was entitled to on coming of age; and when of age, a few months afterwards, applying for and receiving the residue of such stock:—Held, a fraud in the infant, and that neither he himself nor his assignees could enforce repayment by the trustees of the stock paid during infancy, and that applying for the residue of the stock when of age was a recognition of the first payment. *Cory* v. *Gertcken*, 2 Madd. 40; 17 R. R. 180.

Proper Expenses—Right of Trustees to Reimburse themselves.]—Where persons entrusted with the administration of a fund have incurred legitimate and proper expenses in performing duties thrown upon them by their fiduciary situation, they have a right, both at law and in equity, to reimburse themselves out of the funds in their hands, without any special provision to that effect. *Att.-Gen.* v. *Norwich Corporation*, 2 Myl. & Cr. 407. Affirming 1 Keen, 700; 1 Jur. 398.

Trustee, or next friend of infant, is entitled to fair expenses beyond taxed costs, under the head of just allowances. *Fearns* v. *Young*, 10 Ves. 184.

Costs Bonâ fide Paid to Solicitor to the Trust.]—An executor or trustee is not to be allowed, without question, the amount of bills of costs which he has paid bonâ fide to the solicitor to the trust; and the master, without regularly taxing the bills, will moderate their amount. *Johnson* v. *Telford*, 3 Russ. 477; 27 R. R. 116.

Postponement of Payment Off of Incumbrances.]—A father devised his real estate to trustees to pay an annuity of 6,000*l.* a year to his daughter, and subject thereto upon trust to accumulate the rents for twenty-one years, and out of the accumulated fund from time to time to pay his debts, legacies, and the incumbrances on the estates, and invest the residue in the purchase of lands to be held on the same trusts; and he directed the estates, on the expiration of the trust for accumulation, to be settled in strict settlement. He directed that as soon as the incumbrances were paid off, the annuity should be increased to 8,000*l.* He gave his residuary personal estate to his trustees to pay off the incumbrances, and apply the surplus in the same way as the accumulated rents and profits. He died leaving personalty which, within a month after his death, was ascertained to be amply sufficient to pay off his debts, legacies, and incumbrances. The trustees, however, retained a considerable part of the personal estate, as it was producing a high rate of interest; and they did not for several years pay off all the incumbrances:—Held, that the trustees were right in paying the annuity at the rate of 8,000*l.* a year from the testator's death, and must be allowed it in their accounts. *Astley* v. *Essex* (*Earl*), L. R. 6 Ch. 898; 25 L. T. 470.

Allowances for Due Management.]—A trustee and executor, although taking under the will a commission as a satisfaction for the trouble, is entitled to allowances under a general trust to set and manage, as he should think proper, and out of the rents and profits to pay all rates and taxes, charges of repairs, stewards', bailiffs', and gamekeepers' salaries and expenses, and all other charges and expenses he should think proper; but he was not allowed to appoint an establishment, gamekeepers, &c., except as the due management required. *Webb* v. *Shaftesbury* (*Earl*), 7 Ves. 480.

—— **Annuities given to Trustees—Collector of Weekly Rents.**]—Testator gave annuities to his trustees for their trouble in the execution of his will, and died possessed of several houses, let at weekly rents. The trustees are justified in paying a person to collect these rents, and do not, therefore, lose their annuities. *Wilkinson* v. *Wilkinson*, 2 Sim. & S. 237; 25 R. R. 193.

Fund Set Apart for Payment of Expenses.]—As to what expenses relating to real estate are properly payable out of a fund set apart to pay, amongst other things, the expenses of executing the trusts of the will. *Brougham* (*Lord*) v. *Poulett* (*Lord*), 19 Beav. 119; 24 L. J., Ch. 233; 1 Jur. (N.S.) 151.

A testator declared trusts relating to his real and personal estate, and gave his personal estate to trustees, in trust to set apart and invest a sufficient fund to pay his debts, legacies, funeral expenses, expenses of providing his will, "and the execution of the trusts thereof":—Held, that the "expenses in the execution of the trusts of the will" were limited to those properly payable by the executors, in their character of executors alone, and therefore that the costs of executing the trusts of the various real estates fell on the cestuis que trust. *Ib.*

Interest on Advances.]—A trustee will be allowed interest upon money advanced by him, and applied in payment of his testator's debts, or otherwise on account of his personal estate. *Finch* v. *Prescott*, 30 L. T. 156; 23 W. R. 437.

Costs and Expenses in General.]—*See* post, I.

ix. *Notice of Assignments.*

Mortgage—Notice to affect Trustees.]—Funds belonging to M. were, on her marriage in 1834, vested in three trustees (one of whom died in 1840) in trust for her for life for her separate use, without power of anticipation, and after her death for the children of the marriage, and in case there should be none, for such persons, if she should die in her husband's lifetime, as she should appoint. In 1843 the husband and wife executed a deed to secure the payment of moneys due from him, and the wife appointed that in case there should be no child of the marriage, and if she should die in the husband's lifetime, the trustees of the settlement of 1834 should, out of the trust funds, raise sufficient to pay the husband's debt. Notice was given of the deed of 1834 to the two surviving trustees of the settlement. In 1848 the wife and the sole surviving trustee of the settlement, who desired to retire, appointed three new trustees, and assigned to them the trust funds. One of those trustees died, and the two surviving trustees and the survivor of them, at the request of the husband and wife, dealt with some of the trust funds, which ultimately were much diminished. A portion of the funds was invested in the purchase of leasehold premises, which were held upon the trusts of the settlement. The wife died in March, 1870, without having had any child. The husband survived. The survivor of the trustees of 1848 in May, 1870, received a notice from L. of a charge on the leaseholds in his favour, dated the 5th of October, 1864; and in October, 1870, he received a notice of the deed of 1843:—Held, that the surviving trustees of 1848 were not liable to make good the funds which had been lost; that L. was not entitled to priority over the trustees of the deed of 1843; and that the persons claiming under the deed of 1843 were entitled to the funds which remained in part satisfaction of the moneys due to them. *Phipps* v. *Lovegrove*, 42 L. J., Ch. 892; L. R. 16 Eq. 80; 28 L. T. 584; 21 W. R. 590.

Assignees of an equitable interest should, if they desired to be perfectly secured, obtain a distringas on the funds; or have their deed indorsed on the original deed; or obtain a transfer of the funds into court. *Ib.*

Semble: New trustees of trust funds in settlement are not bound to inquire of the old trustees whether they have received notice of any incumbrance; and it has never been the practice of the courts on appointing new trustees of funds to make such an inquiry. *Ib.*

Assignment — Priority — Notice to one Trustee only — Effect of Death on Notice.]—Where one only of two trustees of a fund has notice of an incumbrance or assignment affecting the trust fund, and a second assignment is afterwards made, of which both trustees receive notice, the subsequent death of the trustee who alone had notice of the prior incumbrance or assignment does not alter the priority obtained by the first assignee. *Ward* v. *Duncombe*, 62 L. J., Ch. 881; [1893] A. C. 369; 1 R. 224; 69 L. T. 121; 42 W. R. 59—H. L. (E.)

—— **Notice to one Trustee—Notice of Subsequent Mortgage to Both—Death of Trustee having Notice of Assignment — Priority.**]— In distributing a trust fund it is the duty of all the trustees to act upon the notices of incumbrances received by each, and to this extent notice to one trustee is notice to all. Consequently an intending incumbrancer cannot safely take a charge upon a trust fund without ascertaining from each trustee that he has no notice of any existing charge. *Wyatt, In re*, *White* v. *Ellis*, 61 L. J., Ch. 178; [1892] 1 Ch. 188; 65 L. T. 841; 40 W. R. 177—C. A.

A married woman having by her marriage settlement settled a reversionary share of a trust fund to which she was entitled under a will, joined with her husband in mortgaging the share without disclosing the settlement. One of the trustees of the will had notice of the settlement, the other had not. The mortgagees before taking their security made inquiries of the trustees as to incumbrances, and received from the trustee who had notice an answer which conveyed no information. They then executed the mortgage, and gave notice of it to both trustees. The trustee who had notice of the settlement died before the fund came into possession. In a contest for priority between the marriage settle-

ment and the mortgage :—Held, that the settlement took priority, and that such priority was not changed by the death of the trustee. *Ib.*

—— **Fund Partly in Court and Partly in Hands of Trustees.**]—When an assignment is made of an interest in a trust fund, part of which is in court and part in the hands of the trustees, the assignee, in order to complete his title, must, as regards the fund in court, obtain a stop order, and as regard the fund in the hands of trustees, give notice to the trustees. *Mutual Life Assurance Society* v. *Langley*, 32 Ch. D. 460 ; 54 L. T. 326—C. A. Affirming 53 L. J., Ch. 996 ; 32 W. R. 791.

—— **Trustee Party to Suit—Stop Order — Priority.**]—Where a trustee and a party to a suit had a charge on the share of one of the cestuis que trust, and obtained a stop order, he was postponed to a judgment creditor of the cestui que trust who had obtained an earlier stop order. *Elder* v. *Maclean*, 3 Jur. (N.S.) 283 ; 5 W. R. 447.

Original and Derivative Settlements — Fund in Court — Notice.] — Where there are two settlements, one original and the other derivative, the proper person to whom an assignee of an equitable interest in personalty under the derivative settlement should give notice of his incumbrance is the trustee of that settlement, and not the trustee of the original settlement, though the fund under which the interest arises is still in his hands. Dicta of Lord Romilly in *Bridge* v. *Beadon* (36 L. J., Ch. 351 ; L. R. 3 Eq. 664 ; 15 W. R. 527) dissented from ; *Booth's Settlement, In re* (1 W. R. 444) not approved ; *Holt* v. *Dewell* (4 Hare, 446 ; 15 L. J., Ch. 14), approved. *Stephens* v. *Green*, 64 L. J., Ch. 546 ; [1895] 2 Ch. 148 ; 12 R. 252 ; 72 L. T. 574 ; 43 W. R. 465—C. A.

—— **Trustee himself an Assignee.**]—A trustee who receives notice of an assignment of the trust fund made by the cestui que trust is not, in the absence of inquiry, bound to inform the person giving him the notice that he himself has a prior assignment. By omitting to give that information the trustee will not lose his priority. *Lewer, In re, Wilkes, Ex parte*, 4 Ch. D. 101 ; 35 L. T. 557. Affirmed, nom. *Garrard, Ex parte, Lewer, In re*, 5 Ch. D. 61 ; 25 W. R. 364—C. A.

New Trustees — Notice of Incumbrance to Original Trustees — Constructive Notice.] — Persons appointed new trustees under a will or settlement are bound to inquire what the trust property consists of, and what the trusts are, and to look into the trust documents to see what incumbrances their predecessors had notice of. But if there was nothing among the trust documents which would have given them notice of an incumbrance, they will not be held liable for loss arising from their ignorance of it, even though they have in fact omitted to look into those documents. *Hallows* v. *Lloyd*, 58 L. J., Ch. 105 ; 39 Ch. D. 686 ; 59 L. T. 603 ; 37 W. R. 12. And see *Phipps* v. *Lovegrove*, supra.

—— **Notice to Solicitor of Trustees.**]—Quære, is a solicitor of trustees their agent for the purposes of notice? If so, does the rule that notice to one trustee is notice to all, apply where the notice has been to the solicitor of one trustee? Does the rule apply only so long as the person to whom notice has been given remains a trustee? W. C. was clerk to J. C. his father, a solicitor, who was a trustee with notice, which W. C. knew. W. C. upon the retirement of J. C. was made trustee. Did W. C. import into his character of trustee this antecedent knowledge for the purpose of notice? *Durand's Trusts, In re*, 1 L. T. 84 ; 8 W. R. 33.

Right of Mortgagee to receive Whole of Fund mortgaged.]—The assignee of a trust fund by way of mortgage with power to give receipts in the name of the mortgagor cannot compel the trustees of the fund to pay the whole over to him notwithstanding the existence of puisne incumbrancers. All that he is entitled to demand is the amount due upon the mortgage. *Bell, In re. Jeffery* v. *Sayles*, 65 L. J., Ch. 188 ; [1896] 1 Ch. 1 ; 73 L. T. 391 ; 44 W. R. 99—C. A.

Accretion to Trust Estate — Devise to First Mortgagees—Mortgage held on Trust.]—B., by will dated the 24th March, 1884, devised his freehold ground rent arising out of the house and premises, No. 7, W. Terrace, and all his interest in the said premises, "to the present mortgagees thereof." At the date of the will, and of B.'s death, there was no mortgage of the freehold ground rent in existence, but the leasehold premises out of which the rent arose were mortgaged by demise to the trustees of a certain settlement to secure moneys advanced by them out of the trust funds. These trustees and the beneficiaries under the settlement were alike strangers to B. :—Held, that the ground rent passed under the devise to the trustees of the settlement, but that they took upon the trusts of the settlement, and not beneficially. *Payne's Settlement, In re, Kibble* v. *Payne*, 54 L. T. 840.

And see NOTICE.

x. *Remuneration.*

General Principle.]—A trustee is of course entitled to all reasonable expenses of the trust, but not for personal trouble and loss of time, unless he makes out a special case therefor, before acceptance of trust. *Brocksopp* v. *Barnes*, 5 Madd. 90.

Settled rule, that, in all matters of trust or in the nature of trust, a trustee is not allowed any compensation for his trouble in the business entrusted to him. *Ormsby, In re*, 1 Ball & B. 189 ; 12 R. R. 13.

A trustee has no right to exact or charge any remuneration or bonus in respect of great advantages accrued to the cestuis que trust from services incident to the performance of the duties imposed by the deed of trust. *Barrett* v. *Hartley*, L. R. 2 Eq. 789 ; 12 Jur. (N.S.) 426 ; 14 L. T. 474 ; 14 W. R. 684.

A settled account by a cestui que trust, allowing a bonus to the trustee, was set aside. *Ib.*

Professional Business—Costs out of Pocket.]—A trustee acting as solicitor in the trust matters is merely entitled to costs out of pocket. The rule is not inflexible ; and compensation may, in special cases, be made to him under the authority of the court, by a fixed allowance, but not by allowing him to make the usual professional charges. *Bainbrigge* v. *Blair*, 8 Beav. 588 ; 9 Jur. 765.

Trustees can only be allowed costs out of pocket for professional business transacted by a firm, one of whom is a trustee, though the business is done by one of the partners who is not a trustee. *Christophers* v. *White*, 10 Beav. 523. *See also* post, 10.

Salary for Management of Road.]—Two persons, in whom was vested, under an act of parliament, the right to the tolls and profits arising from a certain road, for a term of fifty years, conveyed, by deed of May 27th, 1827, the same, and all their estate and interest therein, to A., B. and C. (the defendant), upon certain trusts therein mentioned; and subject thereto, in trust for the said A., B. and C., their executors, administrators, and assigns, as tenants in common, for their own use and benefit, for the residue of said term of fifty years; and the deed contained a provision, that in case any of the said trustees should be unable to join in the direction and superintendence of the said road, it should be lawful for any two of the said trustees to act of themselves in the management of the said road, and in all other things relating to the execution of the said trusts. The interests to which the said A. and B. were entitled under the said deed having become subsequently vested in the plaintiff, and C. (the defendant) having taken upon himself the exclusive control and management of the road, and insisted upon his right thereto, and also upon being paid a salary for his trouble and supervision:—Held, upon a bill filed by the plaintiff, disputing such right, that the defendant C. was entitled to have the sole management of the road, but that his claim for salary could not be maintained. *Taylor* v. *Taylor*, 4 Dr. & War. 124.

Commission of Mortgagee appointed Receiver by Co-Mortgagees.]—Mortgagor conveyed all his real and personal estate to three mortgagees in trust for creditors:—Held, that one of the mortgagees was not entitled to a commission on the rents received by him under an appointment as receiver by himself and his co-trustees. *Nicholson* v. *Tutin*, 3 Jur. (N.S.) 235.

Law of Scotland as to Trustee holding Office of Profit.]—Quære, how far the principle of English law, that a trustee cannot hold an office of profit under the trust (except with the express sanction of the court), has been established in Scotland. Quære, also, as to the soundness of the principle. *Home* v. *Pringle*, 8 Cl. & F. 264—H. L. (Sc.)

A trustee does not, by being cashier to the trust estate, incur any additional liability in respect of its management, beyond what he was subject to as trustee. *Ib.*

Payment into Court—Trustee Deducting Costs.]—A trustee paid into court the balance of the trust fund, having first deducted the amount which he claimed for costs, charges, and personal expenses, which amount he knew was objected to by his cestuis que trust, as being excessive:—Held, that the trustee ought to have paid into court the whole of the trust fund, leaving it to the court to decide the amount to which he might be entitled. *Beaty* v. *Curson*, 38 L. J., Ch. 161; L. R. 7 Eq. 194; 20 L. T. 61; 17 W. R. 132.

Auctioneer's Commission.]—A. assigned to B. timber and stock in trade, upon trust to sell and apply the money arising from the sale in paying the expenses of preparing for, making, and completing such sale or sales, "including the usual auctioneer's commission, and otherwise incidental to the aforesaid trusts." B. was auctioneer, and had been employed as such by A.:—Held, that the words appeared to have been inserted to provide for B. being employed in the sale, and that B. was entitled to charge his commission. *Douglas* v. *Archbutt*, 2 De G. & J. 148; 27 L. J., Ch. 271; 4 Jur. (N.S.) 315; 6 W. R. 306.

Appointment of Trustee as Receiver.]—Though a general, it is not an inflexible, rule that no remuneration will be allowed to a trustee appointed by the court receiver of the trust estate. The court has a discretion to grant or refuse it. The fact that nothing is said about remuneration in the judgment appointing a receiver does not preclude the court from subsequently allowing remuneration. *Bignell, In re, Bignell* v. *Chapman*, 61 L. J., Ch. 334; [1892] 1 Ch. 59; 66 L. T. 36; 40 W. R. 305—C. A.

—— Commission Paid to Rent-collector.]—Trustees who have been appointed by the court to receive the rents of, and to manage, a trust estate, receiving a commission upon the rental, will not be allowed to charge additional payments made by them to a collector of rents. *Cox* v. *Bennett*, 39 W. R. 308—C. A.

And see as to disallowance of salary, *Bedingfield, In re. Bedingfield* v. *D'Eye*, 57 L. T. 382, supra, col. 615, and *Freeman's Settlement, In re*, 57 L. J., Ch. 160; 37 Ch. D. 148; 57 L. T. 798; 36 W. R. 71.

xi. *Application for Advice or Opinion of the Court.*

See now R. S. C., Ord. LV.

a. Under the General Jurisdiction of the Court.

Notice to Trustees of Doubt as to Testator's Title to Devised Estate.]—Upon a bill filed by trustees for the directions of the court in execution of the trusts of a will, if the trustees have notice of any doubt as to the title of the testator to a part of the estate devised, the person who may be benefited by that doubt is properly made a defendant to the suit, and the court will not proceed to the execution of the trusts of the will, until that doubt is removed, either by a proceeding at law, or by such other course of inquiry as the court may think proper to direct. *Talbot* v. *Radnor (Earl)*, 3 Myl. & K. 252.

As to Trusts upon which Property ought to be held.]—Where a trustee accepts the trust of a fund, with the knowledge that it is doubtful whether it ought to be held upon such trust, he is nevertheless entitled to come to the court for its direction, whether the trusts ought to be executed:—Held, by Lord Justice Turner; Lord Justice Knight Bruce entirely dissenting, *Neale* v. *Davies*, 23 L. J., Ch. 744; 2 Eq. R. 530; 2 W. R. 358.

Where trustees accept such a trust, with knowledge of the doubt, and with the same and no more knowledge, are called upon to part with the fund, by the cestui que trust, they are bound in morality to do so; and an adverse claimant would have no claim against them personally after they had parted with the fund in conformity

with the trusts on which they accepted it: Per Lord Justice Knight Bruce. *Ib.*

The question having been raised in a suit between the trustees and cestui que trust of the deed, one of the vice-chancellors refused to pronounce a decree, but ordered the cause to stand over, with liberty to the plaintiff, the cestui que trust, to amend by adding parties; and their lordships differing in opinion, the order of the court below was affirmed. *Ib.*

Opinion as to Propriety of Applying Rents in Repairs and Permanent Improvements.]—Where trustees of a settlement, having a power of purchasing lands on the request of tenants for life, desired the opinion of the court as to the propriety of applying 1,200*l.* on such request, in repairs and permanent improvement, no answer was given on the petition: but it was intimated that, on a bill filed, there would be no objection on principle to the course proposed to be taken, and subsequently the order was made in a suit instituted for the purpose. *Barrington's Settlement, In re*, 1 J. & H. 142; 29 L. J., Ch. 807; 6 Jur. (N.S.) 1073; 8 W. R. 577.

Important and Difficult Question Involved.]—On application by trustees for the advice of the court, where an important and difficult question is involved, the proper course is, to file a bill instead of presenting a petition. *Mockett's Trusts, In re*, Johns. 628; 29 L. J., Ch. 294; 6 Jur. (N.S.) 142; 1 L. T. 136; 8 W. R. 235.

Trustees of an under-lease of church property authorised to take steps to obtain a clause for compensation for their tenant right of renewal, inserted in an act pending in parliament, to make a new street, which would require part of the property. *Jones* v. *Powell*, 4 Beav. 96.

Direction as to Investment of Moneys during Minority—Payment into Court.]—A testator bequeathed to each of his six grandchildren 200*l.*, and, in case any of them should not have attained twenty-one at the death of the testator, he directed his trustees, who were also his executors and residuary legatees, to pay interest for the legacies of such children, after the rate of 5 per cent., towards their maintenance and education. Upon differences arising between the father of the children and the trustees as to the investment of the money pending minorities, the trustees filed their bill to obtain the direction of the court, and for leave to pay the amount into court:—Held, that the trustees might pay the principal money into court; and, semble, the trustees will not be liable to make up the difference between the dividends on the money in court and the 5*l.* per cent. *Abrahams* v. *Holderness*, 6 Jur. 290.

Semble, if the direction in the will had been for the trustees to pay interest at 2 per cent., and the money was paid into court, the legatees would be entitled to the full amount of the dividends. *Ib.*

Effect of Invoking Aid of Court.]—After trustees have invoked the aid of the court in administering an estate, and a decree has been made, they cannot act in the matter of the administration except under the sanction of the court. *Minors* v. *Battison*, 46 L. J., Ch. 2; 1 App. Cas. 428; 35 L. T. 1; 25 W. R. 27—H. L. (E.)

Originating Summons — Act done outside Trust.]—Rule 3 (e) of Ord. LV. only relates to the doing, or the abstaining from doing, by trustees, of some act within the scope of their trusts; and an originating summons ought not to be taken out under that rule for the purpose of obtaining a direction to trustees to do, or to abstain from doing, an act which is outside the scope of their trust. *Suffolk* v. *Lawrence*, 32 W. R. 899.

Trustee acting under Special Case—Protection.]—By the combined effect of Ord. XXXIV., r. 8, and the saving clause in the Statute Law Revision Act, 1883, the protection given to trustees and others acting on the declaration of the court on a special case is preserved, notwithstanding the repeal of the act. *Forster* v. *Schlesinger*, 54 L. T. 51.

b. Under the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 30. Repealed by Trustee Act, 1893.

Retrospective Effect of Statute.]—The 22 & 23 Vict. c. 35, s. 30, is retrospective in its operation. *Simpson's Will, In re*, 1 J. & H. 89; 2 L. T. 170; 8 W. R. 388.

Who may Apply.]—The court will make an order under 22 & 23 Vict. c. 35, s. 30, on the petition of a cestui que trust. *Ward, In re*, 13 L. T. 494; 14 W. R. 96.

As to Construction of Instruments.]—The court will not, upon a petition presented by a trustee or an executor under s. 30 of the 22 & 23 Vict. c. 25, for the opinion, advice, or direction of the court, construe an instrument or make any order affecting the rights of the parties to property. Such petitions should relate only to the management and investment of trust property. *Lorenz, In re*, 1 Dr. & Sm. 401; 7 Jur. (N.S.) 402; 4 L. T. 501; 9 W. R. 567.

The court declined, upon a petition for its opinion under 22 & 23 Vict. c. 35, s. 30, to decide whether an intestate's estate was liable upon a covenant to be implied in his marriage settlement. *Evans, In re*, 30 Beav. 232.

Questions of construction affecting capital of considerable amount will not be decided upon a petition under the 22 & 23 Vict. c. 35, s. 30. *Bunnett, In re*, 10 Jur. (N.S.) 1098.

The court will not, under 22 & 23 Vict. c. 35, s. 30, give its opinion for the guidance of trustees on the effect of a limitation contained in an instrument. *Hooper's Estate, In re*, 29 Beav. 656; 30 L. J., Ch. 795; 7 Jur. (N.S.) 595; 9 W. R. 729.

The court will not give an opinion under the 22 & 23 Vict. c. 35, upon matters of detail, which cannot be properly dealt with without the superintendence of the court and the assistance of affidavits. *Barrington's Settlement, In re*, 1 J. & H. 142; 29 L. J., Ch. 807; 6 Jur. (N.S.) 1073; 8 W. R. 577.

Therefore, where trustees of a settlement, having a power of purchasing lands on the request of tenants for life, desired the opinion of the court as to the propriety of applying 1,200*l.* on such request, in repairs and permanent improvement, no answer was given on the petition; but it was intimated that, on a bill filed, there would be no objection on principle to the course proposed to be taken, and subsequently

the order was made in a suit instituted for that purpose. *Ib.*

On Questions of Difficulty.]—Where the opinion of the court is sought by petition under 22 & 23 Vict. c. 35, by executors of a will upon which questions of difficulty arise, and the assets are not distinctly ascertained, the court will not give its opinion unless at the wish, and with the consent, of all parties interested. *Mockett's Trusts, In re*, Johns. 623; 29 L. J., Ch. 294; 6 Jur. (N.S.) 142; 1 L. T. 136; 8 W. R. 235.

The 22 & 23 Vict. c. 35, s. 30, was not intended to provide for the decision of nice questions of law, but merely to procure for trustees the assistance of the court upon points of minor importance arising in the management and administration of trust property. *Tyrrell's Trusts, In re*, 23 L. R. Ir. 263.

Indemnity to Trustees.]—The opinion of the court upon a petition under the 22 & 23 Vict. c. 35, gives an indemnity to the trustees only upon the facts stated in the petition, is subject to no appeal, and will not preclude the filing a bill, which would seem the better course under the circumstances above stated. *Mockett's Trusts, In re*, supra.

Hypothetical Case.]—The court will not give its opinion on an hypothesis; therefore when a petition was presented under 22 & 23 Vict. c. 35, to obtain the advice of the court as to the mode in which calls not yet made on account of shares specifically bequeathed by a testator were to be met, the court ordered the petition to stand over till the call had been actually made. *Box, In re*, 11 W. R. 945.

As to Investments.]—On an application under s. 30 of 22 & 23 Vict. c. 35, for the opinion of the court whether, under a trust for investment in government or other personal securities, trustees would be justified in investing a trust fund in East India stock or railway debentures, or on mortgage of freehold, copyhold, or leasehold hereditaments, the court approved of an investment on freeholds in England or Wales, but declined to give any answer sanctioning investments in the other securities mentioned. *Simson's Will, In re*, 1 J. & H. 89; 2 L. T. 170; 8 W. R. 388.

If an act of parliament contains provisions enabling trustees, with the sanction of the court, to invest trust funds upon securities, neither recognised by the courts, contemplated by the legislature, nor sanctioned by the settlor or testator at the time the trusts were created, the court, in the absence of an express legislative declaration, will not give the act any other than a prospective operation, or advise trustees under the 22 & 23 Vict. c. 35, ss. 30, 32, to invest the trust funds upon any other securities than those comprised within the provisions of the instrument creating the trusts. *Miles' Trusts, In re*, 27 Beav. 579; 29 L. J., Ch. 47; 5 Jur. (N.S.) 1236; 1 L. T. 122; 8 W. R. 54.

The trustee of a will of a testator, who died in 1845, had power to invest on "real securities in England or Wales, but not in Ireland." The court declined advising the trustee to invest, under the powers contained in the 22 & 23 Vict. c. 35, s. 32, on a mortgage of a Scotch estate. *Ib.*

As to Compromise of Claim.]—The court will on a petition under 22 & 22 Vict., c. 35, s. 30, sanction the compromise by trustees of a claim depending on foreign law and the accounts of disbursements on an estate in a foreign country, which accounts the trustees have no means of verifying. *Mackintosh's Settlement, In re*, 42 L. J., Ch. 208.

As to Appointment of Trustees.]—A father bequeathed a share of a fund in trust for his daughter and her children, power being given to the trustees to invest it in the public funds of any colony or dependency of the united kingdom. The daughter married a domiciled citizen of the Canadian dominion, and was permanently resident in Canada. It was proposed to appoint two persons, citizens of Canada, trustees, and to transfer the share of the trust fund to them for the purpose of investment in securities in Canada. On a petition under 22 & 23 Vict. c. 35, s. 30, the court was of opinion that such proposed appointment and transfer might be made. *Smith's Trusts, In re*, 26 L. T. 820; 20 W. R. 695.

As to Granting Leases.]—Upon a special case presented under the 22 & 23 Vict., c. 35, and the 23 & 24 Vict., c. 38, the court declined to give power to trustees to grant leases of real estate for a term not exceeding ten years. *Shaw's Trusts, In re*, L. R. 12 Eq. 124; 25 L. T. 22; 19 W. R. 1025.

As to Payment of Income.]—A married woman who was of unsound mind, but not so found by inquisition, was entitled for her separate use to the income of certain trust funds. Her written consent was also required to the investments by the trustees. Upon a petition under Lord St. Leonards' Act (22 & 23 Vict., c. 35, s. 30) for the advice of the court:—Held, that the court had jurisdiction to entertain the petition; that the whole income might be paid to the husband on his undertaking to apply it to the maintenance of the wife: and that her consent to the investments might be dispensed with. *T——, In re*, 15 Ch. D. 78; 29 W. R. 42.

As to Retaining Mortgages.]—A testator lent money on thirteen mortgages of 100*l.* each, granted under an act of parliament, on the security of stallage rents, and received 4*l.* per cent. interest. He devised and bequeathed all his realty and personalty upon trusts for sale and conversion. After his death the trustees discovered that the mortgagors had exceeded their borrowing powers, and that the mortgages were only worth 74*l.* each, and they sold five at that price. If the remainder were sold, the income of the beneficiaries would be reduced from 32*l.* to 20*l.* per annum. On a petition by the trustees, under 22 & 23 Vict. c. 35, the court was of opinion that they would be justified in retaining the remaining mortgages in their hands. *Faning's Trusts, In re*, 10 Jur. (N. S.) 307; 10 L. T. 61.

As to Payment of Costs incurred by Tenant for Life.]—The trustees of settled estates presented a petition under s. 30 of Lord St. Leonards' Act, 1859, asking the opinion of the court (1) whether they were justified in applying money in their hands, proceeds of sales and enfranchisements of the settled estates, towards paying costs incurred by the tenant for life as plaintiff and defendant in a series of actions undertaken by him to resist claims of rights of common over the settled estates; (2) whether

they might apply similar sums to be derived from future sales, and towards discharging their costs; (3) whether in discharging these costs they might properly treat them as a solicitor and client costs; (4) whether they might adopt the acts and proceedings of the tenant for life. The petition was also entitled in the Settled Estates Act, 1877, under which the trustees prayed that such costs as were not provided for as above might be raised and paid as between solicitor and client by means of a charge on the settled estates:—Held, that the first four questions might be answered in the affirmative, and that the order for raising and paying the residue of the costs as between solicitor and client might be made to the court under s. 17, although no application had been made to the court before commencing proceedings. *De la Warr's (Earl) Settled Estates, In re*, 51 L. J., Ch. 407; 46 L. T. 340.

Where proceedings have been instituted (though without the preliminary sanction of the court), whether by claim in an action, or by defence to an action, for the protection of a settled estate, the court will, if it sees fit, give permission to the trustees to apply the proceeds of the sale of a portion of the estate in defraying the costs already incurred, and which must necessarily be incurred, by the tenant for life, in instituting such proceedings. *S. C.*, 50 L. J., Ch. 383; 16 Ch. D. 587; 44 L. T. 56; 29 W. R. 350.

The tenant for life of settled estates having successfully opposed a sewage scheme proposed by the sanitary authority of the parish in which the settled estates were situate, on the ground that the works would deteriorate the value of the estate, incurred certain costs. The trustees of the settled estates applied, under 22 & 23 Vict. c. 35, s. 30, for the advice of the court whether they would be justified in paying these costs out of money in their hands, representing the proceeds of part of the settled estates sold under the order of the court made in 1874. The petition was entitled in the matter of the Settled Estates Act, 1856, and the Amendment Acts of 1858 and 1864, and the Act 22 & 23 Vict. c. 35. The court was of opinion that s. 30 of the act 22 & 23 Vict. c. 35 only gave the court power to advise, and did not empower it to authorise the payment, but that the case came within s. 17 of the Settled Estates Act, 1877, and ordered that the petition should be amended by entitling it in the matter of that act, when, on the amount expended by the tenant for life, not exceeding a sum named, being proved before the registrar, the court would advise the trustees to pay it. *Willan's Settled Estates, In re*, or *Twyford Abbey Settled Estates, In re*, 45 L. T. 745; 30 W. R. 268.

Practice on Application.]—Where an application was, under the 22 & 23 Vict. c. 35, s. 30, made in chambers by trustees for the direction of the court as to certain repairs of a permanent nature proposed to be made on the property mentioned in the will, the vice-chancellor directed that the matter should be brought before him in court upon petition, it not being, in his opinion, intended that the court should deal with questions of this kind without the assistance of counsel. *Dennis's Will, In re*, 5 Jur. (N.S.) 1388; 1 L. T. 158.

On a petition under the 22 & 23 Vict. c. 35, s. 30, the court will not direct an inquiry at chambers. *Mockett's Trusts, In re*, Johns. 628; 29 L. J., Ch. 294; 6 Jur. (N.S.) 142; 1 L. T. 136; 8 W. R. 235.

A petition under the 22 & 23 Vict. c. 35, s. 30, ought not, in the first instance, to be served upon any one, but an application should be made in chambers as to the persons upon whon the petition should be served. No affidavits can be read on such petition. *Muggeridge's Settlement, In re*, Johns. 625; 29 L. J., Ch. 288; 6 Jur. (N.S) 192; 1 L. T. 436; 8 W. R. 234.

When a petition is presented under 22 & 23 Vict. c. 35, the petitioners must serve such persons as they think proper, and must not bring on the petition merely in order to ascertain who ought to be served. *Green's Trust, In re*, 29 L. J., Ch. 716; 6 Jur. (N.S.) 530. *And see* 6 Jur. (N.S.) 479; 2 L. T. 275; 8 W. R. 403.

On a petition (not served on any person) by English and Irish trustees, under 22 & 23 Vict. c. 35, s. 30 (the domicil of the testator and the tenant for life being Irish and English respectively), for the opinion of the court as to the power of the trustees to make certain investments, the court, there having been no application to the court of chancery in Ireland, exercised the jurisdiction, and did not require the petition to be served on any one. *French's Trusts, In re*, L. R. 15 Eq. 68.

c. Investment of Trust Funds.

i. *In General.*

Statutes.]—*Trustee Act*, 1893, *ss.* 1—9, *Trustee Act*, 1894, *s.* 4.

General Principles.]—Trustees not answerable for having applied the trust property, even to what turned out a losing adventure, if without fraud or negligence. *Wilkinson* v. *Stafford*, 1 Ves. 41.

Trustee investing money at his own discretion, runs risk of depreciation. *Hancom* v. *Allen*, Dick. 498.

A testator empowered his trustees to lend such part of the trust moneys as they should think proper to A. and B., who were respectively his son and son-in-law:—Held, that this authorised a several loan to either. *Parker* v. *Bloxam*, 20 Beav. 295.

One year is a "reasonable time" in which a purchase directed by will should be made. *Parry* v. *Warrington*, 6 Madd. 155; 22 R. R. 264.

It is the duty of a trustee who executes a power to show that he has complied with the exigencies required by it. So where he varies the investment of the trust fund, the burden of proof lies on him to show that it is a fit and proper investment. *Norris* v. *Wright*, 14 Beav. 291.

If the executor lays out the assets on private securities, all benefit made thereby shall accrue to the estate, yet the executor shall answer all the deficiency, and the particular circumstances of good conduct in the executor cannot prevail against the general rule. *Adye* v. *Feuilleteau*, 1 Cox, 24.

An executor bonâ fide invested part of the assets of his testator in the purchase of bank stock. He is not answerable for any further loss than was occasioned by his buying bank stock instead of three-and-half per cent. government stock. *Hynes* v. *Redington*, 1 Jo. & Lat. 589; 7 Ir. Eq. R. 409; Ll. & G. t. Plunk. 33.

Where a will directs dividends to be paid to

the tenant for life at Lady-day and Michaelmas-day, the money was ordered to be invested in the 3 per cents. reduced; the dividends on that stock being payable at that period. *Caldecott* v. *Caldecott*, 4 Madd. 189.

Reduction in Rate of Interest.]—A testator gave a legacy of 12,500*l.* 4 per cent. annuities. At the making of his will there was a stock called new 4 per cents., in which he had a small sum, and a stock called 4 per cents. consolidated, of which he was a holder to a very large amount. Before the death of the testator the latter stock was reduced to 3½ per cent.; another 4 per cent. stock was created. The investment of the legacy is to be made in an existing 4 per cent. stock, and not in the stock which had been reduced to 3½ per cent. *Banks* v. *Sladen*, 1 Russ. & M. 216; Tam. 407; 8 L. J. (o.s.) Ch. 101.

—— **Right of Remainderman.**]—Where the question as to the propriety of an investment by trustees for a tenant for life and remainderman arises between the latter parties, while the court will not, on the one hand, sanction a collusive and fraudulent investment that would have the effect of diminishing the capital to which the remainderman will be entitled on the death of the tenant for life, yet, on the other hand, it is not in the power of the remainderman to require the investment to be made at the lowest rate of interest, in order that the capital may be increased. *Vickery* v. *Evans*, 33 Beav. 376; 3 N. R. 286; 33 L. J., Ch. 261; 10 Jur. (N.S.) 30; 9 L. T. 822; 12 W. R. 237.

Where, however, the trustees are also residuary legatees, and where there is a large discretion reposed in them, and no fraud in the case, it would seem that there is no rule prohibiting an investment of the trust funds at 4*l.* 5*s.* per cent., on sufficient security. *Ib.*

Personal estate was bequeathed to a trustee to lay out upon personal or government security, paying the interest to one for life, remainder as to the principal sum, after the life interest to others:—Held, that upon the bill of the next in remainder, the money not already laid out upon private security must be laid out on government security. *Holmes* v. *Moore*, 2 Moll. 328.

—— **Consols.**]—Although the court will not, except under special circumstances, invest a fund in court in any stock except consols, yet if executors or trustees have power under the will to invest in other government securities, they will not be held liable for a breach of trust for so doing, although the stock in which they invest should be reduced, provided they acted fairly and reasonably. Where a testator gave personal estate to his executors, upon trust to convert the same and to invest the produce in "government or some other good security," and left a sum of navy 5*l.* per cents., which were afterwards reduced to 3*l.* 5*s.* per cents., the surviving executrix, who was also tenant for life, was not held liable for having permitted the fund to remain in that investment. *Baud* v. *Fardell*, 7 De G. M. & G. 628; 25 L. J., Ch. 21; 1 Jur. (N.S.) 1214; 4 W. R. 40.

Words held sufficient to give an option of investing on real security or in consols. *Apsland* v. *Watte*, 25 L. J., Ch. 53; 3 W. R. 526.

Power of executors as to investment of funds under a power to employ them in any manner they should think proper. *Dickonson* v. *Player*, C. P. Cooper, 178; 2 Jur. 870.

Legacy to be Invested in Lands for a Charity.]—Where it appeared upon an information against the Fishmongers' Company, that the company had omitted to invest a legacy directed to be invested in land for the benefit of the charity, but had applied their own funds in aid of the charity to a larger amount than the investment would have produced; the court held, that the neglect to invest the legacy, either in land, or (if that could not be advantageously accomplished) in some separate fund, was a substantial ground of complaint, and directed accordingly such investment as appeared most beneficial to the charity, but refused an inquiry as to the loss alleged, but not shown to have been sustained by the neglect to invest. And, considering that the suit was not instituted for the benefit of the charity, the court directed the defendants to pay the costs, as between party and party, and refused the relators their extra costs out of the charity fund. *Att.-Gen.* v. *Fishmongers Co.*, 1 Keen, 492.

Purchase of Lands.]—Trustees authorised by a settlement to lend the trust fund upon such security as they should think advantageous laid out a portion of the trust fund in the purchase of lands in fee simple; an offer having been made to purchase the lands at a profit, the court directed the purchase to be completed, and the purchase money to be brought into court to the credit of the trust. *Robinson* v. *Robinson*, Ir. R. 10 Eq. 189.

Onus as to Sufficiency of irregular Securities.]—When trustees lend on irregular securities, the onus is on them to show that they were of sufficient value, not on the cestui que trust to show that they were insufficient. *Stretton* v. *Ashmall*, 3 Drew. 9; 24 L. J., Ch. 277; 3 W. R. 4.

Measure of Liability.]—Where executors were declared liable for a breach of trust in allowing leaseholds to be enjoyed by the tenant for life till the expiration of the term, and responsible for the value at the testator's death, and the title to such leaseholds was shown to have been bad, and not marketable:—Held, nevertheless, that the value must be fixed on the footing of the actual enjoyment, and not by the price they would have fetched if sold at the proper time. *Mehrtens* v. *Andrews*, 3 Beav. 72.

Partnership—Change of Members.]—Where a testator directs his trustees to invest certain funds, "either by placing the same on deposit in the hands of" a specified firm, "should they be willing to receive it at interest, but, if not, to invest the trust moneys" as in the will stated; the testator must in the absence of indications of a contrary intention, be held to have placed reliance in the partners at the time his will takes effect; that, consequently, on a change in the membership of the firm, it is the duty of his trustees to call in the trust funds, and they are liable to the beneficiaries for any loss which may occur by reason of their not having done so. *Tucker* v. *Tucker*, 63 L. J., Ch. 223; [1894] 1 Ch. 724; 8 R. 113; 70 L. T. 127; 42 W. R. 266.

Conversion of Bank Shares.]—C. bequeathed 2,000*l.* to trustees upon trust to invest in real

estate; and he then gave certain cottages and hereditaments to the same trustees on the same trusts as he had declared as to the estate to be purchased with the 2,000*l.* He then gave his thirty shares in the Leeds Banking Company to the same trustees upon the same or the like trusts as were declared concerning the 2,000*l.* and the cottages. The banking company failed, and the trustees had paid large sums out of the testator's estate on account of the shares. A suit was instituted for the administration of the testator's estate, and the master of the rolls considered the trustees of the will liable for not having converted the shares:—Held, that the directions for investment contained in the will could not be taken to apply equally to the 2,000*l.* and the cottages, and must be read reddendo singula singulis. The bequest of the bank shares was specific, and the shares need not be converted unless the direction to convert was clear. The court was of opinion that it was not clear, and reversed the order of the Master of the Rolls. *Craven* v. *Craddock*, 20 L. T. 638—L. C.

Power to Sever Fund for Investment.]—A testatrix directed her trustees to pay the interest or annual rent of 2,000*l.* to Mrs. A. during her life, and after her death to divide that sum among her children; and to pay the interest or annual rent of a similar amount to Mrs. B. in life-rent, with the fee to her children. The trustees were empowered by the deed to realise, or to continue to "hold any or all of such shares or stocks" as might belong to the testatrix at her decease, "should they consider it advisable or expedient to do so, without any personal responsibility for loss, if any, thereby sustained": with power also "to lend or place out on such securities, heritable or movable, as they shall consider advantageous, the aforesaid legacies of 2,000*l.* and 2,000*l.* respectively, the securities to be conceived in favour of my trustees, and that for the purposes of this trust and no otherwise." The testatrix at her death held 850*l.* stock of an unlimited bank. The trustees, at the desire of Mrs. A., and without consulting Mrs. B., set 200*l.* of this stock aside as part of the fund appropriated to Mrs. A., and realised the remainder. They afterwards, on the narrative of the purposes of the trust deed, and of the sums invested for the two specific legacies of 2,000*l.*, and that they had paid the residue, received their discharge from Mrs. A. and Mrs. B. Statements and separate accounts of interest on the investments allocated to each were sent half-yearly to Mrs. A. and Mrs. B. All the investments stood in the names of the testatrix's trustees. The bank became insolvent, and calls were made upon the trustees in respect of the 200*l.* stock. They sought to indemnify themselves for payment of the calls out of the whole trust estate. Mrs. B. objected to any portion of her legacy being taken:—Held, reversing the decision of the court below, that the trustees had the power to sever and had severed the two legacies, and had placed them in separate investments for behoof of the respective beneficiaries, and therefore the trustees had no right to relief from the investments allotted to Mrs. B. and her family for liabilities incurred on those allotted to Mrs. A. and her family. *Garland, Ex parte* (10 Ves. 110), followed. *Fraser* or *Robinson* v. *Murdoch*, 6 App. Cas. 855; 45 L. T. 417; 30 W. R. 162—H. L. (Sc.)

Investment in such Securities as the Trustees shall "think fit."]—A power to trustees to invest in such securities as they "think fit" means as they "honestly think fit." *Smith, In re, Smith* v. *Thompson*, 65 L. J., Ch. 159; [1896] 1 Ch. 71; 73 L. T. 604; 44 W. R. 270.

Residue and Wasting Property.]—*See* ESTATE.

Parliamentary Deposits.]—*See* PARLIAMENT.

See also LANDS CLAUSES ACT — SETTLED LAND.

ii. *Discretion of Trustees.*

Statute.]—*Trustee Act*, 1893, *s.* 3.

Power to Change Securities with Consent.]—Discretion of trustees having power to change securities with consent, is not to be controlled by court, unless mischievous and ruinous to that fund. *De Manneville* v. *Crompton*, 1 V. & B. 354; 12 R. R. 233.

Purchase of Railway Stock bearing High Rate of Interest—Securities of a permanent Nature.]—A testator directed his trustees to lay out and invest 15,000*l.* upon Government, real, or personal security, or in such stocks, funds, or shares as they might, in their absolute discretion, think fit, and pay the interest to his wife for life; the capital to be for his children. The trustees, with the sanction of the widow, invested a portion of the money upon railway stock bearing a high rate of interest. Upon her death the securities were greatly reduced in value:—Held, that the trustees were bound to invest upon securities of a permanent nature; that, in the absence of evidence to the contrary, it must be assumed from the rate of interest that these investments were not permanent, and that the 15,000*l.* must be invested for the benefit of the children of the testator. *Stewart* v. *Sanderson*, L. R. 10 Eq. 26; 18 W. R. 278.

Express Direction for Conversion and Investment.]—An express direction, by a testator, for the conversion and for investment of his personal property, from time to time as trustees may think fit, does not necessarily prevent the operation of the general rule of investing in securities approved by the court. *Caldicott* v. *Caldicott*, 1 Y. & C. C. C. 312; 11 L. J., Ch. 158; 6 Jur. 232.

Power to Postpone Sale of Real Estate.]—A testator directed his trustees "as soon as conveniently might be after his decease, to sell his real estates," and invest the proceeds in government or real securities. The trustees postponed the sale for eleven and thirteen years. The value of the estates at the testator's decease was 1,500*l.*, which would then produce 2,630*l.* consols. The estates, however, realised 2,112*l.*, which only produced 2,300*l.* consols:—Held, first that under the terms of the will the trustees had a discretionary power to postpone the sales; and secondly that such discretion had been discreetly exercised. *Warner* v. *Torkington*, 4 L. J., Ch. 193.

Where trustees have a discretion, the test of a negligent breach of trust is what would have been the course of the court under similar circumstances. *Ib.*

Where trustees have a discretion as to what part of the testator's estate may be converted the court will not interfere with such discretion,

at all events after a considerable time has elapsed since it has been exercised. *Sewell's Estate, In re*, 40 L. J., Ch. 135; L. R. 11 Eq. 80; 23 L. T. 835.

Trustees Declining to Exercise Discretion.]—Where trustees are directed to pay a certain sum to a person for life, and are empowered according to their discretion to invest the trust funds out of which that sum is to arise, but decline or neglect to act, and the assistance of a court of equity is sought in order to carry into effect the purposes of the will, the court will not, as a matter of course, exercise that discretion, but will only act on its established and known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding. *Prendergast* v. *Prendergast*, 3 H. L. Cas. 195; 14 Jur. 989.

A testator, after making certain specific bequests, proceeded as follows: "I give and bequeath to my trustees hereinafter named, so much of my personal estate and effects, as, at the time of my decease, shall produce the clear annual income of 1,500*l.*; and I direct that the same shall be selected and appropriated, and set apart, as soon as may be, &c., by my said trustees, in their uncontrolled discretion, upon trust to pay" to his wife the dividends during her life or widowhood; and after her death or second marriage, the same was to become part of his residuary personal estate. He directed that if the annual produce so appropriated should be increased or reduced in amount, his wife was to receive the increased or reduced dividends, as the case might be, in lieu of those before directed to be paid to her. The trustees were fully empowered, at their discretion, to permit the personal estate to continue on the same securities as at the time of his decease, or to sell and reinvest, as the testator himself might do. Some of the foreign funds ceased to pay any dividends, and the trustees refused to exercise their discretion as to altering the investments, but submitted to act as the court should direct. The court refused to exercise the discretion vested in the trustees, but acting on its general rule in such matters (as the testator had not expressed a different intention), directed the annuity to be raised by the purchase of an adequate sum in consols, and ordered the master to inquire, having regard to the interests of other parties under the will, what investments must be called in to effect this object:—Held, that the decree thus made was correct. *Ib.*

Power to Purchase Irredeemable Annuity]—By a will a sum was given to two trustees on trust to pay the income to C. for his life, with a gift over of the principal on his death; but the trustees had a discretionary power to purchase with the principal an irredeemable annuity for the life of C. for his benefit. The trustees did not purchase an annuity, but one of them paid to C. during his life, from time to time, various small sums, amounting in the aggregate to more than the total income, but less than the principal:—Held, that this was a proper exercise of the discretionary power. *Messeena* v. *Carr*, 39 L. J., Ch. 216; L. R. 9 Eq. 260; 22 L. T. 3; 18 W. R. 415.

Discretionary Trusts in General.] — See ante, B. 7.

iii. *Express Powers of Investment with Consent.*

In Funds or on Real Security or in Purchase of Estates—Loan to Bank without Written Consent.]—A marriage settlement recited that it had been agreed that a debt should be assigned to the trustees upon trust, after calling it in, to invest the money upon such security as should be approved of by the husband and his father, either on government, real, or personal security; and by the witnessing part, the debt was assigned upon trust for calling in, and investing the same on government, real, or personal security, or in the purchase of lands at the sole order and by the sole direction, consent, and approbation of the husband and his father or the survivor, and to stand possessed thereof on the trust therein mentioned. Then followed the trusts, and a power in the usual form for the trustees, with the consent of the husband and his father or the survivor in writing, to invest the trust money in the funds, or on real security, or in the purchase of freehold or leasehold estates:—Held, that the last clause controlled and interpreted the former parts of the settlement, and that a loan of the trust fund to a bank in which one of the trustees was a partner on an interest note without a written consent, was a breach of trust constituting a provable debt against the separate estate of the trustee. *Hakewill, Ex parte, Wise, In re*, 2 Mont. D. & D. 607; 6 Jur. 787.

Consols — Sale without Consent.] — Consols were settled to the separate use of the wife for life, with a power to appoint by will, and with a power for the trustees, with the consent of the wife, to alter the securities, such securities to be either real or in the public funds. The trustees, without such consent, sold the consols, and invested the produce in long annuities, which they afterwards sold and lent the money, which was afterwards received by the husband, who invested it in leaseholds. The wife received the long annuities until sold, and afterwards joined her husband in executing a deed, reciting that the sale of the long annuities and the subsequent investments had been with her consent:—Held, that the appointees of the fund under her will were entitled, as against the husband and trustees, to have the consols replaced, and that the interest, over which the wife had a general power of appointment, was not liable to make good the breach of trust. *Kellaway* v. *Johnson*, 5 Beav. 319; 6 Jur. 751.

Power to invest in Freeholds or Copyholds of Inheritance—Purchase of Copyholds for Life without Consent.]—The trustees of a marriage settlement being empowered by it to invest the trust funds in freeholds, or copyholds of inheritance, with the consent of the husband and wife, authorised the husband to purchase a certain estate, as an investment of part of the trust funds, and afterwards they sold out a sufficient part of those funds to pay for the estate, and the husband received the proceeds. The estate was copyhold for lives, and the purchase was made without the wife's consent:—Held, nevertheless, that, as between the husband and the trustees, he must be considered to have purchased the estate for them. *Trench* v. *Harrison*, 17 Sim. 111.

Consent by Tenant for Life just of Age to Inadequate Security.]—Where a tenant for

life gave his consent (as required by the terms of a settlement) to the investment by trustees of trust funds upon a particular mortgage :—Held, that he could not afterwards, on the security turning out inadequate, complain that it was an improper investment ; but, the loss being chiefly attributable to the subsequent mismanagement and negligence of the trustees, that he might recover against the trustees the loss of interest incurred thereby, and that his original consent to the improper investment gave them no counter-claim against the funds in court representing his life interest, in respect of the costs, &c., incurred by them in suits and proceedings instituted on account of the trust funds. *Lockhart* v. *Reilly*, 25 L. J., Ch. 697 ; 3 W. R. 227—L. C.

The consent of the tenant for life was obtained from him by the acting trustee, when he was just of age, in pecuniary difficulties, and without a proper knowledge of the facts, yet the deed which signified such consent never having been set aside :—Held, that the court was bound to treat it as a binding consent. *Ib.*

Funds Invested on Inadequate Security — Consent of Tenant for Life Refused.]—Where trust funds are invested on inadequate security, it is the duty of the trustees to re-invest them, although the written consent of the tenant for life, rendered necessary to any change in the investment, is refused, and the security is one expressly authorised by the trust. *Harrison* v. *Thexton*, 4 Jur. (N.S.) 550.

—— Stock—Sale with Consent of Intended Husband and Wife — Loan without Security.]—Stock was transferred into the names of trustees of a marriage settlement, in trust for the intended wife for life, with trusts over. The trustees had power to sell out the stock and invest it on mortgage or other securities, with the consent of the intended husband and wife. After the execution of the settlement, and before the marriage, the intended wife and husband and the settlor signed a memorandum, requesting the trustees to lend the stock to the owners or lessees of a particular property called V., who at that time were the settlor and two others. The stock was sold out and lent to the three, but no security was taken. The settlor then sold his interest in the property called V. to the other two, who gave a mortgage on the same :—Held, that the loan was a breach of trust on the part of the trustees. A bill was filed by the wife, her daughter, who had attained twenty-one, and her infant children, for the restoration of the stock ; and by the decree the stock was ordered to be brought into court. *Fowler* v. *Reynal*, 2 De G. & Sm. 749 ; 13 Jur. 649. Affirmed, 3 Mac. & G. 500 ; 21 L. J., Ch. 121 ; 13 Jur. 1019.

Suit without Consent of Husband and Wife for Enforcement of Charge on Hotel.] — A marriage settlement empowered the two trustees to vary the investment of the trust funds, "with the consent in writing of the husband and wife." Part of the trust funds consisted of 1,000*l.*, which was a first charge on an hotel and premises, of which the husband was, at the time of the marriage, the sole proprietor. Afterwards, the hotel was destroyed by fire, but was rebuilt on the same site, enlarged by the addition of adjoining ground. Subsequently the husband became bankrupt, and one of the trustees became, by purchase, sole proprietor of the new hotel and premises. The other trustee filed a bill against him, and against the assignees in bankruptcy of the husband, and prayed that the 1,000*l.* might be raised by a sale of the premises. It did not appear that the consent of the husband and wife had been obtained : —Held, that the want of the consent could not fetter the action of the court, which, if satisfied that the existing security was insufficient, was bound, independently of any consent, and in order to protect the interests of all the cestuis que trust, to require that the money should be called in and properly invested ; and the court decreed that the 1,000*l.* should be raised out of the premises on which it was charged. *Costello* v. *O'Rorke*, Ir. R. 3 Eq. 172.

Another portion of the trust funds consisted of 1,000*l.*, which was paid in cash to the two trustees, who, in breach of trust, invested it in ordinary railway shares. Thereby a loss was sustained ; and the trustees, in further breach of trust, transferred these shares to the N. Bank, to secure the private debt of the husband, the tenant for life. Subsequently O., one of the trustees (without the knowledge of his co-trustee), procured an assignment (for a nominal consideration) of those shares to two persons who became trustees thereof for the R. Bank, which had made to the husband large advances, the full amount of which was secured by the guarantee of O. A week after this assignment, the amount of the husband's debt to the N. Bank was paid by a cheque on the R. Bank, which, before the transfer of the shares was lodged with it, cashed that cheque out of the original credit given to the husband. These shares were sold, without the other trustee's knowledge, for 592*l.* 10*s.*, which sum was applied in reducing the debt due by the husband to the R. Bank. O. obtained from the husband mortgages of the hotel, furniture, &c., to the amount which covered the whole sum guaranteed by him to the R. Bank :—Held, that O. was, as between him and his co-trustee, primarily bound to replace the 592*l.* 10*s.* *Ib.*

Debt to be Called in and Invested at Request of Settlor—Payment by Debtor to Trustees without Request.]—A., on her marriage, assigned a debt due to her from B. to three trustees, upon trust, when requested by her to call it in and invest it, and hold it in trust for A., her husband and children. B., with full notice, but without such request, paid part of the money to the husband by order of the trustees, and other part to the trustees for the express purpose of being advanced to the husband in breach of trust. The money was lost :—Held, that B., as well as the trustees, was responsible for the breach of trust. *Andrews* v. *Bousfield*, 10 Beav. 511.

Part of Trust Fund Outstanding on Husband's Note of Hand.]—Trustees of a marriage settlement were empowered, with consent of the husband and wife, to invest the funds on such security, "either real or personal," as they, with such consent, should think proper. At the date of the marriage a sum of 2,500*l.*, part of the trust funds, was outstanding on the note of hand of the husband, having been advanced to him by the intended wife prior to the marriage. A separation having taken place, but the wife, nevertheless, desiring that the fund should remain in the husband's hands :—Held, that this investment might be continued until further order on the husband executing a bond

to the trustees for the amount. *Picard* v. *Anderson*, L. R. 13 Eq. 608 ; 26 L. T. 725.

Re-Investment without Consent in Railway Debentures.]—By a settlement, the trustees were authorised to invest the trust money in debentures, preference shares, or other securities, issued or guaranteed by any incorporated public company paying a dividend, or guaranteed income; and, with the consent in writing of the tenant for life (notwithstanding her coverture), to alter, vary and transpose the funds and securities from time to time. The trustees, without any consent, invested the trust money in debentures of a railway, which were afterwards paid off, and the money then received was, in like manner, reinvested in debentures of another line. The dividends on that line were guaranteed by the contractors of it. The tenant for life and her husband joined in signing the receipts for the dividends from the latter investment, till the contractors failed, when the line ceased to pay anything. The wife died ; but after her death the husband received a dividend from the subsequent investment. On a bill by him against the trustees of the settlement, to make them liable for a breach of trust:—Held, that the previous consent in writing of the wife was not required to an investment by the trustees ; and that he could not make them liable for a breach of trust. *Stevens* v. *Robertson*, 37 L. J., Ch. 499 ; 18 L. T. 427 ; 16 W. R. 724.

Prayer for Payment of Trust Moneys — Form of Decree.]—The husband was entitled under the settlement to the trust funds for his life ; and under his wife's will to the absolute interest in them in remainder (subject to the payment thereout, on his death, of certain legacies). He, as the executor of his wife's will, wished to pay the legacies forthwith, out of the settlement moneys ; and for that purpose to have those moneys paid to him on his undertaking to satisfy the legatees :—Held, that the proper decree was to declare the trust funds bound by the trusts of the settlement and the will, with liberty to all parties interested to apply. *Ib.*

iv. *Advancement of Trust Funds to Husband.*

a. Express Power.

Advance without Written Consent.]—By a marriage settlement the interest of a trust fund was limited to a wife for life, for her separate use, with power to the trustees, upon her consent in writing, to advance the trust fund to her husband, upon the security of his bond ; if the trustees, with consent of the wife, advance the fund to the husband, but without her written consent, and without the husband's bond, and if the trust fund be lost by his subsequent bankruptcy, the trustees are not entitled to be indemnified to the extent of the wife's interest. *Cocker* v. *Quayle*, 1 Russ. & M. 535.

[[—— **Acquiescence.**]—By a marriage settlement, 700*l.* then in the hands of H., was agreed to be transferred to the joint account of H. and two other trustees, to be held by them upon trust to pay the same to the lady at her request in writing, and, subject thereto, upon trust, for her separate use, and on her death, as she should by will appoint, with certain trusts over in default. The money was left for many years, with the lady's acquiescence, in the hands of H., who advanced to the husband the greater part of the principal, as to 200*l.* with the lady's knowledge, but not by her request in writing :—Held, that H. was liable to replace the 500*l.* but no more, and that the lady was disentitled to relief against the other trustees by reason of acquiescence. *Jones* v. *Higgins*, 35 L. J., Ch. 403 ; L. R. 2 Eq. 538 ; 14 L. T. 126 ; 14 W. R. 448.

Power to trustees to advance to A. 1,000*l.* with consent of B. under her hand, signed by two witnesses. Trustees advance the sum without consent. Subsequent acquiescence by such deed not sufficient, and trustees ordered to refund. *Bateman* v. *Davis*, 3 Madd. 98 ; 18 R. R. 200.

Prospective Consent.] — Trustees were empowered by a settlement to lend the trust funds to the husband, with the consent in writing of the wife. They lent him part of the funds, the wife by deed consenting to that loan and to the loan of the remaining trust moneys at such times and in such proportions as the husband might require, and the husband covenanting to repay the loan then made in six months on demand. Further parts of the trust moneys were advanced. The moneys advanced were all lost by the insolvency of the husband :—Held, that the trustees were not bound to call in the money at the end of six months, the form of the wife's consent showing that she sanctioned the loan for an indefinite time. Held also that the wife could not give a prospective consent, but her consent was necessary to each particular loan. *Child* v. *Child*, 20 Beav. 50.

Subsequent Consent—Bankruptcy of Debtor.]—Trustees of a marriage settlement held a bond of the husband for securing 6,000*l.* six weeks after the marriage. The trusts were to permit the money to remain on this security with the written consent of the wife and her husband, or to call in and invest the same upon government security with the like consent. The trustees without any written consent, permitted the money to remain upon the bond, and the husband became bankrupt. A composition was made by him of 16*s.* 6*d.* in the pound, and paid to the other creditors, and the fiat was annulled, the trustees being consenting parties. They did not receive the composition of 16*s.* 6*d.* on the 2,000*l.*, and the husband again became bankrupt. The trustees after the first bankruptcy obtained the wife's written consent that the money should not be called in. The whole was ultimately lost, although it was proved that 16*s.* 6*d.* in the pound might have been recovered :—Held, that the trustees were liable for the whole amount of the 2,000*l.* *Wiles* v. *Gresham*, 5 De G. M. & G. 770 ; 3 Eq. R. 116 ; 24 L. J., Ch. 264 ; 3 W. R. 87.

By a clause in a marriage settlement, trustees were empowered and required, at the request in writing of the wife, to advance part of the trust moneys to the husband, on the security of his bond. After the marriage, the husband was arrested, went to prison, and took the benefit of the Insolvent Debtors Act. The wife then applied to the trustee for a loan to the husband, according to the terms of the settlement :—Held, that such a change had taken place in the circumstances of the husband, as rendered the clause inapplicable to him, and consequently

that the trustee was justified in refusing to lend the money. *Boss* v. *Godsall*, 1 Y. & C. C. C. 617; 11 L. J., Ch. 391; 7 Jur. 146.

b. Concurrence of Wife.

Trust Property Transferred to Husband with Consent of Wife.]—Stock was settled on a wife, for her separate use, for life, with a power of appointment by will. The trustees, at the request of the husband and wife, sold out the stock, and paid the proceeds to the husband, who afterwards became bankrupt. The wife filed a bill to compel the trustees to replace the stock, and obtained a decree, under which the trustees transferred part of the stock into court, and they were allowed time to transfer the remainder. The wife died, having by her will appointed the stock to her husband, and appointed him her executor. He filed a bill of revivor and supplement against the trustees, and his assignees, claiming the stock under the appointment, and praying the same relief as his wife might have had. But, as he had received the proceeds of the stock sold out, his bill was dismissed. *Nail* v. *Punter*, 5 Sim. 565.

—— **On Release and Joint Bond of Indemnity.**]—By settlement before marriage it was agreed, that 2,000*l.* in the hands of a trustee should be laid out in land, to the use of the husband for life, then to the wife for life for her jointure, and to the children equally; and in default of issue, to the wife in fee; and if he survived, to him in fee. The husband and wife being necessitous, the trustee paid them 600*l.* on a release, and their joint bond of indemnity, and afterwards 400*l.* on a like bond, and a new agreement that the remaining 1,000*l.* should be laid out in an annuity, for the separate use of the wife, during coverture, and in fee in case of survivorship. The trustee afterwards paid the husband the remaining 1,000*l.*; then he died without issue, and left his wife destitute. Upon a bill by the wife against the trustee's representative, upon this breach of trust, and to be paid what should be due to her for the 2,000*l.*, the parties, on the recommendation of the lord chancellor, agreed to pay the wife 100*l.* per annum for life, tax free, together with the costs, which was ordered accordingly. *Thayer* v. *Gould*, 1 Atk. 615.

Settlement upon marriage, of stock, the property of the wife, in trust from time to time to receive the dividends, and to pay them into the hands of the wife, for her sole and separate use; her receipt to be a discharge; after her decease, if the husband should survive, for him for life; and after the decease of the survivor, to transfer the principal among the children, according to her appointment by will; in default thereof, equally; if no children, according to her appointment by will. The trustees, with the privity of the wife, sold the stock, and paid the money to the husband, taking his bond of indemnity: he died insolvent. Upon the bill of the widow and children, the fund having been replaced by the trustees was transferred to the accountant-general upon the trusts of the settlement; the trustees to pay the dividends to the widow from the death of the husband with costs. *Whistler* v. *Newman*, 4 Ves. 129. See, as to the authority of this case, 5 Ves. 17 n. and 694 n.

A sum of money charged upon lands was, by a marriage settlement, assigned to trustees, to pay the interest to A., the husband, for his life, and after his death to pay the wife a jointure of 200*l.* a year; provided that it should be lawful for A., with the consent of the trustees, in writing, to call in the fund, and lay out and dispose of the same in the purchase of an estate of inheritance or freehold, for a term of at least three lives, or of a lease for a term of years, whereof ninety-nine years shall be unexpired, or otherwise advantageously, which purchase or disposal, when so made, should be settled and vested to the several uses, trusts, intents, and purposes thereinbefore mentioned in respect to the said sums. A portion of the fund was paid to the surviving trustee, who lent it to A., on a release being executed by A. and the wife B. and C. their son, and acknowledged by her:—Held, after the death of A., in a suit by B. to replace the trust fund, that the release as to her was inoperative. *Smithwick* v. *Smithwick*, 12 Ir. Ch. R. 181.

—— **On Bankruptcy of Husband Interest cannot be Proved for.**]—Where trustees under marriage settlement lend wife's money to husband with her consent, and husband becomes bankrupt, they cannot, on behalf of wife, prove for interest of money, but only for the principal; she having been supported by husband since marriage; upon the principles applicable to wife's pin-money. Semble, secus, if they prove to save themselves from consequences of their own act, her consent not having been given. *Green, Ex parte*, 2 Deac. & C. 113; 2 L. J., Bk. 2.

—— **Transfer into Name of Wife.**]—A testatrix gave a sum in stock to a feme covert, to be transferred into her name, the dividends to be for her sole and separate use, the principal remaining in the executors' hands until her youngest child attained twenty-one, when it was to become her own, or in case of her demise to devolve to her husband. The trustees transferred the stock into her name alone, and she with her husband sold it out, and both signed the transfer:—Held, to constitute a breach of trust, and the trustees were ordered to bring the fund into court, but that the wife had made a valid disposition of the dividends to accrue until the youngest child, born after the death of the testatrix, attained twenty-one. *Crosby* v. *Church*, 3 Beav. 485; 10 L. J., Ch. 212; 5 Jur. 50.

—— **Covenant by Husband to Settle After-Acquired Property.**]—In his marriage settlement, a husband covenanted that any after-acquired property, exceeding 200*l.*, should be settled in the same manner as certain sums therein mentioned. The husband, as next of kin, became, in 1848, entitled to a sum exceeding the above amount, and he induced the administrator, who had notice of the trust, to pay the whole to him, the wife consenting, and signing a memorandum at the time. The husband died in January 1862, and in December following the the surviving trustee of the settlement, in conjunction with the widow, filed a bill for a declaration that the estate of the administrator (he having died in 1853) was, in the hands of his representative, liable to make good the sum paid to the husband; and the court held that the widow was entitled to have raised out of real estate of the administrator (his personal estate having been fully administered) a sum sufficient to provide her an annuity equal to the interest of the misapplied fund; and that the right of the trustee of the settlement to sue was not barred by the statute of limitations. *Cresswell*

v. *Dewell*, 3 N. R. 148 ; 10 Jur. (N.S.) 354 ; 10 L. T. 22 ; 12 W. R. 123.

Right of Trustees to be Recouped—Restitution of Fund by Husband.]—The trustee of a marriage settlement concurred in a breach of trust, by lending the fund to the husband, on a security not warranted by the settlement:—Held, that the representatives of such trustee could maintain a bill against the husband and the cestui que trust, for the restitution of the fund. *Greenwood* v. *Wakeford*, 1 Beav. 576 ; 8 L. J., Ch. 333.

A trust fund settled on husband, wife, and children in succession, was received by the husband and lent by him to his brother. A bill by one trustee against the other trustee, the husband and wife, and omitting the brother and children :—Held, sustainable, and a decree was made against the husband, reserving all rights against the brother and the trustees. *Hughes* v. *Key*, 20 Beav. 395.

The co-trustee, who had not joined as co-plaintiff, refused his costs. *Ib.*

By a marriage settlement of 1832, real and personal estate of H., the intended wife, was conveyed to trustees in trust for R., the intended husband for life, and after the death of the survivor of R. and H., in trust for the children of the marriage, as R. and H. or the survivor should appoint, and in default of appointment for the children equally. The trustees allowed R. to obtain possession of the trust fund, which he mixed with moneys of his own, and in 1861 one of the trustees commenced a suit to compel him to replace the fund. By arrangement of the trustees with R., he and H., by deed of the 25th September, 1861, irrevocably appointed the fund equally among the children, four of whom were of age, and one (the plaintiff) a minor. On the following day the four adult children, and two years afterwards the plaintiff, when of age, executed a deed releasing the trustees from the trusts of the settlement. The children executed the release by the direction of their father, without any professional advice or assistance, and in ignorance of its contents or effect, and of their rights under the settlement. R. from time to time paid sums of money for the plaintiff; he purchased for the plaintiff a commission in the army, paid for his outfit, &c., made him an adequate yearly allowance, and paid a large sum for his promotion. No one of the sums so advanced was equal in amount to the plaintiff's share of the trust fund, nor was there any evidence that it was stated at the time of the advances, or understood between the plaintiff and R., that they were made out of the trust fund in R.'s hands:—Held, first, that the release should be set aside; second, that R.'s position was that of a debtor to his five children for their respective shares of the trust fund; third, that the sums advanced being respectively less in amount, that the plaintiff's share was not a satisfaction of it, pro tanto, and that R. was not entitled to credit for them. *Reade* v. *Reade*, 9 L. R. Ir. 409.

The trustees of a marriage settlement permitted the husband to retain the trust funds, which he appropriated to his own use. One of the trustees ultimately became entitled under the settlement to half the trust funds:—Held, that the estate of the husband was liable to refund his moiety. *Butler* v. *Carter*, 37 L. J., Ch. 270 ; L. R. 5 Eq. 276 ; 18 L. T. 11 ; 16 W. R. 388.

The trustees of a fund settled on a husband for life or until insolvency, and then to his wife for life for her separate use, at the solicitation of her husband, and with the concurrence of the wife, committed a breach of trust by lending part of the trust funds to the husband, who afterwards became an insolvent. In a suit against the trustees, charging them with a breach of trust, the husband and wife being parties to the suit:—Held, that the court could make a declaration that the husband should recoup the trustees the amount which they were liable to make good to the trust funds; and that a cross-bill by the trustees was not necessary. *Keays* v. *Lane*, Ir. R. 3 Eq. 1. And see *Nail* v. *Punter*, supra, col. 669.

—— **Reversionary Interest of Wife.**]—Held, also, that the husband not being in insolvent circumstances at the time of the loan, his wife's separate estate in the trust fund was then reversionary; and, therefore, as it could not then be bound by her, it was not available to recoup the trustees. *Ib.*

—— **Contingent Interest of Wife for Separate Use.**]—A money fund belonging to the wife was vested in trustees, upon trust to pay the interest to the husband for his life, or until he should take the benefit of any act for the relief of of insolvent debtors; and, after his decease, or obtaining the benefit of such act, upon trust to pay the interest to the wife for her life, the same to be paid to her, in case of the insolvency of the husband, to her separate use, and, after her decease, in trust for the issue. The trustees, at the instance of the wife, committed a breach of trust, by lending part of the trust funds to the husband, who afterwards was discharged as an insolvent. Upon a bill by the wife and her children to make the trustees answerable for the breach of trust:—Held, that the contingent interest of the wife for her separate use was not bound to make good to the trustees the money so advanced. *Mara* v. *Manning*, 2 Jo. & Lat. 311 ; 8 Ir. Eq. R. 218.

Quære, whether her life interest, after death of husband, was so bound. Semble, if the discharge of husband as an insolvent had been concerted with her so as to get a present interest, and defeat the equity of the trustees, they would be entitled against her. *Ib.*

—— **Power of Appointment to Wife.**]—Trust money was settled on a married woman for life for her separate use, without power of anticipation, but with power to her to appoint the capital after her death by deed. The trustees lent part of the trust money to the husband on mortgage, and she consented to the investment by the mortgage deed. Part of the trust money having thereby been lost:—Held, that the wife had not, by executing the deed, appointed the reversion, so as to make it liable for loss. *Fletcher* v. *Green*, 33 Beav. 426.

Trustees committed a breach of trust, by lending trust moneys on mortgage; they instituted a suit to realise their security, in which the property was sold, and the produce paid into court and invested. In taking the accounts, they were debited with the cash, and not with the investment. On further directions, the stock was ordered to be sold, and the produce, after payment of the costs, was paid to the trustees. The funds having risen, there was a gain of

251*l.* by the investment: — Held, that the trustees were entitled to the benefit of this sum, in discharge of their liabilities. *Ib.*

v. *Purchase of Land.*

Statute.]—*Trustee Act*, 1893, *s.* 6.

Power to Purchase Land—Real Estate Purchased partly with Testator's Money.]—Personal estate was given to executors in trust to invest 50,000*l.*, part thereof in the purchase of land to be conveyed to the use of a nephew, with remainders over, and as to a considerable residue, in trust for his nephew as residuary legatee. The executor did not prove, and the residuary legatee became administrator with the will annexed, and purchased several estates, partly with money of the testator, in his own name, at prices amounting to 49,773*l.* He subsequently improved one of these estates so that it was worth 60,000*l.*, and by his will gave it to the tenant in tail in remainder of the estates directed to be purchased, on condition that he should accept it in satisfaction of all claims under the original will: — Held, that the estates purchased for 49,773*l.* were purchased in execution of the trust for investment, and that the condition was nugatory. *Mathias* v. *Mathias*, 3 Sm. & G. 552; 3 Jur. (N.S.) 429.

Trustee for the purchase of land died without personal assets, but, having purchased land, the estates purchased were held not liable to the trust, the circumstances affording no presumption that they were purchased in execution of the trust. *Perry* v. *Phelips*, 17 Ves. 173.

J. S., by will, left 8,784*l.* to A. in trust, to be invested in lands, and settled on herself for life; remainder to the heirs of B. A decree was had against A., to lay out the money in lands, and to settle the same according to J. S.'s will. A. purchased lands to the value of 3,300*l.*, and devised those lands to C. (who was heir-at-law to B.) and her heirs, and gave several legacies, which could not be paid if the devise were not to be taken as part satisfaction, and for that reason it was decreed. *Gibson* v. *Scudamore*, Select Ca. Ch. 63.

Trustees, with the consent of A. B., the tenant for life, had a power to sell the trust estate, and invest the produce in other real estate. In 1810, A. B., with the concurrence of the trustees, sold the estate for 8,440*l.*, and received the purchase money. About the same time (but whether with the concurrence of the trustees was not proved), A. B. purchased another estate for 17,400*l.* Of the 8,440*l.*, 8,124*l.* was paid by A. B. in part payment of the second estate; the remainder was partly paid out of A. B.'s monies, and partly by money raised by a mortgage of the estate. The estate was conveyed to A. B. in fee. No acknowledgment or declaration of trust was ever made by A. B., and he retained possession of the estate till thirty years after, when he became bankrupt. The court, against A. B.'s assignees, presumed, under these circumstances, that the purchase had been made under the power for the benefit of the trust, and held that there had been no such adverse possession, and no such acquiescence on the part of the trustees, as to preclude the court making a declaration that they had a lien on the estate to the extent of the trust monies invested in its purchase. *Price* v. *Blakemore*, 6 Beav. 507.

Purchase of Equity of Redemption.]—A power to trustees to purchase freehold or leasehold hereditaments does not authorise a purchase of an equity of redemption in land. *Worman* v. *Worman*, 43 Ch. D. 296; 61 L. T. 637; 38 W. R. 442.

"Irish Land"—Liverpool Corporation Stock.]—Where a testator gave all his personal estate to executors to be sold, and directed them out of the proceeds to buy land in Ireland, and in the meantime the executors had invested part of the proceeds in Liverpool Corporation stock; on an originating summons, asking for directions as to the investments, and for an order permitting the applicant to delay or postpone making any investment in Irish land:—Held, that the Liverpool Corporation stock was not an investment authorised by the joint operation of s. 21 of the Settled Land Act, 1882, and s. 17 of the Local Authorities Loans Act, 1875. Further, that it was imprudent for the trustees to invest money in Irish land, and it was their duty to retain it until such time as it was prudent to carry out the directions of the testator, and that the court had jurisdiction to postpone such investment under s. 33 of the Settled Land Act, 1882. *Maberly, In re, Maberly* v. *Maberly*, 56 L. J., Ch. 54; 33 Ch. D. 455; 55 L. T. 164; 34 W. R. 771.

Fixed Rent-charge—Freehold Estate subject to a Long Term.]—By private act, money was directed to be laid out in the purchase of freehold lands, tenements, or hereditaments, and the fee simple and inheritance thereof, which might be approved by this court:—Held, first, that the purchase of a fixed rent-charge was not a proper investment; and secondly, that the purchase of a freehold estate, subject to a term of 1,000 years, at a fixed rent, was equally objectionable. *Gartside, Ex parte*, 6 L. J., Ch. 266.

Freehold Ground Rents.]—A power to invest trust funds in the purchase of hereditaments of a clear and indefeasible estate of inheritance in fee simple in possession, authorises an investment in freehold ground rents. *Peyton's Settlement, In re*, 38 L. J., Ch. 477; L. R. 7 Eq. 463; 20 L. T. 728.

Copyholds for Life.]—The trustees of a marriage settlement being empowered by it to invest the trust funds in freeholds, or copyholds of inheritance, with the consent of the husband and wife, authorised the husband to purchase a certain estate, as an investment of part of the trust funds, and afterwards they sold out a sufficient part of those funds to pay for the estate, and the husband received the proceeds. The estate was copyhold for lives, and the purchase was made without the wife's consent:—Held, nevertheless, that, as between the husband and the trustees, he must be considered to have purchased the estate for them. *Trench* v. *Harrison*, 17 Sim. 111.

Mines and Minerals.]—A testator directed his trustees to invest certain funds in the purchase of lands to be held with others devised in strict settlement:—Held, that they might invest in the purchase of the mines and minerals under part of the settled estates. *Bellot* v. *Littler*, 30 L. T. 861; 22 W. R. 836.

No Purchase within Reasonable Time.]—

Where trustees who are directed by will to purchase land within a reasonable time (a year being taken as the limit of such reasonable time), do not purchase within one year, the party who would have been entitled to the land to be purchased is entitled to interest on the fund provided for that purpose. *Parry* v. *Warrington*, 6 Madd. 155; 22 R. R. 264.

Directions by will to lay out personal estate, consisting of Bank and East India stock, and moneys standing on other funds and securities, in the purchase of land to be settled to certain uses; whether the stock and funds, not being consols, ought to be sold and invested in consols during the interval which elapsed before the purchase of lands was found, quære. *Sowerby* v. *Clayton*, 3 Hare, 430; 8 Jur. 597.

Purchase of Lands in Scotland.]—A testator gave various annuities, which he directed to be secured in the public funds, and that as they respectively fell the principal should be added to the residue of his fortune, and be disposed of by his executors, as after directed, for the benefit of the heirs, under a bond or deed of entail therein mentioned. He then gave some legacies, and directed his executors to consolidate into one fund the whole of his fortune and movables, which fund they were to lay out in purchasing lands in Scotland, to be entailed upon the series of heirs specified in the bond and deed of entail already mentioned:—Held, that the first year's clear annual proceeds of the executory estate from the death of the testator, it being invested in consols, was properly paid by the executors to the first heir under the deed of entail. *Macpherson* v. *Macpherson*, 16 Jur. 847.

—— **Whether Heir Entitled to Interest on Money until Invested.**]—Trust fund directed by the testator to be invested by the trustees after his death in the purchase of lands, to be settled on certain persons mentioned:—Held, that after the period of twelve months from the time of testator's death, the interest of the trust fund, until it should be invested in land, was given to those who would be successively entitled to the rents and profits of the lands when purchased; this being a rule founded on the primary intention of the testator, and resting on principles common to the laws both of England and Scotland. *Stair (Earl)* v. *Macgill*, 1 Bligh (N.S.) 662; 1 Dow & Cl. 24—H. L. (Sc.)

Money directed to be laid out in Purchase of Lands—Rebuilding Mansion House.] — A testator devised real estates in strict settlement, and directed his residuary personalty to be laid out in the purchase of lands to be settled to the same uses. After the date of the will, the testator executed a deed whereby he assigned specific personalty to a large amount to the same persons, whom he named as the trustees and executors of his will, upon trusts (not referring to, but) corresponding with, and only in a remote contingency differing from, those of the will. The mansion-house having been pulled down, and requiring to be re-built, the tenant for life proposed that, out of the specific personalty fund settled by the deed, 24,000*l.* should be advanced to him to pay for the re-building, and that out of the same fund 40,000*l.* should be set aside, and the dividends accumulated for twenty years, until an amount of 24,000*l.* should be saved, with which the same fund should be recouped:—Held, that the court had jurisdiction to make the order. *Donaldson* v. *Donaldson*, 3 Ch. D. 743; 34 L. T. 900; 24 W. R. 1037.

A testator devised his mansion-house and other real estate to trustees for the term of 1,000 years, upon certain trusts, and, subject thereto, he devised the same upon legal limitations, under which the plaintiff was tenant for life. Shortly after the testator's death the mansion-house was burnt down. The sole acting trustee had expended, in addition to insurance moneys, a sum of 2,000*l.* in re-building the mansion-house, which amount he had borrowed on his own personal security and on a charge of the estate. It was admitted that this expenditure was very beneficial to the estate, and that the value thereof was increased. There were in court sums of consols, arising from the sale of part of the estate, and such funds were liable to be re-invested in land. By the decree in the action an inquiry had been directed as to what sum was necessary to complete the restoration of the mansion-house, and how the same ought to be raised, but no formal order was made sanctioning the raising of a loan for the purpose. A petition was presented by the personal representative of the trustee, asking that the funds in court might be sold, and that such further sum as, with the proceeds of such sale, would make up the 2,000*l.* borrowed by the trustee, might be raised by mortgage or sale of the settled estate, in order to enable such loan to be repaid:—Held, that the court had no jurisdiction to order a mortgage or sale of the settled estate, or to authorise the expenditure for the proposed purpose, even of moneys which were subject to a trust for re-investment in land; but it appearing that the estate had been benefited by the outlay of the trustee to the full amount of the funds in court, and that the outlay had been bonâ fide made under the impression that it would be repaid out of the estate, the court would, although considering the conduct of the trustee irregular, order that he should be recouped his outlay to the extent of the funds in court, but no further. *Jesse* v. *Lloyd*, 48 L. T. 656.

Devise of lands to successive tenants for life, and then in strict settlement, with a condition that "he or they" should reside in the mansion-house on the lands, and a declaration of forfeiture in case of non-residence. The first tenant for life, who was a married woman, was named as such in the will:—Held, that on breach of the condition by her the estate for life was forfeited. *Dunne* v. *Dunne*, 3 Sm. & G. 22; 30 Beav. 363; 7 De G. M. & G. 207; 3 Eq. R. 760; 1 Jur. (N.S.) 176, 1056; 3 W. R. 256, 380.

—— **Improving and Repairing Mansion-House.**]—Held, also, that although the mansion-house was inadequate to the income of the devised property, and was also dilapidated, the tenant for life was not authorised to employ towards improving or repairing the mansion-house any part of the capital of funds directed by the testator to be laid out in the purchase of lands to the same uses. *Ib.*

—— **Re-building Parsonage-House.**] — A nobleman directed his trustees to lay out his residuary personalty in the purchase of land to go along with certain settled property. The settled property comprised an advowson, of which the parsonage-house was, at his death,

in a ruinous state, and he was about to re-build it :—Held, that the trustees might properly lay out part of the residuary personalty in re-building the house. *Hotham (Lord), In re*, L. R. 12 Eq. 76.

—— **Rebuilding House—Restitution of Funds—Consent and Acquiescence.**]—Under a marriage settlement a wife was entitled to the income of the trust property for life, for her separate use, without power of anticipation. The settlement contained a power to the wife to appoint 10,000*l.*, and the trustees were empowered to invest in the purchase of lands. It appeared from the evidence that after the marriage the wife contemplated a gift of capital to her husband, and from the first she permitted her husband to receive the income of the whole trust property. In pursuance of the power in the settlement, the wife appointed that a sum of East India Stock (of the value of 10,000*l.*) should be transferred to her husband and herself, for his and her own absolute use and benefit. This sum of stock was sold by the husband at four different times ; the wife joined in the transfers of the stock ; the husband received the proceeds of sale, and applied them to his own purposes. The husband subsequently borrowed two sums of 8,000*l.* and 5,696*l.* from the trustees of the settlement to enable him to make purchases of real property ; these sums were secured by a deposit of title deeds. The husband also rebuilt a house on the property in settlement, with the consent of the trustees, and sought to have 2,000*l.* in respect of such improvements allowed in account as against the sum of 8,000*l.* due from him. In an action against the husband and the trustees, commenced by the wife and continued by her executors :—Held, that the 2,000*l.* expended in building could not be considered as sanctioned by the power to invest in land ; and that the two sums of 8,000*l.* and 5,696*l.* must be repaid, but without interest ; and that the executors of the wife were not debarred from obtaining the restitution of the trust funds by the alleged acquiescence of the wife in the breaches of trust. *Hale* v. *Sheldrake*, 60 L. T. 292.

—— **Permanent Drainage and Erection of New Farmhouses.**]—A testator devised his residuary personalty to the trustees of a settlement to be held and applied as moneys arising from the sale of any of the settled estates. The settlement directed that the moneys to arise from the sale of any of the settled estates should be laid out in the purchase of other lands to be settled to the same uses :—Held, that the trustees might apply the residuary personalty in making good sums expended by them in the permanent drainage of part of the settled estates, and in the erection of new farm buildings on other parts of the estates. *Leslie's Settlement Trusts, In re*, 45 L. J., Ch. 668 ; 2 Ch. D. 185 ; 34 L. T. 239 ; 24 W. R. 546.

Trustees of a settled estate having, out of moneys in their hands, in trust to be laid out in lands to be settled to the same uses, purchased a farm for 20,000*l.*, the court, in an action, authorised 1,000*l.* of the same moneys to be applied in repairing, improving, and rebuilding the farm buildings and cottages upon the purchased lands. *Cowley (Lord)* v. *Wellesley*, 46 L. J., Ch. 869.

When the rents of real estate devised in strict settlement were directed to be accumulated during the minority of any person who should become tenant for life, and the accumulated fund and interest thereon were from time to time to be invested in the purchase of other lands to be settled to the same uses :—Held, that no part of such accumulated fund could be applied, at the instance of a tenant for life, in necessary repairs and improvements on the estate. *Brunskill* v. *Caird*, 43 L. J., Ch. 163 ; L. R. 16 Eq. 493 ; 21 W. R. 943.

—— **New Buildings.**]—Moneys, which under the trusts of a will, settlement, or private act of parliament, are to be invested in the purchase of land, as well as moneys to be invested under the Settled Estates Act or the Lands Clauses Act, may be properly employed in the erection of new buildings on land settled to the same uses, provided the court is satisfied that it is beneficial to the estate ; but repairs and permanent improvements do not come within this principle. *Drake* v. *Trefusis*, L. R. 10 Ch. 364 ; 33 L. T. 85 ; 23 W. R. 762. S. P., *Venour's Settlement, In re*, 45 L. J., Ch. 409. And see *Newman's Settled Estates, In re*, 43 L. J., Ch. 702 ; L. R. 9 Ch. 681.

Proceeds of Sale of Timber—Building a Farmhouse.]—An estate was settled with a direction that the proceeds of the sale of timber should be laid out in land, to be settled to the like uses :—Held, that a sum produced by the sale of timber could not be laid out in building a farmhouse, as a permanent improvement of the settled estate. *Poulett (Earl)* v. *Somerset*, 25 L. T. 56 ; 19 W. R. 1048.

A trust fund is created by will to be laid out in the purchase of lands : an estate is purchased, and trust money is laid out in repairs and improvements ; this is a misapplication, and shall not be allowed. Part of the trust money was sold out just before a dividend was payable ; no allowance can be made to the tenant for life (who would be entitled to the dividend) in the price. Where a trustee sells out trust money, the cestui que trust may elect whether he will have it replaced, or be paid the produce of it. *Bostock* v. *Blakeney*, 2 Bro. C. C. 653.

Direction to Purchase Land in a particular County.]—Where a testator orders his money to be laid out in land in a particular county, and his trustees cannot purchase in that county, the court, after a convenient time, will deviate from the strict terms of the trust. So, where trustees cannot purchase a freehold without great disadvantage, unless they take a college-holding with it, the court will dispense with the strict directions of the will. *Maynwaring* v. *Maynwaring*, 3 Atk. 414.

Trustees for Sale of Building Land—Other Lands to be Purchased with Proceeds.]—By a private act of parliament certain settled estates, of which the ultimate remainderman was an infant, were vested in the plaintiffs as trustees for sale, with directions to sell the same for building purposes, and lay out the proceeds in the purchase of other lands, to be settled to uses similar to those declared by the settlement with respect to the lands sold, and to pay over the surplus, if any, to the tenant for life. The act did not contain any express power to the trustees to expend any part of the trust funds in laying

out the property in lots, or in making roads :—Held, that the trustees ought, and that it was to be understood that the legislature intended that they should have the power of doing that which was necessary to effect the purposes pointed out by the act, viz. the power of making roads, and dividing the property into lots for sale. *Cookson* v. *Lee*, 23 L. J., Ch. 473—L.JJ.

Solicitors for trustees for sale purchased part of the trust property and mortgaged it to A. and B. The purchase was set aside :—Held, that A. and B., who had had notice of the relation in which their mortgagors stood to the vendors, could claim no better title than their mortgagors. *Ib.*

Contract for Sale and Purchase of Lands.]—Effect of a contract for the purchase of lands for the reinvestment of trust moneys being made without reference to the fund proposed to be thereby reinvested. *Caddick's Settlement, In re*, 9 Hare (App.) lxxxv. ; 17 Jur. 84 ; 1 W. R. 212.

The S. estates were by act of parliament vested in trustees upon trust to sell, with the consent of the earl, the tenant for life in possession, and to invest the sales moneys in the purchase of other lands convenient to be held with the bulk of the property. Under these trusts certain outlying portions of the estates were, by a contract between the trustees, the earl, and P., contracted to be sold to P. for 29,000*l.*, and 5,000*l.* was paid by P. to the earl as deposit, to be paid by him to the trustees when a proper purchase should be fixed upon in which to re-invest the sales moneys according to the trust. The purchase was never completed, and the 5,000*l.* thus left in the earl's hands was forfeited, and the same lands were, some years afterwards, sold for 22,000*l.* :—Held, that the 5,000*l.* belonged to the settled estates, and not to the earl absolutely. *Shrewsbury* (*Earl*) v. *Shrewsbury* (*Countess*), 18 Jur. 397.

The earl had bought, in his own name, for 18,000*l.*, the C. H. estate, which was convenient to be held with the bulk of the S. estates, and with the view of offering it to the trustees. In order to raise the purchase money the earl immediately mortgaged it to nearly the full amount of 18.000*l.*, and after having made some alterations in it to suit his own purposes, he offered the same to the trustees for 16,350*l.* The trustees agreed to the proposition, and a joint petition was presented to the court, praying a reference to inquire into the title, and whether it was a fit and proper purchase, and an order was made in the terms of the prayer. Before any other step was taken the earl died. The agreement by the trustees to purchase the C. H. estate was not signed by the trustees, but rested on some letters written by the earl to his solicitors, and by them to the earl, the solicitors being also solicitors to the trustees :—Held, that the C. H. estate was part of the earl's estate, and not part of the settled estates, there being no binding contract entered into by the earl capable of being enforced against his real representative. *Ib.*

Quære, what would have been the result if the order had not stopped at directing the inquiries, but had proceeded to order the completion of the sale, in case of the inquiries as to fitness and title being satisfactory. *Ib.*

Lands vested in trust out of receipts, &c., to make certain payments, and lay out surplus upon mortgage or government securities, with a view to accumulation, with bequest of such accumulations. On petition, a real estate contiguous to testator's real estate was permitted to be purchased under the circumstances, and to be considered as personal estate. *Webb* v. *Shaftesbury* (*Lord*), 6 Madd. 100 ; 22 R. R. 249.

Purchase of Leaseholds with Consent, whether Imperative or Discretionary.]—Where the power of trustees, with the consent of the husband and wife, or the survivor, to vary the securities, was discretionary, and the wife having survived and married again, sought to have the funds invested in leaseholds (although eligible securities), the court refused to interfere. *Lee* v. *Young*, 2 Y. & C. C. C. 532 ; 12 L. J., Ch. 478 ; 7 Jur. 761.

Trustees were "authorised and empowered," with the "consent and direction" of the tenant for life, to lay out the trust moneys on leasehold hereditaments "in some convenient place" :—Held, that it was imperative on the trustees, on the requisition of the tenant for life, to invest in leaseholds, and that they could not refuse to do so on the ground of the liabilities to be incurred by them on the covenants, they having expressly contracted on the subject, but that they had a discretion to exercise as to value, title, and locality ; secondly, that leasehold houses were within the power. *Beauclerk* v. *Ashburnham*, 8 Beav. 322 ; 14 L. J., Ch. 241 ; 9 Jur. 146.

By a deed, power was given to trustees, and they were required, with the approbation of the tenants for life, to invest in the purchase of leaseholds :—Held, that it was compulsory on them to invest when called upon to do so by the tenants for life. *Cadogan* v. *Essex* (*Earl*), 2 Drew. 227 ; 2 Eq. R. 351 ; 23 L. J., Ch. 487 ; 18 Jur. 782 ; 2 W. R. 313.

Costs of Investment.]—Under a direction by will to accumulate and lay out a certain sum of money in the purchase of land to be settled to uses thereby declared, the costs of the investment are to be paid out of the particular sum directed to be invested. *Gwyther* v. *Allen*, 1 Hare, 505.

See also POWERS.

vi. *Mortgages.*

a. Freeholds.

Statute.]—*Trustee Act*, 1893, *ss.* 8 *and* 9.

General Principles.]—Trustees, when considering whether trust funds should be invested on mortgage, must, notwithstanding the opinions of valuers, solicitors, or other trusted agents, exercise their own judgment as to the security. They must regard the transaction not only from the view of securing the capital, but must also consider whether the income of the property is sufficient to provide the interest on the amount advanced. Although the position of the borrower may reasonably be considered by them, they should not advance a sum largely in excess of the proper amount, relying on the pecuniary position of the borrower. *Somerset, In re, Somerset* v. *Poulett* (*Earl*), 62 L. J., Ch. 720 ; 3 R. 547 ; 68 L. T. 613 ; 41 W. R. 536. See *S. C.* on appeal, 63 L. J., Ch. 41 ; [1894] 1 Ch. 231 ; 7 R. 34 ; 69 L. T. 744 ; 42 W. R. 145.

Semble, that in the absence of direction as to investment, trustees cannot properly invest on mortgage. *Raby* v. *Ridehalgh*, 7 De G. M. & G.

104 ; 3 Eq. R. 901 ; 24 L. J., Ch. 528 ; 1 Jur. (N.S.) 363 ; 3 W. R. 344.

There is a known established distinction in equity, between government and real securities ; "real" is a term adopted in the law, and must be understood to mean land securities only. *Att.-Gen.* v. *Bowles*, 3 Atk. 808.

It is not necessarily a breach of trust, under a will directing trustees to invest in parliamentary stocks or funds, or on real securities, to continue in their actual state of investment part of the assets, consisting of turnpike bonds. *Robinson* v. *Robinson*, 1 De G. M. & G. 247 ; 21 L. J., Ch. 111 ; 16 Jur. 255.

Where an executor puts out money, though without the indemnity of a decree, upon a real security, which there was no reason then to suspect, but afterwards such security proves bad, he is not accountable for the loss, any more than he would have been entitled to the profits had it continued good. *Brown* v. *Litton*, 1 P. Wms. 141 ; 10 Mod. 20.

General Rule as to Advance.]—The general understanding is, that a trustee should only lend to the extent of two-thirds of the value on agricultural freeholds, and to the extent of one-half on freehold houses. Semble, also, that one-half is the limit in the case of a leasehold renewable for ever at a large head rent. *Macleod* v. *Annesley*, 16 Beav. 600 ; 22 L. J., Ch. 633 ; 17 Jur. 608 ; 1 W. R. 250.

Two-thirds Rule — Advance on Valuation made on Sale to Mortgagor.]—In May 1870, F. and G., the trustees of a will, one of whom, F., was an experienced farmer, and the other, G., a solicitor, advanced a sum of 2,400*l.*, part of the trust estate, along with another sum of 2,600*l.* not part of the estate, making together 5,000*l.*, at 4*l.* per cent., on the security of a freehold farm, which in 1868 had been sold to the mortgagor, who was farming that and the neighbouring land on a peculiar system of husbandry. The trustees had power to advance on contributory mortgages. In 1868 the farm had been valued on behalf of the vendors, of whom G. was one, and also the solicitor, at 6,895*l.* This valuation was communicated to F. at the time of the mortgage ; and no other valuation was made. Interest was paid in full, but irregularly, down to November 1877, since which time the farm, which was situated on clay soil, in a wet situation, had become unsalable and unlettable, owing to unfavourable seasons, and had yielded no income. The mortgagor became insolvent. Upon claim by the cestui que trust against F. and the executors of G. to be declared entitled to payment of the 2,400*l.* and interest since November 1877 :—Held, notwithstanding that no valuation was used at the date of the mortgage other than the valuation made on behalf of the vendors at the time of the sale to the mortgagor ; that G., the trustee, was himself one, and solicitor of the others, of the vendors to the mortgagor ; and that the sum advanced was more than two-thirds of the estimated value of the farm—that the trustees were not liable to make good the deficient security. *Godfrey, In re, Godfrey* v. *Faulkner*, 52 L. J., Ch. 820 ; 23 Ch. D. 483 ; 48 L. T. 853 ; 32 W. R. 23.

The test of liability always is, whether or not the trustees have acted as prudent men would have acted in dealing with their own property. The "two-thirds" rule is not enforceable with exact strictness. *Ib.*

—— **Valuation by Trustees' Surveyor.**]—A testator bequeathed all the residue of his property to trustees upon trust to invest it "on good and approved freehold or leasehold securities." The trustees advanced a sum of 2,600*l.* of the trust fund to a builder, upon security of certain freehold buildings and land, valued by a surveyor at 3,500*l.*, the income of which was 175*l.* per annum. The mortgagor became insolvent, and upon a sale of the mortgaged property there was a loss of 353*l.* to the trust estate :—Held, that, although the defendant's general conduct had been faithful and honest to his cestuis que trust, he had been negligent and wanting in judgment in making the investment upon property of such doubtful value ; that to advance two-thirds of the supposed value of the property could not be considered a prudent act of a trustee, notwithstanding he had had the property valued by a surveyor ; and that, as the defendant had not exercised due care and diligence in the investment, he must be held liable to make good the loss occasioned to the trust fund ; but as there was nothing to impeach his character, no costs would be given as against him. *Jones* v. *Lewis*, before the Lord Chancellor, 26th February, 1852. Reversing *S. C.*, 3 De G. & Sm. 471 ; 18 L. J., Ch. 430 ; 13 Jur. 877.

One-half Rule — Mortgage of Buildings — Report of able Practical Surveyor.]—A trustee is not entitled to the protection afforded by s. 4 of the Trustee Act, 1888, unless the report or valuation upon which he acted in making an investment, which ultimately proves insufficient, was made upon his own instructions and directed to the particular investment. A trustee is not entitled to the protection afforded by s. 5 of the Trustee Act, 1888, unless the investment which has proved deficient was a proper investment at the time in all respects other than value. *Walker, In re. Walker* v. *Walker*, 59 L. J., Ch. 386 ; 62 L. T. 449. See also *Blyth* v. *Fladgate*, 63 L. T. 546.

The onus lies upon a trustee who seeks to take advantage of s. 5 of the Trustee Act, 1888, to show that at the time he made an investment it was, except as to value, in all respects a proper one. An investment of trust funds by way of mortgage upon an undivided third, together with an undivided moiety of another undivided third, in reversion, of lands held at rent, comes within the rule which limits the loan to one-half the value of the lands. *Jones* v. *Julian*, 25 L. R., Ir. 45.

—— **House Property.**]—Trustees, who were empowered to invest on mortgage, advanced the sum of 8,300*l.* upon the security of certain leasehold property consisting of small cottages, some of which were let to weekly tenants. The mortgagor having made default, the trustees took possession of the property, which would not realise the sum advanced, the value of the property having greatly depreciated. Evidence was adduced to show that, at the date of the mortgage, the sum advanced was equal to about two-thirds of the value of the property. But there was other evidence to the effect that the property was then even less valuable ; and that the trustees had not obtained any formal valuation thereof :—Held, that the trustees had made a most improvident investment, and had disregarded the rule as

to the limit to be observed when investing trust funds upon the security of house property; that they ought to have made a more careful examination of the security; and that, under the circumstances, they were liable to replace the sum advanced. *Olive, In re, Olive* v. *Westerman*, 56 L. J., Ch. 75; 34 Ch. D. 70; 55 L. T. 83; 51 J. P. 38.

—— **Hotel.**]—Trustees having power to invest upon real security invested 1,400*l.*, part of the trust fund, upon the security of a freehold house at Broadstairs, used as an hotel. The evidence of value, upon which they made the investment, was a report made by a London surveyor, who, according to his report, went to Broadstairs, and examined the property, and made some inquiries; he valued the security at 2,700*l.*, including in this sum 800*l.*, as the value of the beer and spirit licence. No other inquiries appear to have been made. In fact, the house had only recently been opened as an hotel, and did not prove successful. The security turned out to be deficient:—Held, that the security was not a proper security for the investment of trust funds, and that the trustees must be charged with the amount advanced. *Budge* v. *Gummow*, 42 L. J., Ch. 22; L. R. 7 Ch. 719; 27 L. T. 666; 20 W. R. 1022.

—— **Hotel and Stables.**]—Trustees advanced trust money upon mortgage of properties consisting of an hotel and stables, and cottages and houses which were principally let at weekly rents. Valuers were employed, and the particulars of the several properties as furnished by the mortgagors were submitted to them, but the trustees did not make inquiries for the purpose of verifying the statements made by the mortgagors as to the value or nature of the properties, or whether they were all let, or what was the amount of the outgoings payable. In their instructions to the valuers, they told them that the mortgagees were trustees, but they did not tell them, according to the rule laid down for trustees in lending on the security of house property, that they did not desire to lend more than one-half the value. Neither did they call the attention of the valuers to circumstances which might affect the value. They also omitted to instruct the valuers to ascertain whether the particulars were correct, or what were the outgoings or average amount of repairs. In each case the valuers gave it as their opinion that a sum more than one-half of the value might be advanced on the security, and such a sum was in each case advanced. Shortly afterwards the mortgagors became insolvent. The several properties were put up for sale, but failed to realise the amounts advanced:—Held, that the investments were improper; that the trustees had been guilty of negligence in not making inquiries as to the particulars, and in not giving proper instructions to the valuers, and in acting upon valuations which under the circumstances they ought not to have acted upon, and they were jointly and severally liable for the money lost. *Partington, In re, Partington* v. *Allen*, 57 L. T. 654.

Valuation by Mortgagor's Surveyor.]—In 1873 trustees advanced 3,800*l.* trust moneys to B. upon the security of a freehold house and appurtenances in the occupation of B., and carried on by him as a school in partnership with S. By the deed of partnership B., as owner of the freehold, was to receive 300*l.* a year out of the profits of the school, and in the event of his death, S. was to take a lease at the same rental. The advance was made in reliance upon the report of a surveyor, instructed by one of the trustees in his capacity of solicitor to B., such report being made for the purposes of a previous mortgage negotiation with other trustees, which fell through. By this report the property was estimated at 5,800*l.* on the assumption that a responsible tenant was willing to take a lease of the property at a rental of 400*l.* a year. The security having proved insufficient:—Held, that the trustees had not acted as prudent men in making such an advance upon a valuation made on behalf of the borrower, and must restore the trust funds. *Walcott* v. *Lyons*, 54 L. T. 786; 50 J. P. 772.

Trustees empowered to invest on mortgage lent under the advice of their solicitors a sum of 5,000*l.* upon mortgage of a freehold house and grounds at Liverpool, valued to them at from 7,000*l.* to 8,000*l.* The trustees did not exercise their own judgment as to the choice of a valuer, but accepted the suggestion of their solicitors that a London surveyor who had introduced the security to them, and was in fact the agent of the mortgagor with a pecuniary interest in the completion of the mortgage, should value the property for the trustees, and they acted upon the report of this valuer, which was of an inflated character. The mortgagor afterwards became bankrupt, and the property would not realise the sum advanced:—Held, that the trustees were jointly and severally liable to replace the sum advanced, with interest at 4 per cent. from the date of the loan. *Fry* v. *Tapson*, 54 L. J., Ch. 224; 28 Ch. D. 268; 51 L. T. 326; 33 W. R. 113.

Trustees lent trust money on mortgage, upon a valuation made on behalf of the mortgagor. The security proved greatly deficient:—Held, that the trustees were personally liable for the loss. *Ingle* v. *Partridge*, 34 Beav. 411.

Introduction by Trustees of Valuer to Mortgagor.]—Trustees ought not to introduce the valuer, who is valuing property with a view to a mortgage by the trustees, to the mortgagor, or the mortgagor's agent, for the purpose of negotiating the amount of the fee for the valuation. *Partington, In re, Partington* v. *Allen*, 57 L. T. 654.

Trade Premises.]—Trustees had power to invest upon such securities as they should approve:—Held, that they were bound nevertheless to exercise a careful discretion in selecting a security as to value, and that an investment in trade buildings, not having ascertained that they were at least worth twice the money invested, was a breach of trust. *Stretton* v. *Ashmall*, 3 Drew. 9; 24 L. J., Ch. 277; 3 W. R. 4.

—— **Brickyard.**]—Trustees, having a power to invest on real securities, invested 3,500*l.* on a mortgage of a freehold brickyard with buildings, machinery and plant. Before doing so they obtained a report from a competent surveyor that the property formed a good security for the amount of the advance. The report did not state, and the trustees did not inquire, what value the surveyor placed upon the property, nor how that value was arrived at. In fact, the valuation was based on the brick business being carried on as a going concern, and the land was taken as worth 2,000*l.* only. The security having turned out insufficient, an action was brought

against the trustees to have the trust fund replaced :—Held, that the trustees had not acted with proper care, and were liable to make good the loss, with interest at four per cent. from the last payment by the mortgagor :—Held, also, that the tenant for life could not be required to bring into account interest in excess of four per cent. received under the mortgage before default was made. *Learoyd* v. *Whiteley*, 57 L. J., Ch. 390 ; 12 App. Cas. 727 ; 58 L. T. 93 ; 36 W. R. 721—H. L. (E.)

A trustee advanced trust moneys to a brick-making firm upon the security of a first mortgage of their premises, freehold and leasehold, and some of the plant. In so doing he acted upon the advice of his solicitor, and upon a favourable report and valuation made by a respectable firm of architects and surveyors. A bank of good standing, moreover, consented to postpone a charge of theirs to his mortgage. The mortgagors failed three years afterwards, whereby their lease of that part of the property upon which was found most of the clay and shale necessary for the carrying on of the business, became forfeited. The remainder of the property proved unsalable, and rapidly went to ruin. An action was subsequently brought by the cestuis que trust to make the trustee liable for the loss sustained by them, and it appeared that the report and valuation proceeded, ex facie, in some respects upon faulty principles :—Held, nevertheless, that the trustee had acted as a prudent man would have acted in dealing with his own property, and was therefore not liable. *Pearson, In re, Oxley* v. *Scarth*, 51 L. T. 692.

China Clay Works.]—Where trustees invest a larger sum than is justified by the value of the property upon mortgage of undivided shares of real property, part of which consists of china-clay works, and part of which is let on leases for lives, one of the trustees being himself interested in other of the undivided shares, the investment is an improper one, and therefore will not be deemed an authorised investment for a smaller sum, under section 9, sub-section 1, of the Trustee Act, 1893. *Turner, In re, Barker* v. *Irimey*, 66 L. J., Ch. 282 ; [1897] 1 Ch. 536 ; 76 L. T. 116 ; 45 W. R. 495.

Freehold Houses in a Town.]—Power to trustees to invest on government or real security :—Held, not to authorise a loan by the trustees of part of the trust fund on the security of freehold houses in a town, the value of which depends upon their situation, and was besides liable to be diminished by the effect of covenants relating to other premises which were let with them. *Phillipson* v. *Gatty*, 7 Hare, 516; 13 Jur. 318. Affirmed, 2 Hall & Tw. 459.

Two executors were empowered by will to lend money on government, real or personal security. One of them, in 1815, lent part of the fund to the other executor and his partner in trade, upon mortgage. The mortgagors became bankrupt in 1831, and then the mortgaged property, which consisted in part of a windmill, a watermill, and a house in a town, being sold, produced considerably less than the sum advanced ; the executors were held liable for the deficiency. Semble, so much as two-thirds of the value should only be advanced upon property of a permanent value, as freehold land, and not upon houses or buildings ; still less upon buildings used in a trade, and whose value depends upon the absence of competition in that trade. *Stickney* v. *Sewell*, 1 Myl. & Cr. 8.

Mortgage for Five Years of Freeholds.]—A testatrix directed her executors, who were also her residuary legatees, to invest such a sum in the stocks or on freehold security, as would produce 150*l.* a year, and she bequeathed 150*l.* to A. for life ; and after his death, she gave the security on which the investment should have been made to B. The executors invested 3,530*l.* at 4½ per cent., on a mortgage for five years of freeholds, which were let for a long term on ground rents producing 176*l.* per annum. The value of the freeholds was about 4,344*l.*, but the property on which the rents were secured was of much greater value : —Held, that the investment was not improper. But held, that if the payment to the plaintiff should be delayed by the inability of the trustees to call in the mortgage for five years, the plaintiff was entitled to have the mortgage sold and the deficiency paid by the executors. *Vickery* v. *Evans*, 33 Beav. 376 ; 3 N. R. 286 ; 33 L. J., Ch. 261 ; 10 Jur. (N.S.) 30 ; 9 L. T. 822 ; 12 W. R. 237.

Freehold Ground Rents.]—A. by will directed her executors and trustees to invest such a sum of money as, when so invested, would produce 150*l.* per annum, and to pay the income to A. for life, and after A.'s death, to hold the stocks, funds, and securities in or upon which the investment should be made, for B. absolutely. The executors were made residuary legatees ; and the will also contained a clause directing that it should not be binding on the trustees to make such investment, if doing so involved selling the testatrix's freehold or leasehold property, or shares in public companies, or other investments ; the trustees having the fullest discretionary powers to sell such shares or other investments or not, and to retain them as long as they might think expedient so to do. The executors set apart capital, which, being invested at interest at 4½ per cent., was sufficient to meet the annuity ; and they invested such sum on a mortgage of freehold ground rents, more than sufficient in amount to raise the annuity, and reserved in respect of newly-erected building property. On a bill by B., challenging the amount of the appropriation as insufficient, and the investment as improper :—Held, that having regard to the bonâ fide exercise of the discretion reposed in the executors, the appropriation was sufficient, and that their being interested as residuary legatees did not prevent them from exercising such discretion in a manner which might prove beneficial to themselves. *Ib.*

Same Solicitor acting for Mortgagor and Mortgagee.]—If trustees lending money on mortgage have the same solicitor as the mortgagor, they must take the utmost precaution ; if they trust implicitly in the solicitor, however high his reputation, they will be held responsible for any loss which his fraud may occasion. The indemnity clause usually inserted in settlements will not protect them. *Sutton* v. *Wilders*, 41 L. J., Ch. 30 ; L. R. 12 Eq. 373 ; 25 L. T. 292 ; 19 W. R. 1021.

G. and H., trustees of a settlement, on the solicitation of D., the tenant for life of the settlement, lent the trust funds on a security which totally failed. G. was a solicitor, and in the transaction of the loan, no other solicitor was

employed for the lenders, and no sufficient investigation of title was made:—Held, that the trustees were compellable to replace the trust fund. *French* v. *Graham*, 10 Ir. Ch. R. 522.

Held, also, that both being solvent, H. was bound to replace one moiety, and G. the other moiety, that G. was not entitled to be indemnified by the tenant for life, the onus of investigating the title having been cast upon him, but that H. was entitled to be recouped, by the tenant for life, the amount of his moiety. *Ib.*

When the same solicitor is employed to act both for mortgagor and mortgagee trustees there is imposed on the parties concerned in such transactions the onus of proving, and upon the court which has to investigate them, the duty of ascertaining with closer scrutiny, that the transaction has been a fair one, and that no advantage has been taken of one party by the other. *Crampton* v. *Walker*, 31 L. R. Ir. 437.

New Valuation.]—There is no hard and fast rule laid down as to procuring a new and special valuation in every particular transaction in order to protect trustees. *Ib.*

Negligence of Solicitor.]—A trustee is liable for the loss of a trust fund occasioned by his solicitor having neglected to take proper precautions on the occasion of the investment of the fund on mortgage. *Hopgood* v. *Parkin*, L. R. 11 Eq. 74; 22 L. T. 722; 18 W. R. 908.

Copyholds.]—A trustee taking a mortgage of copyholds without a power of sale does not thereby commit a breach of trust. *Farrar* v. *Barraclough*, 2 Sm. & G. 231; 2 W. R. 244.

Defendant, being trustee under a will containing no direction as to investment, lent part of the trust fund upon the security of unsurrendered copyholds, the deposit of a lease, and a bond. He was ordered to bring the money into court within six weeks. *Wyatt* v. *Sharratt*, 3 Beav. 498.

Building Speculation—Liability of Trustees and Law Agent—Beneficiary with Contingent Interest, Title to Sue.]—The defender M. was trustee under a marriage contract, by which the wife's property was settled on herself for life, excluding the jus mariti; and, in case she survived her husband, to her in fee; but, should she predecease her husband, to him for life or until his second marriage; and lastly, in the event of her predeceasing her husband, to her children in fee, after her husband's decease or second marriage. The defender M. and the husband and wife—who were also trustees—lent this trust fund on the security of unfinished houses in course of erection under a building speculation. The only valuation the trustees had before them was one by an architect, which had been obtained by the borrower, but they consulted the defender H., who was their law agent, and were informed by him that there was no objection to the investment. The deed contained an immunity clause exonerating the trustees from "omissions or neglect of diligence, or the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases." The pursuers, the children of the marriage, while both spouses were alive, brought an action for a declarator that the defender M. and the law agent were jointly and severally liable to restore the fund, which had been lost by the failure of the speculation:—Held, that there had been a positive breach of duty on the part of the defender M., and that he was liable—the pursuer's rights being contingent, and the husband and wife being barred from any relief against him—to restore the trust fund by paying it to a judicial factor appointed by the court to abide the event, if and when the pursuers became entitled. *Rae* v. *Meek*, 14 App. Cas. 558—H. L. (Sc.)

Held, also, that the law agent was not liable, for there was no evidence to prove that he had been employed by the pursuers or any person on their behalf. *Ib.*

Sub-mortgage—Building Estate.] — Under a settlement S. was tenant for life with an ultimate trust, in default of children (which happened), for her testamentary appointees. The trustees, having power to invest on leasehold securities, invested the trust funds, with S.'s consent, on separate sub-mortgages of leasehold houses, unfinished and unlet, on a building estate of which the roads and drainage were in a defective condition. The investment was made without an independent or reliable valuation, and more than half the value of the house was lent on each sub-mortgage. S. died, having by will disposed of the trust funds, and appointed executors. The executors, with the sanction of the chief clerk in an action establishing S.'s testamentary appointment, had the sub-mortgages transferred to them by the trustees, and subsequently, finding them an insufficient security, brought an action against the trustees to make them personally liable for the deficiency:—Held, that, although the sub-mortgages were not improper investments in point of form, the trustees having invested the trust funds on insufficient security of a speculative character, and without proper precautions, must make good the loss; and that the executors having taken the transfers in ignorance of the circumstances attending the investment, were not bound by adoption or acquiescence. *Smethurst* v. *Hastings*, 55 L. J., Ch. 173; 30 Ch. D. 490; 52 L. T. 567; 33 W. R. 496.

Second Mortgage of House Property.]—Trustees lent trust moneys on a second mortgage of house property greatly out of repair, and the principal part was lost:—Held, that they were liable as for a breach of trust, notwithstanding an indemnity clause declaring they should not be liable for the insufficiency or deficiency in value of any securities, except through their wilful default. *Drosier* v. *Brereton*, 15 Beav. 221.

Whether a trustee is justified in lending trust money on second mortgage, without obtaining the legal estate, quære. *Norris* v. *Wright*, 14 Beav. 291.

An estate of the value of 80,000*l.* was subject to a first mortgage of 40,000*l.*, and to two others for 11,000*l.* and 6,800*l.*, and between the second and third there was a dispute as to priority. A trustee advanced 1,908*l.* trust money on the security of an assignment of an equal amount of the 6,800*l.*:—Held, that this was a breach of trust. *Ib.*

Option to take Wrong Investment—Notice to Trustee.]—U., a trustee, who had power to invest on real security, invested on a mortgage of freehold houses, with power of sale, a larger sum of trust money than was justifiable. He afterwards

retired from the trust, and transferred the mortgage to the new trustees. The security proving unproductive, the new trustees, with the privity of the plaintiff, who was a purchaser of a share in the trust funds, but without any notice to U., sold the mortgaged property at a considerable loss, but it was not established that the sale was unfair or improvident. The plaintiff then sued U. for the loss :—Held, by the court below, that a trustee who makes an improper investment is entitled, upon making good the trust fund, to have the investment returned to him ; that the plaintiff and the new trustees were therefore not justified in selling the property without notice to U., so that he might have an option of replacing the trust fund and taking to the mortgage, that U. therefore was not liable, and that the action must be dismissed :—But held, on appeal, that an investment on a security of a description authorised by the trust, where the breach of trust consists only in not exercising due caution in taking it, stands on an entirely different footing from an investment of an unauthorised description, which the cestuis que trust must either accept or reject ; that the mortgage here became part of the trust estate, that the cestuis que trust could not therefore be under any obligation to U. to give him notice whether they accepted or rejected it ; that the new trustees had a right to realise as they did without notice to U., and that he was liable for the deficiency. *Salmon, In re, Priest* v. *Uppleby*, 42 Ch. D. 351 ; 62 L. T. 270 ; 38 W. R. 150—C. A.

The trustees of a settlement, having invested the settled funds on a mortgage security, which turned out insufficient, and it not appearing that they took due precaution to ascertain whether the security was sufficient, were ordered to pay into court the whole amount of the trust funds, taking upon themselves the security. By the decree in the court below they were declared liable to pay so much only as the mortgaged premises, when sold, should prove insufficient to answer. *Lockhart* v. *Reilly*, 25 L. J., Ch. 697 ; 3 W. R. 227—L. C.

Contributory Mortgage.]—It is a breach of trust, in the absence of express authority in the instrument creating the trusts, where the trustees are directed to invest in their own names, to invest trust moneys upon a contributory mortgage. *Webb* v. *Jonas*, 57 L. J., Ch. 671 ; 39 Ch. D. 660 ; 58 L. T. 882 ; 36 W. R. 666.

—— Sale of Trust Funds—Liability of Trustees to replace Stock sold.]—The trustees of a settlement had power to invest in real securities, and to vary investments. In 1875 they sold a sum of consols forming part of the trust funds, and invested the proceeds of sale on a contributory mortgage of real estate subject to a jointure and portions. It was admitted that this mortgage was an improper investment. The tenant for life having died, the money on mortgage was called in. The whole of the principal was forthcoming, so that no loss would follow directly from the investment, but remaindermen, who were entitled to the capital, claimed that the trustees ought to replace the sum of consols sold in 1875, which at that time stood at a much lower price than the then present value :—Held, that, as the sale was made for the purpose of effecting another investment, if that purpose was improper, then the sale was improper also ; and that consequently the trustees were in this case liable either to replace the stock or to repay the proceeds of sale at the option of the cestuis que trust. *Massingberd's Settlement, In re, Clarke* v. *Trewlawny*, 59 L. J., Ch. 107 ; 60 L. T. 620. Affirmed, 63 L. T. 296—C. A.

By an antenuptial settlement a sum of stock was settled upon certain trusts for the benefit of the wife and children of the marriage. The settlement contained powers for the trustees to sell the trust fund, and reinvest the proceeds in government or real securities. By a contemporaneous memorandum, which was executed by the father, the wife, and the intended husband, and indorsed upon the deed of settlement, the trustees were empowered to advance any portion of the trust fund to the owners or lessees of Vauxhall gardens, upon mortgage, either as first, second, or third mortgagees, for such time and at such rate of interest as the trustees might think fit. The trustees lent the whole of the trust fund to three persons, who afterwards became the joint proprietors of, and partners in, Vauxhall gardens ; but no written security was then taken by the trustees. One of these proprietors subsequently retired from the partnership. Some time afterwards the trustees obtained a covenant from the two remaining partners to surrender the Vauxhall gardens by way of mortgage, subject to two prior charges. This mortgage eventually proving a wholly inadequate security for the trust fund, a suit was instituted to compel the trustees to reinstate the stock :—Held, that under the circumstances the trustees must be considered, in having made the advance without security, and in having afterwards accepted the covenant of two only of the three joint debtors, to have misapplied the trust fund, and that they had subjected themselves to the liability of replacing it. *Fowler* v. *Reynal*, 3 Mac. & G. 500 ; 21 L. J., Ch. 121 ; 15 Jur. 1019.

Depreciation in Mortgage Securities—Duty of Trustees as to calling in Mortgage—Discretion.]—When mortgaged freehold property, on the security of which trust money has been invested, has fallen in value, so that the mortgage debt has come to exceed two-thirds of the actual value of the mortgaged property, it is not the absolute duty of the trustees at once to call in the mortgage, but they have a discretion which they must exercise as practical men with a due regard to all the circumstances of the case, such as the position and solvency of the mortgagor. *Medland, In re, Eland* v. *Medland*, 58 L. J., Ch. 572 ; 41 Ch. D. 476 ; 60 L. T. 781 ; 37 W. R. 753.

—— Retaining Authorised Investments—Omission to Realise—Duty of obtaining Valuation.]—Trustees who retain mortgages on real property created by their testator and authorised as investments by the terms of his will, will not be held liable for loss occasioned by the depreciation in value of land where they have acted with reasonable care, prudence, and circumspection. *Chapman, In re, Cocks* v. *Chapman*, 65 L. J., Ch. 892 ; [1896] 2 Ch. 763 ; 75 L. T. 196 ; 45 W. R. 67—C. A.

Trustees and executors are not absolutely bound to call in within twelve months of their testator's death investments made by him. The duty of a trustee who has to consider whether he will retain an existing security is not similar to that of a trustee who is about to invest money in his hands. *Ib.*

It is not the absolute duty of trustees to have their mortgage securities valued by a professional valuer, and then to call upon the mortgagors to reduce the amount secured so as to bring it within the two-thirds limit. *Ib.*

There is no rule that trustees commit a breach of trust if they retain authorised securities in a falling market when they honestly believe that that is the best course for all parties; nor that they must be held liable for so doing unless they prove absolutely that no proceedings on their part could have been effectual to recover the funds. The question is what was best to be done at the time, and they must show that they had reasonable grounds for their inaction. *Ib.*

See Trustee Act, 1894, s. 4.

b. Leaseholds.

Statute.]—*Trustee Act*, 1893, *s.* 8.

Real Securities—Long Leaseholds.]—As a general rule long terms of years do not answer the description of "real securities," within the meaning of a power for trustees to lend on mortgage of "real securities." *Boyd's Settled Estates, In re*, 49 L. J., Ch. 808; 14 Ch. D. 626; 43 L. T. 348.

A power to invest in "real securities" does not authorise trustees to invest the trust funds upon long terms of years created in real estate for the purpose of raising portions. *Leigh* v. *Leigh*, 56 L. J., Ch. 125; 55 L. T. 634; 35 W. R. 121.

Under a power to invest in "real securities," trust funds were invested on mortgage of long leaseholds. The mortgagee of a one-sixth share of the trust fund commenced an action against the trustee to administer the trust estate, alleging that the investment was improper, and that the trust funds were in danger of being lost. Pending the action, the trustee paid the remaining five-sixth shares to the other persons entitled, who had not been made parties to the action in any way, and paid the plaintiff's share into court:—Held, that the trust funds had been improperly invested. *Chennell, In re, Jones* v. *Chennell*, 47 L. J., Ch. 583; 8 Ch. D. 492; 38 L. T. 494; 26 W. R. 595.

Held, also, that under the circumstances, the action had been instituted unnecessarily, and therefore that the trustee was justified in partly distributing the fund, and was entitled to be paid his costs of the action, and costs, charges and expenses as trustee out of the share in court.

Leaseholds with only Fourteen Years to run.]—Trustees being empowered under a settlement to invest moneys upon mortgage of freehold, copyhold, or leasehold estates, invested upon mortgage of leaseholds with only fourteen years to run; the court directed the mortgage to be called in, without prejudicing any question as to the liability of the trustees in the event of a loss. *Pince* v. *Beattie*, 2 N. R. 546; 9 Jur. (N.S.) 1119; 9 L. T. 315; 11 W. R. 979.

On Deposit of Lease.]—Defendant, being trustee under a will containing no direction as to investment, lent part of the trust fund upon the security of unsurrendered copyholds, the deposit of a lease, and a bond. He was ordered to bring the money into court within six weeks. *Wyatt* v. *Sharratt*, 3 Beav. 498.

Leaseholds for Lives.]—A power to invest trust moneys on real security in Ireland authorises a loan on leaseholds for lives, perpetually renewable, at a head rent. *Macleod* v. *Annesley*, 16 Beav. 600; 22 L. J., Ch. 633; 17 Jur. 608; 1 W. R. 250.

The general understanding is, that a trustee should only lend to the extent of two-thirds of the value on agricultural freeholds, and to the extent of one-half on freehold houses. Semble, also, that one-half is the limit in the case of a leasehold renewable for ever at a large head rent. *Ib.*

Trustee made liable for a loss on a mortgage investment, he not having taken due precautions to ascertain the value of the property mortgaged. *Ib.*

Under a power to trustees of a settlement "to lay out and invest the trust moneys upon government or real securities in England, Ireland, Scotland, or Wales," the trustee invested part of the trust moneys on leaseholds for lives in Ireland, with a covenant for perpetual renewal, subject to a headrent. The property at the time of the investment was subject to certain charges, after payment of which barely sufficient surplus rents were left to pay the interest on the mortgage debt, and afterwards it became much depreciated in value, and insufficient to answer the debt:—Held, in a suit instituted by one of the cestuis que trust to make the trustee liable for the loss arising from the investment, that leaseholds for lives in Ireland, with a covenant for perpetual renewal, if the same had been of adequate value, would not have been a breach of trust, but that, having regard to the value of the property, the investment was a breach of trust. *Ib.*

Judgments.]—A power to trustees to lay out money "in the public stocks or funds in Great Britain, or on any mortgage of freehold or leasehold estates, or any other real securities in England, Wales or Ireland," does not authorise them to lend it on the security of a judgment, even since the 3 & 4 Vict. c. 105, s. 22. *Johnston* v. *Lloyd*, 7 Ir. Eq. R. 252.

c. Railway Mortgages or Debentures.

Power to Invest "on Real Securities."]—Under a power to invest trust money "on real securities," a trustee lent it to a railway company, on the usual assignment of the "undertaking, tolls, &c., the principal not payable till seven years:—Held, that, whether real security or not, the investment was improper. *Mant* v. *Leith*, 15 Beav. 524; 21 L. J., Ch. 719; 16 Jur. 302.

A testator directed his trustees to invest in the funds, or on government securities, or upon the security by way of mortgage of any freehold, copyhold, or leasehold hereditaments in England or Wales:—Held, that this did not authorise an investment upon the security of railway mortgages made in conformity with the 8 & 9 Vict. c. 16, s. 38, or in Great Northern Railway debenture stock. *Mortimore* v. *Mortimore*, 4 De G. & J. 472; 28 L. J., Ch. 558; 7 W. R. 601.

d. Stock Mortgages.

Improper Investment.]—A trustee sold consols, forming part of the trust estate, and invested the proceeds in a stock mortgage:—

Held, that this was an improper investment. *Whitney* v. *Smith*, L. R. 4 Ch. 513; 20 L. T. 468; 17 W. R. 579.

The general rule, that where stock is standing in the names of trustees any party interested may have an order, ex debito justitiæ, to have it transferred into court, does not apply to a case where there are discretionary trusts still to be performed. Under the statutory power to vary securities, a stock mortgage is an improper investment. But where trust funds had been lent on stock mortgage, and retransferred before the institution of the suit:—Held, that this, though a mistake on the part of the trustees, was no reason for depriving them of the control of the fund. *Bromley* v. *Kelly*, 39 L. J., Ch. 274; 18 W. R. 374.

vii. *Other Securities.*

a. Loan on Personal Security.

General Rule.]—The investment of trust money on personal security is a breach of trust. *Walker* v. *Symonds*, 3 Swanst. 63; 19 R. R. 155.

Trustee charged with breach of trust for not putting out money at interest, nor on the best security, according to the trust in a deed. Money lent on a promissory note is not put out on a security. *Ryder* v. *Bickerton*, 3 Swanst. 80.

Trustees lending money on personal security, is not of itself such gross neglect as to amount to a breach of trust; and the legatee, and afterwards his assignee, having acquiesced in such loan, a bill to charge the trustees was dismissed. *Harden* v. *Parsons*, 1 Eden, 145.

Trustees may lend money on good personal security, until a proper purchase in land can be had, but are not justified in placing it out in a fluctuating or precarious fund. *Emelie* v. *Emelie*, 7 Bro. P. C. 259.

Where a testator authorises his three executors to lend money on personal security, it is a breach of trust if two of the executors lend it to the third. —— v. *Walker*, 5 Russ. 7.

Trustees and executors charged with a loss occasioned by a breach of trust, by joining in a transfer and sale, and lending the produce to a partnership, in which one of them was engaged, the others receiving no benefit. Decree against all to account for the funds. *French* v. *Hobson*, 9 Ves. 103.

Power to Lend on Real or Personal Security—Loan upon Bond.]—Power to lend trust money upon real or personal security, does not enable trustees to accommodate a trader with a loan upon his bond. *Langston* v. *Ollivant*, G. Cooper, 33; 14 R. R. 213.

By indenture of March 3, 1832, executed upon the marriage of J. H. and E. R., the sum of 400*l.*, the fortune of E. R., the intended wife, was assigned to the trustees, D. B. and C. B., upon trust, that they should invest the same, as soon as conveniently might be, either in some public bank, stocks, or fund, or else upon one or more good and sufficient securities, either real or personal, and in such manner as they, the said trustees, should in their discretion think fit. The money was paid to one of the trustees, C. B., and, shortly after the execution of the settlement, the trust fund was lent by the same trustee to Sir J. C., upon the security of his bond to both trustees, with warrant of attorney collateral. During the lifetime of Sir J. C. the interest was regularly paid; but upon his death, which was in 1835, the security proved worthless, and the trust fund was lost. In 1842 D. B. filed the present bill against his co-trustee, C. B., and J. H., and his wife, seeking a declaration that the trustee, C. B., was responsible for the breach of trust, and praying that he might be ordered to bring in said sum of 400*l.*, and invest same upon the trusts of the settlement. It appeared that J. H., the husband, was fully aware of the loan, and had concurred in it; but that the plaintiff, though not active in the breach of trust, was acquainted with all the circumstances of the affair shortly after its occurrence. E. H., the wife, was not in any manner implicated in the transaction:—Held, that though the conduct of the defendant, C. B., was free from any moral blame, yet that he was responsible for the consequences of the breach of trust, and was therefore bound to bring in sufficient funds to secure the wife in the event of her surviving her husband. *Buckley* v. *Buckley*, Dr. 375.

Private Security—Infants' Money.]—Trustees taking upon themselves to lend an infant's money on a private security, must in all cases be responsible in case of the failure of the security. *Holmes* v. *Dring*, 2 Cox, 1.

Promissory Note.]—One trustee suffering the other to have trust money under a note of hand, held liable. *Keble* v. *Thompson*, 3 Bro. C. C. 112.

Testator bequeathed 500*l.* to his executors, upon trust that they should lay out and invest the same in the public funds, or in such other security or in such other manner as to them should seem expedient, at interest, and apply the produce to a charitable purpose. One of the executors, who took the entire management of the estate, paid the debts, and most of the legacies of the testator, but neither specifically appropriated nor invested 500*l.* for the charity. He paid interest, however, on 500*l.* to the charity; at the same time receiving interest on the promissory note of a debtor to the estate, who was in good credit, but whose debt was the only fund available for payment of the legacy. The executor afterwards died. On the admission, by his representatives, that he had, in his lifetime, assented to the payment of the legacy to himself as trustee:—Held, that his estate was severally answerable as for a breach of trust. *Att.-Gen.* v. *Higham*, 2 Y. & C. C. C. 634.

Lodging Money in Banker's Hands.]—A trustee who lodges money in a banker's hands merely on personal security, at the same time that he takes a bond for his own money, is guilty of gross negligence, and liable on the failure of the banker; and it is no excuse that he could not get a good mortgage security. *Anon.*, Lofft, 492.

Deposit Note.]—Semble, there is no impropriety in the temporary investment by trustees of trust money on a deposit note. *Wilkins* v. *Hogg*, 31 L. J., Ch. 41; 8 Jur. (N.S.) 25; 5 L. T. 467; 10 W. R. 47—L. C.

Trade Premises and Personal Security—Power to Lend on "Personal" Security—Immunity Clause—Law Agent Acting for both Parties.]—Trustees sold a tenement, the property of the trust, to one of seven beneficiaries under the trust deed, the price according to the terms of the contract being payable in May, 1874. In

November, 1874, the purchaser being unable to pay 12,000*l.* of the price, was allowed to retain it on loan. As security for the loan he conveyed to the trustees three houses, including his purchase from the trust, upon each of which there were prior incumbrances, to an amount exceeding two-thirds of the estimated value as stated by the borrower. Besides these securities the trustees held the personal obligation of the borrower and his father-in-law, both of whom were engaged in trade. Some of the other beneficiaries remonstrated in 1874, and again in 1880; but the money was allowed to remain on these securities until 1884, when the borrower and his father-in-law became bankrupt, and about 10,000*l.* was lost to the trust. The trust deed contained (1), a clause empowering the trustees to lend out the proceeds and other funds of the trust on "such securities heritable or personal" as they might think proper; and (2), an immunity clause declaring that the trustees should not be liable for "omissions, errors, or neglect of management." The same law agent acted for the trustees and the borrower:—Held, that the trustees had not acted with perfect impartiality between the beneficiaries, nor had they brought to the management the same care and diligence which a man of ordinary prudence would have exercised in his own concerns, that in these circumstances neither the immunity clause nor the authority to lend on personal security were sufficient to protect them, and that they were personally liable to make good the deficiency in the trust funds. *Knox* v. *Mackinnon*, 13 App. Cas. 753—H. L. (Sc.)

Trading Firm—Change in Firm.]—Though the settlor should authorise the trustees to continue the trust funds upon the personal security of a trading firm, in which he had invested them, yet the trustees are guilty of a breach of trust, if, upon a change taking place in the firm, they permit the funds to remain upon the personal security of the new firm. *Cummins* v. *Cummins*, 3 Jo. & Lat. 64; 6 Ir. Eq. R. 723.

Measure of Liability.]—Where trustees may invest in stock or on real security, and they lend on personal security, they shall be answerable for the principal money only, and not for the value of the stock which might have been purchased. *Marsh* v. *Hunter*, 6 Madd. 295.

b. Exchequer Bills.

Government Security or Securities.]— The words "government security or securities":—Held, not to apply to exchequer bills. *Chaplin, Ex parte*, 3 Y. & C. 397; 3 Jur. 750.

Government or Real Security.]—Where the trustee was authorised to invest the fund in government or real security:—Held, that pending a treaty for a mortgage he was justified in investing in exchequer bills, but that having left them in a broker's hands, who misapplied them, he was personally liable for the value of the bills at the time of the loss, and not for the stock which the money would have purchased. *Mathew* v. *Brise*, 6 Beav. 239; 12 L. J., Ch. 263. Affirmed, 15 L. J., Ch. 39; 10 Jur. 105.

Cash under the Control of the Court—Money Paid into Court under Private Act.]—Money paid into court under a private act, and invested in exchequer bills, is "cash under the control of the court," within the meaning of the Act 23 & 24 Vict., c. 38, and the general order of February 1, 1861, and may be invested in any of the securities sanctioned by the court, although such private act directs the investment to be in exchequer bills. *Jackson* v. *Tyas*, 52 L. J., Ch. 830.

—— **Prohibitive or Restrictive Words in Settlement.**]—Trustees of settlements coming within the operation of Lord St. Leonards' Act, 1860 (23 & 24 Vict., c. 38), may invest the trust funds in any securities in which cash under the control of the court may be invested, notwithstanding prohibitive or restrictive words in the instrument creating the trust. *Wedderburn, In re*, 47 L. J., Ch. 743; 9 Ch. D. 112; 38 L. T. 904; 27 W. R. 53.

—— **Stock in the Funds belonging to a Charity Incorporated by Act.**]—Stock in the funds belonging to a charity incorporated by act of parliament, and having power to invest in the public funds, may, under 23 & 24 Vict. c. 38, s. 11, be sold out for the purpose of re-investment on any of the stocks, funds, and securities on which cash under the control of the court may be invested. *Clergy Orphan Corporation, In re*, L. R. 18 Eq. 280; 30 L. T. 809; 22 W. R. 789.

Such funds may also be sold out and re-invested on metropolitan consolidated stock under the Metropolitan Board of Works Loans Act, 1871, s. 13. *Ib.*

c. Foreign Bonds or Securities.

Shares in Foreign Adventure Bequeathed to Trustees.]—If shares in a foreign adventure are bequeathed to trustees, the court, unless asked to change the investment, will make no order as to the continuance of the shares as an investment. *Bates* v. *Mackinley*, 31 L. J., Ch. 389; 8 Jur. (N.S.) 299; 5 L. T. 783; 10 W. R. 241.

Victoria, Russian and Brazilian Bonds.]—Under a direction in a will that "all my personal property invested in government or other securities, in bonds or shares of whatever nature or kind, be held in the same or the like investments by and in the names of my trustees," Victoria, Russian, and Brazilian government bonds, which pass by delivery and were lodged for safety with a bank, and also railway stocks, are investments within the meaning of the will. *Arnould* v. *Grinstead*, 21 W. R. 155.

Securities of a Foreign Country—Bonds of a French Railway Co.]—Under a settlement the trustees were empowered to invest the trust funds in the "bonds, debentures, or other securities, or the stocks or funds of any colony or foreign country." The question arose whether they could properly invest in the bonds of a French railway company, the payment of the capital on which within fifty years was secured by a sinking fund guaranteed, together with interest in the meantime, by the imperial government:—Held, that these bonds were not "securities of a foreign country" within the meaning of the trust for investment. *Langdale's Settlement Trusts, In re*, L. R. 10 Eq. 39.

"Any Funds or Securities whatsoever"—Russian Railway and Egyptian Bonds.]—A testator by will gave all his residue to trustees upon

trust to invest in the parliamentary stocks or funds, or upon real securities; and the will contained a proviso that, as often as the trustees should think it expedient so to do, they might sell out, transfer, or otherwise vary any of the trust moneys, funds, and securities, and invest the same in or on any other funds or securities whatsoever:—Held, that the sale of new 3*l.* per cent. annuities and the investment of the proceeds in Russian railway and Egyptian bonds was authorised, and not a breach of trust. *Lewis* v. *Nobbs*, 47 L. J., Ch. 662; 8 Ch. D. 591; 26 W. R. 631. And see *Brown, In re, Brown* v. *Brown*, 54 L. J., Ch. 1134; 29 Ch. D. 889; 52 L. T. 853; 33 W. R. 692.

—— **Greek Bonds.**]—Testator directed all his property, except ready money or moneys in the funds, to be converted into money, and the clear moneys arising from such conversion to be invested, in the names of the executors, in three per cent. consols, or other government securities in England:—Held, that "Greek bonds," though guaranteed by this country, were not comprehended in the word "funds," and that they were a proper subject of conversion under the terms of the will. *Burnie* v. *Getting*, 2 Coll. C. C. 324; 9 Jur. 937.

Bills and other Private Securities in Ireland.]—Where a sum of 4,000*l.* was vested in trustees upon certain trusts, with a power to invest it in land or in government securities in England, but they invested it in bills and othe private securities in Ireland, whereby a sum of 1,200*l.* remained unaccounted for by them:—Held, that although, from the nature of the trusts, none of the cestuis que trust had a present right to any part of the principal fund, yet that the sum unaccounted for was a debt due in equity, and demandable from the defendant as a defaulting trustee. *Waller* v. *Fowler*, Sau. & Sc. 274.

Direction to Appropriate Estate for Annuity—Personal Estate Invested in Foreign Funds.]—Where the testator directed his executors to set apart so much of his estate as would produce a certain annuity, and pay the interest to his widow for her life or widowhood, and that she should receive any surplus and bear any deficiency that might arise in the annual produce of the fund so set apart, and the principal afterwards to fall into his residuary estate, the conversion and investment were to be in the absolute discretion of the executors. At the time of his death the personal estate was invested in foreign funds; the court refused to direct any appropriation of the latter funds, but that the annuity should be raised by the purchase of consols, after a reference to ascertain which should be applied to that purpose; regard being had to the interests of other parties under the will. *Prendergast* v. *Lushington*, 5 Hare, 171. On appeal, 16 L. J., Ch. 125.

—Power to invest in the Trustees' Names—Securities to Bearer—Power to Postpone Conversion—Discretion—Majority.]—R., by will, gave his residuary estate to trustees upon trust to convert and to invest in their names upon the public stocks, funds, or securities of Great Britain or of any foreign or colonial government, and he gave them power to postpone for such time as should seem expedient the sale, conversion, or getting in of any part of the trust estate. The testator's estate consisted chiefly of foreign stocks and bonds, some of which were payable to bearer. The trustees retained these securities for some years, then one trustee wished to realise; the other three thought it best to further postpone the sale:—Held, on a summons taken out by the trustee who wished to realise, that under the power to invest in their names the trustees had not power to purchase foreign government bonds payable to bearer; that they had power to postpone the sale of such bonds possessed by the testator at his death, but that this power to postpone could only be exercised by the trustees unanimously, and if one trustee objected the bonds or other unauthorised securities must be converted. *Roth, In re, Goldberger* v. *Roth*, 74 L. T. 50.

d. Shares of Public Companies.

Shares Registered in Name of a Single Person.]—An investment in the shares or stock of a public company, which provides that the shares shall be registered in the name of a single person, is not a proper investment of trust funds. *Consterdine* v. *Consterdine*, 31 Beav. 330; 31 L. J., Ch. 807; 8 Jur. (N.S.) 906; 7 L. T. 122; 10 W. R. 727.

Shares which, by the rules of a company, could only be held in the name of a single person, were bequeathed specifically to three trustees for A. for life, with remainder over:—Held, that they might lawfully be held in the name of a single trustee. *Ib.*

A power to trustees to invest in stock or shares of a public company, authorises the purchase of shares or stock in an incorporated company bearing a fixed rate of interest. *Ib.*

Shares subject to Paramount Lien of Company for Moneys Owing.]—Semble, trustees having power to invest in the shares of trading companies ought not to invest in the shares of any company whose articles of association provide that the company should have a paramount lien and charge upon all the shares of any shareholder for all moneys owing to the company from him, alone or jointly with any other person, and that when a share is held by more persons than one, the company should have a lien and charge thereon in respect of all moneys so owing to them from all or any of the holders thereof, alone or jointly with any other persons. *New London & Brazilian Bank* v. *Brocklebank*, 51 L. J., Ch. 711; 21 Ch. D. 302.

Shares in Railway Company.]—A will authorised investments in "shares of any established railway in full operation":—Held, that investments in shares in railways within the United Kingdom, established by act of parliament, were authorised. *Edwards* v. *Thompson*, 38 L. J., Ch. 65.

—— **Preference Railway Shares.**]—A power to invest trust funds "upon the security of the funds of any company incorporated by act of parliament," does not warrant their investment in preference railway shares. *Harris* v. *Harris*, 29 Beav. 137; 7 Jur. (N.S.) 955; 9 W. R. 444.

"Railway or other Public Companies"—Things ejusdem generis.]—A testator directed his trustees to invest the residue of his estate (inter alia) "upon the debentures or securities

of any railway or other public company carrying on business in any part of the United Kingdom." The trustees proposed to invest in the securities of certain companies incorporated under the companies acts:—Held, that the companies having been incorporated by public statute, the instruments forming their constitution being accessible to the public, and their shares being transferable to the public, they were public companies within the investment clause; and that the reference to the railway companies in the same clause did not restrict the meaning of the words "public companies." *Sharp, In re, Rickett* v. *Sharp*, 60 L. J., Ch. 38; 45 Ch. D. 286; 62 L. T. 777—C. A.

Company Incorporated by Act of Parliament—Royal Charter.]—A trustee empowered by will to invest in the shares of any company incorporated by act of parliament invested in the shares of "The London Assurance," a company created by royal charter granted in pursuance of an act of parliament, with rights and privileges which the crown could not have conceded apart from the act:—Held, that the company was a company incorporated by act of parliament within the meaning of the power. *Elve* v. *Boyton*, 60 L. J., Ch. 383; [1891] 1 Ch. 501; 64 L. T. 482—C. A.

—— **Companies Act, 1862.**]—A power for trustees to invest in the securities of any "company incorporated by act of parliament" does not authorise them to invest in the securities of a company incorporated by registration under the Companies Act, 1862. *Smith, In re, Davidson* v. *Myrtle*, 65 L. J., Ch. 761; [1896] 2 Ch. 590; 74 L. T. 810; 45 W. R. 29.

Such Securities as the Trustees shall "think fit."]—A power to trustees to invest in such securities as they "think fit" means as they "honestly think fit." *Smith, In re, Smith* v. *Thompson*, 65 L. J., Ch. 159; [1896] 1 Ch. 71; 73 L. T. 604; 44 W. R. 270.

—— **Debentures to Bearer—Limited Company—Secret Commission—Liability to Account.**]—Two trustees, A. and B., having power to invest in such securities as they thought fit, invested 3,000*l.* in debentures to bearer, issued by a limited company in the form of a floating security. A. received a commission of 300*l.* for procuring the trustees' application for these debentures. B., who was also tenant for life under the will, concurred in making the investment, but knew nothing of the commission paid to A.:—Held, that A. was liable for a breach of trust in making the investment, but that B. was not liable. Held also, that in addition to making good any loss arising on the investment, A. must account to the trust for the 300*l.* commission. *Ib.*

Bank Shares—Foreign and Colonial Bonds.]—A testator directed that his trustees should invest the moneys coming to their hands in respect of his estate in their names, or under their control, in such mode or modes of investment as they, in their uncontrolled discretion, should think fit. Before the commencement of an action to administer the testator's estate, the trustees (who were also executors) invested moneys forming part of it in the purchase of bonds of a foreign government, bonds of a colonial railway company, and shares of a bank on which there was a further liability. The chief clerk, in taking the accounts of the testator's estate, disallowed the trustees the sums which they had expended in the purchase of these bonds and shares. The shares in the bank had been previously sold at a profit:—Held, that though the investments in question ought not to be retained by the trustees, yet as they had acted bonâ fide, and no loss had resulted to the trust estate, they ought not to be disallowed the sums which they had laid out in making the investments. *Brown, In re, Brown* v. *Brown*, 54 L. J., Ch. 1134; 29 Ch. D. 889; 52 L. T. 853; 33 W. R. 692.

—— **Altered Conditions.**]—Where fully paid-up shares in a banking company were bequeathed to trustees, with power to retain the investment, and the shares after the testator's death were altered in amount and became liable to calls:—Held, that by reason of the changes that had taken place, the shares were no longer in the same state of investment as at the testator's death, but were in a state of investment unauthorised by the will, and that the trustees must convert them. *Morris, In re, Bucknill* v. *Morris*, 54 L. J., Ch. 388; 52 L. T. 462; 33 W. R. 445.

—— **Shares not "Securities."**]—A direction to executors to invest in such securities as they may think proper, does not warrant the purchase of shares in a limited banking company. *Kavanagh, In re, Murphy* v. *Doyle*, 27 L. R. Ir. 495.

—— **New Shares in Respect of Old Shares.**]—Certain old shares in a bank being in the name of one of two trustees, he received a circular asking him whether he would take new shares in respect of such old shares. The cestui que trust (a married woman, tenant for life without power of anticipation) urged him to take them, and she herself sent to the bank the form filled up by him. In the suit a call as to the old shares was directed to be paid out of the estate, but as to a call on the new shares:—Held, that he could not be indemnified. *Sheriff* v. *Butler*, 12 Jur. (N.S.) 329; 14 L. T. 510; 14 W. R. 629.

—— **Unlimited Banking Company.**]—A testator had, at the time of his death, one hundred shares in a bank with unlimited liability. By his will he directed his trustees and executors to convert his personal estate at their sole discretion, and at such time or times as they should think fit, and to invest the proceeds in shares in any public company incorporated by act of parliament and paying a dividend. The shares, which were very profitable, were retained by the sole trustee, who, subsequently, accepted twenty-five additional new shares allotted in respect of the old ones. The trustee then retired, and appointed two new trustees. Ultimately the bank stopped payment:—Held, that the original trustee had not committed a breach of trust in retaining the old shares, but had done so in accepting the new ones, and was liable to indemnify the testator's estate for losses incurred thereby. *Edwards* v. *Edmunds*, 34 L. T. 522.

A testator, by will dated in August, 1862, bequeathed his shares in a public company and the rest of his estate, to his trustees upon trust to convert, "immediately after his decease, or so soon thereafter as they might see fit to do so." Part of the estate consisted of thirty-six shares in an unlimited banking company. At his death the shares were at a premium, and considered a good

and safe investment. Soon after his death the bank issued new shares, offering them to the original shareholders at par. Nine were offered to the trustees in respect of the testator's shares, and being at a premium were purchased by them, though the trust for investment did not authorise investment in shares. The old and new shares were held together by the trustees until July, 1866, when the bank broke:—Held, that the trustees should not have purchased the new shares, and should have sold the old shares in reasonable time after the testator's death; that reasonable time, in such case, if no cause is shown for delay, is a year after the testator's death; and that the trustees must replace, not only the amount of the calls made upon all the forty-six shares and the purchase money of the shares purchased, but also the loss to the testator's estate in respect of the shares having become valueless. *Sculthorpe* v. *Tipper*, 41 L. J., Ch. 266; L. R. 13 Eq. 232; 26 L. T. 119; 20 W. R. 276.

e. South Sea Stock.

Lottery Orders.]—A goldsmith, without any orders from the proprietors, subscribed lottery orders into the South Sea Company; he was held indemnified by the act 6 Geo. 1, c. 4, s. 23, empowering all trustees, guardians, executors, &c., to make such subscriptions, and it would have been the same if the cestui que trust had forbidden him to subscribe. *Trenchard* v. *Wanley*, 2 P. Wms. 165; 2 Eq. Cas. Abr. 724, pl. 2. And in the next term, in *Weaver* v. *Fowler* (2 P. Wms. 170), Ld. Macclesfield made the same resolution.

Laying out trust money in South Sea stock where it subjects the trust to a loss, is not a good security, for the directors may trade away the whole stock whilst they keep within the terms of the charter; South Sea annuities and bank annuities only, are proper and good security; for it is not in the power of the directors to bring any loss upon them. *Trafford* v. *Boehm*, 3 Atk. 444.

A., who is trustee for B. of 1,000*l.* South Sea stock, at the desire of B. borrows 4,000*l.* on this stock of the company, and B. receives the money; A. pays the 10 per cent. (under the 7 Geo. 1, sess. 2, s. 7) to be discharged of the loan; though B. forbade the payment, yet he is liable. *Balsh* v. *Hyham*, 2 P. Wms. 453; 2 Eq. Cas. Abr. 741, pl. 8.

viii. *Non-Investment by Trustees in Specified Securities.*

Legacy to be laid out in Stock.]—Where a person, executor and trustee of a legacy to be laid out in stock, has fully administered the estate and assented to the legacy, and retains the legacy in his hands not as assets but as trustee, he is liable for a breach of trust, and was ordered to purchase stock at the price of the time when he was first able to invest it. *Byrchall* v. *Bradford*, 6 Madd. 235; 23 R. R. 204.

Direction in Will to Invest in Consols and Accumulate.]—A trustee, who was directed by the will of the testator to invest the residue in consols, and to accumulate the dividends, invested it on mortgage of real estate; he was held liable to make good the amount of stock which would have been purchased in consols, together with the amount of accumulation which would have been produced by a proper investment of the dividends of such stock. *Pride* v. *Fooks*, 2 Beav. 430; 9 L. J., Ch. 234; 4 Jur. 213.

Omission to Invest Money to Satisfy Annuity —Rise in Stock.]—A trustee, by omitting to invest a sum of money sufficient to pay an annuity of 100*l.* a year to a party for life, is liable, when the parties in remainder become entitled to the fund, to make good any rise in the stock, assuming it had been purchased; and although the principal sum directed to be invested was paid, and a release obtained, still it was set aside, and the difference in value was directed to be paid to the cestuis que trust, who were illiterate and ignorant of their rights. *Aspland* v. *Watte*, 20 Beav. 474; 25 L. J., Ch. 53; 3 W. R. 526.

—— **Inquiry as Sum to be Invested.**]—A testator directed his trustees to invest a sufficient sum on government or real securities or railway stock to produce an annuity of 100*l.* a year, and after the death of the annuitant to call in and divide the principal among his brothers then living, or the children of such as should be then dead. The testator left three brothers; and the trustees (of whom the annuitant was one) provided for the annuity in part by appropriating a railway debenture for 1,500*l.*, which bore interest at first at 5*l.* per cent., and afterwards at 4*l.* per cent., and in part by interest paid by one of the brothers upon a loan to him of moneys of the testator. A child of another brother who was dead, having filed a bill, during the annuitant's life, against the surviving trustees, to have a sufficient fund properly invested:—Held, that he was entitled to an inquiry as to what sum should have been invested at the end of a year from the testator's death to meet the annuity, and to a declaration that the trustees were liable to make good the sum so ascertained. *Starkey* v. *Dyson*, 24 W. R. 37.

Falling off in Value of Stock.]—Where there is a falling off of stock, without the neglect of trustee, he is not liable to make good the deficiency, but is answerable only so far as the value, especially where it was specific stock. *Jackson* v. *Jackson*, 1 Atk. 513.

Option of Cestui que Trust—Rate of Interest.]—Where a testator directs his trustees to invest trust moneys in parliamentary stocks or funds, or on real securities, and they omit so to invest it, the cestuis que trust have not the option of charging them with the moneys which could have been produced if the moneys had been invested in the funds, but are only entitled to have the trust moneys replaced, with interest at 4 per cent. *Robinson* v. *Robinson*, 1 De G. M. & G. 247; 21 L. J., Ch. 111; 16 Jur. 255.

The testator directed his trustees to invest the residue of his personal estate in government or real securities. Some of the cestuis que trust and one of the trustees permitted the trust moneys to remain in the hands of the other trustee at interest:—Held, that, inasmuch as no investment was made, the trustees were chargeable with the whole amount of the trust funds possessed by them, with interest; but were not answerable for the amount of consols, or any other particular security, in which they might, according to the directions of the will, have invested the trust moneys. *Shepherd* v. *Mould*, 4 Hare, 500; 14 L. J., Ch. 366; 9 Jur. 506.

A trustee having, under a settlement, a power of sale, with a trust for interim investments in the funds or on real security, concurred in a sale, and permitted the tenant for life to receive

the purchase money, which was not invested according to the trust :—Held, that the cestui que trust has not the option of requiring the trustee to replace the purchase money with interest, or to buy such a sum of stock as the proceeds of the sale would have purchased if invested at the time. *Rees* v. *Williams*, 1 De G. & Sm. 314.

—— **Improper Exercise by Trustee of Option to Invest on Mortgage or Government Security.**]—Where a trustee neglects to invest on real or government securities according to the trust, the cestui que trust has the right of selecting whether the trustee shall be answerable for the money or for the stock. A trustee, having the option of investing on mortgage or government security, improperly took an insufficient mortgage security. Being held answerable, the court decided that, having exercised his discretion, though improperly, he was answerable for the money lost, and not for the stock it might have produced. *Ames* v. *Parkinson*, 7 Beav. 379.

—— **Investment of Sale Moneys on Personal Security.**]—Husband and wife had a power to sell real estates, with the consent of the trustees ; the moneys were, with all convenient speed, to be laid out in the purchase of other lands ; and, until a convenient purchase could be effected, it was made lawful for the trustees, with the consent of the husband and wife, to invest the money in government or real securities. A sale took place in 1811, and in 1816 the produce was lent by the trustees on personal security :—Held, that the trustees were liable for the stock which the money would have produced in 1816. Held, also, that the trustees ought not to have consented to a sale without first providing the means of investing the purchase money. *Watts* v. *Girdlestone*, 6 Beav. 188 ; 12 L. J.,Ch. 363 ; 7 Jur. 501.

—— **Trust Money Invested by Tenant for Life Contrary to Trusts.**]—Trustees, authorised to lay out trust money in the public funds or on mortgage, invested it on a mortgage. The mortgage was paid off, and the amount was received by the tenant for life, who, contrary to the trusts, invested it in real estate :—Held, that the cestuis que trust had the option of charging the tenant for life, either with the sum sterling received, or with the amount of 3 per cents. which might have been purchased therewith at the time the breach of trust was committed. *Ouseley* v. *Anstruther*, 10 Beav. 456.

—— **Option of Trustee.**]—A trustee, with power to invest in consols or on real security, who makes an improper investment, has the option of replacing either the actual sum misapplied with interest at 4*l.* per cent. per annum, or the sum which would have been produced by an investment in consols. *Robinson* v. *Robinson*, supra. followed. *Brown* v. *Gellatly* (L. R. 2 Ch. 751) distinguished ; *Fisher* v. *Gilpin*, 38 L. J., Ch. 230.

Neglect to Convert—Interest Allowed to Tenant for Life.]—A testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in government or real securities, of which they were to stand possessed, upon trust for A. during her life, and, after her death, for B. The trustees permitted a share, which the testator had in an Indian loan, bearing interest at 10 per cent., to remain for several years on that security, during which time they paid to A. the interest at 10 per cent. which it yielded annually ; and, the loan being afterwards paid off, they invested the money in the 3 per cents. at a time when the funds were so low, that the amount of stock purchased was considerably greater than if the conversion had taken place at the end of a year from the testator's death :—Held, that the tenant for life was not entitled to the actual interest, which the money yielded, while it remained in the Indian security, but only to the dividends of so much 3 per cent. stock as would have been purchased with it at the end of a year from the testator's death. *Dimes* v. *Scott*, 4 Russ. 195 ; 28 R. R. 46 —L. C.

Held, also, that the trustees ought to be charged with the whole of the stock actually purchased, and all sums actually received in respect of the Indian rate of interest ; and that they ought to be allowed in their discharge, as payments to the tenant for life, not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends, if the money had been transferred from the Indian security and invested in the 3 per cent. stock at the end of a year from the testator's death. *Ib.*

ix. *Improper Sale of Stock.*

Option of Cestui que Trust.]—Trustee, mistaking his power, sold stock without authority ; decreed to replace it immediately : if at a less price, to invest the surplus in the same stock to the same uses. *Powlett (Earl)* v. *Herbert*, 1 Ves. 297.

Trustee of stock sells it ; the cestui que trust has an option to have the stock or the produce, with interest. *Forrest* v. *Elwes*, 4 Ves. 497 ; 4 R. R. 269. S. P., *Harrison* v. *Harrison*, 2 Atk. 121. And see *Bostock* v. *Blakeney*, infra.

Executor and trustee having been guilty of a breach of trust, by selling out stock and dealing improperly with the money, the cestui que trust have an option to have the stock replaced, or the money produced by the sales, with interest at 5 per cent. or more, if more has been made by it, and the costs occasioned by his misconduct. *Pocock* v. *Reddington*, 5 Ves. 749.

Trustee selling out stock, which was the trust fund, without corrupt motive, decreed to replace the stock with costs of so much of the suit as was occasioned by his act ; but no option given to the cestui que trust to have the money produced by the sale invested, as there would if the trustee made anything, or sought to make anything, by the sale. *O'Brien* v. *O'Brien*, 1 Moll. 533.

—— **Bankrupt Trustee Selling.**] — Where bankrupt trustee has sold out stock, the cestui que trust may either prove for the price or for the value at the time of the bankruptcy. *Garner, Ex parte, Iveson, In re*, 1 Mont. D. & D. 497.

Trustee Selling Stock and Investing on Improper Mortgage — Request of Married Woman.]—Where a trustee, at the request of the cestui que trust, a married woman, and tenant for life of the fund for her separate use, sold out the trust fund, and invested it on an improper security :—Held, in a suit by such tenant for life against the trustee to have the trust fund replaced in a proper state of investment, that no costs ought to be given, as between the plaintiff and the defendant, on either side ; held, also, that the costs of the parties entitled in remainder

were to be paid by the plaintiff. *Mant* v. *Leith*, 15 Beav. 524; 21 L. J., Ch. 719; 16 Jur. 302.

Where a trustee, at the instance of a cestui que trust, a married woman, sold out stock, and placed the trust fund in an improper state of investment; he was charged only with the amount of the dividends which would have accrued due on the trust fund had it remained in its original investment. *Ib.*

Where the trusts are to invest in any of the public stocks or funds, or on real securities, railway debentures, though real securities, are not real securities within the terms of the trust. *Ib.*

Stock to be Replaced.]—Where trustees, having power to invest on government or real security, and vary such investment from time to time, sold out stock for the purpose of investing the produce of the stock in a mortgage, which they were not justified in taking, it was held, that the court could not treat the sale of the stock as lawful, and the investment as unlawful, so as to satisfy the trust by replacing the money; but that the whole must be treated as one unjustifiable transaction, and that the trustees must replace the stock. *Phillipson* v. *Gatty*, 2 Hall & Tw. 459. Affirming 7 Hare, 516; 13 Jur. 318.

Misapplication of Exchequer Bills by Broker.]—A trustee properly invested trust money in exchequer bills, but he kept them in the hands of a broker; upon a misapplication of them by the broker:—Held, that the trustee was personally liable for the value of the exchequer bills at the time of the loss, and not for the stock the money would have purchased. *Mathew* v. *Brise*, 6 Beav. 239; 12 L. J., Ch. 263. Affirmed, 15 L. J., Ch. 39; 10 Jur. 105.

Stock Sold Out just before Dividend was Payable.]—A trust fund is created by will to be laid out in the purchase of lands; an estate is purchased, and the trust money is laid out in repairs and improvements; this is a misapplication, and shall not be allowed. Part of the trust money was sold out just before a dividend was payable; no allowance can be made to the tenant for life (who would be entitled to the dividend) in the price. Where a trustee sells out trust money, the cestui que trust may elect whether he will have it replaced, or be paid the produce of it. *Bostock* v. *Blakeney*, 2 Bro. C. C. 653.

x. *Funds in Court and Investment with Sanction of Court.*

See R. S. C., November, 1888 (substituted for R. S. C., 1883, Ord. 22, r. 17).

Investment in Bank Stock and East India Stock.]—Where there was a power to invest trust funds in Government or real securities, the court sanctioned an investment in bank stock and in East India stock. *Bishop* v. *Bishop*, 30 L. J., Ch. 624; 4 L. T. 350; 9 W. R. 549.

—— **Consols.**]—Where a petition prayed an investment of 3 per cent. consols in bank stock or East India stock, the court directed the investment to be made in bank stock. *Peillon* v. *Brooking*, 4 L. T. 731.

The costs of all parties were ordered to be paid out of the capital of the trust fund; but several residuary legatees who had appeared by different counsel were allowed only one set of costs. *Ib.*

A trust fund invested in consols was paid into court under the Trustee Relief Act. On the petition of the tenant for life to change the investment into East India or bank stock, and for payment of the dividends to him, a transfer into bank stock was, under the circumstances, ordered; and, a petition being otherwise necessary, the costs were directed to be paid out of the corpus. *Langford's Trusts, In re*, 2 J. & H. 458; 31 L. J., Ch. 334; 8 Jur. (N.S.) 114; 5 L. T. 579; 10 W. R. 121.

On the application of a person who had a life interest in two funds invested in consols, the court, under the provisions of 22 & 23 Vict. c. 35, directed such funds to be sold by the accountant-general, and to be invested in bank stock. *Cohen* v. *Waley*, *Newton* v. *Waley*, 7 Jur. (N.S.) 937; 3 L. T. 436; 9 W. R. 137.

—— **23 & 24 Vict. c. 38—Interim Investment until suitable Investment in Land.**]—A testator directed his trustees to convert his personal estate and invest it in the purchase of lands to be settled in strict settlement, and in the meantime to invest it in the funds and pay the dividends to the persons who would have been entitled to the rents of the lands if purchased. The testator died shortly before the passing of the statute 22 & 23 Vict. c. 35, possessed of considerable sums of bank stock and East India stock:—Held, after the passing of the stat. 23 & 24 Vict. c. 38, that the trustees were justified in retaining the above stocks in their present state and investing other moneys in like stocks until a suitable investment in land could be found, and that the tenant for life was entitled to the whole income arising from them subsequent to the passing of that statute. But held that for the period between the death of the testator and the passing of the stat. 23 & 24 Vict. c. 38, the tenant for life was entitled only to such income as she would have received had the stocks been converted at the testator's death and invested in consols; the last mentioned statute making s. 32 of 22 & 23 Vict. c. 35, retrospective for the purpose of making it apply to instruments coming into effect before it was passed, but not so as to affect rights accrued before the passing of the later act. *Hume* v. *Richardson*, 4 De G. F. & J. 29; 31 L. J., Ch. 713; 8 Jur. (N.S.) 686; 6 L. T. 624; 10 W. R. 528. And see *Sowerby* v. *Clayton*, 3 Hare, 430; 8 Jur. 597.

Section 32 of 22 & 23 Vict. c. 35, enabling trustees, in certain cases, to invest their trust funds in bank stock or East India stock, does not apply where the trust fund is already invested in bank annuities, and the trustee has no power, independently of the act, to vary any investment. *Warde, In re*, 2 J. & H. 191.

—— **Sale by Husband of Part of Reversionary Interest.**]—Circumstances under which the court will authorise the investment of trust funds in East India stock. A tenant for life, having a power to give a life interest to his wife, by his marriage settlement appointed certain hereditaments to trustees, during his wife's life, upon trust, if she survived him, to pay her an annuity of 500*l.* out of the rents and profits, during her life, for her jointure, in lieu of dower. He afterwards acquired the fee, and the hereditaments, subject to the jointure, being considered an insufficient security, the husband and

wife joined in conveying the same, with other hereditaments, to trustees, discharged from the annuity, upon trust, to raise, by mortgage, sufficient money to purchase an annuity of 500*l.* for the life of the wife, if she survived him, or, if the money should not be raised by mortgage within three months, upon trust to sell the hereditaments, and invest a sufficient part thereof in 3 per cent. consols, or (if insufficient) to invest the whole of the moneys in the parliamentary stocks or public funds, or in government or real securities, with power of variation of securities, and after the decease of the tenant for life, to pay the income to the wife during her life in satisfaction of the annuity, and to stand possessed of the surplus in trust for the husband. The power to raise money by mortgage was not exercised, and the trust premises were sold and the proceeds invested in consols, but the whole income was insufficient to pay the annuity. Upon a bill filed by the wife after the death of the husband:—Held, that she was not entitled to have the deficiency of the income made good out of the corpus of the fund. *Mortimer* v. *Picton*, 4 De G. J. & S. 166; 3 N. R. 338; 33 L. J., Ch. 337; 10 Jur. (N.S.) 83; 9 L. T. 795; 12 W. R. 292.

Held, also, that the primary object of the trust being to secure the annuity, the court might properly, in the exercise of its statutory jurisdiction, direct the conversion of the trust fund into East India stock, notwithstanding that the husband had sold a portion of his reversionary interest. *Ib.*

—— **Transfer of Fund in Court belonging to Married Woman.**]—It is a matter of discretion vested in the court as to whether a transfer of a fund in court, belonging to a married woman equitably entitled for life, and which was invested in consols, should be laid out in East India stock, under 23 & 24 Vict. c. 38. *Cockburn* v. *Peel*, 30 L. J., Ch. 575; 7 Jur. (N.S.) 810; 4 L. T. 571; 9 W. R. 725.

Where, however, the fund is not in court, trustees making the transfer will be entitled to the protection of the court, if they act bonâ fide and to the best of their discretion. *Ib.*

—— **Special Reason for Change of Investment.**]—On an application by two unmarried women and a married woman and her husband to have certain sums of moneys, to which they were entitled for life under their father's will, transferred from the government new 3 per cent. stock to Bank of Ireland stock, the court will not permit such a transfer, except under special circumstances, showing either that the transfer will be beneficial to those entitled in remainder, or that it is necessary in order to carry out the primary object of the trust. The mere increase of income is not a sufficient ground for the transfer. *Boyces' Minors, In re*, Ir. R. 2 Eq. 255; 15 W. R. 827.

—— **Fund for Maintenance—Infants nearly of Age.**]—The court ordered a fund invested in consols, out of which maintenance had been allowed by an order of the court for infants in a suit, and which has become diminished, to be invested in East India stock, the infants having nearly attained their majority. *Fluid* v. *Fluid*, 7 L. T. 590. S. P., *Hurd* v. *Hurd*, 11 W. R. 50.

—— **Application of Married Woman aged Fifty-one without Children.**]—Where a woman, fifty-one years of age, who had been married thirty-four years without ever having had children, asked that a sum of consols which was settled upon herself for life, remainder to her children, remainder to herself absolutely, might be sold out and invested in East India stock, the court directed the change of investment, notwithstanding the opposition of the petitioner's husband, as the probability of there being any children to take under the settlement was extremely remote. *Vidler* v. *Parratt*, 4 N. R. 392; 10 L. T. 686; 12 W. R. 976.

—— **Party very Poor.**]—Where a party is very poor, the court will not only sanction the exchange from consols to bank stock, but will dispense with any provision in the order disenabling the party from receiving three dividends in one year. *Ingram's Trust, In re*, 8 L. T. 758; 11 W. R. 980.

—— **Tenant for Life who was Settlor.**]—An investment of settled trust funds in East India or bank stock sanctioned, upon the petition and at the cost of the tenant for life, who was the settlor. *Equitable Assurance Co.* v. *Fuller*, 1 J. & H. 379; 30 L. J., Ch. 848; 7 Jur. (N.S.) 307; 4 L. T. 50; 9 W. R. 400.

Administration of Trust Funds in Court—No Direction for Investment in East India Stock.]—In the administration of trust funds in court no direction will be made for the investment in East India stock, though the court gave the tenants for life permission to apply in chambers for leave to invest the funds on real security in England. *Ungless* v. *Tuff*, 30 L. J., Ch. 784; 9 W. R. 729.

Position of Stock while Company's Charter was in Force.]—While the 3 & 4 Will. 4. c. 85, for the regulation of the East India Company's charter, was in force, the capital stock of the company was not "a government or parliamentary stock or fund," nor was it "a foreign stock or fund." *Brown* v. *Brown*, 4 K. & J. 704; 6 W. R. 613.

New East India Stock.]—The court will in no case authorise trustees to invest trust money in the new East India stock. *Fromow's Estate, In re*, 8 W. R. 272.

Money having been paid into court in obedience to the Standing Orders, upon an intended application to parliament for a bill for the construction of a railway, the parties paying in the money applied that the same might be invested in the New East India 5 per cent. loan, raised under the powers of the 22 & 23 Vict. c. 39; but Wood, V.-C., was of opinion that such investment would not be East India stock within the meaning of the 22 & 23 Vict. c. 35, s. 32, and the full court of appeal concurred. *Colne Valley and Halstead Ry. Bill, In re*, 1 De G. & J. 53; 1 John. 528; 29 L. J., Ch. 33; 5 Jur. (N.S.) 1129; 1 L. T. 20, 26; 8 W. R. 18.

Such investment is not what the court of chancery would sanction; but if a trustee had so invested money, and were brought before the court as for a breach of trust, and he pleaded the provisions of the 22 & 23 Vict. c. 35, s. 32, the court would be bound to decide in his favour. *Ib.*

Where Special Securities Directed by the

Trust.]—By an act of parliament, funds in court were, by way of interim investment, to be laid out in navy, victualling, or exchequer bills. But under 23 & 24 Vict. c. 38, and the General Orders of February 1, 1861, the court allowed them to be invested in consols. *Birmingham Blue Coat School, In re*, 35 Beav. 345; 35 L. J., Ch. 837; L. R. 1 Eq. 632.

The court of chancery may order the investment in East India stock of a fund paid into court under the provisions of a special act anterior to 23 & 24 Vict. c. 38, although such special act directs the investment to be in consols or 3*l.* per cent. reduced bank annuities. *Wilkinson's Estate, In re*, L. R. 9 Eq. 343.

An application for an order for investment of such a fund in bank stock or new East India stock (in which trustees are authorised to invest by 30 & 31 Vict. c. 132) refused. *G. N. Ry., Ex parte*, L. R. 9 Eq. 274.

Loans on Real Securities in Ireland.]—Section 3 of 4 & 5 Will. 4, c. 29, enacts that in certain cases loans on real securities in Ireland shall be made under the directions of the court of chancery or exchequer in England to be obtained in any cause upon petition in a summary way:—Held, that the concluding part of the section must be read thus: "in any cause, or upon petition in a summary way"; and that the proposed securities must be approved of by the master. *French, Ex parte*, 7 Sim. 510.

An application made under the 4 & 5 Will. 4, c. 29, to invest trust funds on Irish security, refused, for though for the benefit of the tenant for life, as increasing his income, it was otherwise as to those in remainder, as affording a less secure investment. *Stuart* v. *Stuart*, 3 Beav. 430; 10 L. J., Ch. 148; 5 Jur. 3.

Lynch's Act (4 & 5 Will. 4, c. 29) only relieves a trustee from liability in respect of an investment in Ireland instead of England, and therefore where, upon petition under the act, the court sanctioned an investment which was made without proper evidence of value, and without the consent of the necessary parties, and there was a loss, the trustees were held liable for the breach of trust. *Norris* v. *Wright*, 14 Beav. 291.

Pending a suit to make trustees liable for the improper investment of trust moneys on an Irish estate, the property was put up for sale under the Incumbered Estates Act, and an order was made giving the trustees liberty to buy, which they did:—Held, that this order did not relieve the trustees from any liability in the cause, although it was not expressed to be made "without prejudice." *Ib.*

Reference to Master to Inquire whether Change of Investment Beneficial to all Parties.]—Under the 4 & 5 Will. 4, c. 29, a trust to invest money in real securities in England or Wales or Great Britain, will authorise an investment on real securities in Ireland also; and although the money be already invested in Great Britain, the court will, on the application of the tenant for life of the fund, direct a reference to the master to inquire whether it will be for the benefit of all parties interested that that investment should be changed for one at a higher rate of interest in Ireland. *Pawlett (Lord), Ex parte*, 1 Ph. 570; 14 L. J., Ch. 321.

An order of reference, under the act 4 & 5 Will. 4, c. 29, as to whether it would be for the benefit of the parties beneficially interested in a settled fund to lend it on the security of freehold estates in Ireland, may be made ex parte; but the court will not confirm the master's report, finding that such a loan would be for the benefit of such parties, unless they all, as well those entitled in remainder as those entitled for life, have either been served with the petition or appeared before the master. *Kirkpatrick's Trust, In re*, 15 Jur. 941.

Securities other than Consols.]—The court will not, on the application of a tenant for life, except in special cases, order a fund in court to be invested in any other security but that of consols. *Darwin* v. *Darwin*, 22 L. J., Ch. 1007; 17 Jur. 781.

—— **New Three per cent. Annuities.**]—Sum of money paid into court under the Trustee Act allowed to be invested in new 3*l.* per cent. annuities. *Dunster's Trusts, In re*, 3 Eq. R. 449; 3 W. R. 267.

Under special circumstances the court permitted an infant's fund to be invested in new 3*l.* per cent. reduced bank annuities, instead of consols. *Hanson* v. *Murray*, 3 Eq. R. 758; 1 Jur. (N.S.) 917; 3 W. R. 557.

—— **London and Westminster Bank Shares.**] Trustees, under a power in a will, invested the residuary estate in London and Westminster Bank shares. An administration decree having been made, the remaindermen under the will applied to have the funds invested in consols; and it appearing that one of the trustees desired the change of investment, but was willing to retire from the trust, the court ordered the fund to be invested in consols, with liberty to apply with reference to any appointment of new trustees. *Butler* v. *Withers*, 1 J. & H. 332; 4 L. T. 736.

—— **Freehold Houses.**]—An investment of a fund in court in freehold houses will not, however eligible, be sanctioned by the court. *Moore* v. *Walter*, 8 L. T. 448; 11 W. R. 713.

—— **Purchase of Land.**]—Upon a petition by a tenant for life without impeachment of waste for the investment of 6,100*l.*, part of a large fund in court, in the purchase of land, the court approved of the purchase, notwithstanding the timber on the property was valued at 1,800*l.* *Jones's Settled Estates*, 3 Eq. R. 735; 24 L. J., Ch. 504; 1 Jur. (N.S.) 817; 3 W. R. 564.

—— **Foreign Bonds.**]—The court will allow the investment of a fund in court on foreign bonds where the interest is payable to bearer by coupons passing from hand to hand. *Brackenbury's Trusts, In re*, 31 L. T. 79; 22 W. R. 682.

Indian Railway Stock.]—A testator by his will gave 6,000*l.* on trust for C. for life, and after her death, in certain events, for R. for life. He directed the 6,000*l.* to be invested, inter alia, in the guaranteed stock of any railway company in India upon which a minimum rate of interest should be guaranteed by the government of India. All railways in India, not belonging to the Government, are leasehold. C. applied that the 6,000*l.* might be invested in East Indian Railway Stock Annuity B., and in Scinde, Punjaub, and Delhi Railway five per cent. guaranteed stock. R. opposed:—Held, that the

court would approve of the proposed investment. *Mansel, In re, Rhodes* v. *Jenkin*, 45 L. T. 741 ; 30 W. R. 133.

Effect of Administration Decree.]—After an administration decree has been made all powers of management of the estate which may be vested in trustees are subject to the control of the court; and the judge who exercises such control must be personally satisfied of the propriety of the course proposed to be adopted by the trustees. *Bethel* v. *Abraham*, 43 L. J., Ch. 180 ; L. R. 17 Eq. 24 ; 29 L. T. 715 ; 22 W. R. 179.

American Funds.]—Trustees having power to invest certain moneys belonging to a testator's estate at their discretion, and having also power to continue or change securities from time to time, as to the majority should seem meet, applied to the court in a suit for the administration of the trust estate for liberty to invest the moneys in and to convert securities into American funds or railway stocks. Infants were interested in the trust estate :—Held, that if the trustees had the discretion they claimed (which was doubtful), the court ought not, in a case where infants were interested, to permit them to exercise that discretion in the way they proposed. *Ib.*

American Federal Securities.]—The trusts of a settlement as to two-thirds of the trust funds made it imperative on the trustees, and as to the remaining one-third left it discretionary with them, to invest in American securities. During the civil war in America two petitions were presented, seeking an authority from the court to make such investments, but, having regard to the then condition of the United States, the court directed an investment in British funds with liberty to apply. After the termination of the war a third petition was presented, which the court answered by authorising investments in American Federal securities, directing the costs to be paid out of the corpus. *Knowles's Settlement, In re*, 37 L. J., Ch. 840 ; 18 L. T. 809.

Practice on Application to Court.]—*See* R. S. C. 1883, Ord. XXII, r. 18.

Former Practice.]—On motion for application of money placed in bank by a former order, there must not only be a certificate that the money was paid into the bank, but that it is actually there at the time of the motion. *Anon.*, 1 Atk. 519.

Notice of motion was given for the payment of money into court, but the notice did not proceed to state that any application would be made for its investment ; one of the parties did not appear on the motion :—Held, that no order for investment of the fund could be made. *Robinson* v. *Wood*, 1 Beav. 206.

When money is to be laid out under a marriage settlement in purchases, application must be made to the court upon each separate purchase. *Harrington* v. *Fleming*, 1 Bro. C. C. 74.

On a petition for the investment of stock and payment of the dividends, the court required an affidavit of title to be made by the petitioners. *St. Mary's College, Winchester, Ex parte*, 14 L. T. 550 ; 14 W. R. 788.

Upon an application for the investment of money paid into the bank, in the name of the accountant-general, to the credit of the copyhold commissioners, under s. 73 of the Copyhold Enfranchisement Act (4 & 5 Vict. c. 35), it is proper for the petitioner to serve the commissioners with notice of the application ; and, notwithstanding the act makes no provision for the payment of any costs, the court ordered the petitioner to pay the costs of the copyhold commissioners, and to add them to his own ; and that all such costs should be paid to the petitioner out of the fund, and said that this would be the rule for the future. *Hereford (Bishop), Ex parte*, 5 De G. & Sm. 265 ; 21 L. J., Ch. 608.

An order for the interim investment of money paid into court under a private act had been made by the Vice-Chancellor Kindersley :—Held, that an application for the payment out of court of part of the funds for the purposes of the same act, should be made before the same judge. *Harman's Bowden Park Estate Act, In re*, 1 Eq. R. 246 ; 1 W. R. 492.

The 23 & 24 Vict. c. 38 is an enabling act, and s. 10, which enacts that all orders for conversion of bank annuities into other funds or securities be made upon petition, to be presented by any of the parties in a summary way, does not preclude the court, in the exercise of its ordinary jurisdiction, from making such orders on a decree in a suit. *Lucas* v. *Rudd*, 16 W. R. 325.

When money is paid into court in consequence of a tenancy for life, and there is no provision in the private act under which it was paid in for service on any other person than the tenant for life, service on the trustees of the instrument under which he claims was dispensed with, and an investment was ordered in East India Stock under 23 & 24 Vict. c. 38, s. 10. *Adam's Will, In re*, 17 L. T. 641.

Asking Advice of Court as to Investments.]—*See* supra, 6 b. xi.

Investment of Purchase Money paid into Court under Special Statutes as Cash under Control of the Court.]—*See* LANDS CLAUSES ACT—PARLIAMENT—SETTLED LAND.

xi. *Power to Vary Investments.*

Statute.]—*Trustee Act*, 1893, *s.* 1.

Admission by Trustee of Sale of Part of Funds.]—A trustee, having power to vary trust funds, admitted that he had sold part of the funds, but did not show how the produce had been invested :—Held, on such an admission, that he was liable to make good the fund. *Meyer* v. *Montrion*, 5 Beav. 146 ; 11 L. J., Ch. 398.

Burden of Proof.]—It is the duty of a trustee who executes a power to show that he has complied with the exigencies required by it. So, where he varies the investment of the trust fund, the burden of proof lies on him to show that it is a fit and proper investment. *Norris* v. *Wright*, 14 Beav. 291.

Trust Legacy—Absence of Power to Vary.]—When specific property is bequeathed upon trust without any power being given to the trustees to alter the mode of investment, such trustees may, nevertheless, sell the property and invest the proceeds on any of the statutory investments, and vary such investment from time to time, provided that they never buy any redeemable security at a premium. *Waite* v. *Littlewood*, 41 L. J., Ch. 636.

—— **Appropriation—Change of Investment.**]—When a trust legacy has been appropriated it is a breach of trust to vary the investment without reasonable cause; and upon the legacy falling into possession, the trustee is liable to indemnify the legatee against any loss resulting from the change of investment. The duties of trustees with respect to the appropriation and investment of trust legacies considered. *Walker, In re, Walker* v. *Walker*, 59 L. J., Ch. 386; 62 L. T. 449.

Consols—National Debt Conversion.]—Trustees of a will containing directions to invest in consols, but no direction to change or vary the investment, may, under the National Debt (Conversion) Act, 1888, sell original stock and invest the proceeds in authorised securities. *Tuckett's Trusts, In re*, 57 L. J., Ch. 760; 58 L. T. 719; 36 W. R. 542.

Trust Investment Act, 1889.]—The power to vary investments in s. 3 of the Trust Investment Act, 1889, applies to all investments authorised by the act, whether made under the act or not. Therefore, where trust funds were invested in securities authorised by the act under an instrument which contained no power to vary:—Held, that the trustees had power to sell out such securities for the purpose of investing the proceeds in other securities authorised by the act. *Hume* v. *Lopes*, 61 L. J., Ch. 423; [1892] A. C. 112; 66 L. T. 425: 40 W. R. 593—H. L. (E.)

The expression "trust funds" in s. 3 of the act includes money invested on security as well as uninvested cash. *Ib.*—By Lord Watson and Lord Macnaghten.

—— **Appropriation to Particular Legacy.**]—The power given to trustees by s. 3 of the Trust Investment Act, 1889, to invest trust funds in any of the stocks therein mentioned, does not extend to authorising them to set apart or appropriate any of such stocks to answer a particular purpose, as, for instance, to provide for an annuity given by will, so as to facilitate the distribution of the rest of the testator's estate. *Owthwaite, In re, Owthwaite* v. *Taylor*, 60 L. J., Ch. 854; [1891] 3 Ch. 494; 65 L. T. 144; 40 W. R. 38.

—— **Corporation holding Funds for Charitable Purposes—Varying Investments.**]—A corporation incorporated by special act of parliament and holding funds for charitable purposes is a trustee within the meaning of the Trust Investment Act, 1889, and consequently is entitled to invest any trust moneys in its hands on any of the securities specified or referred to in s. 3 of the act, unless expressly forbidden to do so by the instrument creating the trust. A trustee, however, who has not, under the instrument creating his trust, power to vary the investments comprised in such instrument, cannot sell existing investments for the purpose of reinvesting the proceeds in the securities specified or referred to in s. 3 of the act. *Manchester Royal Infirmary* v. *Att.-Gen.*, 59 L. J., Ch. 370; 43 Ch. D. 420; 62 L. T. 419; 38 W. R. 460. But see *Hume* v. *Lopes*, supra.

—— **Scope of Act—Building Society.**]—The powers of investment conferred on trustees by the Trust Investment Act, 1889, are not applicable n the case of the funds of a building society incorporated under the Building Societies Act, 1874, whether such funds are standing in the name of the society or in the names of its trustees. Those powers are only exercisable by trustees who have funds in their hands for the purpose of investment. *National Permanent Building Society, In re*, 59 L. J., Ch. 403; 43 Ch. D. 431; 62 L. T. 596; 38 W. R. 475.

7. Indemnity, Lien and Reimbursement.

Statute.]—*Trustee Act*, 1893, ss. 24, 49.

a. Indemnity Clause.

Trustees Joining in Receipts.]—L., by will, in 1854, after appointing three trustees, declared "such" (sic in the will, but "each" in the draft) trustee should be answerable only for losses arising from his own default, and not for involuntary acts, or for the acts or defaults of his co-trustees or trustee, and particularly that any trustee who should pay over to his co-trustee, or should do or concur in any act enabling his co-trustee to receive any moneys for the general purposes of her will, should not be obliged to see to the due application thereof, nor should such trustee be subsequently rendered responsible by an express notice or intimation of the actual misapplication of the same moneys. The three trustees joined in signing and giving receipts to two insurance companies for the two sums of money paid by them, but two of the trustees permitted their co-trustee to obtain the money without ascertaining whether he had duly invested it. That trustee having misapplied the money, a bill was filed for the purpose of making his co-trustees personally liable:—Held, that according to the true construction of the indemnity clause contained in the will, their concurrence in enabling their co-trustee to receive the money did not make them liable for the misapplication of the fund. *Wilkins* v. *Hogg*, 3 Giff. 116; 31 L. J., Ch. 41; 8 Jur. (N.S.) 25; 5 L. T. 467; 10 W. R. 47—L. C.

There are three modes in which a trustee may become liable, according to the ordinary rules of the court: first, where one trustee receives trust money, and hands it over to a co-trustee without securing its due application; secondly, where he permits a co-trustee to receive trust money without making due inquiry as to his dealing with it; thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the necessary steps to obtain restitution; but the operation of these rules was excluded by the indemnity clause contained in the will. *Ib.*

Authorising Bank to Honour Signature of One Trustee.]—A testator authorised his two trustees and executors, A. and D., to carry on his business, giving them full discretion as to its management, and power to employ collectors of debts and accountants. The will contained an indemnity clause, that each trustee should be answerable only for losses arising from his own default, and that any trustee who should pay over to his co-trustee, or should concur in any act enabling him to receive any moneys for the purposes of the will, should not be obliged to see to the application thereof, nor should such trustee be rendered responsible by an express notice of the actual misapplication of the same moneys. The business was carried on, with the consent of the beneficiaries, by one

trustee, A., the testator's son, and an account was opened at the bank, and a letter signed by both executors and trustees, authorising the bank to honour the signature of the one trustee, viz. A., the son. Under this authority the trustee, A., drew out, nominally for the business, large sums of money, which he misappropriated to his own purposes:—Held (following *Wilkins* v. *Hogg*, supra), that in the absence of proof of gross negligence or personal misconduct on the part of the trustee D., he was fully protected by the indemnity clause, from liability in respect of the loss to the estate occasioned by the defalcations of his co-trustee, A. *Pass* v. *Dundas*, 43 L. T. 665; 29 W. R. 332.

Co-Executors Executing Assignment of Mortgage.]—Where testator had directed that his executors should be liable for each other's acts, one of them, who was in good credit at the time, having called in a mortgage, and received the money, sends round the assignment to his co-executors, who execute it and sign a receipt:—Held, that as no part of the money had come to their hands, they should not be answerable. *Westley* v. *Clarke*, 1 Eden, 356.

Trustee Neglecting to take Necessary Steps to Secure Trust Fund.]—The ordinary trustee indemnity clause affords no security to a trustee who neglects to take the necessary steps to secure the trust fund. *Dix* v. *Burford*, 19 Beav. 409.

Where a person nominated executor accepts the executorship, and assents to a bequest, and thereby becomes a trustee of the fund bequeathed, the rule as to the non-liability of executors for the receipts of their co-executors ceases to apply, and it becomes the duty of the trustee, by notice or otherwise, to make it impossible for a co-trustee to receive and misapply the fund, and he will not be protected against the consequences of neglect so to do by the ordinary trustee indemnity clause. *Ib.*

Consequences of Breach of Trust.]—Trustees made personally responsible for the consequences of their neglect to enforce a covenant contained in a marriage settlement. By a marriage settlement it was covenanted and agreed that 5,000*l.* consols, part of the wife's property, should be transferred to trustees, upon certain trusts for the husband, and wife, and children. At the time of the settlement, a sum of 4,946*l.* was standing in the name of the wife; but the trustees took no steps to enforce a transfer, and it was sold out and misapplied by the husband:—Held, that the trustees were personally responsible for the loss; and, secondly, that they were not relieved from their liability by the trustee indemnity clause declaring that they shall not be liable "for any casual or involuntary loss" without their wilful default, but "for such moneys only as should actually come to their hands." *Fenwick* v. *Greenwell*, 10 Beav. 412; 11 Jur. 620.

A clause in a marriage settlement, "that the trustee should not be chargeable with, or accountable for, any money arising in execution of the trusts, but what the person or persons so to be accountable should actually receive," does not bind the trustees as a covenant, but is a clause of indemnity, to take away that responsibility which each would be subject to for the acts of the others, were it not for this clause; and only leaves each of them accountable for what he actually receives as for a simple contract debt. *Bartlett* v. *Hodgson*, 1 Term Rep. 252.

The trustee indemnity clause does not exonerate a trustee from the consequences of a breach of trust. *Brumridge* v. *Brumridge*, 27 Beav. 5.

An executor and trustee, having adopted a loss which happened through the failure of an agent—by suppressing the fact of his having allowed the agent to receive the money—by declaring to his co-trustees the money to be in his own hands—by taking securities and proving them in the agent's estate—by actually replacing the amount by the investment of his own money and by charging himself, in an answer in chancery, with the amount as received by him; was not allowed, afterwards, to throw the loss on the trust estate, on the ground that the indemnity clause in the will would have saved him from liability; the court held, that by his conduct, the same loss was to be deemed not the money of the trust, but his own. *Abercrombie* v. *Gordon*, 1 L. J., Ch. 33.

Placing Trust Money with Bankers on a Deposit Account.]—Trustees made personally liable for loss arising from placing trust moneys with bankers on a deposit account, which was not authorised by the will, and that, notwithstanding a trustee indemnity clause against losses by a banker of moneys deposited for safe custody. *Behden* v. *Wesley*, 29 Beav. 213.

Power to Forbear Enforcing Payment of Debt.]—Construction of a clause, giving trustees liberty to forbear enforcing payment; that it was for their indemnity, as, if with a view to insolvency, it might amount to fraud. *Alcock, Ex parte*, 1 V. & B. 179.

The usual indemnity clause does not exonerate one of two trustees, from a loss occasioned by a debt due from the other having been suffered to remain outstanding. *Mucklow* v. *Fuller*, Jacob, 198; 23 R. R. 29.

Each Trustee to be Answerable only for One Moiety.]—Where it is a term of the trust deed that each trustee shall be answerable only for one moiety, the court will not extend the liability. *Birls* v. *Betty*, 6 Madd. 90; 22 R. R. 246.

Lending Trust Moneys on Second Mortgage of House greatly out of Repair.]—Trustees lent trust moneys on a second mortgage of house property greatly out of repair, and the principal part was lost:—Held, that they were liable as for a breach of trust, notwithstanding a trustee indemnity clause declaring they should not be liable for the insufficiency or deficiency in value of any securities, except through their wilful default. *Drosier* v. *Brereton*, 15 Beav. 221.

In charging trustees for breaches of trust and the costs of suit, it is immaterial how the trust was created, and whether for valuable consideration or by the voluntary gift of the trustees themselves. *Ib.*

Persons Employed by Trustees.]—The indemnity of the trustees under a deed of trust does not give the persons employed by them a right as creditors against the trust fund. *Worrall* v. *Harford*, 8 Ves. 4.

Trustee-Mortgagee employing same Solicitor as Mortgagor—Fraud of Solicitor.]—If trustees lending money on mortgage have the same solicitor as the mortgagor, they must take the utmost precaution; if they trust implicitly in the solicitor, however high his reputation, they will

be held responsible for any loss which his fraud may occasion. The indemnity clause usually inserted in settlements will not protect them. *Sutton* v. *Wilders*, 41 L. J., Ch. 30; L. R. 12 Eq. 373; 25 L. T. 292; 19 W. R. 1021.

Costs—Priority—Trustees and Mortgagors of Harbour Rates—Commissioners Clauses Act, 1847.]—An action was brought by a creditor against incumbrancers and the Dartmouth Harbour Commissioners, who were trustees and mortgagors of the tolls and rates raised under their act of parliament. A receiver had been appointed and priorities determined, and money paid into court in the course of the action. The court directed the taxing-master in taxing the plaintiffs' costs to distinguish the costs of which the other incumbrancers (except the commissioners) had had the benefit in securing the fund in court or in determining the rights of the parties to it, and ordered these costs to be paid to the plaintiffs in priority to all other incumbrancers, the plaintiffs to add the rest of their costs to their security:—Held, that by the Commissioners Clauses Act, 1847, s. 60, the commissioners were entitled to be indemnified out of the rates and other moneys coming to the hands of the commissioners by virtue of that and the special acts for all payments made or liability incurred in respect of any acts done by them, and for all losses, costs, and damages incurred by them in the litigation, and that this provision applied to the funds now in court, and that the fact that the commissioners were in the position of mortgagors did not affect their rights as trustees to reimbursement under this provision. Therefore, they were entitled to their costs as between solicitor and client in priority to the plaintiffs and other incumbrancers. *Batten* v. *Dartmouth Harbour Commissioners*, 59 L. J., Ch. 700; 45 Ch. D. 612; 62 L. T. 861; 38 W. R. 603.

Bond of Indemnity to Co-trustee.]—A., being trustee with B. of a legacy of 10,000*l*., applied to B. to be allowed to employ it in his private business; B. gave his consent, on receiving from A. a bond, conditioned to keep him harmless and indemnified against all actions, suits, proceedings, claims, demands, loss, costs, charges, damages and expenses, on account of the legacy, or by reason of A.'s being permitted to hold the same. The legacy not having been accounted for or paid by A. to the cestuis que trust, the latter filed a bill against the executors of A. and B., and obtained a decree, which declared that A. and B. had become jointly and severally liable to make good the legacy, and ordered them to do so. A charge had been carried in against the estate of B., but no sum had been paid with the exception of 10*l*. for costs of suit:—Held, first, that the bond was not illegal. Secondly, that the representatives of B. were entitled to recover from the representatives of A. 10,000*l*., with interest and costs of suit. *Warwick* v. *Richardson*, 10 M. & W. 282; 11 L. J., Ex. 351.

b. Express Agreements by Cestuis que Trust to Indemnify Trustees.

Statute.]—*Trustee Act*, 1893, *s.* 24.

Covenant of Indemnity — Trustee of two separate Funds Paying over one Fund.]—A trustee of two separate funds held not entitled to require from the cestui que trust of both funds a covenant of indemnity in respect of dealings with one of the funds before paying over the other fund, as to which there was no question; and the trustee was made to pay the costs of a suit instituted by the cestui que trust to obtain payment of the latter fund without any such indemnity. *Price* v. *Loaden*, 21 Beav. 508.

Separate Covenants—Suit against Cestuis que Trust Jointly.]—Where cestuis que trust have entered into separate covenants with the trustees to pay, in certain proportions, the expenses of the trustees, and to indemnify them against liabilities incurred in the execution of trusts necessarily involving expense on their part, the trustees are entitled to file a bill against such cestuis que trust jointly for a general account of the trust, in order that, if the assets are exhausted, the liability of the cestuis que trust, under the covenants, may be ascertained once for all. *Singleton* v. *Selwyn*, 3 N. R. 27; 9 Jur. (N.S.) 1149; 9 L. T. 408; 12 W. R. 98.

The existence in such a case of a creditors' suit for administering the trust does not necessarily prevent the trustees from instituting such suit on their own behalf. *Ib.*

Request by Cestui que Trust to Call in Settled Debt.]—Where, by the terms of a marriage settlement, it was declared that a trustee should stand possessed of a debt, upon trust, in the first instance, to call in or compel payment of such debt, unless the cestuis que trust consented to its remaining outstanding, and the trustee is requested by the cestuis que trust to call in the debt, he is not entitled to an indemnity from them previously to his bringing an action, if necessary, for the same; and a trustee, under such circumstances, was made to pay the costs of a suit made necessary by his neglecting to bring the action. *Kirby* v. *Mash*, 3 Y. & C. 295; 8 L. J., Ex. Eq. 33; 3 Jur. 221.

Indemnity given by Solicitor of Married Woman for Breach of Trust before her Marriage.]—A marriage being in contemplation, A. B., the intended wife, conveyed property to trustees for herself until marriage, and then for her separate use for life, without power of anticipation, and, subject to certain interests to her husband and children, if any, for herself. Before the marriage took effect the trustees committed a breach of trust, against which A. B., by her solicitor, gave an indemnity. The marriage took effect two years after the settlement, and the husband died without children:—Held, that the indemnity was valid and subsisting, and that the trustees had been released from their liability. *Ghost* v. *Waller*, 9 Beav. 497.

Transfer to New Trustees who were Americans—Deposit of Tobacco Warrants with Liberty to Sell.]—Trustees of a marriage settlement transferred the trust fund to new trustees who were Americans, and apprehending this to be a breach of trust, they got from the husband a deposit of tobacco warrants, with liberty to sell. The trustees sold the tobacco warrants, and invested the produce in exchequer bills, but it was afterwards decided, by a court of equity in England, that at the time of the execution of the deposit, no breach of trust had been committed, and that the old trustees had then no interest in the fund:—Held, that as there was no consideration for the deposit or agreement, the old trustees had no

right, as against the husband or his representatives, to retain the exchequer bills for the benefit of the infant children of the marriage. *Meinertzhagen* v. *Davis*, 1 Coll. C. C. 353; 13 L. J., Ch. 457; 8 Jur. 973.

Distributing Trust Fund among Strangers at Request of One Beneficiary—Trustee subsequently becoming Beneficially Entitled.]—A trustee who distributes a trust fund among strangers at the request of one of the beneficiaries, from whom he takes a covenant of indemnity, cannot afterwards recover under the covenant for the loss of a beneficial interest, to which he has subsequently become entitled, in the fund. The effect of active concurrence by a person in a breach of trust upon a beneficial interest to which he subsequently becomes entitled in the trust fund considered. *Evans* v. *Benyon*, 37 Ch. D. 329; 58 L. T. 700—C. A.

A. was sole trustee of a fund held in trust for B. for life, then for Mrs. B. for life, then if she died in B.'s lifetime, in trust as she should appoint by will, and in default for her next of kin. A., at the request of B. and his wife, raised 5,000*l.* out of the fund, paid 1,000*l.* to each of the four adult daughters of C., and 1,000*l.* to C. in trust for his infant daughter. B. covenanted with A. to indemnify him against "all consequences" of this distribution of the 5,000*l.* Mrs. B. died in B.'s lifetime intestate, and her next of kin were A. and C. On the death of B., A.'s representative sued B.'s representative to compel him to replace the £ 000*l.*:—Held, that the object of the covenant was only to indemnify A. from demands against him, as trustee, for breach of trust, and that it ought not to be construed as an undertaking to make good to him any loss which he, as a beneficiary, might sustain by the diminution of the trust fund; and that since A., as next of kin, could not have made a claim against himself as trustee in respect of the breach of trust, there was no claim against A.'s estate in respect of which his representative could claim indemnity from B.'s estate so far as regarded A.'s interest as one of the next of kin; that C., having actively concurred in the distribution, could not have made any claim against A. or his estate in respect of it, even if he had not known, as the court was satisfied he did know, that he had a possible interest in the trust fund, and that the distribution of it was a breach of trust; and, therefore, that as regarded C.'s interest as one of the next of kin, there was no claim against B.'s estate under the covenant. *Ib.*

c. Right of Trustee in other Cases.

Concurrence in Breach of Trust—Liability of Interest of Cestui que Trust.]—The interest of a cestui que trust, who concurs with a trustee in a breach of trust, is liable to indemnify the trustee. *Booth* v. *Booth*, 1 Beav. 125; 8 L. J., Ch. 39; 2 Jur. 938.

Where a cestui que trust, who is party to a breach of trust, is a married woman, and the trustees claim a right of retainer against her life interest in the settled funds to indemnify them against their breach of trust, they are bound to show that she acted for herself in the breach of trust, and was fully informed of the state of the case. *Sawyer* v. *Sawyer*, 54 L. J., Ch. 444; 28 Ch. D. 595; 52 L. T. 292; 33 W. R. 403—C. A.

Equity will endeavour to deliver a trustee from a misapplication of trust money, where he errs in the management only; but if he goes out of it with the approbation of the cestui que trust, it must be first made good out of the person's estate who consented. *Trafford* v. *Boehm*, 3 Atk. 444.

Tenant for life, who had obtained the benefit of a breach of trust, made responsible upon a bill for that purpose, instituted by the trustees. *M'Gachen* v. *Dew*, 15 Beav. 84.

In a suit by children against trustees, to make them liable for a breach of trust, it was alleged by the trustees that their co-defendant, the tenant for life, had concurred; the decree was made against the trustees, without prejudice to any right or remedy they might have against the tenant for life. *Meyer* v. *Montriou*, 9 Beav. 521.

The representatives of a surviving trustee who had concurred with his co-trustee in a breach of trust by lending to the tenant for life on his promissory note, were held entitled to file a bill against such tenant for life, and the other cestuis que trust, for replacing the funds, and the appointment of new trustee, with costs against the tenant for life, or out of the fund. *Greenwood* v. *Wakeford*, 1 Beav. 576; 8 L. J., Ch. 333.

Trustees who had improperly allowed perishable property to remain in specie, and to be enjoyed by the tenant for life, being made liable, were allowed, by means of an inquiry, in the same suit, to recover back against the estate of the tenant for life the amount overpaid to him. *Hood* v. *Clapham*, 19 Beav. 90; 24 L. J., Ch. 193; 1 Jur. (N.S.) 78; 3 W. R. 78.

—— **Interest on Moneys replaced by Trustee.**]—Trustees, who, with the concurrence of the tenant for life, had committed a breach of trust, by lending the trust moneys on an improper security, were directed to replace the amount, and to reimburse themselves out of the life interest of the tenant for life:—Held, that they were not entitled to charge interest on the money replaced by them, from the time of replacing it to the time of the repayment, out of the life interest. *Monk* v. *Druce*, 4 L. J., Ex. Eq. 61.

—— **Trust Money advanced to One Cestui que Trust with Sanction of Other.**]—The trustees of a sum of stock were empowered by the settlement to invest the trust fund in government or real securities. They, with the sanction of one of the cestuis que trust, sold out part of the stock, and lent the proceeds to another cestui que trust upon his personal security. The trustees were held liable to replace the stock sold out, but were allowed an indemnity with regard to the sum advanced out of the interest in the trust property of the cestuis que trust receiving and sanctioning the advance. *Phillipson* v. *Gatty*, 7 Hare, 516; 13 Jur. 318.

—— **Waiver of Right to retain Life Interest.**]—Where a trustee had permitted a tenant for life to possess himself of the fund, in breach of the trust:—Held, that he could not waive his right to resort to the interest of the tenant for life to replace the fund, and having, by joining in a creditor's deed, by which the life interest was made applicable to the payment of debts, &c., inter alia, a debt due to the trustees, which he afterwards received, he was not precluded thereby from retaining the life interest, in order

to make good the trust fund. *Fuller* v. *Knight*, 6 Beav. 205 ; 12 L. J., Ch. 182.

—— **Interest under Settlement effected by Distinct Deeds.**]—The interest which a party takes under a settlement, is liable to make good any breach of trust or other liability which he may have incurred under it, and that though the settlement is effected by distinct deeds. *Woodyatt* v. *Gresley*, 8 Sim. 180.

—— **Solicitor Trustee not investigating Title.**] —G. and H., trustees of a settlement, on the solicitation of D., the tenant for life of the settlement, lent the trust funds on a security which totally failed. G. was a solicitor, and in the transaction of the loan, no other solicitor was employed for the lenders, and no sufficient investigation of title was made :—Held, that the trustees were compellable to replace the trust fund. *French* v. *Graham*, 10 Ir. Ch. R. 522.

Held, also, that both being solvent, H. was bound to replace one moiety, and G. the other moiety, that G. was not entitled to be indemnified by the tenant for life, the onus of investigating the title having been cast upon him, but that H. was entitled to be recouped, by the tenant for life, the amount of his moiety. *Ib.*

—— **Persons who have ceased to be Trustees entitled to be Recouped.**]—Where trustees are made liable for a breach of trust, the tenant for life having received the benefit, they are entitled to be recouped out of the interest of the tenant for life, although they have since ceased to be trustees. *Barratt* v. *Wyatt*, 30 Beav. 442 ; 31 L. J., Ch. 652 ; 8 Jur. (N.S.) 1045 ; 10 W. R. 454.

Indemnity against Expense of Rendering Accounts.] — Trustees are entitled, on being required by a person claiming to be a cestui que trust to furnish accounts and information in respect of the trust estate, to demand that they should be guaranteed against the expense of complying with the requisition ; and this rule is not affected by the circumstance that one of the trustees happens to be a solicitor. *Bosworth, In re, Martin* v. *Lamb*, 58 L. J., Ch. 432.

Extent of Trustee's Right of Indemnity.]—The right of a trustee to be indemnified out of his trust fund for money expended by him in its preservation, is strictly limited to the trust fund. *Leslie, In re* (23 Ch. D. 552), explained. *Winchilsea's (Earl) Policy Trusts, In re*, 58 L. J., Ch. 20 ; 39 Ch. D. 168 ; 59 L. T. 167 ; 37 W. R. 77.

The right of a trustee to be indemnified out of the trust estate covers not only payments actually made by him, but also his liability to pay ; and by virtue of this right of indemnity a trustee is entitled to resort in the first instance to the trust estate for necessary expenses. *Blundell, In re, Blundell* v. *Blundell*, 57 L. J., Ch. 730 ; 40 Ch. D. 370 ; 58 L. T. 933 ; 36 W. R. 779.

A bond was settled on B. for life, remainder to his wife M. for life, remainder to their children. The trustees permitted B. to receive the produce of the fund, and invest it in the purchase of a leasehold interest, not justified by the trusts of the settlement. B. having died, M., with a knowledge of all the facts, continued to receive the rents of the leaseholds, which produced a larger income than could have been derived from a proper investment. M., having died, and the leasehold having expired, a suit was instituted to compel the representative of the surviving trustee to pay to the children the amount misapplied. The surviving trustee during his life, and his representative, by their answer, asserted that the investment was proper within the trusts of the settlement :—Held, that the trustee had not a right to be indemnified out of the assets of M. to any greater amount than the excess of the rents received by M. over what would have been the produce of the fund if rightly invested. *Bentley* v. *Robinson*, 10 Ir. Ch. R. 287.

Trustees, having no express authority to invest on mortgage, at the instance and for the benefit of some, but without regard to the interest of others, of their cestuis que trust, invested part of their trust fund on mortgage of real estate. A loss having arisen from the investment :—Held, that the trustees were bound to make good the loss to the trust estate, but that they were entitled to be recouped by each of the cestuis que trust who had induced them to make the investments, out of his estate and his interest in the trust fund, to the extent of the amount actually received by such cestui que trust from the trustees in consequence of such breach of trust. *Raby* v. *Ridehalgh*, 7 De G. M. & G. 104 ; 3 Eq. R. 601 ; 24 L. J., Ch. 528 ; 1 Jur. (N.S.) 363 ; 3 W. R. 344.

The notion that in any case trustees to whom no direction has been given to invest in any particular kind of security can safely invest on mortgage, not encouraged. *Ib.*

By a marriage settlement in 1834 the husband gave a bond for 2,000*l.* to the trustees, to be paid within six months of the marriage, to be left outstanding with the consent in writing of the wife and husband, and to be called in with the like consent. Another debt of 4,000*l.* was included in the settlement. The 2,000*l.* was never got in. The husband became bankrupt in 1836. The trustees proved for the debt, but afterwards joined in a supersedeas, on the bankrupt guaranteeing to his creditors 16*s.* 6*d.* in the pound. The other creditors were so paid ; the trustees never took their composition. In 1838 the wife and husband gave a written consent that the debt should remain out on the husband's bond. No other consent was ever given. The husband was again bankrupt in 1847. In 1834 the trustees had, at the instance of the husband (having no power to invest in the purchase of lands), purchased copyhold land and buildings with part of the 4,000*l.* The husband erected new and valuable buildings on the land at his own expense, increasing its value far more than 2,000*l.* There was no evidence to connect this outlay with the discharge of the bond debt :—Held, that the trustees could not be indemnified out of the increase of value of the land, caused by the husband's outlay upon it. *Wiles* v. *Gresham*, 2 Drew. 258 ; 2 Eq. R. 560 ; 23 L. J., Ch. 667 ; 2 W. R. 355. Affirmed on appeal on one point, 5 De G. M. & G. 770 ; 3 Eq. R. 116 ; 24 L. J., Ch. 264 ; 3 W. R. 87. *See* ante, col. 668.

—— **Funds severed for Investment for Distinct Legatees.**]—A testatrix directed her trustees to pay the interest or annual rent of 2,000*l.* to Mrs. A. during her life and after her death to divide that sum among her children ; and to pay the interest or annual rent of a similar amount to Mrs. B. in life-rent, with the fee to her children. The trustees were empowered by the

deed to realise, or to continue to "hold any or all of such shares or stocks" as might belong to the testatrix at her decease, "should they consider it advisable or expedient to do so without any personal responsibility for loss, if any, thereby sustained"; with power also "to lend or place out on such securities, heritable or moveable, as they shall consider advantageous, the foresaid legacies of 2,000*l.* and 2,000*l.* respectively, the securities to be conceived in favour of my trustees, and that for the purpose of this trust and no otherwise." The testatrix at her death held 850*l.* stock of an unlimited bank. The trustees, at the desire of Mrs. A. and without consulting Mrs. B., set 200*l.* of this stock aside as part of the fund appropriated to Mrs. A., and realised the remainder. They afterwards, on the narrative of the purposes of the trust deed, and of the sums invested for the two specific legacies of 2,000*l.*, and that they had paid the residue, received their discharge from Mrs. A. and Mrs. B. Statements and separate accounts of interest on the investments allocated to each were sent half-yearly to Mrs. A. and Mrs. B. All the investments stood in the names of the testatrix's trustees. The bank became solvent, and calls were made upon the trustees in respect of the 200*l.* stock. They sought to indemnify themselves for payment of the calls out of the whole trust estate. Mrs. B. objected to any portion of her legacy being taken:—Held, that the trustees had the power to sever and had severed the two legacies, and had placed them in separate investments for behoof of the respective beneficiaries, and therefore the trustees had no right to relief from the investments allotted to Mrs. B. and her family for liabilities incurred on those allotted to Mrs. A. and her family. *Garland, Ex parte* (10 Ves. 110) followed. *Fraser* or *Robinson* v. *Murdoch*, 6 App. Cas. 855; 45 L. T. 417; 30 W. R. 162—H. L. (Sc.)

Indemnity for Costs—"Outlay in Strict Line of Duty."]—Costs incurred by an executor, who, to meet a possible charge of devastavit, separately defends an action brought jointly against residuary legatees and himself, are not "an outlay in the strict line of his duty" towards his cestuis que trust; and he cannot call upon them to indemnify him in respect of his expenditure. *Hosegood* v. *Pedler*, 66 L. J., Q. B. 18.

Trustees Acting under Direction of Court.]—Though trustees are protected in acting under the decision of a competent tribunal, the protection does not extend to persons receiving payments out of a fund for themselves; and though the decision has been long acted on, it is no protection to such persons against the claims of others not bound by it. *Foster* v. *M'Mahon*, 11 Ir. Eq. R. 287.

Where the court administers the assets, the trustees are protected against all claims on the testator's estate, but legatees still remain liable in respect of the beneficial interest. *Underwood* v. *Hatton*, 5 Beav. 36.

Where trustees distribute a fund under the direction of the court, they require no indemnity. *Smith* v. *Smith*, 1 Dr. & Sm. 384; 7 Jur. (N.S.) 652; 4 L. T. 44; 9 W. R. 406.

——Right of Lessor.]—A lessor of a testator has not a right to require the court to retain part of the testator's assets by way of indemnity against future breaches of covenant in the lease. *Ib.*

Right of Indemnity in respect of Shares—Calls.]—The right of a trustee, in whose name shares in a company in liquidation were standing, to an indemnity from his cestui que trust, enforced. *Hemming* v. *Maddick*, 41 L. J., Ch. 522; L. R. 7 Ch. 395; 26 L. T. 565; 20 W. R. 433.

It is a general rule of equity that when a person accepts a trust at the request of another, and that other is a cestui que trust, the cestui que trust is liable personally to indemnify the trustee against all losses accruing in the due execution of the trust. *Jervis* v. *Wolferstan*, 43 L. J., Ch. 809; L. R. 18 Eq. 18; 30 L. T. 452.

Where the loss in respect of which such indemnity is sought occurs after the death of the cestui que trust the trustee is in the position of a creditor of the cestui que trust, and entitled to recover as a creditor from legatees to whom his estate has been paid. *Ib.*

J. and P., at the request of a settlor, accepted transfers of shares in an unlimited company upon trust for a tenant for life and remaindermen. J. and P. were executors of the will of the settlor, and distributed the residue of his estate. Subsequently in the lifetime of the tenant for life, large calls were made on the shares, and the remaindermen under the settlement disclaimed:—Held, that J. and P. as trustees were entitled to be indemnified against the liability out of the settlor's residuary estate, and to recover the capital which they had distributed among the residuary legatees. *Ib.*

—— Directors holding Shares for Company.]—Directors who hold shares in a company as trustees for the company are to be treated in the same manner as any other trustees whose cestui que trust has become bankrupt, and are primarily liable to pay the calls made on the shares in respect of which they are on the register, but they are entitled to be indemnified out of the assets of the company. *Universal Banking Corporation, In re, Challis, Ex parte*, 17 L. T. 637; 16 W. R. 451.

——. Deposit of Shares—Trustee for Banking Company.]—C. being indebted to B., B. and P., and the N. Banking Co., certain shares the property of C., and two debts owing to him are assigned to B., for the benefit of B. and P. B. and P. request B. by letter to hand over their share of the proceeds of the shares to the bank, and B. agrees, also by letter, to do so. Calls are made on the shares, and B., having applied to the bank to know whether they gave up all claim, which was answered in the negative, without any further agreement, pays several calls. The debts become valueless, and the company in which the shares are held is wound up. The bank fails, and is voluntarily wound up, and B. claims as a creditor under the Winding Up Act, 1857, in respect of the calls paid by him. On the question whether the relation of trustee and cestui que trust existed between him and the bank:—Held, that it did not except as to the net proceeds of the shares when realised, and that he was therefore not entitled to go in as a creditor in the winding up. *Northumberland and Durham District Mining Co., In re, Briggs, Ex parte*, 8 W. R. 110.

—— Action against Cestui que Trust before Call.]—Certain moneys belonging to A. were invested in shares in a banking company in the joint names of A. and B., the ultimate trust being

for the estate of A., who predeceased B. The company went into liquidation and calls would be made upon the shareholders, on the list of whom the executor of B. would be put:—Held, that the executor of B. was entitled to be indemnified by the estate of A., and might bring an action for and obtain a declaration of indemnity before he was placed on the list and before any call was made on him. *Fraser* v. *Murdoch*, supra, col. 723, discussed. *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, infra, distinguished. *Hobbs* v. *Wayet*, 36 Ch. D. 256; 57 L. T. 225; 36 W. R. 73.

—— **Against future Liability—Quia Timet Action.**]—A trustee held shares in a company on trust for an adult cestui que trust. He had applied for them at the request of the cestui que trust, who paid the money due to the company on the application and allotment. The trustee executed a transfer of the shares to the cestui que trust, and the latter sent it to the company for registration, but the directors refused to register it, and when an order was made to wind up the company the name of the trustee remained on the company's register as the holder of the shares. No further call had been made on them. The trustee brought an action against the cestui que trust, claiming an indemnity against liability on the shares. There was no evidence to show whether calls were likely to be made in the winding up: Held, that the action was a mere quia timet one, and that it was premature and could not be maintained. *Ranelagh (Lord)* v. *Hayes* (1 Vern. 189), not followed. *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, 52 L. J., Ch. 418; 22 Ch. D. 561; 48 L. T. 107; 31 W. R. 285. But see *Blyth* v. *Fladgate*, 60 L. J., Ch. 66; [1891] 1 Ch. 337; 63 L. T. 546; 39 W. R. 422.

And see COMPANY.

Power to Purchase Land—Advance by Trustee of Part of Purchase Money—Lien.]—Under a marriage settlement the trustees were empowered, at the request of the husband and wife, to invest the trust fund in the purchase of real estate, and to resell the same. In exercise of this power the trustees, at the request of the husband and wife, bought certain real estate at a price which exceeded the whole of the trust fund, the husband promising to provide the balance out of his own moneys. The husband could not fulfil his promise, and C. P., one of the trustees, at the request of the husband and wife, borrowed the sum necessary to complete the purchase from a bank, and deposited with them the title-deeds of the estate. C. P. died, and the husband was unable to repay the loan. In an action brought by the bank for an account and the realisation of their security, and for administration of C. P.'s estate:—Held, that the trust estate was entitled to a first charge upon the real estate purchased for the full amount of the trust fund; that subject to such charge the estate of C. P. was entitled to be indemnified out of such real estate for the amount borrowed by him, and actually invested in or about the purchase, and to enforce such indemnity by sale of such real estate without the consent of the husband and wife; the bank being entitled to stand in the place of C. P. as against the trust estate for the amount due to them. *Pumfrey, In re, Worcester City and County Banking Co.* v. *Blick*, 52 L. J., Ch. 228; 22 Ch. D. 255; 48 L. T. 516; 31 W. R. 195.

Lien on Deeds of Chapel for Money borrowed for Rebuilding.]—The rebuilding of a dissenting chapel was entrusted to three of the several trustees in whom the estate was vested. There being a deficiency of money, they borrowed, on a deposit of the deeds of the chapel, a sum of money which they paid. Interest was for a long time paid out of the chapel funds, but ultimately the representatives of the trustees were compelled to pay the money. The legal estate was vested in new trustees:—Held, that the representatives of the persons who had paid the money borrowed had a lien on the deeds, but that they were not entitled to a decree for foreclosure or sale, as by granting such relief the trust would be altogether destroyed. *Drake*, or *Darke*, v. *Williamson*, 25 Beav. 622; 4 Jur. (N.S.) 1009; 6 W. R. 824.

Trustee Entering into Account with Tenant for Life, and Acting as her Solicitor.]—A trustee of a marriage settlement, after the death of the husband, entered into an account with the widow, acting also as her solicitor:—Held, that the trustee was entitled to retain out of the dividends upon the trust fund the balance due upon such account. *Russel* v. *Buchanan*, 4 Jur. 430.

Transfer of Fund to New Trustees—Claim by Old Trustee of Lien for Charges.]—Where a trustee is required to make a transfer of a fund to new trustees, and he alleges that he has a lien for charges (though he may have a right, under the act of parliament under which he acts, or by agreement, to recover payment), he has no right to interpose any delay in the way of making the transfer in respect of his alleged claim. *Wilson* v. *Parker*, 10 Jur. 979.

Legacy in Trust for Sons—Deed of Composition — Legacy Transferred to Son.]—Legacy intrust for the testator's son for his own use and benefit, provided no misfortune in business shall in the meantime have happened to him, so as to deprive him or his family of the benefit of it; the testator declaring his intention, his son's fortune being amply sufficient, by this fund to form a certain and permanent provision for him or his family: but in case he fail in business at any time before the age of thirty-two, then in trust for the support of him, his wife, and children, as the trustees think proper, so long as he shall labour under the effects of any misfortune in trade; but as soon as he shall be freed and absolutely discharged from the effects of any misfortune or failure in trade, then (but not before) to be paid to him: otherwise the interest to be continued to be paid for the support of him, his wife and children, for his life; and if, at his death, he shall be under any difficulty from misfortune or failure in business, in trust for his wife and children according to his appointment by will; and if he shall leave no widow or child, according to his disposition. There was a considerable settlement. The son, in the twenty-eighth year of his age, being discharged under a deed of composition, the legacy was decreed to him, the trustees and his children not opposing it; but the court observed that, if he should not be discharged, as in case it should end in a bankruptcy, the trustees would not be indemnified. *De Mierre* v. *Turner*, 5 Ves. 306.

Fund paid over to Tenant for Life on an Indemnity and subsequently Appointed.]—A. B. was tenant for life of a trust fund, with a

general power to appoint by will, and, in default, it was settled on the plaintiff. A. B. ordered the trustees to pay over the fund to her on an indemnity, and she afterwards appointed the fund to the plaintiff and others, who filed a bill to make the trustees liable for a breach of trust:—Held, that, by the appointment, the fund became assets for answering A. B.'s liabilities, of which the indemnity was one, and that, therefore, the trustees were not liable. *Williams* v. *Lomas*, 16 Beav. 1.

Priority of Trustee's Claim to be Indemnified.]—The right of a trustee to be indemnified out of the trust property is the first charge thereon, and it has priority to any charge created upon it by the cestuis que trust. And, consequently, the right of a trustee of a public company to be indemnified out of the property has priority over the debenture creditors. *Erhall Coal Co., In re, Bleckley, In re*, 35 Beav. 449; 12 Jur. (N.S.) 757; 14 L. T. 280; 14 W. R. 599.

A trustee has a primary charge (in priority of the general creditors) to be recouped, out of the life estate of a deceased tenant for life, the amount of trust money wrongfully received by him and for the costs of suit. *Williams* v. *Allen*, 32 Beav. 650.

Trustee Acting bonâ fide under Invalid Will.]—A trustee, acting bonâ fide and with the concurrence of the heir at law, under a will which was supposed to be valid, but turns out to be invalid, is entitled to be indemnified out of the personal estate. *Edgecumbe* v. *Carpenter*, 1 Beav. 171; 8 L. J., Ch. 17.

Indemnity to Trustee for Liability for Torts.]—A trustee, in due execution of his trust, directed the bailiff employed on the settled estate to have certain trees felled. The bailiff ordered the woodcutters usually employed on the estate to fell the trees. In doing so they allowed a bough to fall upon a passer by, who brought an action against the trustee and recovered heavy damages:—Held, that the trustee was entitled to an indemnity out of the trust estate. *Benett* v. *Wyndham*, 4 De G. F. & J. 259.

Trustee's Right of Retainer—In respect of Debts.]—A trustee of an estate devised or conveyed to him for the purpose of paying debts has no right of retainer thereout, whether he is executor or not. *Bain* v. *Sadler*, 40 L. J., Ch. 791; L. R. 12 Eq. 570; 25 L. T. 202; 19 W. R. 1077.

An executor, who was also trustee for sale of an estate for the payment of debts, was a creditor of his testator, who died insolvent, and had received personal estate which he had retained in part satisfaction of his debt. The real estate was sold, a portion before the time when a creditor's suit was instituted, and the remainder under the decree, and the proceeds as to part were in the executor's hands, and the remainder in court:—Held, that the other creditors must be paid out of the proceeds of sale up to an equality with the executor, and that there must then be a rateable distribution. *Ib.*

A trustee, in answer to a request for money by his cestui que trust, refused to make any further advances until he had reduced a balance found due to him on an account previously stated between them, and subsequently, with the acquiescence of the cestui que trust, continued in receipt of the income of the trust property without furnishing any account, but, after a considerable lapse of time, giving various sums of money to the cestui que trust:—Held, that there was evidence from which it might be inferred that the trustee had, with the authority of his cestui que trust, applied the income in liquidation of the balance due to himself. *Stewart* v. *Connick*, 5 Ir. C. L. R. 562.

—— Of Moneys to make good Breach of Trust by Defaulting Cestui que Trust.]—A policy of assurance on the life of H. was taken in the names of trustees and a settlement was executed by virtue of which the bonuses payable on the policy were to be held upon trust for H., and the money assured, on the trusts of the settlement. H. obtained possession of and misappropriated a portion of the trust funds:—Held, that the trustees were not entitled as against H.'s executrix to impound or retain the bonuses to make good the trust funds misappropriated by H., not as being settled properly, because there was a prior resulting trust of them for H.: not by way of set-off, because they were not payable till after H.'s death. *Hallett* v. *Hallett*, 49 L. J., Ch. 61; 13 Ch. D. 232; 41 L. T. 725; 28 W. R. 321.

A trustee allowed one of his cestuis que trust to have the trust fund, with a view to its investment in foreign funds. The cestui que trust went to America, and invested it in his own name; he afterwards sold out a part, and, remitting the moiety to agents in England, came home. The trustee impounded the money so remitted, in the lord mayor's court, and this court granted an injunction, restraining proceedings on the part of the cestui que trust to get it out. *Hipkins* v. *Newton*, 9 L. J. (O.S.) 1 Ch. 227.

Interest on Sums Advanced.]—A trustee will be allowed interest upon money advanced by him, and applied in payment of his testator's debts, or otherwise on account of his personal estate. *Finch* v. *Prescott*, 43 L. J., Ch. 728; L. R. 17 Eq. 554; 30 L. T. 156; 22 W. R. 437.

The trustee of real estate, on which a dwelling-house was situate, who was empowered to lay out the rents in repairing the house, but was not empowered to borrow money for the purpose, pulled down and rebuilt the house, and borrowed money at interest for the purpose, which he afterwards repaid out of the rents:—Held, that his claim for interest on the sum borrowed must be disallowed. *Fazakerley* v. *Culshaw*, 24 L. T. 773; 19 W. R. 793.

Rights of Defaulting Trustee.]—A defaulting trustee cannot claim, as against his cestuis que trust, any beneficial interest in the trust estate, even although he may have become entitled thereto derivatively, for example, as being one of the next of kin of a cestui que trust who has died intestate. *Jacobs* v. *Rylance*, 43 L. J., Ch. 280; L. R. 17 Eq. 341.

Title-Deed of Property in Hands of Trustee for Ancestor's Widow—Right to Possession of, as between Trustee and Heir-at-Law.]—Plaintiff, as heir-at-law of C., sued defendant to recover possession of a title-deed under the following circumstances: By a conveyance of the 12th November, 1862, certain freehold property was conveyed to C. in fee. On the 13th July, 1865, C., by an ante-nuptial settlement of that date, in consideration of his intended marriage with the defendant's sister, charged the said property with the payment, after his death, of a yearly

annuity of 12*l.* to her during her life, and secured the same by a grant of the said property to the defendant, as trustee for his sister, for a term of 100 years, with the usual powers of distress and entry, &c., in case of the quarterly payments of the annuity being in arrear. Upon the execution of the settlement C. handed the deed of conveyance of the 12th November, 1862, to the defendant and said to him, "You shall have the deed of the house to hold in your possession for the safety of your sister," and at the same time a written acknowledgment of the receipt of the conveyance, and an undertaking to deliver it to C. or his assigns, on the fulfilment of the trusts of the settlement, was signed by the defendant. The marriage took place, and on C.'s subsequent death, in December, 1875, the plaintiff, as his eldest son and heir-at-law, brought an action in the county court against the defendant to recover possession of the conveyance of 12th November, 1862. The county court judge held, in favour of the plaintiff, that he was entitled to recover the deed in question:—Held, that the defendant, as trustee of the settlement, was entitled to retain possession of the deed of conveyance in question during the continuance of the trusts of the settlement on the ground that it was delivered to him by C., the settlor, as a further security for the payment of the annuity, and that the possession of it enabled him the better to perform the trusts of the settlement with the execution of which he was charged. *Corin* v. *Thomas*, 46 L. T. 916.

Claim against Estate of Married Woman—Clause against Anticipation—Payment of Income in Advance.]—Where there is a clause against anticipation, and trustees pay the income to a married woman in advance, they are liable to pay it over again, and are not entitled to be reimbursed out of the subsequent income. *Leach* v. *Way*, 5 L. J., Ch. 100.

—— **Accepting Allotment of New Shares.**]—A trustee under a marriage settlement accepted an allotment of new shares in a bank, which afterwards failed. The settlement contained a clause against anticipation:—Held, that he had no claim to be indemnified out of the trust estate. *Sheriff* v. *Butler*, 12 Jur. (N.S.) 329; 14 L. T. 510; 14 W. R. 629.

—— **Savings from Separate Estate—Calls.**]—One of two trustees of a marriage settlement, under which the wife took a separate estate for life without power of anticipation, having shares in a bank vested in him upon the trusts of the settlement, obtained an allotment of new shares at the request of the wife, and upon the faith of her representation that the purchase money should be paid out of certain savings of her separate estate. The bank failed, and calls were made upon the trustee, who filed a bill to enforce payment out of the wife's savings:—Held, that the savings of the wife's separate estate were liable to indemnify the trustee against all calls and liabilities incurred on her behalf in respect of the shares. *Butler* v. *Cumpston*, 38 L. J., Ch. 35; L. R. 7 Eq. 16; 19 L. T. 274; 17 W. R. 24.

Held, also, that money arising from savings of separate estate which had been invested by the wife in the names of the trustees of the settlement without any intimation that it was to be held on the trusts of the settlement, was liable to indemnify the trustees of the shares. *Ib.*

—— **Advance to Husband without Written Consent of Wife or Bond of Husband.**]—By a marriage settlement the interest of a trust fund was limited to a wife for life, for her separate use, with power to the trustees, upon her consent in writing, to advance the trust fund to her husband, upon the security of his bond; if the trustees, with consent of the wife, advance the fund to the husband, but without her written consent, and without the husband's bond, and if the trust fund be lost by his subsequent bankruptcy, the trustees are entitled to be indemnified to the extent of the wife's interest. *Cocker* v. *Quayle*, 1 Russ. & M. 535.

—— **Instigation of Tenant for Life—Mode of Enforcing Indemnity.**]—The executors of the trustees of a marriage settlement were sued by the remaindermen under the settlement for restoration of the trust fund, which had been advanced by the trustees to the husband and wife in breach of trust. The wife, who was tenant for life with restraint on anticipation, was a defendant, but no relief was asked by the plaintiffs against her. The executors did not deny the breach, but they pleaded that the advance was made at the instigation of the tenant for life, and claimed indemnity out of her life estate:—Held, that it was not necessary to bring a fresh action to enforce the indemnity, but that the executors should be given liberty to apply in chambers as to determining and enforcing their right, if any, against the tenant for life. *Holt, In re, Holt* v. *Holt*, 66 L. J., Ch. 734; [1897] 2 Ch. 525; 76 L. T. 776; 45 W. R. 650.

—— **Scotch Settlement.**] — R., by deed, assigned property in Scotland to B., as trustee, with a direction to pay to his sister Mrs. R., a married woman, during her life, the net income of the property, or such part of it as he might deem necessary for the support of her and her family; and he thereby declared the provision for Mrs. R. to be purely alimentary, and exclusive of the marital right of her then or any future husband, and that it should not be assignable, or subject to any deed which either she or such husband might grant in relation thereto, or debts which they might contract. Advances were made by A. to the husband of Mrs. R., for the support of his family, and on other accounts; to secure the repayment of which, B., with Mrs. R.'s consent, executed to A. a deed of assignation of her interest in the trust property, reserving 60*l.* per annum for aliment to Mrs. R. and her family. Upon appeal from, and reversing the decision of the court of session:—Held, that the execution of the deed of assignation was ultra vires of B., and a breach of trust on his part, and that the deed was wholly invalid as against Mrs. R. *Ritchie* v. *Rennie*, 9 Jur. 435.

—— **Married Woman Annuitant under Will appointed Executrix not obtaining Probate but taking Possession of Estate.**]—A married woman who is an annuitant under a will for life, for her separate use, without power of anticipation, is appointed executrix; but failing in obtaining probate, takes possession of and misappropriates the estate. In an administration suit asking the usual accounts against her, but not referring to her separate estate:—Held, that the arrears of the annuity were applicable to

make good her misfeasances, but not the accruing payments. *Pemberton* v. *M'Gill*, 8 W. R. 290.

—— **When Separate Estate liable for General Torts and Breaches of Trust.**]—The separate estate of a married woman is not liable for general torts committed by her, nor for breaches of trust, unless the breaches of trust consist in appropriation of trust funds comprised in the same settlement as that creating her separate estate. *Wainford* v. *Heyl*, 44 L. J., Ch. 567; L. R. 20 Eq. 321; 33 L. T. 155; 23 W. R. 848.

A woman, on her marriage, settled a necklace upon trust for herself for life, with remainder to her eldest son. She also settled other property to her separate use for life, as to part of such property with, and as to other part without, restraint upon anticipation. She afterwards, in fraud of the settlement, sold the necklace, and appropriated the money to her own use:—Held, that the property settled to her separate use, with restraint upon anticipation, was not chargeable with the value of the necklace, but that the property settled without such restraint was so chargeable. *Clive* v. *Carew*, 1 J. & H. 199; 28 L. J., Ch. 685; 5 Jur. (N.S.) 487; 7 W. R. 433.

See also ante, 6. *c.* iii. and iv.

—— **Fund Settled to Separate Use of Wife—Lien Agreed to before Marriage.**]—Trustee of a settlement not entitled, by an agreement with the husband before the marriage, to a lien on the fund, settled to the separate use of the wife during the joint lives of the husband and wife, with remainder to the survivor, in opposition to a joint appointment made by them, under a power reserved to them in the settlement. *Morris* v. *Clarkson*, 1 J. & W. 107.

d. Statutory Power of Court to Impound Interest of Beneficiary.

Statute.]—*Trustee Act*, 1893, s. 45.

Impounding Interest—Consent of Beneficiary—Trustee Act, 1888, s. 6.]—In order to give a court power under s. 6 of the Trustee Act, 1888, to impound the interest of a beneficiary by way of indemnity to trustees, the beneficiary must "instigate," "request," or "consent in writing," to some act or omission which is itself to his knowledge a breach of trust, and not to some act or omission which only becomes a breach of trust by reason of want of care on the part of the trustees. *Somerset, In re, Somerset* v. *Poulett (Earl)*, 63 L. J., Ch. 41; [1894] 1 Ch. 231; 7 R. 34; 69 L. T. 744; 42 W. R. 145—C. A.

—— **Breach of Trust committed "at the Instigation or Request or with the Consent in Writing of a Beneficiary"—Request without Writing.**]—In s. 6 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), providing for indemnity to a trustee who has committed a breach of trust "at the instigation or request or with the consent in writing of a beneficiary," the words "in writing" apply only to "consent," and not to "instigation" or "request." *Griffith* v. *Hughes*, 62 L. J., Ch. 135; [1892] 3 Ch. 105; 66 L. T. 760; 40 W. R. 524.

The discretion which the section confers upon the court of ordering that the interest of the beneficiary be impounded by way of indemnity to the trustee ought to be exercised in a case where both the trustee and the instigating beneficiary were aware of the facts which constitute the breach of trust. *Ib.*

Where a trustee for a married woman, tenant for life restrained from anticipation, advanced part of the capital to her upon her verbal request and statement that the money was needed to prevent her home from being sold up: Held, that the trustee, upon making good to the estate the money so advanced, ought to be indemnified out of the income payable to the married woman. *Ricketts* v. *Ricketts*, infra, distinguished. *Ib.*

—— **Right to impound Interest of Instigating Beneficiary in Hands of Assignee for Value—Married Woman restrained from Anticipation—Trustee's Duties towards—Knowledge of Trustee a Fact for Consideration.**]—Section 6 of the Trustee Act, 1888, which is substantially repeated by s. 45 of the Trustee Act, 1893, was intended to enlarge the power of the court as to indemnifying trustees, and to give greater relief to trustees, and did not operate to curtail the previously existing rights and remedies of trustees or to alter the law except by giving greater power to the court. The discretion given to the court by s. 6 as to whether it will impound or not is a judicial discretion, and if, prior to the act, the court would in a proper case enforce the equity of a trustee to have the interest of a beneficiary, who has instigated a breach of trust and receive money advanced in pursuance of it, impounded, and would impound that interest in the hands of an assignee, it will equally since the act "think fit" to enforce the equity in a similar case and impound. The fact that the trustee has been offered and has not taken an express charge upon the beneficiary's interest does not amount to an abandonment of the right to enforce the equity. The trustee does not lose his right because he first replaces the money. *Bolton* v. *Curre*, 64 L. J., Ch. 164; [1895] 1 Ch. 544; 13 R. 174; 71 L. T. 752; 43 W. R. 521.

Where an assignee of the beneficiary's interest knows at the date of his purchase that the beneficiary is a debtor to the trust estate in respect of moneys borrowed, he is bound in law to have knowledge of all equities arising out of the circumstances of the borrowing. *Ib.*

The court declined to remove a restraint on anticipation in order to enable trustees to impound a married woman's life interest, where she had consented in writing to the change of an investment, but had not instigated the change and did not know that the new investment was a breach of trust, and the trustees had not explained to her that the proposed new investment was improper in any way. It is the duty of a trustee to protect a married woman against herself, when she, as a beneficiary restrained from anticipation, asks him to commit a breach of trust, and he must not deliberately commit a breach of trust at the request or with the consent of such a beneficiary in the hope that the court will afterwards assist him by removing the restraint. One of the facts to be borne in mind by the court in the exercise of its discretion, is whether the breach of trust was committed by the trustee knowingly, but it is incorrect to say that a trustee who knowingly committed a breach of trust can never have his beneficiary's interest impounded. *Ricketts* v. *Ricketts*, infra, explained. *Ib.*

—— **Reversionary Interest of Married Woman —"Beneficiary in the Trust Estate."**]—R. was entitled absolutely in remainder to the trust funds of his mother's marriage settlement, which she had appointed to him by deed, subject to her own life interest. By his own marriage settlement R. covenanted to pay 10,000*l.* to his trustees within six months after his mother's death, and, in case of his death in his mother's lifetime, that his executors should pay his trustees, during his mother's life, 400*l.* per annum, to be applied as if it were income of the 10,000*l.* R. took the first life interest under his settlement, with remainder to his wife for life. R. assigned to his trustees, as security, the trust funds of his mother's settlement. The trustees of the mother's settlement had notice of the assignment. R. having become embarrassed, the trustees of the mother's settlement were induced, on the entreaty of R., his mother and his wife, to apply a large portion of the trust funds in discharge of R.'s debts. The trustees of R.'s settlement brought an action against the trustees of the mother's settlement for breach of trust, claiming that they might replace the funds. The defendants counterclaimed (inter alia) that the interest of R. and his wife in the funds might be impounded and declared liable to indemnify them:—Held, (1) that there was no right of indemnity to the defendants out of the interest of either R. or his wife under R.'s settlement, such interest not being an interest of a "beneficiary in the trust estate" of which the defendants were trustees, so as to come within the Trustee Act, 1888, s. 6; (2) that, even if the interest of R.'s wife had been such an interest, the court would not in its discretion under the act have impounded it, there having been no misrepresentation on the part of R.'s wife, and as the defendants must be taken to know that she could not validly deal with her reversionary interest. *Ricketts* v. *Ricketts*, 64 L. T. 263.

8. RELEASE.

Acknowledgment or Deed.]—Trustees have a a right to some sort of discharge from their cestui que trust, not, perhaps, a release, unless the instrument creating the trust was under seal. *Wright's Trusts, In re*, 3 K. & J. 419.

A trustee paying the trust money in strict accordance with the tenor of the trusts is not entitled to a release by deed; secus, if he is called upon to depart from the strictly expressed trusts. *King* v. *Mullins*, 1 Drew. 308.

Where a trust was created by parol for A. for life, and to provide for her funeral expenses, remainder to her two children and the tenant for life, and remainderman called for payment:—Held, that the trustee might lawfully insist on a release under seal. *Ib.*

—— **Transfer of Stock to Cestui que Trust.**]—Trustee of stock, on transferring the stock to his cestui que trust:—Held, under the circumstances of the case, entitled to an acknowledgment by the cestui que trust of the stock being received in full of all demands, though not entitled to a release under seal. And inasmuch as the cestui que trust declined to make the acknowledgment, the court directed a general administration account to be taken of the real and personal estate of the testator from whose real and personal estate the stock was derived, although no account but a mere transfer of the stock was prayed by the bill, and no open unsettled account suggested by the answer. *Chadwick* v. *Heatley*, 2 Coll. C. C. 137; 9 Jur. 504.

—— **Transfer to Other Trustees.**]—Trustees, on receipt from other trustees of trust moneys, are not bound to execute a release; all that can be required from them is a written acknowledgment of the receipt of the money. *Cater's Trusts, In re*, 25 Beav. 366.

Partial Release—Surviving Partners.]—Where the defendants were surviving partners, and executors and guardians of their deceased partner:—Held, that the cestui que trust were not barred by the lapse of thirty years, nor by partial releases executed on insufficient knowledge of the partnership affairs and state of accounts, from calling for inquiry and account, and claiming a share in the profits arising from the estate of the deceased having been continued and used in the partnership, although during successive changes in the firm. Semble, time is only a bar in cases of trust when there has been a direct and independent dealing between the trustees and cestuis que trust, and upon full information and examination of all the documents and evidence after that relation has terminated. *Wedderburn* v. *Wedderburn*, 2 Keen, 722. Affirmed, 4 Myl. & Cr. 41; 8 L. J., Ch. 177; 3 Jur. 596.

Release of Breach of Trust—Onus of Proof of Knowledge.]—When a breach of trust has been committed, from which a trustee alleges that he has been released, it is incumbent upon him to show that such release was given by the cestui que trust deliberately and advisedly, with full knowledge of all the circumstances, and of his own rights and claims against the trustee. *Farrant* v. *Blanchford*, 1 De G. J. & S. 107; 32 L. J., Ch. 237; 9 Jur. (N.S.) 423; 7 L. T. 770; 11 W. R. 294.

A release by cestuis que trust to trustees after a breach of trust, and whilst ignorant thereof, is invalid. *Munch* v. *Cockerell*, 5 Myl. & Cr. 179; 9 Sim. 339; 9 L. J., Ch. 153; 4 Jur. 140.

—— **Independent Solicitor.**]—Where the trustee (a solicitor) came to a final settlement of accounts with his cestuis que trust and a general release was executed, the accounts containing credits for his professional bills of costs, which were perused by an independent solicitor, acting for the cestuis que trust:—Held, that the defendant was entitled to the benefit of the release; and in the absence of any fraudulent advantage having been taken over ignorant parties, the plaintiffs were bound by it. *Stanes* v. *Parker*, 9 Beav. 385; 10 Jur. 603.

Releases given to trustees by their cestuis que trust in respect of breaches of trust set aside on the ground of the releases having been obtained by the improper influence of the person for whose benefit the breaches of trust have been committed, and of the cestuis que trust not having had independent professional advice in the matter of such release. *Lloyd* v. *Attwood*, 3 De G. & J. 614; 5 Jur. (N.S.) 1322.

Although cestuis que trust acting by an independent solicitor, to whom all the facts of the case are known, may be bound by a release given to their trustees under the advice of that solicitor, it rests upon the trustees to show that the cestuis que trust acted in relation to such release by an independent solicitor. *Ib.*

—— **Deed of Confirmation.**]—Where cestuis que trust, in ignorance of their rights, give a release to their trustees, even a deed of confirmation, also executed under the same circumstances, will operate nothing. *Ib.*

Two ladies, entitled to a trust fund which had been improperly lent by the trustees to A., who stood towards those ladies in loco parentis, were induced by A., not long after their coming of age, to execute releases to the trustees, taking from him a security for the money, which security was known by him to be worthless. No direct communication took place between the ladies and the trustees, nor did the trustees render any account to them, but the ladies were represented in the transaction by B., a solicitor, who was known to the trustees to have been for years the confidential adviser of A., and the transaction was conducted by B. and A.'s solicitors. B. was never, in fact, authorised by the ladies themselves to act for them, but was nominated by A., and the ladies did not consider him to be acting for them :—Held, that under the circumstances the trustees could not avail themselves of the releases. *Ib.*

—— **Setting Aside Release.**]—A release was executed in 1859 by two ladies in favour of the trustees of the will under which the ladies were residuary legatees. The ladies and their husbands applied on summons to have the release set aside on the ground that they had no independent advice, and had acted in ignorance of the fact that they were residuary legatees, instead of, as they had supposed, entitled to legacies only, and had been induced to give an absolute release in consideration of a sum far less than that to which it turned out they were entitled. The evidence in support of their claim was uncontradicted :—Held, that the release could not be set aside on the materials before the court. *Garnett, In re, Gandy* v. *Macaulay*, 32 W. R. 474.

—— **Release Executed under Mistake.**]—A. executed a bond to B. and C., conditioned for payment of an annuity of 100*l.* to D. for life, and assigned an annuity of 120*l.* for the life of one M., and a policy of insurance for 700*l.* on M.'s life, to B. and C., upon certain trusts for further securing the annuity of 100*l.* M. died, and A. died shortly afterwards, having, as was then believed, received the 700*l.* and applied it to his own use. Shortly afterwards, D., in consideration of 500*l.*, released A.'s personal representative and B. and C. from the annuity of 100*l.* and the securities for it. Some years afterwards it was discovered that A. had placed the 700*l.* in a bank, in the names of B. and C., where it still remained :—Held, that the release having been executed under a mistake, was inoperative, and that the 700*l.* remained impressed with the trusts for securing the annuity of 100*l.* *Hore* v. *Becher*, 12 Sim. 465 ; 11 L. J., Ch. 153 ; 6 Jur. 93.

—— **Deed of Compromise with Representatives and Creditors of Deceased Trustee.**]—A deed of compromise executed by cestui que trust, with the representatives and creditors of a deceased trustee, guilty of a breach of trust, rescinded, and co-trustees declared responsible. *Walker* v. *Symonds*, 3 Swanst. 2 ; 19 R. R. 155.

Release by Infant.]—A release executed by an infant to the trustee of all demands in respect of the trust :—Held, not to be a bar to a suit by the same cestui que trust against the trustee, although such suit was not brought until seven years after the cestui que trust had attained twenty-one. *Overton* v. *Banister*, 3 Hare, 503 ; 9 Jur. 906.

Release by Married Woman.]—A sum of money charged upon lands was, by a marriage settlement, assigned to trustees, to pay the interest to A., the husband, for his life, and after his death to pay the wife a jointure of 200*l.* a year ; provided that it should be lawful for A., with the consent of the trustees in writing, to call in the fund, and lay out and dispose of the same in the purchase of an estate of inheritance or freehold, for a term of at least three lives, or of a lease for a term of years, whereof ninety-nine years shall be unexpired, or otherwise advantageously, which purchase or disposal, when so made, should be settled and vested to the several uses, trusts, intents, and purposes thereinbefore mentioned in respect to the said sums. A portion of the fund was paid to the surviving trustee, who lent it to A., on a release being executed by A. and the wife B. and C. their son, and acknowledged by her :—Held, after the death of A., in a suit by B. to replace the trust fund, that the release as to her was inoperative. *Smithwick* v. *Smithwick*, 12 Ir. Ch. R. 181.

—— **Recital in Settlement on Second Marriage of Wish to give Credit to Trustees for all Payments made at her Request.**]—Personal estate was by settlement vested in trustees for R., a married woman, for life, without power of anticipation ; and in case there should be no issue of the marriage, in case M., her husband, should survive her, as she should by deed or will appoint, and in case she should survive, for her absolutely. W., the acting trustee of the settlement, at the instance of the wife applied the property in discharge of her husband's liabilities. M. died, and by R.'s request the trustee took no steps to realize his assets. R. married again after the lapse of some years, and in her marriage settlement recited her wish to give credit to W. for all payments made by the trustees at her request :—Held, that R. had lost her right to make the trustee liable for his breaches of trust. *Rutherfoord* v. *Maziere*, 13 Ir. Ch. R. 204.

Release by Person just of Age.]—The court looks with considerable jealousy at a release executed by a young lady, at or shortly after attaining twenty-one, upon a settlement of accounts between her and her trustees. *Parker* v. *Bloxam*, 20 Beav. 295.

A suit for impeachment of such a release must be instituted quickly. *Ib.*

Observations on the jealousy with which the court looks at a release executed by a person who has just come of age, and on the effect of the particular circumstances under which the release is given. *Ib.*

By a marriage settlement in 1832, real and personal estate of H., the intended wife, was conveyed to trustees in trust for R., the intended husband for life, and after the death of the survivor of R. and H. in trust for the children of the marriage, as R. and H. or the survivor should appoint, and in default of appointment for the children equally. The trustees allowed R. to obtain possession of the

trust fund which he mixed with moneys of his own, and in 1861 one of the trustees commenced a suit to compel him to replace the fund. By arrangement of the trustees with R., he and H., by deed of the 25th September, 1861, irrevocably appointed the fund equally among the children, four of whom were of age, and one (the plaintiff) a minor. On the following day the four adult children, and two years afterwards the plaintiff, when of age, executed a deed releasing the trustees from the trusts of the settlement. The children executed the release by the direction of their father, without any professional advice or assistance, and in ignorance of its contents or effect, and of their rights under the settlement. R. from time to time paid sums of money for the plaintiff. He purchased for the plaintiff a commission in the army, paid for his outfit, &c., made him an adequate yearly allowance, and paid a large sum for his promotion. No one of the sums so advanced was equal in amount to the plaintiff's share of the trust fund, nor was there any evidence that it was stated at the time of the advances, or understood between the plaintiff and R., that they were made out of the trust fund in R.'s hands: —Held, first, that the release should be set aside; second, that R.'s position was that of a debtor to his five children for their respective shares of the trust fund; third, that the sums advanced, being respectively less in amount than the plaintiff's share, were not a satisfaction of it pro tanto, and that R. was not entitled to credit for them. *Reade* v. *Reade*, 9 L. R., Ir. 409. And see *Wade* v. *Cox*, 4 L. J., Ch. 105.

Release to One of Several Trustees.]—A release to one trustee in respect of a breach of trust committed in the investment of part of the trust funds:—Held, to be a release to the other trustee, the release operating as an acceptance of the securities upon which the funds had been invested. *Blackwood* v. *Borrowes*, 2 Con. & L. 459; 4 Dr. & War. 441.

Release by the Court.]—On motion, reference directed to inquire whether defendant, a trustee, remains accountable for any acts done by him as trustee, and, if not, to settle release. —— v. *Osborne*, 6 Ves. 455.

See also DEED and BOND.

9. CONTRIBUTION FROM CO-TRUSTEE.

Assignees in Bankruptcy.]—Contribution enforced among assignees in bankruptcy to reimburse a payment by one under an order for a loss, occasioned by their joint act; and the objection that the defendants acted only for conformity upon the representation and advice of the plaintiff, did not prevail. *Lingard* v. *Bromley*, 1 V. & B. 114; 12 R. R. 195.

Suit against Trustees to Repair Breach of Trust.]—Contribution between trustees cannot be enforced in a suit instituted against them to repair a breach of trust for which they are all liable. *Fletcher* v. *Green*, 33 Beav. 513.

As to the right of co-trustees, who had committed a breach of trust, to contribution in a suit to make them replace the trust fund. *Ib.*

Right to Bring Action.]—If A. and B., two trustees, have committed a breach of trust and are equally liable, but B. received the produce, A. may sustain a bill against B. alone to recover the amount, for the benefit of the trust. *Baynard* v. *Woolley*, 20 Beav. 583.

H. assigned property to B. and W. to be invested in the public funds or other securities upon trust for himself for life, remainder to his wife for life, remainder to his son. After H.'s death the trustees, having received 400*l.* of the trust money, lent it to W., who already owed H. 100*l.*, and who thereupon signed an informal memorandum, stating that the title-deeds of his house, &c., were held as a collateral security. These deeds were in B.'s possession in respect of a debt due to another person, and secured by a term of 500 years. The widow was informed of this transaction, and received interest on the 500*l.* at 4 per cent., subsequently, at her request, raised to 5*l.* per cent. W., having conveyed all his real and personal estate to L. for the benefit of his creditors, and having afterwards ceased to pay interest on the 500*l.*, a bill was filed against him by B. (the widow and the son of H. and L. being also made defendants) for the recovery of the 500*l.*, &c.:—Held (1) that B. was entitled to file such bill against his co-trustee, notwithstanding that he had himself been guilty of a breach of trust; (2) that he was himself liable to replace the whole trust fund, if it could not be recovered from W.; (3) that the acknowledgment signed by W. constituted an equitable mortgage; (4) that the legal estate in the hereditaments therein comprised being vested in B., the subsequent assignment to L. did not affect the term of 500 years; (5) that the widow was liable to account to the trust fund for interest received by her in excess of 4*l.* per cent. *Ib.*

—— **Insufficient Security—One Trustee acting Honestly but Erroneously—Other Trustee doing Nothing.**]—H., C., and T., trustees, invested a sum on mortgage. The security turned out to be insufficient, and a loss was sustained. In a suit instituted by the beneficiaries it was declared that T., C. and her husband, and the estate of H. were jointly liable to make this loss good, and numerous orders were made directing C. and her husband and T. to pay certain sums into court, and eventually the plaintiffs, who were the trustees of a settlement which comprised certain portions of H.'s estate, paid the whole sum into court. The plaintiffs then sued T. for his one-third contribution, and obtained judgment, but by reason of his insolvency recovered nothing. They then sued Mr. and Mrs. C. for half contribution. There was an arrangement between the trustees that Mr. and Mrs. C., who were resident abroad, should not be troubled about the trusts, and, as a fact, they did nothing therein:—Held, that this was no bar to contribution, for where one trustee acts honestly though erroneously, the other trustee who by doing nothing neglects his duty more than the acting trustee, is not entitled to indemnity. *Bacon* v. *Camphausen*, 58 L. T. 851.

Improper Investments — Solicitor-Trustee Guilty of Negligence.]—Trustees were held liable to replace sums improperly invested by them. One of the trustees, A., was a solicitor, authorised to make professional charges for work done for the trust. The other was the widow

of the testator, and the tenant for life under his will of the trust funds. A. took the more active part in making the investments, and was paid costs for his professional work, charging scale fees both for negotiating the loans, deducing the title, and preparing and completing the mortgages; and he did not, in the opinion of the court, communicate what he did to his co-trustee in such a way as to enable her to exercise her judgment upon the investments, and make them her acts as well as his own:—Held, that A. had undertaken to find proper investments, and that the widow had joined in advancing the fund on the faith that the investments were proper ones which had been looked into by A., as solicitor; that she had been misled by him, and he had been guilty of negligence in his duty as a solicitor; and that, as between A. and the widow, A. was primarily liable for the breach of trust. *Partington, In re, Partington* v. *Allen*, 57 L. T. 654.

—— **Advance to Builder on Mortgage of Land—Money Advanced applied in Payment to One Trustee of Price of Land.**]—Two trustees advanced to a builder money on mortgage of land and houses thereon. The land had belonged to the defendant, one of the trustees, and part of the money advanced was applied by the builder in payment of the price of the land and of other money due from him to the defendant. The other trustee filed a bill against the defendant, alleging that the security was insufficient, and asking that the security might be realised, and that the defendant should make good any deficiency:—Held, that the plaintiff had no equity to make his co-trustee primarily liable; and that the court would not direct a sale of the property in the absence of the cestuis que trust. *Butler* v. *Butler*, 47 L. J., Ch. 77; 7 Ch. D. 116; 37 L. T. 518; 26 W. R. 85—C. A.

—— **Legacy paid to Solicitor of Trustees—Misappropriated by One Trustee.**]—P., by his will, gave a legacy to Mrs. W., defendant, which legacy was, on her marriage settled in the usual way, being then still unpaid, the testator's estate being very deficient. Afterwards, Mrs. P., the widow of the testator, by her will directed her trustees to pay and make good, out of her assets, all the legacies given by her late husband, "upon condition that all parties concerned should abstain from requiring any claim against her late husband's estate, &c., and should also execute any releases which her said husband's executors might require in respect thereof." Mrs. P.'s estate being ample, the legacy was ready to be paid, but the executors required the discharge of three trustees of Mrs. W.'s settlement. There was at that time but one trustee. Mr. W. procured A. and another person to be trustees; and the legacy having been paid to the solicitor of all three trustees, he paid it over to A., who immediately misapplied it, by suffering W. to convert it to his own use. On a bill filed by the other two trustees against A. and Mr. and Mrs. W. to have the fund brought back:—Held, first, that the legacy under Mrs. P.'s will was bound by the trusts of the settlement. *Gray* v. *Addison*, 2 Jur. (N.S.) 662.

Held, secondly, that the two plaintiffs had been guilty of no conduct, by laches or otherwise, to deprive them of their right to relief. *Ib.*

Held, thirdly, that they had a right to have the whole fund replaced by A., and not for contribution only. *Ib.*

Assignment of Money due to Settlor by Firm to Trustees, one being a Partner in the Firm.]—By a settlement made in contemplation of marriage, a lady assigned a certain sum of money and interest, due to her from a trading firm, to one of the partners in the firm and the plaintiff, as trustees, upon trust, to permit the fund to remain in the hands of the firm until the trustees should be requested by the settlor, in writing, to call it in, and upon such request to call in and compel payment of the same, and invest it, and to hold such sum and the investment upon the trusts therein mentioned; and it was provided, that it should be lawful for the trustees, with the consent of the settlor, after giving to the partner trustee, or any other member of the firm, three months' notice in writing, to call in the said fund; but that, so long as it remained in the hands of the firm with the consent of the settlor, the trustees were not to be answerable for any insufficiency thereof. The firm suspended payment, and made a composition with their creditors: and after such suspension, the settlor, for the first time, requested the trustees to call in the fund. The plaintiff thereupon requested his co-trustee to pay the money. Upon his refusal to do so, the plaintiff filed his bill against his co-trustee and the cestuis que trust, to have the trust executed by the court, and himself indemnified:—Held, that the partner trustee must be considered as having the fund in his hands from the expiration of three months after the notice requiring him to pay it; and that, therefore, a decree for payment of the debt might be made against him, although the other partner in the firm was not a party to the suit. *Norton* v. *Steinkopf*, Kay, 45; 23 L. J., Ch. 35; 2 W. R. 34.

If adult cestuis que trust insist upon their strict rights, the court will not exercise any discretion for the benefit of other cestuis que trust who are infants. *Ib.*

Directors — Breach of Trust — Liability of Executor.]—The directors of a company advanced moneys of the company upon an unauthorised security, and two sums of 600*l.* and 400*l.* so lent were lost. The 600*l.* formed part of a loan of 800*l.*, and the 400*l.* formed part of a loan of 1,000*l.* which was granted by the board of directors, and of which 400*l.* was actually advanced and repaid, and a second 400*l.* was advanced and not repaid. In an action by the company against one of the directors who had taken part in granting the loans, he was held liable to pay the two sums of 600*l.* and 400*l.* to the company, and, having paid them, he sued three of his co-directors for contribution. One of the defendants was not present at the meeting at which the loan of 800*l.* was granted, and at which a cheque for the 800*l.* was drawn, but he was present at a subsequent meeting at which the minutes of the former meeting were read and confirmed. The 800*l.* had been already paid to the borrower:—Held, that, whether the defendant would or would not have been liable to the company, there was no equity to compel him to contribute to the plaintiff in respect of the 600*l.* *Ramskill* v. *Edwards*, 55 L. J., Ch. 81; 31 Ch. D. 100; 53 L. T. 949; 34 W. R. 96.

The same defendant was present at the meeting at which the loan of 1,000*l.* was granted, when he protested strongly against it. He was present

at a subsequent meeting at which the minutes of the first meeting were read and confirmed, and he then signed a cheque which was drawn for the first 400*l.* :—Held, that by signing the cheque he had adopted the whole loan of 1,000*l.*, and that he was therefore liable to contribute in respect of the second 400*l.* which was lost. *Ib.*

The third defendant died after the commencement of the action, and his administrator was then made a defendant :—Held, that the liability to contribute survived against the defendant's estate. *Ib.*

Breach of Trust—Decree against Executor and Estate of Deceased Executor—Payment by Surviving Executor.]—When a decree has been made against an executor, and the estate of a deceased executor, to make good a breach of trust, payment by the surviving executor of the whole amount due is a complete discharge of the deceased executor's estate, and it is not competent for the court to enforce payment against the deceased executor's estate in order to establish contribution. *Micklethwait* v. *Winstanley*, 5 N. R. 204 ; 34 L. J., Ch. 281 ; 11 L. T. 582 ; 13 W. R. 210—L.JJ.

Improper and Improvident Investment—Indemnity—Co-Trustee.]—Where one of two trustees actively manages the trust fund, and is solicitor to the trust estate, he must indemnify his co-trustee against loss caused to the trust fund from an improper investment made at his instance and under his advice. *Turner, In re, Barker* v. *Iximey*, 66 L. J., Ch. 282 ; [1897] 1 Ch. 536 ; 76 L. T. 116 ; 45 W. R. 495.

—— **Trustee Beneficiary.**]—Where two trustees are equally to blame for a breach of trust for which they have been made jointly and severally liable to the cestuis que trust, and one trustee alone has made good the loss, he is entitled to contribution from his co-trustee ; but if one of the trustees is also a cestui que trust and has derived an exclusive benefit from the breach of trust, he is bound to indemnify his co-trustee to the extent of his interest in the trust property ; and this rule applies although the trustee does not become a cestui que trust until after the breach of trust is committed. *Chillingworth* v. *Chambers*, 65 L. J., Ch. 343 ; [1896] 1 Ch. 685 ; 74 L. T. 34 ; 44 W. R. 388—C. A.

Therefore, where two trustees were held liable for a loss to the trust estate arising from improper investments, and after some of the investments had been made, one of the trustees became beneficially entitled to a share in the trust estate exceeding the loss:—Held, that the whole of the loss must be borne out of his share, and that he was not entitled to contribution from his co-trustee. *Ib.*

—— **Employment of Outside Broker—Loss of Trust Funds—Statute of Limitations—Time when Statute begins to run.**]—Where a trustee, to whom his co-trustee had in 1885 handed over a sum of money to be invested in accordance with the terms of the settlement, leaving the management of the trust to him, gave the money to an outside broker for investment, who misappropriated a portion of the same so that it was irrevocably lost in 1888, both trustees were held liable for the lost trust money, and the active trustee was, on the authority of *Chillingworth v. Chambers*, supra, declared to be entitled to contribution from the passive trustee. *Robinson* v. *Harkin*, 65 L. J., Ch. 773 ; [1896] 2 Ch. 415 ; 74 L. T. 777 ; 44 W. R. 702.

The principles laid down in *Dering* v. *Winchelsea* (*Earl*) (1 Cox, 318 ; 2 Bos. & P. 270) as to contribution between co-sureties apply equally to contribution between co-trustees. The law as stated in *Wolmershausen* v. *Gullick* (62 L. J., Ch. 773 ; [1893] 2 Ch. 514 ; 3 R. 610 ; 68 L. T. 753), that in a case of contribution between two co-sureties time does not begin to run under the statute of limitations until the liability of one of the sureties is ascertained, is applicable to the case of co-trustees, and consequently time would only begin to run in the present case as between the co-trustees when the claim of the cestuis que trust was established by the judgment in the action. *Ib.*

10. Solicitor-Trustee.

Right to Costs Generally.]—The rule, that a solicitor, being also a trustee and a party to a cause, is not entitled to charge costs, except costs out of pocket, does not extend beyond his acting as solicitor for himself alone. *Cradock* v. *Piper*, 1 Mac. & G. 664 ; 1 Hall & Tw. 617 ; 19 L. J., Ch. 107 ; 14 Jur. 97.

A solicitor who accepts a trust under a will or settlement is not entitled to charge for work and labour done by him as a solicitor in executing the trust. *New* v. *Jones*, 1 Mac. & G. 668, n. ; 1 Hall & Tw. 632, n.

The rule which allows a solicitor, being also a trustee and a party to a cause, to charge full costs, where he acts in the suit for a body of trustees, of which he himself is one, does not apply to the case of a solicitor being a trustee and acting as solicitor for himself and his co-trustees in the administration of the trust estate out of court. *Lincoln* v. *Windsor*, 9 Hare, 158 ; 20 L. J., Ch. 531 ; 15 Jur. 765.

Where one of a set of trustees is a solicitor, and by the direction of his co-trustees acts professionally in matters relating to the trust (such business being done out of court, and not in a cause in chancery), he will not be allowed any remuneration for professional services, but only be entitled to costs out of pocket. *Broughton* v. *Broughton*, 5 De G. M. & G. 160 ; 25 L. J., Ch. 250 ; 1 Jur. (N.S.) 965 ; 3 W. R. 603.

Where one of a set of trustees is one of a firm of solicitors, and the firm acts, by the direction of the trustees, professionally in the matters of the trust estate (such business being done out of court, and not in a cause in chancery), the firm will not be allowed any remuneration for their professional services, but only be entitled to costs out of pocket. *Ib.*

Profit Costs.]—A trustee solicitor is entitled to be allowed profit costs where he has agreed with his partner that such partner shall act as solicitor to the trust, and receive the profits for his own benefit. *Clack* v. *Carlon*, 30 L. J., Ch. 639 ; 7 Jur. (N.S.) 441 ; 4 L. T. 361 ; 9 W. R. 568.

E., a partner in a firm of country solicitors, was one of two trustees of a will which contained no power to charge for professional services. E. and his co-trustee were respondents to an application for maintenance by a next friend on behalf of an infant under the summary procedure of the court, and E.'s firm, through their London agents, acted as solicitors for E. and his co-trustee and made profit costs :—Held, that E.'s

firm were entitled to receive those profit costs as coming within the exception laid down in *Cradock* v. *Piper*, supra. Although that case has been often disapproved, it has been so long acted on as a binding authority that it ought not now to be overruled. The exception applies not only to proceedings in a hostile suit, but to friendly proceedings in chambers, such as an application for maintenance of an infant. *Corsellis, In re, Lawton* v. *Elwes*, 56 L. J., Ch. 294; 34 Ch. D. 675; 56 L. T. 411; 35 W. R. 309; 51 J. P. 597—C. A.

After the death of E.'s co-trustee, E. was made defendant to an administration action in which a receiver was appointed, and E.'s firm, through their London agents, acted for the receiver and made profit costs:—Held, that these profit costs could not be retained by the firm; on the principle that a trustee must not place himself in a position in which his interest conflicts with his duty. *Ib.*

—— **Preparing Leases.**]—E. and his firm made profit costs by preparing leases and agreements for leases of portions of the trust estate, which costs were paid by the lessees:—Held, that although the costs were paid by the lessees, the solicitors were employed on behalf of the trust estate, and that E. and his firm must account to the estate for the costs. *Ib.*

—— **Fees of Steward of Manor.**]—E. and his co-trustee appointed E.'s partner steward of a manor which formed part of the trust estate, and fees for manorial business were paid to the steward by the tenants and brought into the partnership accounts:—Held, that the fees, not being received by the steward in his character of solicitor, were not liable to be accounted for to the trust estate. *Ib.*

—— **Declaration in Will—Solicitor—Attesting Witness.**]—A declaration in a will that a solicitor, who is an executor-trustee of the will, may charge profit costs for work done for the testator's estate, confers a beneficial gift or interest on him, within s. 15 of the Wills Act, 1837, and is therefore void where the solicitor-trustee has been one of the attesting witnesses of the will. *Pooley, In re*, 58 L. J., Ch. 1; 40 Ch. D. 1; 60 L. T. 73; 37 W. R. 17—C. A.

A testatrix, after appointing V. and H., who was a solicitor and also one of the attesting witnesses to the will, executors and trustees of her will, declared that H. should be entitled to charge and to receive payment for all professional business to be transacted by him under the will in the same manner as he might have done if he had not been an executor. V. proved the will, and a creditor's action was instituted against her. V. employed the firm of solicitors, in which H. was a partner, as her solicitors in the action. H. afterwards proved the will, and was made a defendant to the action. When the action came on for further consideration, a question arose whether H. was entitled to his profit costs, and an order was made declaring that he was not entitled to claim payment of profit costs by virtue of the declaration in the will, he being one of the attesting witnesses thereto, such declaration to be without prejudice to any of his rights apart from the clause in the will. The taxing-master disallowed H.'s profit costs of action, on the ground that he was a solicitor-trustee, and as such not entitled to make a profit out of his trust:—Held, on a summons to review the taxation, that H. was entitled to profit costs of action, but that he was not entitled to profit costs for business not done in the action, and that the rule applied as well to costs incurred before as after he proved the will. *Cradock* v. *Piper*, supra, discussed, and held not to have been overruled. *Broughton* v. *Broughton*, supra, discussed. *Barber, In re, Burgess* v. *Vinicome*, 56 L. J., Ch. 216; 34 Ch. D. 77; 55 L. T. 882; 35 W. R. 326.

Professional Charges—Opening Settled Account.]—S. and S., the trustees and executors of a will, who were solicitors carrying on business in partnership, and were authorised by the will to charge for professional business done by them for the estate, wound up the estate and sent an account to the five residuary legatees with a letter saying that, if they would call at the office of the executors on a day named, the executors would give them any explanations they might require, and would hand them over cheques for their shares of the residue. The account was not a complicated one, and among the items was, "Paid Messrs. S. & Co. costs relating to executorship and counsel's fees and payments made by them, 116*l.* 17*s.* 2*d.*" The ultimate balance shown was 331*l.* 3*s.* 4*d.*, the bulk of the testator's property having been disposed of by specific bequests. The residuary legatees attended, signed at the foot of the account a memorandum, "We have examined and approve of the foregoing account," received cheques for their shares, and executed a release to the trustees and executors. The trustees and executors never informed the residuary legatees that they were entitled to have a bill of costs delivered, and to have it taxed if they thought fit. Nine years afterwards three of the residuary legatees brought an action to have it declared that the release was not binding on them, and to have a bill of costs delivered and taxed. On production of documents there were found in the costs ledger of the solicitors items which came to more than the amount charged for costs in their account, there was no evidence of excessive charge beyond a deposition by an experienced solicitor's clerk, that in his opinion at least one-sixth would be taxed off the amount of costs appearing in the ledger, and there was no proof of error in the rest of the account. Romer, J., dismissed the action:—Held, on appeal, that although it was the duty of the solicitor-trustees to have informed the residuary legatees that they were entitled to have a bill of costs, and if they thought fit to have it taxed or moderated, the omission to do so was not by itself a sufficient ground for opening a settled account; that in order to do so it was necessary to show that injustice would be done by allowing the settled account to stand; that if excessive charges had been shown, the account must have been opened; but that as no error had been shown, the action had rightly been dismissed. *Webb, In re, Lambert* v. *Still*, 63 L. J., Ch. 145; [1894] 1 Ch. 73; 70 L. T. 318—C. A.

——**Power to charge for Professional Services, and also for Work done as Trustee.**]—A testator, having by his will appointed a solicitor one of his executors and trustees, and bequeathed 200*l.* to him if he should accept the office, declared that he and "every other person to be thereafter appointed a trustee of his will who

might be a solicitor should be entitled to receive his usual professional costs and charges as well by way of remuneration for business transacted (including all business of whatever kind not strictly professional but which might have been performed by a trustee not being a solicitor) as costs and charges out of pocket in the same manner as if he had not been a trustee but had been employed by the trustees in the matter of the trusts" :—Held, that notwithstanding the legacy of 200*l.*, the defendant was entitled to charge not only for his professional services, but also for his trouble as a trustee for what was not properly solicitor's work. *Fish, In re, Bennett* v. *Bennett*, 62 L. J., Ch. 977; [1893] 2 Ch. 413; 2 R. 467; 69 L. T. 233—C. A.

—— **Charges not strictly Professional.**]—A testatrix by her will appointed her solicitor (who prepared her will) one of her two executors and trustees, and, stating that it was her desire that he should continue to act as solicitor in relation to her property and affairs, and should "make the usual professional charges," expressly directed that notwithstanding his acceptance of the office of trustee and executor, he should be entitled to make the same professional charges, and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances, time, and trouble given and bestowed by him in or about the execution of the trusts and powers of the will, and the management and administration of the trust estate, real or personal, as if he, not being himself a trustee or executor, were employed by the trustee or executor. Under this direction the solicitor-executor delivered bills of costs, which included charges for all business done by him, whether such business was strictly professional, or could have been transacted by a lay executor without the assistance of a solicitor :—Held, that all items which were not of a strictly professional character ought to be disallowed. *Chapple, In re, Newton* v. *Chapman*, 27 Ch. D. 584; 51 L. T. 748; 33 W. R. 336.

A testator by his will authorised any trustee thereof, who might be a solicitor, to make the usual professional or other proper and reasonable charges, for all business done and time expended in relation to the trusts of the will, whether such business was usually within the business of a solicitor or not. On the further consideration of an action for the administration of the testator's estate, an order was made for the taxation of the costs, charges, and expenses of the trustees, and it was directed that the taxing-master should have regard to the terms of the will as to the costs of the trustees :—Held, that the taxing-master had power to allow to a trustee, who was a solicitor, the proper charges for business, not strictly of a professional nature, transacted by him in relation to the trust estate. *Ames, In re, Ames* v. *Taylor*, 25 Ch. D. 72; 32 W. R. 287.

A solicitor was appointed executor, and was to be at liberty to charge for his professional services :—Held, that he was only entitled to charge for services strictly professional, and not for matters which an executor ought to have done, without the intervention of a solicitor; such as for attendances to pay premiums on policies, attending at the bank to make transfers, and attendances on proctors, auctioneers, legatees, and creditors. *Harbin* v. *Darby*, 28 Beav. 325; 29 L. J., Ch. 622; 6 Jur. (N.S.) 906; 2 L. T. 531; 8 W. R. 512.

—— **Remuneration.**]—Where estates were devised to a near relative and a family solicitor until B. attained the age of twenty-eight years, upon trust to receive the rents and manage the estate, and the will empowered any trustee being a solicitor to charge and be paid for all business done by him as a solicitor in respect of such estate, and a legacy of 100*l.* was given to each trustee, and the trustees managed the estates, consisting of 2,000 acres partly unlet for fifteen years, paying themselves a salary of 100*l.* a year each for the trouble of such management, amounting in all to 3,000*l.*; on an originating summons on behalf of the tenant for life and the infant remainderman :—Held, that such payments of 200*l.* a year were unauthorised by the will; the trustees might at any time have applied to the court, but they neglected to do so: that it was not a case to follow the course adopted in *Marshall* v. *Holloway* (2 Swanst. 432), where an inquiry was directed as to whether any and what sum should be allowed to the trustees for their trouble. The salary was disallowed, and an order made for payment into court, without interest, within six months. *Bedingfield, In re, Bedingfield* v. *D'Eye*, 57 L. T. 332.

11. Liabilities of Trustees for Breaches of Trust.

a. Nature of Breach of Trust.

Statute.]—32 & 33 *Vict. c.* 46—Abolished distinction between specialty and simple contract debts.

When Simple Contract Debt.]—Breach of trust can fall only on the personal estate of a trustee. *Vernon* v. *Vawdry*, 2 Atk. 119; Barnard. 280.

A cestui que trust, claiming compensation for a breach of trust against the representatives of the trustee, can only come in as a simple contract creditor. *Kearnan* v. *Fitzsimon*, 3 Ridgw. 1.

—— **Creditors' Suit.**]—The creditors of a bankrupt appoint the Bank of England as the place where the estate shall be deposited. A dividend is declared; two of three assignees sign drafts for the dividends, which they forward to the other assignee for his signature; he also signs them, and receives the money, which he applies to his own purposes. Upon his death a creditor's suit is instituted for the administration of the assets :—Held, first, that under the covenant which the assignees entered into with the commissioners, the misapplied dividends were a special contract debt due from the estate of the assignee who had misapplied them to the estate of the bankrupt; secondly, that the estate of the assignee was liable, under 49 Geo. 3, c. 121, s. 4, to pay 20 per cent. upon the funds misapplied; thirdly, that the 20 per cent. was not a specialty, but a simple contract debt; fourthly, that the 20 per cent. was part of the general estate of the bankrupt, and did not belong to the creditors entitled to the misapplied dividends. *Wackerbarth* v. *Powell*, Buck. 495, in part reversed on appeal, 2 Glyn & J. 151.

Under the usual decree, in a creditors' suit, the master has no jurisdiction to enter a claim founded on an alleged breach of trust committed by the testator, by investing the trust funds on improper securities. *Casterton* v. *Casterton*, 2 Keen, 774; 7 L. J., Ch. 302.

—— **Two Creditors' Suits—Priority.**]—Where a bill was filed against A .and B., on an admitted breach of trust by B., and the accounts prayed to be taken and the real estate of B. applied in payment of the plaintiff's claim and the other creditors; afterwards a creditors' suit was instituted against the representatives of B., and the usual decree made; the plaintiffs in the first suit claimed priority over the plaintiffs in the second suit, as to the fund in court, but held that after the payment of costs in the first suit, the fund was to be applied amongst all the creditors of B. *Smith* v. *Birch*, 3 Beav. 10; 9 L. J., Ch. 349; 4 Jur. 670.

—— **Trust Deed—No Express Agreement or Declaration by Trustees.**]—A deed, appointing new trustees, recited, that they had agreed to become trustees, and then assigned the trust premises to them to hold on the trusts of the original deed. There was no express agreement or declaration that they would execute the trusts:—Held, that a debt created by a breach of trust was not a specialty debt. *Wynch* v. *Grant*, 2 Drew. 312; 2 Eq. R. 1135; 23 L. J., Ch. 834; 2 W. R. 486.

A breach of trust will constitute merely a simple contract debt, unless there is something in the creation of the trust to raise a liability on covenant against the trustee. *Adey* v. *Arnold*, 2 De G. M. & G. 432; 16 Jur. 1123.

By deed of indorsement under seal, appointing new trustees, and executed by them, a trust fund was assigned to the new trustees, "to hold unto them, their executors, administrators, and assigns, as their own money, property, and effects, but nevertheless upon the trusts and for the ends, intents, and purposes declared by the within indenture;" but there was no declaration of trust by the trustees:—Held, that a loss which occurred by a breach of trust did not constitute a specialty debt. *Ib.*

Semble, a declaration by trustees in a deed executed by them, that they will apply a trust fund in a particular manner, will be construed to amount to a covenant; and any loss to the trust fund arising from a breach of trust will constitute a specialty debt. *Ib.*

—— **Trustee not executing Trust Deed.**]—A trustee under a deed, the terms of which would amount to the creation of a contract, is not a specialty debtor if he has not executed the deed, although he has acted under it. *Richardson* v. *Jenkins*, 1 Drew. 477. *S. C.*, nom. *Jenkins* v. *Robertson*, 1 Eq. R. 123; 22 L. J., Ch. 874; 17 Jur. 446, 1 W. R. 298.

The words "covenant or agree" are not necessary in a trust deed to constitute a specialty contract. A declaration by the trustee that he will stand possessed on certain trusts, &c., is sufficient. *Ib.*

—— **Trustee executing Trust Deed.**]—A trustee executed a deed acknowledging that he had trust money in his hands, and that he intended to secure it on property in which he had a reversionary interest. The deed contained no covenant to pay the money:—Held, that having regard to the absence of a covenant in the deed to repay the debt, and to the fact of the existence of an antecedent liability on the part of the trustee to pay, and also to the principle of construction laid down in *Courtney* v. *Taylor* (6 Man. & G. 851; 7 Scott (N.S.) 749; 12 L. J., C. P. 330) and *Adey* v. *Arnold*, supra, the debt had not been converted by the deed into a specialty debt. *Brook* v. *Harwood*, *Isaacson* v. *Harwood*, 37 L. J., Ch. 209; L. R. 3 Ch. 225; 18 L. T. 622; 16 W. R. 410.

Where a trustee, by deed under his hand and seal, accepted the trusts of a will, and afterwards committed a breach of trust, and died insolvent:—Held, that the cestuis que trust were not entitled to rank as specialty creditors in the administration of his assets. *Holland* v. *Holland*, 38 L. J., Ch. 398; L. R. 4 Ch. 449; 17 W. R. 657.

—— **Costs of One Trustee against Guilty Trustee.**]—A. and B. were trustees of a settlement, and a breach of trust was committed, B. being the guilty party. The trust fund was ultimately restored, and A.'s costs were directed to be paid out of B.'s estate:—Held, that these costs were not a specialty debt, as against B.'s estate. *Lockhart* v. *Reilly*, 1 De G. & J. 464; 27 L. J., Ch. 54.

A. paid a sum on account of his costs, after the 19 & 20 Vict. c. 97, and it was held that the sum was paid in the character of surety, and therefore that, under s. 5, he was entitled to claim as a specialty creditor on account of it. *Ib.*

Held, also, that the Mercantile Law Amendment Act had a retrospective operation so as to be applicable to obligations incurred prior to the passing of the act, and applied to that portion of the costs of A. which he had paid since the passing of the act. *Ib.*

—— **Right to Contribution against Estate of Deceased Trustee.**]—By the decree, the estates of two deceased trustees were declared severally liable to replace a fund. The representatives of one only admitted assets, and the decree directed payment by them, and an account of the estate of the other. The whole being paid by the former:—Held, that their right to contribution against the estate of the latter constituted a mere simple contract debt, although as against both estates, the demand was a specialty debt. *Priestman* v. *Tindall*, 24 Beav. 244.

When Specialty Debt—Trust created by Instrument under Seal.]—The money due in respect of a breach of trust, where the trust is created by instrument under seal, is a specialty debt. *Wood* v. *Hardisty*, 2 Coll. C. C. 542; 15 L. J., Ch. 328.

A. and B. are trustees under a deed, by which neither of them is to answer for the other; A. receives a sum of money under the trust, and gives a writing under hand and seal acknowledging it, and that B. had received no part of it; A. never placed out the money, and dies; this writing is a specialty and good against the executor, but not against the heir of A., he not being mentioned in it. *Gifford* v. *Manley*, Cas. t. Talb. 109.

—— **Words in Deed, "It is Declared."**]—Trust property being vested in three trustees, a part of which is outstanding upon mortgage, the mortgage is called in, the money received by one, and applied to his own use. He lives many years, and his executors, after his death, continue to pay the interest. His estate is insufficient even to pay specialty debts; and the master, in a suit in which

his estate is administered, finds that the money so misapplied is a specialty debt due to the representatives of the surviving co-trustee. The trust deed which was executed by the trustees contained the words, "And it is hereby declared and agreed between and by all the said parties hereto," that the property should be held upon certain trusts. Exceptions are taken to the master's finding, for that he should have found that there was no debt, or if there was, that it was not a specialty debt: —Held, that the trust deed constituted a covenant, being under hand and seal, and a contract between all the parties to it; and there being a clear right to sue at law, this court, in declaring that there was a covenant, could also allow such money so received and misapplied as a specialty debt due from the estate of the deceased trustee, who received the money, to the estate of his surviving co-trustee. The breach of trust, if any, was not in allowing the receipt of the money, but in the misapplication of it. Exceptions overruled with costs. *Alexander* v. *Foster*, 5 W. R. 33.

—— **Covenant by Trustee to hold Money on Trusts.**]—N., reciting that he was entitled to a simple contract debt due to him by his sons, A., B., C., and D., who were partners in trade, assigned it to A. and B. upon trust, if they should think fit to call in the same, to invest it on good and solvent security, and hold same upon certain trusts. A. and B. sealed and delivered the deed, and afterwards misapplied the trust moneys:—Held, that the breach of trust was a debt of A. and B. by specialty, not binding their heirs. *Cumming* v. *Cumming*, 3 Jo. & Lat. 64; 8 Ir. Eq. R. 723.

By marriage settlement, a sum of 5,000*l.* was vested in trustees upon trust to permit the wife, in case she should survive her husband, to receive the interest thereof during her life; and in case there should be no issue of the marriage, in trust for the husband absolutely: with power to the trustees, with the consent of the husband and wife, to invest the money in government or on real security. The money was afterwards, with the consent of the husband and wife, lent upon mortgage. The husband died without issue; and by his will bequeathed his interest in the 5,000*l.* to A. upon certain trusts, and appointed him his executor. The wife afterwards married B.; and upon her marriage, the interest on the 5,000*l.* was assigned to A. upon trust to pay the yearly interest on the 5,000*l.* to the wife for life; and A. covenanted with the wife that he, his executors, &c., would stand possessed of the premises assigned to him upon the trusts therein mentioned. The 5,000*l.* was paid to A. out of the produce of a sale had in a suit in which he was a defendant; and A. represented to B.'s wife that he had invested the money upon government security; and paid her interest according to the rate it would have borne if it had been so invested. The money was not, in fact, so invested, but was applied by A. to his own use:—Held, in a suit for the administration of A.'s assets, that the new trustee of B.'s last marriage settlement was entitled to rank as a specialty creditor for the difference between the amount of the interest actually paid by A., and interest upon the 5,000*l.*, calculated at 6*l.* per cent.: and also (there being a deficiency of the assets to pay the 5,000*l.*, which was a debt by simple contract), as a specialty creditor for any future deficiency in the interest, calculated at 6*l.* per cent. *Jameson* v. *Farrer*, 3 Ir. Eq. R. 346.

—— **Covenant to Settle Property on Trusts.**]—By marriage articles, the intended husband covenanted with the trustees, that a certain sum of money should be vested in the trustees, and the survivor of them, and the executors and administrators of such survivor for ever, upon the trusts specified in the articles. The marriage was celebrated, and the husband, with the assent of the trustees, obtained possession of the money: —Held, in a suit for the administration of the assets of the husband, that the trustees were entitled to rank as specialty creditors of the husband, in respect of that sum of money. *Ib.* S. P., *Hawksworth, In re, Lovell* v. *Sherwin*, 2 Eq. R. 329; 2 W. R. 34.

By deed between A. and B., it was agreed that a sum in the hands of A., but belonging to B., should be laid out in the funds in A.'s name, and in trust for B. A. died, never having vested the money:—Held, that B. was a specialty creditor of A. for the amount. *Mavor* v. *Davenport*, 2 Sim. 227.

A. and B., solicitors, in partnership, jointly attended to the management of certain settled funds, of which A. and E. were trustees, who had executed the settlement. E. was the client of A., who represented to E. that he had a good mortgage security on which to invest a portion of the trust moneys; and E., accordingly, assented to his making such investment. A. did not, however, invest the money on the mortgage, but paid it into the bank of his firm, to their partnership account there; the proceeds being applied, with the knowledge of B., to the use of the firm. A. died in insolvent circumstances, leaving B. him surviving:—Held, that B. was personally liable to E. for the money; and that E. was pro tanto a specialty creditor of A.'s estate. *Eager* v. *Barnes*, 31 Beav. 579; 7 L. T. 408.

b. Personal Liability of Trustees.

i. *In General.*

General Principles.]—In charging trustees for breaches of trust and costs of suit, it is immaterial how the trust was created, and whether for valuable consideration, or by the voluntary gift of the trustees themselves. *Drosier* v. *Brereton*, 15 Beav. 221.

Trustee not to be charged with imaginary values, but only as a bailiff. *Palmer* v. *Jones*, 1 Vern. 144.

Trustee, investing money at his own discretion, runs risk of depreciation. *Hancom* v. *Allen*, Dick. 498.

Trustees investing trust money on an unauthorised security are responsible for any future loss, traceable to that first error. *Fyler* v. *Fyler*, 3 Beav. 550; 5 Jur. 187.

No Benefit derived by Trustee.]—Trustees and their representatives chargeable in equity for a breach of trust, though no benefit derived from it. *Adair* v. *Shaw*, 1 Sch. & Lef. 272.

A trustee is not answerable for an innocent mistake, and from which he derived no advantage; and a court of equity will grant a perpetual injunction to prevent any proceedings at law, grounded on such mistake. *Crookshanks* v. *Turner*, 7 Bro. P. C. 255.

Trustees Acting Honestly.]—Where trustees of a charity under an instrument of doubtful construction have acted honestly, though erroneously, they will not be charged in respect of

past misapplication of the funds. *Att.-Gen.* v. *Exeter Corporation*, 2 Russ. 45; 26 R. R. 2.

Trustees not answerable for having applied the trust property, even to what turned out a losing adventure, if without fraud or negligence. *Wilkinson* v. *Stafford*, 1 Ves. 41.

Trustee not answerable for having engaged the infant's name in an adventure, if, afraid of the consequences, he does not engage the property. Contrà, *Eden's case* in the house of lords cited. *Ib.*

Trustees will not be charged with loss to the trust estate, arising from acts done by them in the honest exercise of a discretion conferred upon them by the author of the trust, though in opposition to the judgment or wish of the cestui que trust. *Selby* v. *Bowie*, 2 N. R. 2; 9 Jur. (N.S.) 432; 8 L. T. 372; 11 W. R. 606.

—— **Judicial Trustees Act, 1896—Acting "Honestly and Reasonably"—"Fairly to be excused."**]—Where the trustee of a deceased solicitor was bonâ fide and on reasonable grounds satisfied that he could not maintain an action against a client personally for costs in an administration owing to an arrangement which had been come to between the solicitor and such client, it was held that the principle of *Clack* v. *Holland* (19 Beav. 262) was applicable, and that the executor was not guilty of any wilful default; but that even if the executor was technically liable for a breach of trust, then under s. 3 of the Judicial Trustees Act, 1896, he, having acted honestly and reasonably, ought fairly to be excused. *Roberts, In re, Knight* v. *Roberts*, 76 L. T. 479—C. A.

—— **Improper Investment—Relief—"Reasonable" Conduct.**]—The burden lies on a trustee, asking the court to exercise the jurisdiction given by s. 3 of the Judicial Trustees Act, 1896, so as to relieve him from personal liability for a breach of trust, of shewing that he has acted "reasonably" in the matter in which he committed the breach; and, in determining whether he has acted reasonably or not, the court will consider whether it is probable that he would have acted in the matter as he did if it had been a matter of his own. *Stuart, In re, Smith* v. *Stuart*, 66 L. J., Ch. 780; [1897] 2 Ch. 583; 77 L. T. 128; 46 W. R. 41.

A trustee invested trust funds upon mortgage on the advice of his solicitor, and in reliance upon him and valuations of surveyors employed by him. The valuations did not satisfy the requirements of s. 8 of the Trustee Act, 1893—first, because the solicitor acted in respect of the mortgages on behalf also of the mortgagors, and the surveyors employed by him were not instructed and employed independently of the mortgagors, and it did not appear that the trustee reasonably believed that they were instructed and employed independently of the mortgagors; and, secondly, because in all the valuations, except one, no values were stated of the properties proposed to be mortgaged, all that was given being the amounts respectively for which the valuers considered the properties to be good securities, and in the case of the one in which the value was given the amount lent exceeded two-thirds of that value. The mortgages proved insufficient, and no special circumstances were put forward:—Held, that the trustee, if acting as a reasonable man, would not have advanced the money without further inquiry if he had been dealing with money of his own, and that it was not a case for the court to exercise its jurisdiction under the Judicial Trustees Act, 1896, to give him relief. *Ib.*

—— **Devastavit.**]—A testator, who at the date of his death was of high reputation, and apparently abundantly solvent, after bequeathing to his widow a sum of 300*l.*, payable immediately after his death, gave the rest of his property to his widow for life, and after her death to his children. The executor, who had reason to believe that the testator's net assets would amount to at least 20,000*l.*, paid the 300*l.* legacy at once, and also paid some small sums out of income. Four months after the testator's death the executor proved the will and advertised in the usual way for creditors. The claims against the estate, with one exception, were of a trifling character. The testator had for many years acted as agent of very large estates, and the present owner of the estates had, previously to the advertisement for creditors, sent in a claim for sums due to him from the testator as his agent. Immediately after the advertisement an action was instituted against the executor by the present owner and the representatives of his predecessor alleging defalcations by the testator as agent. The executor, notwithstanding the action, continued to make payments of income to the widow. Judgment having been given for the plaintiffs for a sum which more than exhausted the whole assets of the testator, relief was claimed by the executor under the Judicial Trustees Act, 1896, in respect of the payments he had made to the widow:—Held, that, under the circumstances, the executor was entitled to be relieved in respect of the payment of the 300*l.* legacy and other sums paid by him before the issue of the writ in the action, but not in respect of sums paid subsequently to the writ. *Kay, In re, Mosley* v. *Keyworth*, 66 L. J., Ch. 759; [1897] 2 Ch. 518; 46 W. R. 74.

Failure to fulfil Trust Directions — Culpa Lata.]—Where a testator gives power to his trustees to appoint a factor to the estate who may be one of themselves, but directs them to require annual accounts, the trustees are guilty of culpa lata if they fail to call for annual accounts. *Carruthers* v. *Carruthers*, [1896] A. C. 659—H. L. (Sc.)

Notice of Claims not under Deed of Settlement.]—Quære, how far a trustee is bound by notice of claims not under the deed of settlement. *Croyden's Trust, In re*, 19 L. J., Ch. 172; 14 Jur. 54.

Trustee of Lunatic renewing Lease for his own Benefit.]—Trustee of lunatic renewing lease for his own benefit, declared guilty of breach of trust, and discharged. *Phelps, Ex parte*, 9 Mod. 357.

Release of Recognisance without Consideration.]—A trustee in a recognisance releases it without any consideration; decreed to pay the principal and interest not exceeding the penalty. *Jevon* v. *Bush*, 1 Vern. 342.

Misrepresentation to Purchaser.] — Trustee charged in respect of a misrepresentation to a purchaser having notice, and alleging only that he did not recollect the fact. *Burrowes* v. *Lock*, 10 Ves. 470; 8 R. R. 33, 856.

Deviation from Trust, Necessary or Beneficial.]—A trustee is not in all cases to be made liable, upon the mere ground of having deviated from the strict letter of his trust, for such deviation may be necessary or beneficial to the interests of the cestuis que trust; but when a trustee ventures to deviate from the letter of his trust, he does so under the obligation and at the peril of afterwards satisfying the court that the deviation was necessary or beneficial. *Harrison* v. *Randall*, 9 Hare, 397; 21 L. J., Ch. 294; 16 Jur. 72.

A trustee who, having good reason to doubt the validity of an appointment, thinks proper to act upon it, must be affected by the consequences which follow upon the act. *Id.* 407.

Non-performance of Unknown Trust.] — A trustee was held not liable for the non-performance of a trust of which he was ignorant, but inasmuch as he had been guilty of negligence in not ascertaining the nature of certain deeds in his possession, or giving his cestuis que trust an opportunity of doing so, the bill against him was dismissed without costs. *Youde* v. *Cloud*, 44 L. J., Ch. 93; L. R. 18 Eq. 634; 22 W. R. 764.

A lady who accepts a trust, although not formally appointed trustee, is accountable for moneys actually received by her as such trustee, and cannot plead ignorance of the trust. *Pearce* v. *Pearce*, 22 Beav. 248; 25 L. J., Ch. 893; 2 Jur. (N.S.) 843.

Suggestion of Invalidity of Trust Deed.]—A suggestion by the trustees of a fund, that the administrator of one of the cestuis que trust, who, in that character, was entitled to a distributive share of the fund, has unfairly obtained the letters of administration under which he claimed such share, is no defence in this court to the claim of the administrator; nor is it a defence for trustees to suggest that a deed, under which the plaintiff derives his title from the cestui que trust, was founded on mistake, or is otherwise subject to be displaced; for it is contrary to the course of the court to direct an inquiry as to the validity or invalidity of a deed, upon a suggestion in the answer of defendants, the trustees of the fund to which it relates, where the ascertainment of the validity or invalidity of the deed is not essential to the safety of the defendants; and the fact of a bill having been filed to set aside the deed under which the claim is made, or to exclude the fund in question from its operation, is not a ground upon which the trustees can resist the legal title to receive the fund; for the court cannot give the plaintiff in such other suit the benefit of an injunction to protect the fund upon the suggestion in the answer of the trustees; but the existence of such other suit entitles the trustees to retain such a portion of the trust fund as may be sufficient to answer their costs of such other suit. *Devey* v. *Thornton*, 9 Hare, 222.

A husband and wife made a post-nuptial settlement of the wife's reversionary chose in action. The wife survived her husband, and it afterwards fell into possession. The wife having done no act to repudiate the settlement:—Held, in a suit to charge the trustees with a breach of trust, that it was no answer to say, that the settlement was void as against the feme coverte. *Thompson* v. *Finch*, 22 Beav. 316. Affirmed 25 L. J., Ch. 681—L.J.J.

Insolvent Trustee.]—A demand in respect of a breach of trust may be proved against the estate of an insolvent trustee. *Ib.*

Devise to Trustee—Legal Estate.]—A trustee and executor, who took a life interest in his testator's residuary real and personal estate, misappropriated and wasted portions of the estates specifically devised and bequeathed, and subsequently became bankrupt:—Held, that his estate in the residuary realty being legal could not be applied in making good his breaches of trust. *Fox* v. *Buckley*, 3 Ch. D. 508; 25 W. R. 170—C. A.

Legacy.]—Legacy to an executor held liable to make good his breach of trust by preventing the appropriation of stock to answer a gift to a legatee for his life. *Morris* v. *Livie*, 1 Y. & C. C. C. 380; 11 L. J., Ch. 172.

Trustee Advancing Money—Following Solicitor's Advice.]—Under a power contained in a will to apply for A.'s advancement in life a portion of his reversionary share, B., the trustee, raised money by mortgage of the share, in order to pay A.'s apprentice premium to an apothecary. It was intended to apprentice A. to X., but it being discovered that X. was not a licensed apothecary, it was arranged by the solicitor acting in the matter that A. should be nominally apprenticed to Y., a licensed apothecary, but actually serve his time with X. The receipt for the whole amount was signed by Y., but only half was paid, and that to X., the remaining half being handed over to A.'s father, who gave Y. his promissory note for the amount, but never discharged the obligation. The purpose for which the money was raised having failed:—Held, that B., although not shown to have been guilty of more than negligence in following his solicitor's advice, was bound to bear the consequences of the mistake, and to replace the money borrowed on the security of A.'s reversionary share. *Simpson* v. *Brown*, 11 L. T. 593; 13 W. R. 312.

New Trustees.]—As to liability of new trustees for breach of trust. See *Geares, Ex parte, Strahan, In re*, 8 De G. M. & G. 291; 25 L. J., Bk. 53; 2 Jur. (N.S.) 651; 4 W. R. 536.

Partial Acceptance of Trust.]—E., who was named as trustee in a marriage settlement, never executed the deed; nor did he, for upwards of twenty years, interfere in carrying out the trusts thereof. Ultimately he signed a memorandum, indorsed upon the indenture of settlement, relating to one particular portion of the trust property:—Held, that in respect of the property comprised in such memorandum, he was liable to answer for the negligence of himself and his co-trustees; but that the mere signing the memorandum above stated did not operate to extend his liability, so as to make him answerable for the entire amount of property comprised in the settlement. *Malzy* v. *Edge*, 2 Jur. (N.S.) 80; 4 W. R. 213.

Trustee Submitting to Arbitration.]—Trustees, by submitting matters to arbitration, do not make themselves personally liable. *Davies* v. *Ridge*, 3 Esp. 101; 6 R. R. 817.

And an admission by one trustee will not bind his co-trustees; aliter where parties are personally liable. *Ib.*

Accepting New Shares.]—A testator had, at the time of his death, one hundred shares in a bank with unlimited liability. By his will he directed his trustees and executors to convert his personal estate at their sole discretion, and at such time or times as they should think fit, and to invest the proceeds in shares in any public company incorporated by act of parliament and paying a dividend. The shares, which were very profitable, were retained by the sole trustee, who subsequently accepted twenty-five additional new shares allotted in respect of the old ones. The trustee then retired, and appointed two new trustees. Ultimately the bank stopped payment:—Held, that the original trustee had not committed a breach of trust in retaining the old shares, but had done so in accepting the new ones, and was liable to indemnify the testator's estate for losses incurred thereby. *Edwards* v. *Edmunds*, 34 L. T. 522.

Assigning to Single Trustee.]—By a marriage settlement the husband assigned a policy of assurance on his life to the two trustees of the settlement, and covenanted to pay the premiums. One trustee disclaimed, and the other, by assigning the policy to a single new trustee, enabled the husband to mortgage and dispose of the policy and a bonus thereon:—Held, that such breach of trust being an act of commission and not of omission only, the trustee so assigning to the new trustee was liable to pay to the trust estate the money actually received for the policy. *Kingdon* v. *Castleman*, 46 L. J., Ch. 448; 36 L. T. 141; 25 W. R. 345.

Trustee Setting up Rival Business.] — A trustee of a will carrying on the business of his testator is not guilty of a breach of trust in setting up for himself in a similar line of business in the neighbourhood, provided that he does not resort to deception, or solicitation of custom from persons dealing at the old shop. A trustee and manager of a business was removed, however, under such circumstances from being such trustee and manager. *Moore* v. *M'Glynn*, [1894] 1 Ir. R. 74.

Reconveyance of Mortgage — Executors of Person absolutely Entitled.]—A trustee of the legal estate in a mortgage in trust for A. absolutely, executed a reconveyance, and signed a receipt for the mortgage money, and handed it to one of A.'s executors, who was also his own solicitor, and who afterwards misapplied the money:—Held, that the money having got into the hands of the executor, the trustee was not liable. *Waugh* v. *Wyche*, 2 Drew. 318; 23 L. J., Ch. 833; 2 W. R. 485.

Liability of Husband for Wife's Breaches of Trust prior to 1883.]—The defaults of a feme trustee during coverture are chargeable to her husband. *Smith's Estate, In re, Clifford* v. *Washington*, 48 L. J., Ch. 205.

A testator appointed his wife and two others executors and trustees; directed his business and a leasehold house to be sold, and gave the residue (which was principally leasehold property) to his wife, directing that if she married again it should be settled to her separate use for life,—then he bequeathed the house "if not sold, and the money settled as above stated that all money, &c., so settled upon her for her lifetime" to certain other persons; but if his wife should not marry again he left the property to her own disposal at her death The widow married again two years after the testator's death; the leaseholds were not converted, and she received the entire income till her death, twenty-nine years afterwards, by which time the greater portion of the term of years had run out. Her second husband, who survived his wife and her co-trustees, never acted in the trust:—Held, that the leaseholds ought to have been converted upon the widow's second marriage, and that the second husband was liable as a trustee having legal control over the trust property, for a breach of trust in permitting the tenant for life to receive the entire income of the unconverted property. *Ib.*

The husband was ordered to recoup to the trust estate the difference between the income of the leaseholds received by himself or his wife during the coverture, and the dividends which would have been produced by a sale thereof at the time of her marriage and investment of the proceeds in consols. *Ib.*

Semble, that the excess of income thus received by the tenant for life must be held as received by her husband through her hands. *Ib.*

Liability of Husband for the Breach of Trust of his Wife before Marriage.]—See *Palmer* v. *Wakefield*, 3 Beav. 227.

—— **Extent of Liability.**] — A husband's liability for his wife's breaches of trust extends to breaches of trust arising from negligence, and is not confined to losses caused by her active misconduct. *Bahin* v. *Hughes*, 55 L. J., Ch. 472; 31 Ch. D. 390; 54 L. T. 188; 34 W. R. 311 — C. A.

See now Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 24.

ii. *Trustees de facto.*

Person assuming Character of Trustee.]—A person who assumes the character of a trustee incurs the responsibility of a trustee. *Rackham* v. *Siddall*, 16 Sim. 297; 1 Mac. & G. 607; 2 Hall & Tw. 44; 12 Jur. 640.

A party assuming to act as heir or devisee of a trustee, and committing an act which, if done by the trustee, would have been a breach of trust, cannot relieve himself of liability by asserting that he was not acting as trustee. *Ib.*

A person taking upon himself to act as trustee cannot set up as an excuse for a breach of trust that he did not know what the trusts were, or what were the legal consequences of the acts done by him in relation to the trust estate. *Pearce* v. *Pearce*, 22 Beav. 248; 25 L. J., Ch. 893; 2 Jur. (N.S.) 843.

—— **Constructive Trustee—Solicitor acting for Trustee.**]—Although the responsibility of trustees may be extended in equity to persons who are not properly trustees, if they are found either making themselves trustees de son tort, or actively participating in any fraudulent conduct of the trustee, to the injury of the cestui que trust, yet strangers are not to be made constructive trustees, merely because they act as agents of trustees in transactions within their legal power, even though such transactions

may be such as the court would not approve of. *Barnes* v. *Addy*, 43 L. J., Ch. 513; L. R. 9 Ch. 244; 30 L. T. 4; 22 W. R. 505.

It is not within the scope of the implied authority of a member of a firm of solicitors to make himself a constructive trustee so as to make his partners liable. *Mara* v. *Browne*, 65 L. J., Ch. 225; [1896] 1 Ch. 199; 73 L. T. 638; 44 W. R. 330—C. A.

—— **Persons Assisting Executrix in Carrying on Testator's Business in Breach of Trust—Receipt of Trust Moneys for Goods supplied—Creditor's Deed—Liability of Trustee under.**]—On the testator's death in 1883, his widow, who was sole executrix, employed his residuary estate, which was bequeathed in trust for herself for life, with remainder in trust for his children, in continuing the testator's business of a miller, without any power under his will to do so. An arrangement was made under which she was assisted by M. and A., who attended occasionally at the mill and bought wheat for her in the market. A banking account was opened in the name of the widow alone, but her cheques were not to be honoured by the bank unless initialled by M. and A. The business was carried on in this way till 1886, and goods for the purposes of the business were sold by M. and A. themselves to the widow, and paid for by cheques so drawn and initialled. In 1886 M. and A. ceased to assist or to initial the cheques. The business ultimately failed, and a creditor's deed was executed by the widow, by which all her property, including the stock-in-trade and assets of the mill, were assigned to M. as trustee, by whom they were sold and the proceeds paid to the creditors. M. and A. were aware of the breach of trust involved in employing the testator's estate in the business. In an action by the children of the testator to render M. and A. liable for the testator's estate come to their hands or employed by them in the business:—Held, that M. and A. had not had such control of the trust estate as to render them liable as trustees de son tort; that they were not liable for the actual moneys paid to them in payment of goods supplied by them; and, that M. was not liable for the moneys received and paid away by him as trustee under the creditor's deed. *Barney, In re, Barney* v. *Barney*, 61 L. J., Ch. 585; [1892] 2 Ch. 265; 67 L. T. 23; 40 W. R. 637.

—— **Undertaking to pay Annuity in Consideration of Assignments of Produce.**]—The plaintiff, being entitled to an annuity of 300*l.* charged upon plantations in the West Indies belonging to K., entered (as agent for K.) into an agreement with D., by which D., in consideration of having the produce consigned to him until his advances were satisfied, was to ship supplies to the plantations, and honour bills drawn upon him (D.) by K. for the expenses of management, and also to pay the plaintiff's annuity. The consignments were made, and D. paid the plaintiff's annuity for one year, and then discontinued the payment, although he received subsequent consignments. The bill prayed that D. might be ordered to pay the annuity so long as he continued to receive the consignments:—Held, on demurrer, that without deciding whether the plaintiff could, with reference to the decision in the case of *Garrard* v. *Lauderdale* (*Lord*) (3 Sim. 1; 2 Russ. & M. 451), sustain a suit to enforce the agreement as against D., D. could not, after the payment of the annuity which he made under the contract, withhold from the plaintiff the benefit of the contract for the further payment of the annuity. *Kirwan* v. *Daniel*, 5 Hare, 493; 16 L. J., Ch. 191; 11 Jur. 235.

—— **Abstraction of Trust Funds — Relief against Receiver.**]—A fraudulent abstraction of trust property by the trustee, and a fraudulent receipt and appropriation of it by another person for his own personal benefit, place the receiver in the same situation as the trustee from whom he received it, and he becomes subject in a court of equity to the same rights and remedies as may be enforced by the parties beneficially entitled against the fraudulent trustee himself; and when it is said that the person who receives under such circumstances is converted by the court into a trustee, the expression is used for the purpose of describing the nature and extent of the remedy against him and denotes that the parties entitled beneficially have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of trust. *Rolfe* v. *Gregory*, 4 De G. J. & S. 576; 34 L. J., Ch. 274; 11 Jur. (N.S.) 98; 12 L. T. 162; 13 W. R. 355.

But the relief against the receiver in such cases is founded on fraud and not constructive trust, and therefore the right of the party defrauded is not affected by lapse of time, or, generally speaking, by anything done or omitted to be done so long as he remains without any fault of his own in ignorance of the fraud that has been committed. *Ib.*

iii. *Deceased Trustees.*

Breach of Trust — Liability of Deceased Trustee's Estate.]—The estate of a deceased trustee is not liable for a breach of trust committed after his death where he has left the trust funds in a proper state of investment at his death. *Palk, In re, Chamberlain* v. *Drake*, 41 W. R. 28.

Breach of trust can fall only on the personal estate of a trustee. *Vernon* v. *Vawdry*, 2 Atk. 119.

Where one of two trustees commits a breach of trust, the representatives of such trustee are liable. *Jenkins* v. *Robertson*, 1 Eq. R. 123; 1 W. R. 298.

Trustees of stock sold it, and lent the money to the tenant for life on improper security. One of them died, and the survivor received the money lent, and invested it in a different security, and shortly afterwards sold it out and again lent it to the tenant for life. The fund was lost:—Held, that the original breach of trust was not cured, and the estate of the deceased trustee was liable for the whole fund. *Lander* v. *Weston*, 3 Drew. 389; 25 L. J., Ch. 235; 2 Jur. (N.S.) 58; 4 W. R. 158.

D. appointed her bankers, A., B. and C., who were partners, to be her executors. They then owed her 20,400*l.*, without any agreement as to any particular rate of interest. Six weeks afterwards A. died, before probate of D.'s will or collecting any of her assets. He appointed B. and C. his executors. B. and C. continued in trade, and ultimately died, without having ever paid the 20,400*l.*:—Held, that the estate of A. was only chargeable, in aid of the estates of B. and C., with simple interest at 4*l.* per cent. on the

principal sum unpaid. *Penny* v. *Avison*, 3 Jur. (N.S.) 62.

Two trustees allowed funds which ought to have been invested on real or government security to remain for several years in a bank to their joint account. After the death of one of the trustees the survivor appropriated the balance of the fund, and afterwards became insolvent:—Held, that the estate of the deceased trustee was liable to make good the amount. *Gibbins* v. *Taylor*, 4 W. R. 432.

Jurisdiction of Court to Order immediate Sale of Trustee's Real Estate.]—In a suit to render the estate of a deceased trustee of a will liable for certain breaches of trust, a decree was made declaring the liability of the estate to make good what should be found due in respect of such breaches of trust, and directing accounts and inquiries. Before the chief clerk had made his certificate, but it having appeared in the course of taking the accounts and inquiries that the estate was liable for a considerable amount which the personal estate was insufficient to satisfy, the cestuis que trust applied by petition, under 15 & 16 Vict. c. 86, s. 55, for the sale of certain real estate belonging to the deceased trustee, a mortgage on which had been redeemed by the existing trustee of the will:—Held, that the court had jurisdiction to order the sale, and that it was in accordance with the practice of the court in such a case, when once it had been ascertained that the real estate would have to be resorted to, to make an order for the sale of the real estate without waiting for further consideration. *Bell* v. *Turner*, 45 L. J., Ch. 681; 2 Ch. D. 409; 24 W. R. 451.

Non-Appropriation to Charitable Legacy by Executor-Trustee.]—Testator bequeathed 500*l.* to his executors, upon trust that they should lay out and invest the same in the public funds, or in such other security or in such other manner as to them should seem expedient, at interest, and apply the produce to a charitable purpose. One of the executors, who took the entire management of the estate, paid the debts, and most of the legacies of the testator, but neither specifically appropriated nor invested 500*l.* for the charity. He paid interest, however, on 500*l.* to the charity; at the same time receiving interest on the promissory note of a debtor to the estate, who was in good credit, but whose debt was the only fund available for payment of the legacy. The executor afterwards died. On the admission, by his representatives, that he had, in his lifetime, assented to the payment of the legacy to himself as trustee:—Held, that his estate was severally answerable as for a breach of trust. *Att.-Gen.* v. *Higham*, 2 Y. & C. C. C. 634.

Admission of Assets by Executors.]—The executors of a deceased trustee, having admitted the receipt of assets which would have been sufficient to satisfy a particular breach of trust committed by their testator, besides his other debts, held chargeable with the loss occasioned by such breach of trust, although they had paid all his debts of which they had any knowledge out of the assets, and had distributed the whole surplus among his residuary legatees many years before, and at a time when they had no notice of the breach of trust, or of any claim in respect of it. *Knatchbull* v. *Fearnhead*, 3 Myl. & Cr. 122; 1 Jur. 687. *See* 6 L. J., Ch. 13, n.

—— Non-enforcement of Covenant—Administrator Ad Litem of Deceased Trustee.]—A marriage settlement, executed in 1817, contained a covenant by the husband with a trustee to pay to the trustee within three years 3,000*l.* to be held upon the usual trusts in favour of the husband and wife and the issue of the marriage, or else to secure that sum by mortgage. The money was neither paid nor secured, and the trustee never attempted to enforce the covenant, but acted as solicitor to the purchaser on a sale in 1846 by the covenantor for his own benefit of the property he had covenanted to mortgage. The trustee died in 1848; his sons had notice of the settlement in 1851. The covenantor became bankrupt in 1852, and applied to the widow and executrix of the trustee to prove for the 3,000*l.*, which she declined to do. Dividends of 11*s.* in the pound were declared in the bankruptcy, and new trustees of the settlement were appointed by the court, whose proof was rejected as too late. The widow and executrix of the trustee died in 1865, and his sons entered into possession of his property as devisees and legatees under his will, but when cited to take out letters of administration to their father, they declined to do so. Upon a bill filed in 1867, by the widow and children of the covenantor and the new trustees, against the sons and administrator ad litem of the deceased trustee, in answer to which the sons admitted assets:—Held, first, that the sons having admitted assets, the administrator ad litem represented the deceased trustee sufficiently for the purposes of the suit. *Woodhouse* v. *Woodhouse*, 38 L. J., Ch. 481; 20 L. T. 209; 17 W. R. 583.

Held, secondly, that the rights of the plaintiffs were not barred by lapse of time, and that the sons were liable to make good the loss occasioned by the breach of trust to the extent of the assets of their father in their hands. *Ib.*

Statute of Limitations.]—Where a breach of trust is committed by a trustee holding property upon an express trust, his assets in the hands of his personal representatives continue liable to the cestui que trust even after a lapse of six years from his death. *Obee* v. *Bishop*, 1 De G. F. & J. 137; 29 L. J., Ch. 148; 6 Jur. (N.S.) 132; 1 L. T. 151; 8 W. R. 102.

—— Covenant to Settle—Settlor Trustee.]—By a post-nuptial settlement executed in 1814, after reciting that J. S., the husband, had before marriage agreed to settle 1,000*l.*, and had paid that sum to R. G.; R. G. covenanted that he would stand possessed of the money upon trust with the approbation of J. S. to invest it in the names of J. S. and R. G., and trusts were declared of the fund for the benefit of the husband and wife successively for life, with remainder to the children of the marriage. By the same deed J. S. covenanted with R. G. to pay to him a further sum of 1,000*l.*, to be held upon the same trusts as the first-mentioned 1,000*l.* Neither of the two sums of 1,000*l.* was, in fact, ever paid. J. S. survived his wife, and died in 1868. In a suit instituted for the administration of the estate of J. S., the children of the marriage claimed to rank as creditors for both sums of 1,000*l.*:—Held, that as to the first-mentioned sum of 1,000*l.* J. S. had constituted himself a trustee of the settlement, and that his estate was liable for the amount, but that the claim to the other 1,000*l.* rested upon a mere legal

obligation, which was barred by the Statute of Limitations. *Stone* v. *Stone*, 39 L. J., Ch. 196; L. R. 5 Ch. 74; 22 L. T. 182.

Guardian in Socage.]—Defendants, executors to their father, who was guardian in socage to plaintiff, ordered to answer for profits taken by him. *Burgh* v. *Wentworth*, 1 Vern. 54.

Right of Cestui que Trust to Sue Surviving Trustees alone.]—Where one of several trustees has died, the cestui que trust may generally sue the surviving trustees for an account without making the representatives of the deceased trustee a party, it being the duty of the surviving trustees to place the fund in a proper position, and recover from the estate of the deceased any portion of the trust money that may have remained in his hands, semble. *Beattie* v. *Johnstone*, 8 Hare, 169.

Where one of several trustees dies pending a suit which does not seek to charge them personally in that character, his representatives are not necessary parties; for the trusteeship survives. *London Gas Light Co.* v. *Spottiswoode*, 14 Beav. 264.

One trustee of a deed of settlement was dead, and a bill for an account was filed against the surviving trustees, but no allegation was made against the deceased trustee, whose legal personal representatives were never parties to the suit, and no account was prayed with regard to him. The surviving trustees, however, alleged in their answer, that he had taken an active part with them in the execution of the trusts:—Held, that the decree must go against the estate of the deceased trustee. *Elwes* v. *Barnard*, 11 Jur. (N.S.) 1035; 13 L. T. 426.

Right of Surviving Trustee to Sue.] — A testator devised his residuary real and personal estate to A. and B., on trusts in which B. was beneficially interested. B. received part of the assets, and died:—Held, that a bill could not be maintained by the surviving trustee against the representatives of B. alone to recover the trust fund received by him, but that the bill ought to seek the general administration of the testator's estate. *Chancellor* v. *Morecraft*, 11 Beav. 262; 17 L. J., Ch. 11.

Surviving Trustee not Specialty Creditor of Deceased Trustee.]—A. and B. were trustees of a settlement, and a breach of trust was committed, B. being the guilty party. The trust fund was ultimately restored, and A.'s costs were directed to be paid out of B.'s estate:—Held, that these costs were not a specialty debt as against B.'s estate. *Lockhart* v. *Reilly*, 1 De G. & J. 464; 27 L. J., Ch. 54.

A. paid a sum on account of his costs, after the passing of the 19 & 20 Vict. c. 97, and it was held that the sum was paid in the character of surety, and therefore that, under s. 5 of that act, he was entitled to claim as a specialty creditor on account of it. *Ib.*

Right of Representative of Deceased Trustee on Transfer of Trust Property to New Trustee.]—The representative of a deceased trustee, who is called upon to transfer the trust property to new trustees, is not entitled to be furnished at the expense of the fund with a duplicate of the instrument appointing such new trustees, nor is he entitled at the expense of the fund to an attested copy of the deed creating the trust. *Warter* v. *Anderson*, 11 Hare, 301; 1 Eq. R. 266; 1 W. R. 493.

Recital in Settlement that Trust Fund had been Received by Trustees when it was never so Received—Lapse of Time.]—In 1828 two trustees executed a marriage settlement, which recited that a sum of money (for which they also signed an indorsed receipt) had been paid to them as such trustees. The trustees had never in fact received the money, and by their neglect to do so it was ultimately lost. The trustees died, having left all their property upon trust for the payment of their debts:—Held, that a breach of trust had been committed, for which the estates of the deceased trustees were liable. *Westmoreland* v. *Holland*, 23 L. T. 797; 19 W. R. 302.

In a marriage settlement, dated in 1807, a recital was contained to the effect that a sum of stock had been transferred into the names of the trustees. The deed was executed by all parties. The stock never was transferred, and the person who ought to have transferred it became bankrupt in 1848. Both the trustees were dead. On bill filed in 1855, by a cestui que trust under the settlement, who came of age in 1839, to have the trust fund made good:—Held, that he was not too late, and the estates of the trustees declared to be jointly and severally liable to make good the fund. *Story* v. *Gape*, 2 Jur. (N.S.) 706.

By deed made on the marriage of A. and B., C., the father of B., settled 1,000*l.* upon A. and B. and their issue, which sum was recited as having been paid to the trustees, and covenanted to pay another 1,000*l.* upon his decease, upon the same trusts. Shortly before C.'s death, he, by deed, gave to other trustees 5,000*l.* upon trusts nearly identical with the trusts of the settlement for A. and B. and their issue; and by his will, of the same date, he declared that what he had given to B. should be taken in full satisfaction and discharge of all claims and demands upon him in any right or manner whatsoever. The trustees of the settlement never received the 1,000*l.* under the covenant of C., and C.'s estate had long been administered. Bill by one of the children of A. and B. against the representative of one of the trustees of the settlement, claiming a portion of the two sums of 1,000*l.* and 1,000*l.* Defence, that the trustees never received either 1,000*l.*, and that the 5,000*l.* was in satisfaction:—Held, first, that the 5,000*l.* was to be taken in satisfaction of the 1,000*l.* covenanted to be paid. *Davis* v. *Chambers*, 7 De G. M. & G. 386; 3 Jur. (N.S.) 297; 5 W. R. 245.

Held, secondly, that although primâ facie the recital in the settlement of payment to trustees is the strongest possible evidence to charge them, yet that the circumstances of this case negatived the receipt by the trustees. *Ib.*

Neglect to Register Bond in Ireland by Guardian—Acquiescence.]—A testator died in 1810 in India, having bequeathed his English property to two infants, whom he acknowledged as his natural children; and having appointed his nephew, E., to be their guardian. Part of his property consisted of a bond, dated in 1810, in which he was obligee, the obligor being seised of real estate in Ireland. In 1811 E. obtained possession of the bond from the testator's executor; but he did not register it, nor did he ever take any steps towards realising the security.

In 1821 the elder of the infants attained twenty-one; in 1832 she married; and in 1833, when the bond had become irrevocable, E., for the first time, informed the elder child and her husband of the existence of the bond; and upon finding it was then too late to register it, he handed it to the husband, directing him to see to it. No step was taken until E.'s death in 1870, after which, in 1871, a bill was filed, seeking to make E.'s estate liable as for a breach of trust. At this time the younger infant was dead, and had no legal personal representative; but his son, who was entitled to administer, was made a defendant. Semble, that E. was not at any time liable for any breach of trust. *Sleeman* v. *Wilson*, L. R. 13 Eq. 36; 25 L. T. 408; 20 W. R. 109.

Held, that the parties, by acquiescing for thirty-eight years, and waiting till E.'s death, had lost their right to make any claim against his estate. *Ib.*

iv. *Loss of Trust Property.*

By Negligence.]—Trustees charged with loss occasioned by mere negligence, and costs follow of course. *Caffrey* v. *Darby*, 6 Ves. 488.

Unexplained loss of property by trustee or bailee attributed to negligence. *Brown* v. *Sewell*, 11 Hare, 53; 22 L. J., Ch. 1063; 17 Jur. 708.

Certain gas shares were settled upon trust for a woman for life, then for her husband for life, and then for their children. New shares were allotted in respect of the original shares, and the husband, without the interference of the trustee, obtained possession of the old and new shares, paid calls on the new shares, and disposed of all the shares. He then became bankrupt:—Held, that the trustee was only liable to make good to the estate the value of the shares less the amount paid for calls. *Briggs* v. *Massey*, 51 L. J., Ch. 447; 46 L. T. 354; 30 W. R. 325—C. A.

By Robbery.]—Defendant was trustee to plaintiff, an infant, and received for him 40*l.* in gold, of which he was robbed by his own domestic servant, together with 200*l.* of his own; lord chancellor allowed the trustee this 40*l.* on his own oath, for he was to keep it as his own. *Morley* v. *Morley*, 3 Ca. Ch. 2.

A decree having been made for a general account, and payment of a balance against a party who died, and his personal representative having delivered certain goods, part of the effects, to her own solicitor to be delivered over, is not answerable in the event of his being robbed of them. Tender of the goods not incumbent on her, she would not have been answerable if they had remained in her own possession till the accident. *Jones* v. *Lewis*, 2 Ves. Sen. 240.

Loss by Agents.]—*See* post, 12.

Loss by Co-trustees.]—*See* post, *c.*

v. *Negligence in getting in Trust Property.*

In General.]—Trustees are liable for not taking proper steps to get the trust fund transferred into their names. *M'Gachen* v. *Dew*, 15 Beav. 84.

It being the duty of A., under the trusts of a settlement, to remit a sum of 1,000*l.* from India, to B., C., and D., in England, he permitted it to remain in the hands of private traders, in whose hands it was lost:—Held, that A. was responsible for it, though it had been properly invested by those parties, and been sold out at the request of the cestuis que trust, and the loss was occasioned by their subsequent bankruptcy, and the bankruptcy of their correspondents in London, on whom they had drawn bills for the amount. *Bacon* v. *Clark*, 3 Myl. & Cr. 294.

A testator, resident in India, directed his trustees and executors to invest his residue in government or other good securities, and then declared trusts of it for the benefit of his children and other persons, all of whom were resident either in England or Ireland, and were mentioned so to be in the will. The residue was allowed to remain in the hands of the testator's bankers and agents in India, who ultimately failed:—Held, that the acting executor and trustee was responsible for the loss thereby occasioned to the estate. *Lowry* v. *Fulton*, 9 Sim. 104; 7 L. J., Ch. 158.

Neglect to get in Debt.]—In 1826 a debt due from a firm at Calcutta was assigned to trustees in England, in trust to call in and invest on Indian securities, and accumulate. The debtors became bankrupts in 1830, and the trustees not having, in the meantime, taken proper steps to call in the money, a considerable portion of the debt was lost:—Held, that they were liable for the breach of trust, and ought to make good the accumulation which would have been produced; secondly, that one of the trustees who had been abroad with his regiment during that period was equally liable; but, thirdly, that they were to be excused during such a reasonable time as was necessary in order to communicate between England and India. *Byrne* v. *Norcott*, 13 Beav. 336.

On a marriage two of the wife's debtors, one of them the bankrupt, were appointed trustees of a fund, to be made up of their several debts:—Held, that the debts not being got in and invested, each trustee was liable only for his own default. *Woodward, Ex parte, Turner, In re*, 3 Mont. & Ayr. 232; 2 Deac. 401; 6 L. J., Bk. 60; 1 Jur. 385.

By a marriage settlement, a debt due from A. was assigned to A. and B., upon trust "with all convenient speed," to get in and invest in consols. For two and a half years B. took no steps to get in the money, and A. then became bankrupt:—Held, that B. was responsible for the loss. *Grove* v. *Price*, 26 Beav. 103.

Trustees not Suing for Specialty Debt.]—There is no rule in equity, any more than at law, that the mere non-suing by a specialty creditor for any period within the statutory limit of twenty years is such negligence as deprives him of the right of requiring payment of the specialty debt. S. covenanted with B. for immediate payment of a sum of money in exoneration of B., and in substitution for a similar sum which B. was liable to pay within six months of his death. S. died without having paid or been called on to pay that sum, leaving property amply sufficient to meet it, but her executor, instead of providing out of her estate funds to meet the liability on her covenant, left her estate, consisting entirely of shares in a bank, which afterwards failed, unconverted. The investment in bank shares was authorized by the will of S.:—Held, that the executors of B. were entitled, after a lapse of

eighteen and a half years, to enforce that covenant against the estate of S., and that the executor of S., having committed a devastavit in not converting the shares to provide for payment of the debt, was liable to make good the amount for which his testatrix was so liable under her covenant. *Baker, In re, Collins* v. *Rhodes, Seaman, In re, Rhodes* v. *Wish*, 51 L. J., Ch. 315; 20 Ch. D. 230; 45 L. T. 658; 30 W. R. 858—C. A.

Neglect to Enforce Covenant.]—By a marriage settlement, a trustee was required, immediately after the marriage, to compel payment of a sum of money secured by a covenant in the deed; he neglected to do so even when required to call it in, and allowed the interest to fall into arrear. He was held liable to pay the costs of a suit instituted to compel him to perform the trusts. *Kirby* v. *Mash*, 3 Y. & C. 295; 8 L. J., Ex. Eq. 33; 3 Jur. 221.

A., on his marriage with B., by his marriage settlement, covenanted with a trustee, that he would, on martinmas day, 1824, pay 10,000*l.*, the trusts of which were to be for A. for life, with remainder to B. for life, with remainder to the children of the marriage, and in default of children, for the persons therein mentioned. A. died in 1836, without having performed the covenant. After A.'s death a suit was instituted by B. against the trustee, to make him personally liable for the non-performance of the covenant. A reference was made to the master to inquire whether A. was of ability, after 1824, to pay the 10,000*l.*, or any part of it. It appeared that A. had for seven years after 1824, an income of 1,800*l.* a year, but that he had no other property than this income, and that he had always lived up to or exceeded his income. The master found that A. was of ability during these seven years to have paid 4,200*l.* in part performance of the covenant. No exceptions were taken to the report. On the hearing of the cause on further directions:—Held, that the trustee was liable to pay 4,200*l.*, and that, had the report been excepted to, it would have been confirmed. *Maitland* v. *Bateman*, 13 L. J., Ch. 273; 8 Jur. 926. And see *Bateman* v. *Maitland*, 14 L. J., Ch. 383.

Trustees made personally responsible for the consequences of their neglect to enforce a covenant contained in a marriage settlement. *Fenwick* v. *Greenwell*, 10 Beav. 412; 11 Jur. 620.

By a marriage settlement it was covenanted and agreed that 5,000*l.* consols, part of the wife's property, should be transferred to trustees, upon certain trusts for the husband, and wife, and children. At the time of the settlement, a sum of 4,946*l.* was standing in the name of the wife; but the trustees took no steps to enforce a transfer, and it was sold out and misapplied by the husband:—Held, that the trustees were personally responsible for the loss; and, secondly, that they were not relieved from their liability by the trustee indemnity clause declaring that they should not be liable "for any casual or involuntary loss," without their wilful default, but "for such moneys only as should actually come to their hands." *Ib.*

Neglect to get in Fund recoverable only in Equity.]—In ordinary cases it is the duty of trustees to get in the funds, but where under the terms of the instrument constituting the trust it is the duty of the trustees not to do so if in their discretion they consider it inexpedient, misconduct on their part must be proved in order to render them liable for loss, and the ordinary rules as to wilful neglect and default have little application. *Paddon* v. *Richardson*, 7 De G. M. & G. 563; 3 Eq. R. 933; 1 Jur. (N.S.) 1192.

A cestui que trust sought to charge a trustee with breach of trust in not recovering moneys, which were recoverable only in equity:—Held, that as, under the circumstances, the cestui que trust might have himself sued he could not make the trustee liable for not doing what he could at any time have himself done. *Ib.*

By settlement, dated in 1814, a legacy belonging to the intended wife was, with other property vested in S. & R., upon trust to get in and invest, and pay the income to Mrs. E. for life, remainder as she should by will direct, remainder over, power being reserved to her to make a will. By her will, dated in 1829, she appointed the fund to her daughter for life (deceased), remainder to the plaintiffs, and made the defendants her executors, directing them to get in all the funds. In 1825 the balance unpaid of the legacy so settled had been transferred to new trustees of the settlement, and by them immediately sold out, and nothing more was ever known concerning such balance, or its application. In 1830 the defendants took out administration to the testatrix, with her will annexed (she not having power to appoint executors), limited to the balance of the legacy outstanding, and the accumulations thereof, if any. The defendants could not show that they had ever taken active or proper steps to inquire after the wasted fund, or to recover the same:—Held, that notwithstanding the lapse of time, and the irregularity of their succession as trustees, they would be clearly liable to make good the breach of trust (if any) committed in 1825. *Taylar* v. *Millington*, 4 Jur. (N.S.) 204.

But held, that by reason of a power contained in the settlement enabling the trustees to take and recoup themselves all costs out of the trust estate, and the fund wasted having been small, (103*l.*), the plaintiffs had failed to establish a breach of trust. *Ib.*

A marriage settlement, made in 1811, recited that the husband was entitled to 20,000 rupees, secured by a note of the East India Company, and 10,000 rupees, part thereof, were thereby assigned (with certain property of the wife) to the trustees of the settlement, upon trust for the husband and wife for their lives, with remainder for the children of the marriage. One of the trustees died six weeks after the settlement was made. The husband died in 1819, and the wife in 1822. The trustees did not, nor did the survivor, take any steps during the lifetime of the husband to recover the 10,000 rupees. After they had attained their ages of twenty-one years, the children filed a bill against the surviving trustee and the representatives of the deceased trustee for an account of trust funds, charging them with the 10,000 rupees. Under a reference to the master to inquire whether the defendant might, by due diligence, have received or got in the 10,000 sicca rupees, the defendant produced evidence, showing it to have been the common belief of persons who knew the husband, that he was not possessed of any such property, but no proof was given that the husband was insolvent; and the court charged the surviving trustee with the fund, and interest from the death of the wife, and directed a reference to inquire the value of

the 10,000 rupees at the time of the settlement. *Simes* v. *Eyre*, 6 Hare, 137.

Neglect to invest Annuity paid under Order of Court.]—A lady under an order of this court was in receipt of 100*l.* a year, part of the income arising from an estate which a testator had ordered to be accumulated, and after the death of her mother, divided among herself and her brothers and sisters, who were numerous. By a settlement made upon her marriage, the lady assigned to trustees the whole of her share in the estate, and its accumulations for the benefit of herself for life, with remainder for her children; but she continued for eleven years to receive the 100*l.* a year under the order. The mother was still living. Upon a bill filed by the children of the marriage:—Held, that the order of the court did not justify the trustees in not investing the 100*l.* a year paid to the lady; that it formed part of the principal vested in them, and that they must replace the amount. *Barratt* v. *Wyatt*, 31 L. J., Ch. 652; 8 Jur. (N.S.) 1045; 10 W. R. 454.

vi. *Payment of Trust Moneys to Persons not Entitled.*

Trustees Doubting without Cause Identity of Cestui que Trust and Paying Over.]—Trustees who, without sufficient cause, doubted the identity of their cestui que trust, and, in breach of trust, paid over the trust fund to others, were ordered to make good the same, and pay the costs and interest at 5 per cent, the accounts to be taken with rests. *Hutchins* v. *Hutchins*, 15 Jur. 869.

Forged Marriage Certificate.]—Trustees who paid over a trust fund to wrong persons, trusting to a marriage certificate which turned out to be a forgery, made responsible for so much of the fund as could not be recovered from those who had wrongfully received it. In a suit by the persons beneficially interested, to make good the moneys, with interest from the date of the wrongful payment, the father of the recipients, who had sent the forged certificate of his marriage to the trustees, was also made responsible for the money. *Eaves* v. *Hickson*, 30 Beav. 136; 7 Jur. (N.S.) 1297; 5 L. T. 598; 10 W. R. 29.

Advance to Bigamous Husband.]—A wife was entitled in remainder to a share of moneys in the hands of a trustee. She deserted her husband, and married another man. The trustee, relying upon her representations that she was legally married, advanced a portion of her reversionary share to the bigamous husband. The fund having fallen into possession:—Held, that the trustee was answerable to the husband for the money which he had so advanced. *Sporle* v. *Barnaby*, 10 Jur. (N.S.) 1142; 11 L. T. 412; 13 W. R. 151.

Payments to Married Woman after Notice of Charge by Her.]—A trustee for a married woman, having received notice of a charge executed by her, was held personally liable for payments afterwards made to her; and that notwithstanding the validity of the charge was disputed by her, and no application had been made for an injunction. *Hodgson* v. *Hodgson*, 2 Keen, 704; 7 L. J., Ch. 5.

Notice of Execution of Power.] — Quære, whether a trustee, having prepared a deed of appointment under a power, but not knowing of the execution of it, shall be held to have had such notice so as to affect him in respect of his payment of the money to the legatee of the person who had the power under a subsequent will. *Cothay* v. *Sydenham*, 2 Bro. C. C. 391.

Payment to Infant Cestui que Trust on False Representation as to Age.]—Payment by a trustee to an infant cestui que trust, nineteen years of age, on the false representation by herself and her parents, that she had attained the age of twenty-one, held to be a discharge to the trustee for the sum so paid. *Overton* v. *Banister*, 3 Hare, 503; 8 Jur. 906.

Payment of Portions.]—If a trustee for payment of children's portions pays one his full share, and the trust estate decays, he shall not be allowed it. *Tilsly* v. *Throckmorton*, 2 Ca. Ch. 132.

N. A. made a will, with certain trusts relating to his real and personal estate, and appointed trustees to carry them into execution. One of these trusts was for the payment of a legacy of 2,500*l.* as a portion to an eldest daughter. R. A. B., the father of this legatee, was one of the executors and trustees under the will. An act of parliament was obtained to carry some of the trusts of this will into execution; and under this act, lands devised by N. A. were sold. The trustee under the act was W. L. On a bill filed against him by the legatee of the 2,500*l.*, he sought to take advantage of the payment by him of that sum to R. A. B.:—Held, that R. A. B.'s receipt was no discharge of W. L.'s liability, as, by the terms of the act, he was absolutely bound to pay the debts and discharge the children's portions; and it was not set up in the answer, nor proved, that R. A. B. had specifically received this money as trustee for his daughter. *Lawrence* v. *Blake*, 8 Cl. & F. 504; 6 Jur. 427.

—— **Acting on Opinion of Counsel.**]—The trustee of a will, who, acting on the opinions of counsel, had distributed the whole estate according to a different view to that taken by the court, was ordered to pay to the representatives of the child the amount of the child's share and the costs of the suit. *Boulton* v. *Beard*, 3 De G. M. & G. 608.

Rents Paid to Cestui que Trust by Trustee, who was also Committee of Lunatic who Claimed the Estate.]—A trustee or apparent trustee for A., who was in possession of an estate, was also committee of B., a lunatic who claimed the estate, and the trustee was properly aware of the claim. On a bill filed to recover the estate for B., it was decided that the estate was his:—Held, that the trustee was liable to B. for the rents received by him and paid to A. *Wright* v. *Chard*, 29 L. J., Ch. 415; 6 Jur. (N.S.) 476; 2 L. T. 104; 8 W. R. 334—L.JJ.

Irregular Payment by Trustees of Will to one of two Trustees of Settlement.]—A testator directed his trustees and executors to settle 4,000*l.* consols upon his daughter E. in case of her marriage; he also gave her upon the death of his widow one-third of his residuary estate, which was subsequently represented by 2,633*l.* 6*s.* 8*d.* stock. E., upon her marriage, in 1847, settled this fund. In 1859 the widow

died. In December, 1859, the trustees of the will executed a settlement of the 4,000*l.* consols, constituting P. and M. trustees of that fund, which was duly transferred to them. Shortly afterwards P. and M. were also appointed trustees of the settlement of 1847. In March 1860 the trustees of the will sold the 2,633*l.* 6*s.* 8*d.* stock, and paid the proceeds to P. without any authority from M. Shortly afterwards P., under a power of attorney from M., sold the 4,000*l.* consols, and received the proceeds. P. invested a portion of each of the funds received, but he retained the balances in his hands, and ultimately became bankrupt. Upon a bill, by E. and her children, against the trustees of the will, and against P. and M., charging breach of trust in respect of both funds, and deficiency in the investments to answer them, and seeking to make the former liable in respect of the payment to P. alone:—Held, that the trustees of the will were liable at the suit of the plaintiffs in respect of the irregular payment to P.; and that, having regard to the blended condition of the trust funds and the necessity of ascertaining how much of each fund was in a proper state of investment, the suit was not multifarious. *Margetts* v. *Perks*, 34 L. J., Ch. 109; 10 L. T. 85; 12 W. R. 517.

Transfer to Feme Covert.]—Bequest of consols to A. B., a feme covert, to be transferred to her in her own name, and the interest to be for her separate use, and the principal to remain in trust of the executors till the youngest of her children attained twenty-one, when the principal was to be her own; or, in case of her demise, it was to devolve to her husband. The trustees, on the death of the testatrix, transferred the fund to A. B.; she and her husband afterwards sold it out, and they both signed the transfer:—Held, that a breach of trust had been committed, but that A. B. had made a valid disposition of the dividends which might accrue previously to her youngest child, born after the death of the testatrix, attaining twenty-one. *Crosby* v. *Church*, 3 Beav. 485; 10 L. J., Ch. 212; 4 Jur. 50.

Power of Appointment — Payment under Fraudulent Appointment.]—Certain policies of insurance effected by a father on his life, as a provision for his daughters, were assigned to a trustee upon trust for such of the daughters as the father should appoint, and certain estates were demised to the same trustee upon trust, out of the rents and profits, to secure the payment of the premiums. The trustee advanced some sums of money in payment of the premiums, and the father appointed the bonuses which had accrued upon the policies to three of his daughters, and the three daughters soon afterwards authorised the trustee to receive the sum paid by the office for the bonuses, and invest part thereof as a fund to keep down the premiums, and a part of the sum was applied in satisfaction of the arrears of such premiums. A subsequent appointment was made in favour of the other daughters, of the residue of the sums to be received on the policies, and which was intended to equalise the shares:—Held, that the first appointment was a fraud upon the power, its immediate object being to relieve the father, and its necessary consequence to relax the diligence of the trustee in enforcing the right of the daughters against the father; and that the application of the trust funds in pursuance of the appointment by the trustee, who knew that the appointment was fraudulent, was a breach of trust for which he was responsible to the objects of the power. *Harrison* v. *Randall*, 9 Hare, 397; 21 L. J., Ch. 294; 16 Jur. 72.

—— **No Appointment Made.**] — Moneys secured by judgments, the property of the wife, were by ante-nuptial settlement assigned to trustees upon trust for her during her life, and in case there should be issue of the marriage, upon certain trusts for their benefit, and if no issue, upon trust to permit the wife to dispose of the moneys to such persons as she, whether sole or married, by any deed or writing, with or without power of revocation, to be by her sealed and delivered in the presence of or attested by two or more witnesses, should appoint, or in default of appointment, gift, or devise, to her next-of-kin under the statute of distributions. There was no issue of the marriage. The surviving trustee received a portion of the moneys secured by the judgments, and paid a part thereof to the husband during his lifetime, and the remaining part to the wife after his death. No appointment by deed or writing was ever executed by the wife:—Held, that the wife took only a life interest, with the power of appointment, and as she had not duly executed the power, the payments to her and her husband were invalid, and accordingly the trustee was bound to replace the fund for the benefit of the next-of-kin of the wife. *Reid* v. *Thompson*, 2 Ir. Ch. R. 26.

Where, on marriage, a settlement is made of the wife's property to herself for life, to her separate use, with remainder as she should appoint, by any writing signed by her, and attested by two witnesses, and for default of appointment to the children of the marriage, and the trustees part with the trust fund upon the joint application of the husband and wife, by letter, not attested by any witness, the trustees, after the death of the wife, must make good the trust fund for the children. *Hopkins* v. *Myall*, 2 Russ. & M. 86.

Premature Payments.]—Under a settlement a sum of 10,000*l.* secured by mortgage, was vested in trustees for the wife of S. for her life, and after her death for S. for his life, and subject as aforesaid, for such persons as the wife should by deed or will appoint, and in default of appointment for S. The wife made a will, by which she directed that her husband should enjoy the income of the fund during his life, subject to payment of two annuities; and she directed certain pecuniary legacies to be paid, after his death, out of one moiety of the fund, and she gave the other moiety of the fund and the residue of her property to her husband, whom she appointed executor. The trustees of the settlement paid over the whole trust fund to the husband; and part of the 5,000*l.* applicable to the payment of the pecuniary legacies was lost by him:—Held, that the payment to him was proper, and that the trustees were not answerable for the loss. *Hayes* v. *Oatley*, 41 L. J., Ch. 510; L. R. 14 Eq. 1; 26 L. T. 816.

Testator directed his trustees, at the expiration of three years after his death, to pay 10,000*l.* (which he charged on an estate devised to his son, one of the trustees) to his daughter's husband, on condition that he should, to the satisfaction of the trustees, give to them the best and most sufficient security in his power, so that the

10,000*l.* might be effectually secured to them upon certain trusts, for the testator's daughter and her children. The son paid the money to the husband before the expiration of the three years, and the trustees took a bond for securing it:—Held, they were justified in anticipating the time of payment, but not in taking the bond. *Mills* v. *Osborne*, 7 Sim. 30.

A. upon the marriage of his daughter, executed his bond and warrant to the trustees of the settlement, who were to hold it upon trust, inter alia, that in case the wife should die during the life of her husband, leaving no issue of the marriage her surviving, or leaving such they should all die under twenty-one, the money secured by the bond should not be called in, but the bond should be given up to A., his heirs, executors, and administrators to be cancelled. The money was not to be called in during his life:—Held, that the trustees of settlement were bound to accept payment of the money secured by the bond from the executor of A., though the husband and wife objected to its being paid in. *Kempland* v. *Humphries*, 2 Jones, 726.

Receipt by Anticipation on Coalition of Life Interest and Reversion.]—Where a fund is vested by a settlement in trustees for A. for life and over, and the reversion has been subsequently settled, the person entitled to the life interest and the trustees of the subsequent settlement are entitled to call for a transfer of the trust fund, and can give the original trustees an effectual discharge although the settlement does not provide for a transfer of payment by anticipation. *Anson* v. *Potter*, 13 Ch. D. 141; 41 L. T. 582.

vii. *Liability for Interest or Profits.*

a. Interest.

When Trustees Chargeable—In General.]—A trustee or executor is chargeable with interest, although not prayed by the bill. *Woodhead* v. *Marriot*, C. P. Cooper, 62.

An executor or trustee insolvent at the time they place out money at interest, shall, if they make any, pay interest, as they run no risk; secus, of one who is in good circumstances. *Bromfielf* v. *Wytherley*, Pre. Ch. 505; 1 Eq. Cas. Abr. 398, but cited and overruled in *Newton* v. *Bennet*, 1 Bro. C. C. 360.

Although a trustee is not directed to put money out at interest, yet, if he makes interest, he shall account for it. *Lee* v. *Lee*, 2 Vern. 548.

The court, ordering loss on trust estate, in consequence of the conduct of trustees, to be made up by the trustees personally, refused interest on the amount, which was comparatively but a small sum. *Bone* v. *Cooke*, 13 Price, 332; M'Cle. 168; 28 R. R. 697.

Trustee bound to pay interest on money retained a length of time. *Trimleston* v. *Hamill*, 1 Ball & B. 385; 12 R. R. 38.

Where executors, directed to invest, allowed the property to be enjoyed by the tenant for life in specie, and three years after her death accounted for the value, and paid it into court, they were held liable also for interest from the death of the tenant for life until the day of payment. *Mackenzie* v. *Taylor*, 7 Beav. 467.

—— **Balances.**]—Executors not liable to interest on balances, unless the purpose for which the money is retained, appear to be answered; but trustees and guardians are, without such proof. *Dawson* v. *Massey*, 1 Ball & B. 231.

Person bound by recognisance to account annually, and retaining money in his hands, though no use be made of it, must pay interest on such balances. *Id.* 230.

Interest decreed upon balances kept by guardian in his banker's hands. *Id.* 219.

Interest decreed against the estate of an accounting party, who had dealt with certain funds, in such a manner, that the court would have given interest on the balances in his hands against him personally, but who had taken the benefit of the Insolvent Act before there was any decree charging him with interest. *Moons* v. *De Bernales*, 1 Russ. 301.

A testator directed his trustees and executors to invest the residue of his estate on good freehold security; the trustee retained in his hands a balance of between 300*l.* and 400*l.* for a period of more than two years, part of which money was in the hands of his bankers:—Held, under the circumstances, that he was not responsible for interest during that time, although he had been informed of certain persons who were desirous of borrowing money on freehold security, he having employed a solicitor to procure a proper investment. *Wyatt* v. *Wallis*, C. P. Cooper, 155, n.; 8 Jur. 117.

To fix a trustee in such a case with a breach of trust, the cestui que trust must find out some person having a proper security, and desirous of borrowing a considerable portion of the trust money, and then inform the trustee of the offer. *Ib.*

—— **Wilful Misconduct.**]—Trustee charged with interest for wilful misconduct, as not paying money into court pursuant to an order: but slight difference in the sums admitted and reported in his hands is not sufficient: and further inquiry whether he made interest not to be directed unless a strong case. *Sammes* v. *Rickman*, 2 Ves. 36.

—— **Neglect to Render Accounts.**]—Owners of a privateer acting for themselves and the crew, in the sale of the prizes, having neglected to render accounts, and delayed the distribution of the proceeds, charged with interest on the balances, and costs. *Pearse* v. *Green*, 1 J. & W. 135; 20 R. R. 258.

The first duty of an agent, receiver, trustee, or executor, is to be constantly ready with his accounts, and neglect in this is a ground for charging him with interest. *Ib.*

Where, on a bill to call a trustee to account, he, by answer, submits readily to it, though found in debt, he shall pay the interest for the balance only from the time of the account liquidated, and no costs; secus, if he controverts the account; there, if found in arrear, he shall pay interest and costs. *Parrot* v. *Treby*, Pre. Ch. 254.

—— **Not Enforcing Payment of Trust Property.**]—A marriage settlement made in 1811, recited that the husband was entitled to 20,000 rupees, secured by a note of the East India Company, and 10,000 rupees, part thereof, were thereby assigned (with certain property of the wife) to the trustees of the settlement, upon trust for the husband and wife for their lives, with remainder for the children of the marriage. One of the trustees died six weeks after the settlement was

made. The husband died in 1819, and the wife in 1822. The trustees did not, nor did the survivor, take any step during the lifetime of the husband to recover the 10,000 rupees. After they had attained their ages of twenty-one years, the children filed a bill against the surviving trustee and the representatives of the deceased trustee for an account of trust funds, charging them with the 10,000 rupees. Under a reference to the master to inquire whether the defendant might, by due diligence, have received or got in the 10,000 sicca rupees, the defendant produced evidence, showing it to have been the common belief of persons who knew the husband, that he was not possessed of any such property, but no proof was given that the husband was insolvent; and the court charged the surviving trustee with the fund, and interest from the death of the wife, and directed a reference to inquire the value of the 10,000 rupees at the time of the settlement. *Simes* v. *Eyre*, 6 Hare, 137.

Trust being established, interest was given against the trustees' estate before the filing of the bill, viz., from the death of the person subject to whose life interest the plaintiffs claimed. *Hawkins* v. *Gardiner*, 2 Sm. & G. 441.

b. Rate of Interest.

Interest at Three per cent.]—An administratrix, who had permitted her solicitor to receive dividends of a fund set apart for an infant next of kin, was ordered to account for the dividends, with interest at the rate of 3 per cent. with half-yearly rests. *Gilroy* v. *Stephens*, 51 L. J., Ch. 834; 46 L. T. 761; 30 W. R. 745.

Interest at Four per Cent.]—A special case is requisite for charging a trustee or executor with a higher rate of interest than 4*l.* per cent. *Woodhead* v. *Marriott*, C. P. Cooper, 62. And see *Knott* v. *Cottee*, 16 Beav. 77; 16 Jur. 752.

Where trustees improperly retain balances, or cause or permit trust money to be lost, they are chargeable for the same with interest at 4 per cent. *Robinson* v *Robinson*, 1 De G. M. & G. 247; 21 L. J., Ch. 111; 16 Jur. 255.

Trustees, in breach of trust, lent trust money to one of them, F., and his partners in trade. F. and his partners gave their bond to F. and his co-trustees for the amount payable with interest at 5 per cent. No action could be maintained on the bond:—Held, in a suit to make the trustees liable for a breach of trust, that F. was only liable to pay 4 per cent. on the loss which had accrued to the trust fund. *Fletcher* v. *Green*, 33 Beav. 426.

Trustees, with power to invest on real security, in the presence of their cestuis que trust, agreed with the solicitor, who had long been employed in managing the property, to leave their funds in his hands, he paying 5 per cent. interest; but it did not appear that anything more was clearly explained to the cestuis que trust than that they were to receive 5 per cent. interest. On the bankruptcy of the solicitor, it appeared that the only security taken by the trustees was a deposit of the deeds of an estate, which the solicitor had contracted to purchase:—Held, that the trustees must make good the loss upon this security, with 4 per cent. interest. *Hooker* v. *Platt*, 1 Jur. 473.

By a deed, A. agreed that B. should insure her life, and that the costs of such insurance, and the payments for keeping the same on foot, should be paid out of the property charged; and she directed the trustees to make the necessary payments for effecting and keeping on foot the policies. The trustees did not make the payments, but the policy was kept on foot by B.:—Held, that he was entitled to interest thereon at 4*l.* per cent. *Hodgson* v. *Hodgson*, 2 Keen, 704; 7 L. J., Ch. 5.

Where there is a direction in the will to accumulate, and the trustee has failed to comply with the direction, he will be charged with interest at 4*l.* per cent. from one year after the testator's death. *Amiss* v. *Hall*, 3 Jur. (N.S.) 584. But see *Emmet's Estate, In re, Emmet* v. *Emmet*, 50 L. J., Ch. 341; 17 Ch. D. 142; 44 L. T. 172; 29 W. R. 464. Post, col. 776.

Interest at Five per cent., or More.]—In three cases the court charges more than its usual rate of 4*l.* per cent. upon balances due from a trustee, viz.: first, where the trustee, in the opinion of the court, ought to have received more than 4*l.* per cent.; secondly, where he has received more; and, thirdly, where he is, in the opinion of the court, to be presumed to have received more. Examination of circumstances with reference to the applicability of the third of these rules. *Penny* v. *Avison*, 3 Jur. (N.S.) 62. And see *Att.-Gen.* v. *Alford*, 4 De G. M. & G. 843; 1 Jur. (N.S.) 361; 3 W. R. 200. Post, col. 776.

Interest at 5*l.* per cent. is only exacted in cases of grave misconduct or fraud on the part of a trustee. *Imperial Mercantile Credit Association* v. *Coleman*, 42 L. J., Ch. 644; L. R. 6 H. L. 189; 29 L. T. 1; 21 W. R. 696.

A trustee of a charity estate, who has used the balances of the rents in carrying on his trade, will be charged with interest at 5 per cent., but not with annual rests. *Att.-Gen.* v. *Solly*, 2 Sim. 518.

When a trustee has employed trust funds for his own benefit he will be charged as of course with simple interest at 5 per cent. *Burdick* v. *Garrick*, 39 L. J., Ch. 369; L. R. 5 Ch. 233; 18 W. R. 387.

A trustee wilfully applying trust moneys to his own use is chargeable with interest at 5*l.* per cent.; but where, under the trusts of a doubtful will, the tenant for life, who was also a trustee, neglected to make proper investments, she was held chargeable with interest at 4*l.* per cent. only, and the decree was made without costs. *Mousley* v. *Carr*, 4 Beav. 49; 10 L. J., Ch. 260.

A tenant for life, having received 5 per cent. on an investment, which she knew to be and insisted was improper, was ordered to account for the excess beyond 4 per cent., for the benefit of the trust. *Baynard* v. *Woolley*, 20 Beav. 583.

Trustees, under a misrepresentation that the fund was invested in stock, charged with interest at 5*l.* per cent. upon the same principle as if they had sold out stock and used the money, viz., an option to the cestui que trust, to have the actual profit or 5 per cent. *Bate* v. *Scales*, 12 Ves. 402; 8 R. R. 345.

The testator directed his executors to lay out the residue of his estate in the purchase of lands or upon heritable or personal securities, at such rate of interest as they should think reasonable; the executors lent the fund to one of themselves on a bond, at 4 per cent., when 5 per cent. might have been made by heritable or government securities:—Held, liable to pay interest at 5 per cent. *Forbes* v. *Ross*, 2 Cox, 113.

Interest upon exchequer bills allowed, at 5 per cent. from the time of the sale, upon the ground that a claimant had a right to consider it as a debt from that time, and had elected so to consider it. *Devaynes* v. *Noble*, 1 Mer. 580 ; 15 R. R. 151.

D. claimed a fund as next of kin to J. D., who had sailed from England in 1814, and had never since been heard of. The fund came into the possession of a trustee in 1844, who retained it in his own hands, and refused to pay it over to D. without direct and positive proof of the death of J. D. :—Held, that the trustee must pay over the whole fund, together with interest at 5*l.* per cent. from the time when he ought to have invested it. *Dobson* v. *Pattinson*, 5 W. R. 771.

Interest at 5*l.* per cent. given against the trustees on a sum lost by breach of trust. *Munch* v. *Cockerell*, 5 Myl. & Cr. 179 ; 9 Sim. 339 ; 9 L. J., Ch. 153 ; 4 Jur. 140.

Where a defaulting trustee has misapplied trust money, the court will charge him with 5*l.* per cent. interest, unless it be shown that he has made more by the user of it. *Berwick Corporation* v. *Murray*, 26 L. J., Ch. 201 ; 3 Jur. (N.S.) 847 ; 5 W. R. 208—L. C.

Lands directed by a will to be sold, and the proceeds divided. The lands were not sold, but were divided, and the share of A. B. remained vested in the trustees, one of whom was her father. Subsequently this share was sold, and the money was not given, either to the cestui que trust, nor invested for her benefit, but was paid to the father. On a bill filed for the recovery of the money, the court held that both the trustees were liable, (although one of them signed the receipt for the sake of conformity only,) and refused to make any allowance to the father for maintenance : and decreed that the trustees should repay the amount of the purchase-money with interest at 5 per cent. *English* v. *Willats*, 1 L. J., Ch. 84.

A trustee, with power to invest the trust property in leasehold or chattel personal securities, or upon the personal security of any person, advanced, at the request of his cestuis que trust, some of the trust property to two ladies on the security of mortgages (with the usual covenants) of a leasehold house in which the ladies were living, and of the furniture in it. The trustee was also the lessor of the house. The mortgagors became insolvent, paid no rent, and no part of the principal or interest on the loan. The trustee, as lessor, determined the lease by entry, and then sold all his interest in the leasehold premises and the furniture ; but he thereby so mixed the trust property with his own that it was impossible to distinguish the one from the other, or to pronounce with certainty how much of the proceeds of the sale was his, and how much belonged to the cestuis que trust. The advance had been made at 5*l.* per cent. After some delay, the trustee replaced the principal money of the loan, but invested it against the wishes of his cestuis que trust in 3*l.* per cent. consols, the dividends on which, however, were paid to them : —Held, that the trustee was bound to make good to the trust estate the whole of the money advanced on the loan, with all interest due thereon at the rate of 5*l.* per cent. per annum, to be computed up to the date of the decree ; and that he must pay the costs of the suit. *Cook* v. *Addison*, 38 L. J., Ch. 322 ; L. R. 7 Eq. 466 ; 20 L. T. 212 ; 17 W. R. 480.

Trustees under a will decreed to pay interest at 5*l.* per cent. per annum, on balances mixed by them with their own moneys, and used in their own business, although the will authorised them to invest the residue on "good private securities." *Westover* v. *Chapman*, 1 Coll. C. C. 177.

A deceased trustee had invested money on mortgage at 5 per cent. on an insufficient security, and for some years, both before and after his decease, interest was paid at that rate to the cestui que trust ; but some years after his decease the payment of interest ceased :—Held, that his estate was chargeable with interest at the rate of 5 per cent. from the time of the last payment. *Price* v. *Price*, 42 L. T. 626.

c. Compound Interest and Rests.

When Compound Interest Charged.]—When a trustee has employed funds for his own benefit, he will be charged as of course with simple interest at 5*l.* per cent. But compound interest will only be given when the money has been used in trade, and the payment by a solicitor of it into his bank to the general account of his firm is not such an employment of the money in trade as to make him liable to be charged with compound interest. *Burdick* v. *Garrick*, 39 L. J., Ch. 369 ; L. R. 5 Ch. 233 ; 18 W. R. 387.

If trustees, for the purpose of their own trade, use trust moneys which, according to the directions of the will, they ought to have otherwise invested, in a decree against them directing an account, compound interest will be charged. *Att.-Gen.* v. *Alford*, infra, commented upon. *Townend* v. *Townend*, 1 Giff. 201 ; 5 Jur. (N.S.) 506 ; 7 W. R. 529.

An executor and trustee having for several years retained funds in his hands uninvested, which he ought to have invested :—Held, not to be chargeable with interest at 5 per cent., or upon the principle of annual rests, but with simple interest only at 4 per cent., there being no circumstances to lead to the conclusion that he had made any profits by his misconduct. *Att.-Gen.* v. *Alford*, 4 De G. M. & G. 843 ; 1 Jur. (N.S.) 361 ; 3 W. R. 200.

The principle applicable to charging executors and trustees with interest in such cases considered. *Ib.*

The court will only charge an executor or trustee with the interest which he has received, or which he ought to have received, or which it is fairly presumed that he did receive, and misconduct on the part of an executor or trustee will not, generally speaking, warrant such a presumption. *Ib.*

The trustee of a will held a fund upon trust (after the determination of a previous life interest) to transfer and pay the same to a child when and as he should attain twenty-one, with a proviso that in case the child should be under age at the determination of the life interest the income of the fund or any part thereof should or might be applied for or towards his maintenance, education, and advancement, and the surplus, if any, should accumulate to and become part of the fund. After the child attained twenty-one (the life interest having previously determined), the trustee retained the fund without making any arrangements with the child or explaining to him his rights :—Held, that the trustee must be taken to have continued to hold the fund after the child attained twenty-one, upon the same trusts and

with the same obligations to accumulate as before, and that he was liable to account for the fund with compound interest. *Wilson* v. *Peake* (3 Jur. (N.S.) 155) distinguished; *Amiss* v. *Hall*, supra, col. 774, observed upon. *Emmet's Estate, In re, Emmet* v. *Emmet*, 50 L. J., Ch. 341; 17 Ch. D. 142; 44 L. T. 172; 29 W. R. 464.

Part of the fund had been invested at 5*l.* per cent. or other rates of interest upon authorised securities, and the rest of it had been either improperly invested or had not been kept separate from the trustee's own moneys:—Held, that as to so much of the fund as had been invested at 5*l.* per cent. or any other rate upon authorised securities, interest must be calculated at the rate actually yielded; that the rest of the fund must be treated as having been in the trustee's hands uninvested, and that under the circumstances he must be charged with interest thereon calculated at 4*l.* per cent. only. *Ib.*

—— **With Rests.**]—Where there is an express direction to accumulate trust property, and the accumulation is not made, the trustees are liable to account upon the footing of yearly or half-yearly rests. *Feltham* v. *Turner*, 23 L. T. 345.

Bequest of personal estate in trust, to invest it in government or real securities and to permit the interest to accumulate until it amounted to 500*l.*, and from time to time, when it amounted to that sum, to lay out or invest such interest in government or real securities, to be applied in the same manner as the principal; the trustees retaining the trust moneys in their business, an inquiry was directed what would have been the amount of the personal estate, and the interest thereof, if it had been invested and accumulated in the manner directed by the will, and the trustees were decreed to pay the amount, and were charged with interest at 5 per cent. on a balance in their hands. *Brown* v. *Sansome*, 1 M'Cle. & Y. 427.

A trustee of a charity estate, who has used the balances of the rents in carrying on his trade, will be charged with interest at 5 per cent., but not with annual rests. *Att.-Gen.* v. *Solly*, 2 Sim. 518.

The order to take an account with rests is always a matter entirely discretionary with the court, on a consideration of the circumstances. *Court* v. *Robarts*, 6 Cl. & F. 65—H. L. (Sc.)

Where A. held funds, part of the estate of B., but held them as security to cover liabilities into which he had entered on account of B., the estate itself being otherwise clearly answerable for such liabilities, and where the creditors of B. had not required him to invest the balance which might probably exist after his liabilities had been indemnified:—Held, that, in the absence of any positive stipulation, he was not, on the final settlement of accounts with the creditors, bound to pay a larger interest than 5 per cent. on the money he had so retained, and the account was not to be taken with rests. Under such circumstances, if the fund had been paid into court, it would have realised 4 per cent. with yearly or half-yearly rests, which being equal to 5 per cent. without rests, A. was held liable to that interest, on the equitable principle of putting the creditors into the same situation as if he had paid the fund into court in the ordinary manner. *Ib.*

As to interest on compensation moneys for minerals wrongfully taken. See *Phillips* v. *Homfray*, 59 L. J., Ch. 547; 44 Ch. D. 694; 62 L. T. 897; 39 W. R. 45.

A trustee of a marriage settlement, who allowed a sum of 350*l.* to remain in the hands of a trading firm for a period exceeding fifteen years after the death of the tenant for life, but who eventually, and before the bill was filed, paid the principal, with 5*l.* per cent. interest:—Held, liable to account with annual rests, and also to the costs of the suit. *Jones* v. *Foxall*, 15 Beav. 388; 21 L. J., Ch. 725.

An executor and trustee who was directed to invest in government stocks of Great Britain, or upon real security, and accumulate the surplus, after maintaining infants, invested the estate in the foreign funds:—It was held, that the investment was improper, and he was charged with four per cent., with annual rests. *Knott* v. *Cottee*, 16 Beav. 77; 16 Jur. 752.

Rule as to charging executors and trustees with interest on balances, and at what rate, and whether with annual rests. *Ib.*

In 1846 an executor invested part of the assets in exchequer bills; they were ordered into court, and sold in the same year, at a loss. In 1848 it was declared by the decree, that the investment was improper; but at that time the price of exchequer bills had risen, so that there would have been then no loss if they had been retained:—Held, that the executor ought to be charged with the amount improperly invested, and credited with the produce of the exchequer bills in 1846. *Ib.*

Costs of an administration suit given to an executor, though charged with the consequences of an improper investment. *Ib.*

d. Profits Accruing from Trust Property.

General Principles.]—Where trustees acquire a benefit as ostensible owners of trust property, that benefit cannot be retained by them, but must be surrendered to those who are beneficially interested. *Aberdeen Town Council* v. *Aberdeen University*, 2 App. Cas. 544—H. L. (Sc.)

The obligation to do an act with respect to property creates a trust; and if the party who is subject to the obligation acquires or retains, by means of his neglect of duty, a greater interest than he would otherwise have had, he becomes a trustee of such excess for the benefit of those who would have been entitled to it if the obligation had been duly fulfilled. *Fleeming* v. *Howden*, L. R. 1 H. L. Sc. App. 372.

The doctrine of trusts has the same origin, and rests on the same principles in Scotch and in English law, and it should be developed to the same extent in both systems of jurisprudence, *Ib.*

There is an obligation and trust created by 20 Geo. 2, c. 50, requiring that property bought with the proceeds of sales of superiorities shall be settled to the original uses; and this trust affects the heirs respectively succeeding to the purchased lands. *Ib.*

The rule of the court is imperative, that, in the absence of any contract for that purpose, no person can, by acting as trustee, derive any pecuniary benefit to himself. *Crosskill* v. *Bower*, *Bower* v. *Turner*, 32 Beav. 86; 1 N. R. 379; 32 L. J., Ch. 540; 9 Jur. (N.S.) 267; 8 L. T. 135; 11 W. R. 411.

Three trustees, two of whom were bankers, were empowered to carry on a business, and to borrow money from any bankers or other persons for that purpose. The bankers made advances of money to the trust at compound interest:—Held,

that, having regard to their fiduciary character, they could make no profit, and were entitled to simple interest only on their advances. *Ib.*

Trustees cannot deal with trust fund for their own benefit; if stock is purchased with trust money, in whatever name it may stand, the profits belong to fund. *Phayre* v. *Peree*, 3 Dow, 128; 1 Bligh (N.S.) 594—H. L. (Ir.)

Both the trustee and the assignee are responsible to the cestui que trust for profits subsequent to an assignment in breach of trust. *Vandebende* v. *Levingston*, 3 Swanst. 625.

Profit derived by a trustee, either from the trust property or from his office of trustee, belongs to the cestui que trust. *Sugden* v. *Crossland*, 3 Sm. & G. 192; 2 Jur. (N.S.) 318; 4 W. R. 343.

It is no answer to the rule, that persons standing in the situation of trustees or agents must account to their cestuis que trust, or principals, for all benefit which they themselves obtain by virtue of that character, that in the course of acquiring the benefit which has been derived by the trustee or agent, he incurred a possibility of loss; it is sufficient, if the transaction has resulted in gain obtained by virtue of the trusteeship or agency, to give the benefit to the cestui que trust. *Williams* v. *Stevens*, 4 Moore, P. C. (N.S.) 235; 36 L. J., P. C. 21; L. R. 1 P. C. 352; 12 Jur. (N.S.) 952; 15 W. R. 409.

The general principle, that a trustee cannot make a profit for himself by the use of the trust property, applies to an agent intrusted with a ship or other chattel for the purpose of using it for the owner's benefit. *Shallcross* v. *Oldham*, 2 J. & H. 609; 5 L. T. 824; 10 W. R. 291.

Conflicting Interests—Benefit acquired by Trustees transferred to Trust Estate.]—A trustee will not be permitted to place himself in a position in which his personal interest will conflict with those of the trust; and if he does place himself in such a position, and acquires benefits from so doing, those benefits will be transferred to the trust estate. *Bennett* v. *Gaslight & Coke Co.*, 52 L. J., Ch. 98; 48 L. T. 156.

On the insolvency of a person who had a lucrative agency agreement with a gas company for the sale by him, at a commission, of their sulphate of ammonia, the company renewed the agency agreement for a limited period to two of the trustees of the insolvent's estate appointed by the creditors' trust deed for the benefit of the estate. Before the expiration of that agreement and the winding up of the trust, one of those two trustees obtained for his firm from the company a fresh agency agreement, to commence from the expiration of that agreement, and to be on less lucrative, though still beneficial, terms:—Held, that the trustee was not at liberty, by obtaining a fresh agreement for the benefit of his own firm, to render it contrary to his own interest to press for a renewal of the old agreement, or a grant of a new one, for the benefit of the trust estate, and that the interest of the trustee under the fresh agreement must be transferred to the trust estate. *Hamilton* v. *Wright*, infra, followed. *Ib.*

It is a rule of universal application that no trustee shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound by fiduciary duty to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of the transaction; for it is enough that the parties interested object. *Aberdeen Ry.* v. *Blaikie*, 1 Macq. H. L. 461; 2 Eq. R. 1281.

It may be that the terms on which a trustee has attempted to deal with the trust estate are as good as could have been obtained from any other quarter, they may even be better, but so inflexible is the rule, that no inquiry into that matter is permitted. *Ib.*

It makes no difference whether the contract relates to real estate, or personalty, or mercantile transactions; the disability arising, not from the subject-matter of the contract, but from the fiduciary character of the contracting party. *Ib.*

The law of Scotland and the law of England are the same upon these points, both coming from the Roman law itself, bottomed in the plainest maxims of good sense and equity. *Ib.*

The rules which govern fiduciary relations are equitable rules, unknown to the courts of common law. Consequently, in a case properly determinable by these equitable rules, the decision of a court of common law, when opposed to them, must be disregarded. *Ib.*

—— **Purchase of Annuity by Trustee of Deed for Benefit of Creditors.**]—A trust was created by a debtor for the benefit of creditors, and the trustee had the power to bind the debtor personally and heritably for the benefit of the trust. By the terms of the trust deed, the trustee was likewise required to do all in his power to keep the residue of the trust estate as large as possible for the debtor. The trustee purchased an annuity granted by the debtor, after the date of the trust deed. The trustee died. His representatives sought to enforce the annuity against the grantor. It was held that they could not do so, and a decree of the court of session affirming their right, was reversed, a trustee being bound not to do anything which can place him in a position inconsistent with the interests of the trust. *Hamilton* v. *Wright*, 9 Cl. & F. 111—H. L. (Sc.)

Colliery Worked by Trustee.—A. bequeathed a leasehold interest in a colliery to B. and C. upon certain trusts, and appointed B., C., and D. his son, executors. B. and C. renounced the trust and did not prove. D. proved the will and entered into possession of the property. He made a profit of the colliery and continued to work it at a profit, although it ought to have been sold twelve months after the death of A:—Held, that he could not make a profit of his trust; and the clear proceeds of the colliery formed part of A.'s personal estate; and that, although the lease of the colliery ought to have been sold twelve months after the death of A., yet as that was not done, its value would not be ascertained as at the time when it ought to have been realised, but that the amount actually realised by D. must be accounted for by him, he being allowed his reasonable expenses. *Lord* v. *Wightwick*, 23 L. J., Ch. 235; 2 Eq. R. 349; 18 Jur. 253—L.JJ.

Private Debt of Trustee to be Retained by Purchaser out of Purchase Money.]—A trustee entered into a contract for the sale of trust property, and it was agreed that the purchaser should, out of the purchase money, retain a private debt due to him from the trustee. On a bill by the trustee:—Held, that this court would not decree the specific performance of such a contract. *Thompson* v. *Blackstone*, 6 Beav. 470.

Presentation to Church Preferment with Secret Condition for Benefit of Trustee.]—Where executor or trustee, entrusted with disposition of some church preferments, made a presentation to A., under a secret condition for his own benefit, the presentation was set aside, and he was decreed to present a more proper person. *Richardson* v. *Chapman*, 7 Bro. P. C. 317.

South Sea Stock Purchased instead of Land.]—A sum of 10,000*l.* trust money was agreed to be laid out in land and settled, but the trustees bought South Sea stock with the money, which increased to 30,000*l.* As the trust would have suffered by the fall, so shall it have the benefit of the rise of this stock. *Anon.*, 1 P. Wms. 648.

Employment of Trust Funds in Trade.]—Where trustees lend or use trust money in trade, they are chargeable not only with the money and interest, but with the profits made in the trade, the interest generally being 5 per cent. *Robinson* v. *Robinson*, 1 De G. M. & G. 247; 21 L. J., Ch. 111; 16 Jur. 225.

The plaintiff was tenant for life under the settlement executed on her marriage, part of the settled property consisting of a sum of 15,500*l.* This sum was allowed to remain in the hands of the plaintiff's father, who employed it in trade, he covenanting at his death to pay it to the trustees. Upon the death of the father, 10,000*l.*, part of the 15,500*l.*, was allowed to remain in the business, such investment being unauthorised by the settlement. Large profits accrued to the 10,000*l.*, some of which, with the plaintiff's consent, had been paid to her husband:—Held, that the plaintiff was entitled in respect of income to 4 per cent. on the original 10,000*l.*, and upon all accretions of profits retained and employed in the business, and that the rest of the profits must be regarded as capital subject to the trust of the settlement, and must be made good out of the husband's estate, so far as he had received any part thereof. *Hill, In re, Hill* v. *Hill*, 50 L. J., Ch. 551; 45 L. T. 126.

—— **Funds Lent to Traders.**]—When trust funds are, without authority, lent to traders, with notice of the trust, and employed in their business, such traders are not liable to account to the cestui que trust for a share of the profits of the business. *Stroud* v. *Gwyer*, 28 Beav. 130; 6 Jur. (N.S.) 719; 2 L. T. 400.

Where executors were empowered to lend such parts of the trusts funds as they should think proper to one of the cestuis que trust, and did so, and he employed the loan in trade:—Held, that the case was to be considered as if he were a stranger, and that he was not liable to account to the estate for the profits of the loan in trade. *Parker* v. *Bloxham*, 20 Beav. 295.

A trustee who was a solicitor, sold out stock forming part of the trust estate and invested it on mortgage. He acted in the transaction as solicitor for the mortgagor as well as for the trust estate, but made no charge against the trust estate for his services, being paid for them by the mortgagor. He also derived some profit as solicitor in consequence of the employment of part of the mortgaged estate for building purposes:—Held, that the plaintiff could not charge him with the profit thus made, as having been made by the employment of the trust estate in his business. *Whitney* v. *Smith*, L. R. 4 Ch. 513; 20 L. T. 468; 17 W. R. 579.

—— **Sale of Testator's Share in Partnership Trade to be Resold to one Executor.**]—Sale of a testator's share in a partnership trade, and the property belonging to it, by his executors to his partners for the purpose of being re-sold to one of his executors, set aside, and his estate held entitled to his aliquot proportion of the subsequent profits, as if the partnership had continued. Interest allowed at 5 per cent. on sums paid out of his estate. *Cook* v. *Collingridge*, Jacob, 607; 1 L. J. (O.S.) Ch. 74; 23 R. R. 155, 767.

—— **Business Purchased by Executor at a Valuation.**]—A testator gave all his real and personal property, including a business, to his executors on trust to sell and pay the income to his wife for life, and after her death to the plaintiff, but with full discretion to his executors to postpone the sale of his estate. And he directed that until the sale the net income should be applied in the same way as the income of the proceeds of the sale was to be applied. Shortly after the death of the testator one of the executors purchased the business at a valuation:—Held, that the sale must be set aside, and that the executor must account for the profits made since the sale without salary, but with just allowances: and that the amount of the profits must be treated as capital, and that the widow was only entitled to the income of it. *Norrington, In re, Brindley* v. *Partridge*, 13 Ch. D. 654; 28 W. R. 711.

On an appeal the case was compromised, and the purchase was confirmed: but the court expressed an opinion that if the sale had been set aside the widow would have been entitled to the profits as income. *Ib.*

Election of Cestui que Trust as to Interest or Profits.]—Where a trustee has an infant's money to lay out for his benefit, and employs it in his trade, the court will give an option for the benefit of the infant either to have interest or the profits of the trade. *Anon*, 2 Ves. Sen. 630.

If a trustee mixes trust funds with his private moneys, and employs both in a trade, an adventure of his own, the cestui que trust may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds so employed. *Docker* v. *Somes*, 2 Myl. & K. 655; 3 L. J., Ch. 200.

Where trust property is employed in trade without authority, the cestuis que trust elect to take either the profits for the whole period, or interest for the whole period. Circumstances may arise to entitle them to take profits for one and interest for another part of the period; but a notice of dissolution of partnership, published for a particular purpose, and not accompanied by a settlement of accounts or a transfer of the property is not sufficient. *Heathcote* v. *Hulme*, 1 J. & W. 122; 20 R. R. 248.

Difficulties of enforcing a cestui que trust's right (however clear) to participate in profits of trade, carried on in part with trust fund. *Wedderburn* v. *Wedderburn*, 4 Myl. & Cr. 41; 8 L. J., Ch. 177; 3 Jur. 596. Affirming 2 Keen, 722. And see *S. C.*, 22 Beav. 84.

Trustees, under a misrepresentation that the fund was invested in stock, charged with interest at 5 per cent. upon the same principle as if they had sold out stock and used the money, viz., an option to the cestui que trust to have the actual profit or 5 per cent. *Bate* v. *Scales*, 12 Ves. 402; 8 R. R. 345.

Though the employment of a trust fund in trade by a firm is technically a breach of trust, yet if the amount of profit attributable to capital alone is not ascertainable, and the trustees acted bonâ fide and accounted to the cestui que trust for the value of her share with five per cent. compound interest, the court would not call upon them for an account of the profits, so as to enable her to exercise an option between the profits and the compound interest. *Vyse* v. *Foster*, 42 L. J., Ch. 245; L. R. 8 Ch. 309; 27 L. T. 774; 21 W. R. 207. Affirmed 44 L. J., Ch. 37; L. R. 7 H. L. 318; 31 L. T. 177; 23 W. R. 355.

The trustees of a mixed fund of realty and personalty laid out 1,600*l*., part of the personalty, upon the erection of a house on the real estate, for the bonâ fide purpose of increasing the value of the whole as building land:—Held, that the trustees should not be entirely disallowed the sum so expended, but if the cestui que trust desired it, they should be ordered to take the house themselves at the price of 1,600*l*., and the value of the site as unbuilt upon. *Ib.*

Lease by Tenant for Life to Trustee at Inadequate Rent.]—A testator, being possessed of a term of years, bequeathed it to five trustees in trust to pay an annuity to his wife for her life, and subject thereto in trust to pay certain sums yearly for the maintenance of his grandson A. T. until he should attain the age of twenty-one, and then in trust to permit A. T. to take the profits for his life, and after his decease to permit such person who for the time being would take by descent as heir male of the body of the said A. T. to take the profits thereof until some such person should attain the age of twenty-one, and then to convey the same unto such person so attaining the age of twenty-one years, his executors, etc., remainder over. A. T., in consideration of faithful services, demised part of the premises to E. K., one of the trustees under the will, who was also his agent, for sixty-one years, at an inadequate rent:—Held, that E. K. being a trustee in the will, was not at liberty to take from the tenant for life a greater interest than he was authorised to grant under the leasing power, and that in thus obtaining this beneficial lease he was guilty of a breach of trust, and that the lease consequently could not be sustained. *Kerr* or *Ker* v. *Dungannon* (*Lord*), 1 Con. & L. 335; 1 Dr. & War. 509; 4 Ir. Eq. R. 343.

Member of Corporation Selling Railway Debentures.]—The corporation of the city of Toronto, in Canada, was authorised by an act of the Legislature of Canada to issue debentures to assist in the construction of a railway. At that period B. was the mayor and a member of the finance committee, and took an active part in passing a bye-law, which authorised the issue by the corporation of debentures for the completion of the railway. B. at that time was engaged in co-partnership with H., and their firm purchased of the contractors for the railway company some of the debentures so issued which had been assigned to the contractors by the corporation. B. and his partner afterwards sold the debentures, and thereby realised a large profit. This transaction was without the knowledge of the corporation:—Held, that B. must, in the circumstances of his being a member of the corporation, and the manner in which he acted throughout the transaction, be treated as the trustee of the corporation, and was not entitled to any benefit received from the sale of the debentures, and was liable to account to the corporation for the ascertained and unquestioned amount of profit made and received by him in the transaction in which he had engaged in respect of the sale of the corporation debentures. *Bowes* v. *Toronto City*, 11 Moore, P. C. 463.

Held, also, that it made no difference that the profits from the sale of the debentures was made by B. and his partner jointly, and not by B. alone. *Ib.*

Assignment of Claim against Trustees in respect of Profits.]—Tenant for life of a trust estate mortgaged it, and it was sold by the mortgagee. After the sale, the purchaser and mortgagee, for a nominal consideration, assigned to the tenant for life certain alleged arrears of interest and profits of part of the trust fund, which, as the plaintiff alleged, the trustees had made in excess of the interest for which they had accounted. A bill filed against the trustees, on the title conferred by this assignment, for an account of their profits was dismissed with costs. *Hill* v. *Boyle*, L. R. 4 Eq. 260.

Purchase by Trustee of Debt due by Cestui que Trust.]—E. C. assigned a legacy to A. B. upon trust to pay a debt due to him; but before the execution of the deed, L., another creditor of E. C., assigned his debt to A. B. for a sum considerably less than its amount. The debtor and creditors were parties to this transaction. Under a decree made in the cause the chief clerk certified that A. B. was entitled to the full amount of the debt assigned by L.; and on motion to vary the certificate, on the ground that A. B. was, when he purchased the debt, acting as trustee for E. C., and was therefore only entitled to the amount actually paid, it was held that A. B. was entitled to the full amount of the debt. *Crompton* v. *Huber*, 1 Jur. (N.S.) 465; 3 W. R. 347.

Secret Recipe for Medicine Communicated to One Child.]—The sole possessor of a recipe for making a medicine assigned it, on the marriage of his daughter, to trustees, in trust for her and her husband, for their lives; and directed that after their decease it should be sold for the benefit of their children. The mother destroyed the recipe, and verbally communicated the contents to her eldest son, for the benefit of his brothers and sisters. Upon a bill filed against him by some of the younger children, he was declared to hold the secret upon the trusts of the settlement, and was decreed to account for the profits since his mother's death; and, as a sale was impracticable, an issue was directed to ascertain the value of the secret. *Green* v. *Folgham*, 1 Sim. & S. 398. *S. C.*, nom. *Green* v. *Church*, 1 L. J. (O.S.) Ch. 203.

Trust for Benefit of Legatees—Rents received after Death of Testator and before Sale of Realty.]—A testator who died in January, 1887, by his will dated in August 1879, gave his real estate at C. and his residuary real estate to his nephew, "he also paying thereout the following legacies: that is to say, the legacy or sum of 1,000*l*.

to my trustees to be held by them upon the trusts hereinafter declared concerning the same," and certain other legacies. The testator directed that such legacies should be paid at the end of six months after the death of his sister, and he directed his trustees to stand possessed of the 1,000*l.* thereinbefore directed to be paid to them and " charged on my C. estate," upon certain trusts. The question was, whether the testator's nephew was liable to account for the occupation rent of so much of the testator's real estate at C. as was in his possession or occupation at the testator's decease for the period between that date and the completion of the sale of that estate by the direction of the court, and with any profits made by him in respect of the crops and other produce of the estate during such period :—Held, that he was not a trustee of the legacies for the legatees, but that the same were merely charged on the C. estate ; and that that being so, he was not liable to account for the back rents and profits thereof. *Oliver, In re, Newbald* v. *Beckitt*, 62 L. T. 533.

Set-off between Profit and Loss on various Investments.]—When trust funds are invested on several improper securities, the trustees, in accounting, are not entitled to set-off the gain on one against the loss on the other. *Robinson* v. *Robinson*, 11 Beav. 371 ; 18 L. J., Ch. 73 ; 12 Jur. 969. On appeal on other points, 1 De G. M. & G. 247 ; 21 L. J., Ch. 111 ; 16 Jur. 255.

A testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in government or real security, of which they were to stand possessed, upon trust for A., during her life, and after her death for B. The trustees permitted a share, which the testator had in an Indian loan, bearing interest at 10*l.*, per cent., to remain for several years on that security, during which time they paid to A. the interest at 10*l.* per cent. which it yielded annually ; and the loan being afterwards paid off, they invested the money in 3 per cents. at a time when the funds were so low, that the amount of stock purchased was considerably greater than if the conversion had taken place at the end of a year from the testator's death : —Held, that the tenant for life was not entitled to the actual interest which the money yielded, while it remained on the Indian security ; but only to the dividends of so much 3 per cent. stock as would have been purchased with it, at the end of a year from the testator's death ; that the trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received in respect of the Indian rate of interest, and that they ought to be allowed in their discharge as payments for the tenant for life, not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends if the money had been transferred from the Indian security, and invested in the 3 per cent. stock at the end of a year from the testator's death. *Dimes* v. *Scott*, 4 Russ. 195 ; 28 R. R. 46.

Trustee of an infant having saved 3,000*l.* out of the profits of his estate, lays it out in a purchase of lands lying near the infant's estate, with the consent of his grandmother, declaring the trust for the benefit of the infant, if he, when at age, shall agree to it ; infant dies within age ; the trustee shall account to the infant's executors for the 3,000*l.*, but the profits of the land set off against the interest. *Winchelsea* v. *Norcliffe*, 1 Vern. 435.

As to Profits by Persons in a Fiduciary Relationship.] — *See* COMPANY, FRAUD, INFANT, LUNATIC, MORTGAGE, PRINCIPAL AND AGENT, VENDOR AND PURCHASER.

viii. *Title Deeds.*

Custody — Mortgage of Building Estate—Solicitor.]—It is the duty of trustees to keep trust deeds under their own control ; but to this obligation there must be reasonable limits, and where the deeds have to be frequently referred to—e.g. for the purpose of realising the trust estate—it is proper for them to be in the custody of the solicitor to the trustees. *Field* v. *Field*, 63 L. J., Ch. 233 ; [1894] 1 Ch. 425 ; 8 R. 201 ; 69 L. T. 826 ; 42 W. R. 346.

—— **Bonds to Bearer.**]—Semble, trustees must deposit bonds and certificates payable to bearer in some place where possession of them cannot be obtained without the consent of the whole body of the trustees. *Ib.*

—— **Railway Debentures.**] — Negligence cannot be imputed to trustees for leaving documents of title in the hands of one of their number, and allowing him to receive the income, and no authority to deal with the property can be implied even in favour of a bonâ fide purchaser from such trustee. *Cottam* v. *Eastern Counties Ry.*, 1 J. & H. 243 ; 30 L. J., Ch. 217 ; 6 Jur. (N.S.) 1367 ; 3 L. T. 465 ; 9 W. R. 94.

Trust money was invested in railway debentures, payable to three trustees. The debentures were left in the hands of A., one of the trustees, who was also allowed to receive the interest. A. forged the signatures of his co-trustees to a deed, purporting to be a transfer from the three, and delivered the debentures with the transfer to the purchasers, who paid full value to A., and had no notice of the forgery. They delivered the transfer to the railway company, who made an entry of it in their books, and the subsequent interest was paid by the company to the purchasers. On a bill filed by the other trustees after A. had been convicted of forgery : —Held, that the defence of purchaser for value without notice did not apply, and the debentures were ordered to be delivered up to the plaintiffs, and the transfer and entry thereof in the company's books cancelled. *Ib.*

Non-Registration of Trust Deed.]—A trustee may, under special circumstances, be held reponsible for the non-registration of the deed creating the trust. *Macnamara* v. *Carey*, Ir. R. 1 Eq. 9 ; 15 W. R. 374.

—— **Bond.**] — A testator died in 1810, in India, having bequeathed his English property to two infants, whom he acknowledged as his natural children ; and having appointed his nephew, E., to be their guardian. Part of his property consisted of a bond, dated in 1810, in which he was obligee, the obligor being seised of real estate in Ireland. In 1811 E. obtained possession of the bond from the testator's executor ; but he did not register it, nor did he ever take any steps towards realising the security. In 1821, the elder of the infants attained twenty-

one; in 1832, she married; and in 1833, when the bond had become irrevocable, E., for the first time, informed the elder child and her husband of the existence of the bond; and upon finding it was then too late to register it, he handed it to the husband, directing him to see to it. No step was taken until E.'s death in 1870, after which, in 1871, a bill was filed, seeking to make E.'s estate liable as for a breach of trust. At this time the younger infant was dead, and had no legal personal representative; but his son, who was entitled to administer, was made a defendant. Semble, that E. was not at any time liable for any breach of trust. *Sleeman* v. *Wilson*, L. R. 13 Eq. 36; 25 L. T. 408; 20 W. R. 109.

Negligence of Trustee in not Ascertaining Nature of his Title.]—A trustee, who had no actual knowledge of his right to real property, suffered an adverse title to be acquired by lapse of time. A bill to make him accountable was dismissed. *Youde* v. *Cloud*, 44 L. J., Ch. 93; L. R. 18 Eq. 634; 22 W. R. 764.

—— **Chirograph of a Fine.**]—The chirograph of a fine relating to the title having come to the trustee's hands, without the deed leading the uses, such dismissal was without costs. *Ib.*

—— **No Negligence—Trustee not Party to Bill for Restitution of Deed.**]—Where there is no imputation of breach of trust in trustee suffering deed to get out of his possession, he need not be party to bill for its restitution. *Knye* v. *Moore*, 1 Sim. & S. 61; 1 L. J. (O.S.) Ch. 18.

c. Liability of Trustees for Acts of Co-Trustees.

i. *In General.*

Statute.]—*Trustee Act*, 1893, *s.* 24.

Relation between Co-Trustees.]—The relation between co-trustees in regard to the trust funds in their charge cannot be considered as that of creditor and debtor. *Taylor, Ex parte, Goldsmid, In re*, 56 L. J., Q. B. 195; 18 Q. B. D. 295; 35 W. R. 148—C. A.

Improper and Improvident Investment—Excuse—Acting Reasonably.]—If a trustee, relying on his co-trustee, who manages the trust fund and is solicitor to the trust estate, allows him to advance the trust funds upon an improper and improvident security, he does not act "reasonably," and therefore will not be excused under s. 3 of the Judicial Trustees Act, 1896, for the breach of trust. *Turner, In re, Barker* v. *Ivimey*, 66 L. J., Ch. 282; [1897] 1 Ch. 536; 76 L. T. 116; 45 W. R. 495.

Modes in which Trustees may become Liable.]—There are three modes in which a trustee may become liable, according to the ordinary rules of the court; first, where one trustee receives trust money, and hands it over to a co-trustee without securing its due application; secondly, where he permits a co-trustee to receive trust money without making due inquiry as to his dealing with it; thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the necessary steps to obtain restitution. *Wilkins* v. *Hogg*, 3 Giff. 116; 31 L. J., Ch. 41; 8 Jur. (N.S.) 25; 5 L. T. 467; 10 W. R. 47.

A man cannot take upon himself the character of trustee, and act partially as such, or deny his liability to replace trust property if, through his negligence or want of attention, a sum of money which he has told his cestuis que trust, or induced them to believe has been retained and invested by him, has, in fact, been squandered by his co-trustees. *Horton* v. *Brocklehurst*, 29 Beav. 504.

A., one of two trustees, rendered accounts in the name of the two, which stated that one-third of the income had been retained and invested, but, in fact, no such investment had been made, and A. alone had received and misapplied these moneys, which were lost by his bankruptcy. The other trustee, however, having at a meeting of the cestuis que trust so acted as to sanction and adopt the accounts:—Held, liable for A.'s default. *Ib.*

Knowledge of Misapplication.]—One trustee knowing and concealing his co-trustee's having sold out the trust fund, equally liable with the trustee who actually sold. *Boardman* v. *Mosman*, 1 Bro. C. C. 68.

A trustee who stands by and sees a breach of trust committed by his co-trustee becomes responsible for that breach of trust. *Booth* v. *Booth*, 1 Beav. 125; 8 L. J., Ch. 39; 2 Jur. 938.

A testator bequeathed to his partner and to B. his personal estate, upon trust to invest the same for the benefit of his wife and children. Both the executors proved the will, and the surviving partner retained the testator's moneys in the trade, which were lost. B. took no active part in the trusts, but was cognisant of the breach of trust, and took no proceedings to prevent it:—Held, that B. was responsible for the consequences of the breach of trust. *Ib.*

Where some of the members of a firm are trustees of funds which they misapply, by making use of them for partnership purposes: if such misapplication be with the knowledge of the other members of the firm, the cestuis que trust may prove against the joint estate. *Heaton, Ex parte*, Buck, 386.

A marriage settlement empowered the two trustees to vary the investment of the trust funds, "with the consent in writing of the husband and wife." Part of the trust funds consisted of 1,000*l.*, which was paid in cash to the two trustees, who, in breach of trust, invested it in ordinary railway shares. Thereby a loss was sustained; and the trustees, in further breach of trust, transferred these shares to the N. bank, to secure the private debt of the husband, the tenant for life. Subsequently O., one of the trustees (without the knowledge of his co-trustee), procured an assignment (for a nominal consideration) of those shares to two persons, who became trustees thereof for the R. bank, which had made to the husband large advances, the full amount of which was secured by the guarantee of O. A week after this assignment, the amount of the husband's debt to the N. bank was paid by a cheque on the R. bank, which, before the transfer of the shares was lodged with it, cashed that cheque out of the original credit given to the husband. These shares were sold, without the other trustee's knowledge, for 592*l.* 10*s.*, which sum was applied in reducing the debt due by the husband to the R. bank. O. obtained from the husband mortgages of the

hotel, furniture, &c., to an amount which covered the whole sum guaranteed by him to the R. bank:—Held, that O. was, as between him and his co-trustee, primarily bound to replace the 592*l.* 10*s.* *Costello* v. *O'Rorke*, Ir. R. 3 Eq. 172.

Participation in Breach of Trust.]—K. & S., being trustees of money in the funds, sell it for the benefit of S., who dies insolvent, and K. becomes bankrupt. The persons interested in the funds may prove against the estate of K. the value of the funds at the bankruptcy, though S.'s estate be first liable. *Shakeshaft, Ex parte*, 3 Bro. C. C. 197.

One of three trustees who was alleged to have participated in a breach of trust, clearly committed by the others, being also executor of a cestui que trust:—Held, that a legatee of the cestui que trust was entitled to maintain a bill against the three trustees to recover the funds lost by the breach of trust. *Sandford* v. *Jodrell*, 2 Sm. & G. 176.

Agreement by Trustees to be Liable for One Another.]—If trustees will bind themselves to be liable for the acts of each other, the court will not relieve them, especially in the case of a composition of debts. *Leigh* v. *Barry*, 3 Atk. 583.

In the case of trustees, though there are not negative words in a deed that they shall not be liable for the acts of one another, yet the court will not make them so for more than each has received. *Id.* 584.

Debtors appointed Trustees—Neglect to get in Debts.]—On a marriage, two of the wife's debtors, one of them the bankrupt, were appointed trustees of a fund, to be made up of their several debts:—Held, that the debts not being got in and invested, each trustee was liable only for his own default. *Woodward, Ex parte, Turner, In re*, 3 Mont. & Ayr. 232; 2 Deac. 401; 6 L. J., Bk. 60; 1 Jur. 385.

Concurrence in Sale of Stock.]—If an executor or trustee, without taking due means to learn from his co-executor or co-trustee, whether it is necessary, in the due execution of the trust, to sell stock, concurs in the sale of stock, and leaves it in the disposition of his co-executors or co-trustees, he is liable for the stock so sold. *Harrington* v. *Harrington*, 1 L. J. (o.s.) Ch. 41.

ii. *Leaving Trust Funds under Sole Control of Co-Trustee.*

General Rule.]—When one of two trustees allows the trust fund to be under the sole control of the other, both trustees are liable to make good to the trust estate any money misapplied. *Rodbard* v. *Cooke*, 36 L. T. 504; 25 W. R. 555.

L. appointed G. C. and I. A. C. executors and trustees of his will. They kept at their bankers' an account relating to the estate, separately from their own. Cheques were drawn against that account with the knowledge of G. C., but signed by I. A. C. alone. In 1867 a sum of 4,000*l.* was received by I. A. C. on account of the estate, and handed by him to accountants through whose hands all money transactions relating to the trust passed, and paid by them into the bank to the account of the trust estate. Shortly after a sum of 3,645*l.* 2*s.* 7*d.* was drawn out by cheques signed by I. A. C. alone. Of that amount a sum of 628*l.* was applied by I. A. C. to his own use, without the knowledge of G. C. I. A. C. had since died:—Held, that G. C. having allowed the fund to be under the sole control of I. A. C., the estates of I. A. C. and G. C. were jointly and severally liable to make good the loss of the estate. *Ib.*

Bonds passing by Delivery—Defalcation.]—Each of two trustees retained possession of a moiety of bonds held in trust, and which passed by delivery, and one trustee committed a breach of trust:—Held, that the other trustee was liable to make good the loss sustained. *Lewis* v. *Nobbs*, 47 L. J., Ch. 662; 8 Ch. D. 591.

Proceeds of Sale received by One Trustee for Payment of Debts.]—A testatrix gave her personal estate to A. and B. subject to debts and legacies upon certain trusts, and she appointed A. alone executor. A fund over which the testatrix had a power was transferred into the names of A. and B. A., the executor, representing that a considerable part of the fund was wanting to pay debts and legacies, induced B. to join in selling out the fund, promising to give a mortgage security for what might not be wanted for debts, &c. A. received the whole, but applied a very considerable sum in payment of debts, &c.:—Held, that B. was liable to replace so much of the stock as had not been applied in payment of debts, &c., and to account for the dividends. *Hewitt* v. *Foster*, 6 Beav. 259; 7 Jur. 228.

A trustee, having placed the trust fund under the sole control of his co-trustee, without any sufficient reason, was:—Held, to have committed a breach of trust, and if the money should be lost by such co-trustee's bankruptcy is liable to make it good. *Broadhurst* v. *Balguy*, 1 Y. & C. C. C. 17.

—— **For Re-Investment.**]—Early in 1818, a cestui que trust, with power of directing the variation of the trust securities, requested B., who was one of his trustees, to sell out trust stock then standing in the 5 per cents. and invest it in the 3 per cents. In April of the same year, the trustees, B. and H., sold out the stock by power of attorney, and soon afterwards H., at the request of B., joined in a cheque on the bankers who acted in the sale, requesting them to pay the amount to themselves or bearer. In the letter of B. requesting H. to sign the cheque, he stated, as a reason for expedition, that the money was to be paid on Thursday to the gentleman to whom it was engaged. B. afterwards applied the money to his own use. On a bill filed in 1838, by the cestui que trust, to compel H. to replace the money:—Held, that H. was primâ facie liable; for that neither of the trustees contemplated an investment pursuant to the direction of the plaintiff; and even if H. had so contemplated, the course taken by him was not required by necessity or convenience. *Id.*

Two trustees having properly sold out trust money, one of them handed the cheque for the proceeds to the other, who misapplied it:—Held, that they were both liable. *Trutch* v. *Lamprell*, 20 Beav. 116.

It is a contradiction in terms to say, that a trustee who acts is not an active trustee, and a defence by a trustee that he only acted for conformity's sake is unavailing. *Ib.*

Two trustees, having power to alter and vary a trust fund, sold it out for that purpose,

but allowed the produce to be received by one alone :—Held, that the other who failed to show that the fund was properly invested, was bound to pay the amount into court, *Wiglesworth* v. *Wiglesworth*, 16 Beav. 269.

Trustees of stock signed a power of attorney to sell it out, and the proceeds were received from the broker by one of the trustees, who afterwards became insolvent :—Decree, that the other trustees account for and pay the amount. *Marriott* v. *Kinnersley*, Tam. 470 ; 31 R. R. 109.

—— **For Payment to Cestui que Trust.**]—Where a trust fund standing in the name of two trustees had been sold out, and the money had been received by one of them, who was to pay it to the cestuis que trust, but failed to do so and afterwards became insolvent, and the money was lost :—Held, that the other trustee was not exonerated from personal liability to make good the fund, on the ground that all the acts which he had done were required for convenience or conformity. *Curtis* v. *Mason*, 12 L. J., Ch. 442.

—— **No Inquiry by Co-trustee as to Proceeds.**]—An appointment of new trustees recited that certain stock and shares had been transferred into the names of the new trustees, and that by an indenture of even date a mortgage debt and the premises subject thereto had been assigned and conveyed to the new trustees ; the trust property having been sold and the proceeds received by one of the trustees and lost, the court on the hearing decided that the co-trustee, not having inquired what had been done with the proceeds, was liable for all sums actually received by him, jointly with his co-trustee, and which had been lost, and referred it to the chief clerk to find what had been jointly received. The chief clerk by his certificate found that all the trust property had been jointly received :—Held, that the chief clerk had rightly found by his certificate. *Hale* v. *Adams*, 21 W. R. 400.

Omission to call in Money authorised to be Lent to Co-Trustee on his Personal Security.]—Under a trust to lend trust money to one of the trustees on his personal security until the trustees should deem it advantageous to invest the money in the funds :—Held, that the omission to call in the money, which had been accordingly lent to the trustee, and its consequent loss did not, in the absence of any proof of misconduct on the part of his co-trustee, create any liability on the part of such co-trustee. *Paddon* v. *Richardson*, 7 De G. M. & G. 563 ; 3 Eq. R. 933 ; 1 Jur. (N.S.) 1192.

Held, also, that as payment of the debt was only enforceable in equity, and the cestui que trust might have enforced it himself, this circumstance was an answer to a suit by him seeking to render the co-trustee personally liable. *Ib.*

Letting Co-Trustee have Trust Money on Note of Hand.]—One trustee suffering the other to have trust money under a note of hand, held liable. *Keble* v. *Thompson*, 3 Bro. C. C. 112.

Trustees of Charity acting in Rotation.]—A., B., C., and D. were co-trustees of a charity, under a will, which directed that one trustee in rotation should be acting trustee for the current year, and keep the accounts. A., being the acting trustee in a particular year, applied some of the funds to his own use, without the knowledge of the other trustees. A. was succeeded by, and delivered his accounts to, B., who delivered his accounts in like manner to C., the next acting trustee. The court held that D. was not liable for the breach of trust committed by A. *Att.-Gen.* v. *Holland*, 2 Y. & C. 683 ; 7 L. J., Ex. Eq. 51.

Assignees for Creditors.]—An order of dividend found that a certain balance was in the hands of one of the assignees, and directed that assignee to divide the same among the creditors :—Held, that the other assignee, having never interfered with the control and application of the trust fund, was not liable to the creditors for the payment of the dividends. *Dawson, Ex parte*, 4 Deac. & C. 130 ; 2 Mont. & Ayr. 94 ; 4 L. J., Bk. 42.

Executors permitting Proceeds of Sale to remain in Hands of Co-Executor—No Explanation to Cestuis que Trust of their Rights.]—A., by his will, gave the residue of his property to three trustees, whom he appointed executors, upon trust to sell and invest the same and to pay the income thereof to his widow for life, and after her decease, to his children, who were all infants at the time of his death. The eldest child attained twenty-one in 1839, and the youngest in 1846. The three executors proved the will, but one of them almost exclusively acted. The money which was the proceeds of the estate was suffered by two of the executors to remain in the hands of the third, who ultimately became insolvent. On the youngest child attaining twenty-one, he, on behalf of himself and his brothers and sisters, attempted to obtain payment from the acting executor, and in 1848 wrote to him a letter consenting to receive payment of the amount then admitted to be due by annual instalments. In 1849, and shortly before the insolvency of the acting trustee, a bill was filed by all the children against the three trustees for the purpose of making them each responsible :—Held, that inasmuch as as it was the duty of the three trustees to have explained to their cestuis que trust what their rights were, and as they had not done so, there was nothing in the conduct of the children to deprive them of their remedy against the three trustees, who were accordingly declared to be jointly and severally liable to make good the deficiency. *Burrows* v. *Walls*, 5 De G. M. & G. 233 ; 3 Eq. R. 960 ; 3 W. R. 327.

Execution of Power of Attorney at Request of Co-Trustee and with Consent of Husband and Wife for Sale of Stock.]—On a marriage a sum of stock was settled for the separate use of the wife for life, remainder to the husband for life, remainder for their children, with power to change securities with consent of the wife. The dividends on the stock being reduced, one of the trustees, in whom the husband and wife principally confided, and who, with his partners, was their solicitor, informed his co-trustees that he had an opportunity of investing the property in a mortgage at 5 per cent., and, with the consent of the husband and wife, requested his co-trustees to execute a power of attorney to enable him to sell the stock. The co-trustees, without inquiring into the matter, complied ; the trustee sold the stock and absconded :—Held, that the co-trustees were liable. *Hanbury* v. *Kirkland*, 3 Sim. 265 ; 30 R. R. 165.

Release for Trust Money Executed by Both Trustees—Money Received by One.]—Two trustees executed a release for trust money, but one alone obtained possession of it, and he invested it on improper security:—Held, that the other was liable, for it was his duty to see that it was properly invested. *Thompson* v. *Finch*, 22 Beav. 316; 25 L. J., Ch. 681.

Fraud by one Trustee—Securities passing by Delivery in Box at Bankers.]—A box containing securities of the Spanish Government, the property in which passed by delivery, was deposited at a bank in the names of three trustees. The Spanish Government having afterwards made proposals for a change in the securities, one of the three trustees, who was a stockbroker, was allowed to take the securities out of the box for the purpose of such conversion. He effected the conversion, but appropriated a part of the converted securities to his own use, and placed the rest in the box, which he returned to the bank. The fraud was not discovered for several years. The trustee kept the key of the box, being allowed to have access to the box for the purpose of from time to time tearing off coupons and obtaining the dividends, and from time to time took out others of the securities, which he converted to his own use, until at last the box was empty:—Held, that the co-trustees were liable for the first breach of trust, it being their duty after the conversion to see that the securities were all deposited in the box, but that they were not liable in respect of the subsequent misappropriation. *Mendes* v. *Guedalla*, 2 J. & H. 259; 31 L. J., Ch. 561; 8 Jur. (N.S.) 878; 6 L. T. 746; 10 W. R. 482.

Trustees are not liable to the cestuis que trust for money belonging to the trust which their co-trustee gets into his possession without their consent or knowledge, and by a fraud upon them. *Barnard* v. *Bagshaw*, 3 De G. J. & S. 355; 9 Jur. (N.S.) 220; 7 L. T. 544.

—— **Cross Cheque—Crossing Struck out by One Trustee.**]—If joint trustees draw a cheque for the trust moneys upon the bankers in whose hands such moneys are, and cross that cheque with the name of certain other bankers, and having so crossed it deliver it to one of their number for the purpose of paying it into the bank of the bankers with whose name the cheque is crossed, the co-trustees are not liable for the misapplication of the money by the trustee to whom the cheque is delivered, if he strikes out the crossing from the cheque, and then receives and misapplies the money. *Ib.*

Assignment of Slaves upon Trust to Sell and Invest Proceeds—Incorrect Admission by Trustees that Proceeds were Invested—Lapse of Time and Acquiescence.]—Slaves in the West Indies were bequeathed to executors, upon trusts for a niece of the testator for her life with remainder to her children. The executors having renounced and disclaimed, administration with the will annexed was granted to the niece, who afterwards married a minor. Before her husband had attained twenty-one the husband and wife executed a settlement, reciting that the husband was, in right of the wife, possessed of the slaves, theretofore the property of her late uncle; but not in any manner referring to the will. The settlement purported to assign the slaves to trustees, in trust to sell and invest the proceeds and pay the income for the separate use of the wife for life, without power of anticipation, with trusts by way of remainder to the children of the marriage. Before the husband came of age, the husband and wife sold the slaves without noticing the settlement in the contract, but paid part of the purchase money to one of the trustees of the settlement, the other trustees not concurring in or being in fact aware of the sale or payment. An amicable bill was then filed on behalf of the infant children of the marriage, to have the trusts of the settlement carried into execution, or a new settlement made in conformity with an offer of the husband to execute such settlement on receiving 3,500*l.* out of the wife's fortune. This bill contained an allegation that the proceeds of the slaves had been invested in the names of the trustees. The trustees by their answer admitted the truth of the allegation. The husband and wife, answering separately, disputed the validity of the settlement, and stated that the wife was not intended to be bound by it; but the husband offered to execute a settlement on the above terms. The decree declared the settlement void, and directed a new settlement to be made upon the footing of the husband's offer. A settlement was accordingly executed and the 3,500*l.* paid to the husband. Afterwards it was discovered that the admission in the trustees' answer was incorrect, the trustee who received the proceeds of the slaves having applied the money to his own use, and having by false statements induced his co-trustees to believe, and upon their answer admit, that the investment in their names and his had been made as there stated. His circumstances were such that any attempt to recover the amount at any period would have been hopeless. More than twenty years after the wife was aware of these circumstances she instituted a suit against the co-trustees to make them personally liable for the breach of trust:—Held, first, that the above facts, independently of the admission of the co-trustees in their answer, did not render them personally liable in respect of the proceeds of the sale of the slaves, the title of the settlors not having been such as to enable the trustees legally to possess themselves of the fund: and, secondly, that in the circumstances of the case that admission did not create any such liability. *Derbishire* v. *Home*, 3 De G. M. & G. 80.

Semble, that a clause restraining a married woman from anticipation does not exempt her from the ordinary consequences of lapse of time and acquiescence; also, that in the circumstances above stated, the administratrix committed a breach of trust by marrying without providing for the security of the trust property; also, that having by her separate answer in the first suit stated that the first settlement was not intended to be binding upon her, she could not afterwards sue the trustees for non-performance of the trusts of it: also, that her having concealed from them the nature of her title when she assumed to settle the funds, would of itself have been a defence to such a suit. *Ib.*

Appointment of Co-Trustee Factor of Scotch Estates.]—The trustees of estates in Scotland appointed one of themselves to be factor, with a salary; and he, though of undoubted responsibility at that time, afterwards retained large balances at the annual settlements of accounts;

whereon one of the trustees, who was cashier, urged him to pay up; but the balances against him increasing, both trustees, after failing in their exertions to obtain payment, revoked his appointment as factor, and he became bankrupt, owing a large debt to the trust estate:—Held, by the lords (affirming decrees of the court of session in Scotland, in an action raised by the first heir of entail, to whom the trustees were bound to account for their management), first, that the appointment of one of the trustees to be factor, even though it gave him no right to charge as factor, was not of itself such a breach of trust as subjected the other trustees to all the consequences of it; secondly, that there was not such gross negligence, in the two trustees permitting the factor to retain balances, as to subject them to liability for the ultimate balance due from him to the trust estate, the lord chancellor observing, as to the first point, that the rule was the same in Scotland as in England. *Home* v. *Pringle*, 8 Cl. & F. 264.

iii. *Trustee joining in Receipts.*

When Liable—Receiving Money.]—Each trustee shall be charged no more than he actually receives. Otherwise, if the trustees join in receipts. *Spalding* v. *Shamler*, 1 Vern. 303.

Trustees joining in receipt are not chargeable unless they also rece ve the money. *Chambers* v. *Minchin*, 7 Ves. 198; 6 R. R. 111.

And see *Churchill* v. *Hobson*, 1 P. Wms. 241; Salk. 318.

Two trustees in a mortgage join in an assignment of the term, and in a receipt for the whole, each receiving a moiety only of the mortgage money, are to be answerable only for what they respectively receive. *Fellows* v. *Mitchell*, 1 P. Wms. 81; 2 Vern. 504, 515.

A trustee joining in a receipt and reconveyance of a mortgaged estate, though he does not receive the money, is liable, and, the receipt being in evidence, no inquiry can be directed as to the fact. *Scurfield* v. *Howes*, 3 Bro. C. C. 90.

—— **Joining for Conformity.**] — One of three trustees for sale was also the solicitor employed in the matter, and he alone received the purchase money, and neglected to apply it. The conveyance was executed, and the receipt signed by all three trustees:—Held, that the solicitor was not the agent of the other trustees, so as to make the receipt by him the receipt of all; and the other trustees having joined merely for the sake of conformity, were not chargeable. *Fryer's Estate, In re, Martindale* v. *Picquot*, 3 K. & J. 317; 26 L. J., Ch. 398; 3 Jur. (N.S.) 485; 5 W. R. 552.

Co-trustee held liable for acts of other, though he merely joined in receipt for conformity's sake, and never meddled in trust beyond that. *Bradwell* v. *Catchpole*, cited 3 Swanst. 78; 19 R. R. 180. S. P., *Westley* v. *Clarke*, Dick. 330.

A trustee charged, though he did not receive the money, under the circumstances, having joined in the receipt; the sale unnecessary; and permitting his co-trustee to keep and act with the money contrary to the trust; not charged in the respect of the interest of one of the cestuis que trust having notice of the breach of trust, and acquiescing. *Brice* v. *Stokes*, 11 Ves. 319; 8 R. R. 164. And see *Griffiths* v. *Porter*, 25 Beav. 236; and *English* v. *Willats*, 1 L. J., Ch. 84.

12. Agents Employed by Trustees.

a. Rights of Trustees in respect of Appointment.

Direction to Employ Particular Person.]—A direction that a particular individual shall be employed as the agent in the management of the testator's estates, where the trustees may have occasion for such a party, does not create a trust which he can enforce. *Finden* v. *Stephens*, 2 Ph. 142; C. P. Cooper, 318; 17 L. J., Ch. 342; 11 Jur. 1019; 12 *id.* 319.

A testator expressed a "wish and desire that F., in whose judgment and integrity he placed great confidence," should be appointed agent, receiver, &c., by his trustees for all purposes for which they might have occasion for an agent, &c.:—Held, that F. could not compel the trustees to appoint him agent, &c. *Ib.*

—— **Receiver and Manager.**]—A. S., being seised in fee of certain lands, devised the same to W. S. for life, with remainders over, and expressed it to be his particular desire, that his executors, whilst acting in the management of his affairs, and W. S. when he should enter into the receipt and management of the rents, should continue B. E. L. in the receipt and management thereof, and should likewise employ and retain him in the receipt, agency, and management of the rents of such other lands as should be purchased in pursuance of the directions of his will, at the usual fees allowed to agents:—Held, not a trust for B. E. L., and that the devisees were not bound to retain him as agent at the usual fees. *Shaw* v. *Lawless*, 5 Cl. & F. 129; 1 Dr. & Wal. 512; Ll. & G. t. Plunk. 558—H. L. (Ir.)

Testator directs "that A. be appointed receiver of his real and personal estate," and dies seised of no real estate, except an estate in the West Indies, having by his will directed a sum of money to be invested in the purchase of lands in England. A. appointed manager of the West India estate, upon entering into a personal recognisance to account for the produce. *Hibbert* v. *Hibbert*, 3 Mer. 681; 17 R. R. 169,

—— **Auditor.**] — A testator devised and bequeathed real and personal estate, which produced a considerable annual income, to trustees, on certain trusts, which would necessarily continue during several years; and he appointed A. auditor of his real estate during the continuance of the trusts, and directed his trustees to pay to A. a proper annual remuneration, with power to the trustees, in case of A. refusing or becoming unable to act as auditor, to appoint another auditor; and he directed the trustees to submit their accounts to the auditor once in every year. A bill was filed by the auditor to have the benefit of this appointment:—Held, that A., being able and willing to perform the duties of auditor, and not having been guilty of any misconduct, could not be removed by the trustees; and a reference was ordered to the master to fix the amount of his remuneration. *Williams* v. *Corbet*, 8 Sim. 349; 6 L. J., Ch. 182.

—— **Solicitor.**]—A direction in a will appointing a particular person solicitor to the trust estate, imposes no trust or duty on the trustees of the will to continue such person as their solicitor in the management and affairs of the

estate. *Foster* v. *Elsley*, 51 L. J., Ch. 275; 19 Ch. D. 518; 30 W. R. 596.

—— **Right to Dismiss Agent.**]—A codicil contained the following clause:—"I appoint C. my agent at a salary of 140*l.* a year and to be paid by quarterly payments, to live in my house called the Henblas, with the garden belonging to it, for which salary he must do my business and the business of my executors and trustees, and not be employed in the service of any other person or persons; and to live rent free as long as he continues to be my agent, that is, as long as he does my business honestly and to the satisfaction of my executors and trustees or any one of them." Pursuant to the powers of the will, trustees were appointed, and B., one of them, appointed H., an attorney, to act in all matters relating to the will and codicil. H. directed A. to make an inspection of certain real estate for which C. was agent. C. refused to assist in making the inspection, and refused to deliver up the documents relating to the estate. He was thereupon dismissed from the agency by H., pursuant to the express authority of B. An action of ejectment was brought to recover possession of Henblas:—Held, that even if C. had an estate for life in Henblas, it was defeasible upon the trustees being dissatisfied with his conduct; and that, even if the court had power to inquire whether the trustees were acting reasonably, he had misconducted himself, and the trustees had good grounds for their dissatisfaction. *Belaney* v. *Kelly*, 24 L. T. 738; 19 W. R. 1171.

Trustees may dismiss an agent for misconduct committed by him anterior to his own appointment. *Ib.*

Power to Appoint Attorney in English Colony or Abroad.]—Semble, that a trustee resident in England, appointed under an English will, can by the English law appoint an attorney to act in matters of discretion connected with a trust in an English colony or a foreign country. *Stuart* v. *Norton*, 14 Moore, P. C. 17; 3 L. T. 602; 9 W. R. 320.

b. Liability of Trustees for Acts of Agents.

i. *In General.*

Statute.]—*Trustee Act*, 1893, *s.* 24.

General Rule.]—A trustee may select solicitors and agents; and so long as he selects persons properly qualified, he cannot be made responsible for their intelligence or their honesty; but he cannot entrust them with any duties which they may be willing to undertake, or pay them any remuneration which they may demand; and he is bound to exercise his discretion in the matter. *Weall, In re, Andrews* v. *Weall*, 58 L. J., Ch. 713; 42 Ch. D. 674; 61 L. T. 238; 37 W. R. 779.

Ordinary Scope of Business.]—The rule that trustees, acting according to the ordinary course of business, and employing agents as prudent men of business would do on their own behalf, are not liable for the default of the agent so employed, is subject to the limitation that the agent must not be employed out of the ordinary scope of his business. *Fry* v. *Tapson*, 54 L. J., Ch. 224; 28 Ch. D. 568; 51 L. T. 326; 33 W. R. 113.

As to losses by agents of trustees, see *Litchfield, In re*, 1 Atk. 87. *Belcher, Ex parte*, and *Parsons, Ex parte*, Amb. 218; 1 Ken. 38.

Though the appointment by trustees of a co-trustee as factor of estates would not make them liable for his defaults, by making him their agent they would be liable for his defaults, the same as of any other agent. The principle is the same in Scotland as in England. *Home* v. *Pringle*, 8 Cl. & F. 264—H. L. (Sc.)

A., B., C., D., and E. (the two latter being married women) take out administration to an intestate, and afterwards appoint C. to be the acting administrator, and direct the creditors to pay their debts to him. C. becomes insolvent:—Held, that A., B., and C., and the husbands of D. and E., are responsible for C.'s receipts. *Lees* v. *Sanderson*, 4 Sim. 28.

It being the duty of A., under the trusts of a settlement, to remit a sum of 1,000*l.* from India to B., C., and D., in England, he permitted it to remain in the hands of private traders, in whose hands it was lost:—Held, that A. was responsible for it, though it had been properly invested by those parties, and been sold out at the request of the cestuis que trust, and the loss was occasioned by their subsequent bankruptcy, and the bankruptcy of their correspondents in London, on whom they had drawn bills for the amount. *Bacon* v. *Clark*, 3 Myl. & Cr. 294.

The trustees of a legacy which had been invested in stock, authorise the sale of the stock, and permit B. to receive the proceeds; B. retains the money in his hands, and, during many years, the legatee, who was not aware that the legacy had ever been invested in stock, or that stock, in which it once was vested, had been sold, deals with B., as the only person accountable to her for the money; notwithstanding these dealings on the part of the legatee, the trustees continue to be accountable for the stock. *Adams* v. *Clifton*, 1 Russ. 297; 25 R. R. 53.

The half-yearly rents on several occasions were duly and properly received by the solicitor and agent of the trustees, and the balances were by him remitted to the tenant for life; but on a subsequent occasion the tenant for life allowed the balance to remain in the hands of the agent until it became known that he was in embarrassed circumstances:—Held, that the trustees were not responsible for the loss of this balance, it not being the result of negligence on their part, but on the part of the legatee, the tenant for life. *Horn* v. *Coleman*, 26 L. J., Ch. 213; 2 Jur. (N.S.) 1127; 5 W. R. 32.

Agent Employed to Collect Money—Onus probandi.]—A common order having been made for the administration of a testator's estate, the district registrar by his certificate found the outstanding personal estate to consist in part of book debts amounting nominally to 291*l.*, as to 113*l.*, part of which he certified that it represented a portion of book debts which the executors had employed H. to collect, and for which H. had not accounted, and had claimed to deduct 55*l.* for remuneration, but that 25*l.* was enough. The certificate went on to say that H. had gone into liquidation, and that no part of the 113*l.* was likely to be recovered. No application was made to vary this certificate. It appeared that H. had collected in all 168*l.*, had paid to the

executors in April, May, and June, 1880, sums amounting in all to 55*l.*, and had gone on collecting without making any further payment to the executors till July, 1881, when a receiver was appointed in the action, but it did not appear when he became insolvent, nor at what times the moneys received came to his hands:—Held, that where an executor or trustee employs an agent to collect money under circumstances which make such employment proper, and the money collected is lost by the agent's insolvency, the burden of proof is not on the executor to show that the loss was not attributable to his own default, but on the persons seeking to charge him to prove that it was. *Brier, In re, Brier* v. *Evison*, 26 Ch. D. 238; 51 L. T. 133—C. A.

Trust Property Stolen by Trustee's Servant—Liability where Trustee Remunerated.]—A trustee, when remunerated for his services, is not liable to the trust estate for loss caused by the thefts of a servant employed by him, where such employment is necessary and the trustee has exercised due care in the selection of the servant:—Semble, the fact that a trustee is remunerated for his services does not add to his liability as trustee. *Jobson* v. *Palmer*, 62 L. J., Ch. 180; [1893] 1 Ch. 71; 3 R. 173; 67 L. T. 797; 41 W. R. 264.

ii. *Bankers.*

Money Left in Hands of Bankers—Failure of Bank.]—Trustees and executors who, for upwards of a year after their testator's death, allowed a considerable portion of the assets to be unproductive in the hands of a banker, who failed, were, under the circumstances, charged with the loss. *Moyle* v. *Moyle*, 2 Russ. & M. 710.

Trustee incautiously leaving trust fund in banker's hands without security, held liable for loss on banker's failure. *Anon.*, Lofft, 492.

If trustee pays rents to a banker, in credit, who fails, the trustee is not liable. *Belchier, Ex parte, Parsons, Ex parte*, Amb. 219; 1 Ken. 38.

Trustees having contracted to purchase land, sell out stock, and deposit the produce at a banker's, when the purchase seems to be near completion. They are not liable to make good the money if the bankers fail. *France* v. *Woods*, Tam. 172; 31 R. R. 75.

A trustee of certain estates received the proceeds and paid them into a bank, where they were left for many years. A suit was instituted, and a receiver appointed of the rents and interest. The bank having failed, it was held that the cestuis que trust, who were infants, must not be prejudiced by the neglect of the trustee to place the fund in safety, and that the trustee was liable to refund the money lost. *Drever* v. *Mawdesley*, 16 Sim. 511; 18 L. J., Ch. 273; 13 Jur. 330.

—— **Deposit Account.**]—Trustees made personally liable for loss arising from placing trust money with bankers on a deposit account, which was not authorised by the will, and that, notwithstanding a trustee indemnity clause against losses by a banker of money, deposited for safe custody. *Rehden* v. *Wesley*, 29 Beav. 213.

—— **On Notes carrying Interest.**]—A testator died in March, 1823. In January, 1824, and January, 1825, the executors and trustees deposited part of the assets in the hands of bankers, on their notes carrying interest. The bankers failed in November, 1825, and, no necessity having been shown for such deposit, the trustees were held personally responsible for the loss. *Darke* or *Drake* v. *Martyn*, 1 Beav. 525.

—— **Order to Invest in Consols.**]—Trustee depositing a trust fund with his bankers, accompanied by an order in writing to invest the money in consols, answerable for the omission of the bankers to make the investment, where he made no subsequent inquiry respecting it until about five months afterwards, when the bankers became bankrupt. *Challen* v. *Shippam*, 4 Hare, 555.

—— **On Declaration of Trust.**]—G., being entitled to a share of an estate, went abroad, leaving a power of attorney to receive such share. The estate was sold, but the purchaser requiring his confirmation, his share was deposited in the names of E. and P. in a bank on a declaration of trust. On the confirmation arriving, E. was repeatedly applied to for more than four months, but neglected to hand the fund over, alleging a difficulty in making out the account; the bank failed, and the money was lost:—Held, that E. was liable to restore the money with interest and pay the costs, P. being always ready to hand over. *Goff* v. *Etty*, 20 L. T. 358.

Agreement by Receiver with Sureties for Payment of Rents into Bank in their Names.]—A receiver in order to obtain sureties, enters into an agreement with them that A., the partner of one of the sureties, shall attend upon the receipt of the rents of the estates, and that they shall be paid into a bank at L., in the name of the sureties: and that all moneys to be applied for the purposes of the receivership shall be drawn for by checks prepared and written by A., and signed by the receiver. This agreement having been acted upon, the bank at L. failed, and a loss was sustained. The account was then transferred to another bank, under the same agreement, when another loss ensued by failure of the bankers:—Held, upon petition, that the receiver was responsible for the amount of losses, &c. *White* v. *Baugh*, 9 Bligh (N.S.) 181; 3 Cl. & F. 44.

Moneys Left in Hands of Bankers in India.]—Trustee, allowing moneys appropriated by him for a particular purpose to remain in the hands of bankers in India, after he had quitted that country, the bankers becoming insolvent before the moneys were paid over by them:—Held, liable for the loss. *Brown* v. *Clark*, 1 Jur. 838.

Trust Money to Separate Account of Trustee—Change of Trustee.]—A trustee was ordered to pay the balance of moneys in his hands belonging to his testator's estate to new trustees, and was discharged from his trusteeship. He kept the trust money in his name at a bank, but to a separate account, for some time after the costs had been taxed and the balance ascertained. The bank shortly afterwards failed:—Held, that he was personally liable to make good the loss which had accrued to the trust estate by reason of the failure of the bank. *Lunham* v. *Blundell*, 27 L. J., Ch. 179; 4 Jur. (N.S.) 3; 6 W. R. 49.

Trustee not charged with a loss by failure of the banker to the agent; in whose hands the money was deposited pending a transaction for the change of

a trustee. *Adams* v. *Claxton*, 6 Ves. 226 ; 5 R. R. 263.

Trust Money to General Account of Agent.]—Preparatory to the final winding up of a trust, the agent and solicitor of the trustee paid the trust money to his bankers, to the credit of his general account with them, and informed the cestui que trust that the money was lying idle at his bankers. The cestui que trust took no notice of the information, and more than a month afterwards the bankers failed :—Held, that as the agent did not inform the cestui que trust that the money had been paid to the credit of his general account, and as the payment to the bankers was not necessary to the winding up of the trust, the agent and the trustee were jointly liable for the money. *Macdonnell* v. *Harding*, 7 Sim. 178 ; 4 L. J., Ch. 10.

Account brought into Chambers of Moneys in Bank.]—Trustees included in their account brought into chambers certain sums which they had received, and which stood in their names in a bank. They were ordered to pay the amount found due into court, and ultimately did so partly out of subsequent receipts, leaving the sum in question still in the bank. On the failure of the bank :—Held, that the trustees were liable for the loss of the sums included in the amount passed, but not for sums subsequently paid in. *Wilkinson* v. *Bewick*, 4 Jur. (N.S.) 1010 ; 6 W. R. 849.

Payment by Administratrix to Separate Account.]—An administratrix, plaintiff in a suit for administration of the estate, received the purchase money of property sold under a contract directed by the decree of the court to be carried into effect. The decree also directed sales of mortgaged property, and that the mortgagees should be paid out of the produce of the sales ; it gave no direction about the purchase money of the property sold by the administratrix. With the advice of the solicitors of the principal, but not all, of the beneficiaries, she paid the money into a private bank to a separate account, and left it there for many months. The administratrix applied by petition, and thereon obtained money out of court to pay off the mortgagees while she had the purchase money lying at the bankers. The bank failed : —Held, that she was not liable for a breach of trust. *Wilks* v. *Groom*, 3 Drew. 584 ; 25 L. J., Ch. 724 ; 2 Jur. (N.S.) 681 ; 4 W. R. 697.

iii. *Brokers.*

Employment of Broker by Assignee of Bankrupt.]—Assignee of bankrupt employs a broker to sell a quantity of tobacco. The broker receives the money, and at the end of ten days fails, before he paid it over. The assignee not bound to make it good. *Belchier, Ex parte, Parsons, Ex parte*, Amb. 218.

Stockbroker.]—A trustee investing trust funds is justified in employing a broker to procure securities authorised by the trust and in paying the purchase-money to the broker, if he follows the usual and regular course of business adopted by ordinary prudent men in making such investments. *Speight* v. *Gaunt*, 53 L. J., Ch. 419 ; 9 App. Cas. 1 ; 50 L. T. 330 ; 32 W. R. 435 ; 48 J. P. 84—H. L. (E.)

A broker employed by a trustee to buy securities of municipal corporations authorised by the trust, gave the trustee a bought-note which purported to be subject to the rules of the London stock exchange and obtained the purchase money from the trustee upon the representation that it was payable the next day, which was the next account day on the London exchange. The broker never procured the securities but appropriated the money to his own use and finally became insolvent. Some of the securities were procurable only from the corporations direct and were not bought and sold in the market, and there was evidence that the form of the bought-note would have suggested to some experts that the loans were to be direct to the corporations ; but there was nothing calculated to excite suspicion in the mind of the trustee or of an ordinary prudent man of business ; and such payment to a broker was in accordance with the usual course of business in purchases on the London exchange :—Held (Lord FitzGerald doubting), that the trustee was not liable to the cestuis que trust for the loss of the trust funds. *Ib.*

Semble, by the Earl of Selborne, L.C., that if the broker had represented to the trustee that the contracts were with the corporations for loans direct to them from the trustee he would not have been justified in paying the money to the broker, for which in such a case there would have been no moral necessity or sufficient practical reason. *Ib.*

A trustee must, in order to escape liability for a loss of the trust property, show that in connection with the transaction in which the loss occurred he acted not only in the ordinary mode of business, but also in the mode in which a prudent man of business would act in such a transaction. *Bullock* v. *Bullock*, 56 L. J., Ch. 221 ; 55 L. T. 703.

B., one of the trustees of a marriage settlement, was employed by his acting co-trustee to make a change of investment of part of the trust property ; but although he sent to his acting co-trustee contract-notes for the new investments, the latter were never completed, and the moneys were misappropriated by a third party. B.'s co-trustees made no inquiries at all for the securities to which the contract-notes related for over eighteen months, and made no efficient inquiries until three years after the transaction had taken place ; and when the loss was discovered B. had shortly before become bankrupt, having up to within a few months of that time been in good credit :—Held, that B.'s co-trustees were liable for the loss, having been guilty of negligence in not prosecuting early inquiries, which would have resulted in information upon which they might have recovered the trust moneys from B. *Speight* v. *Gaunt*, supra, distinguished. *Ib.*

iv. *Solicitors.*

Employing incompetent Solicitor.]—Trustees are bound to employ competent solicitors and agents ; and therefore, where trustees lent trust funds upon mortgage and their solicitor accepted without inquiry an abstract and a valuation made for the purpose of a previous mortgage, and it afterwards turned out that the solicitor for the mortgagor had concealed the fact that since the date of the mortgage and valuation two other mortgages had been effected, and loss resulted to the trust estate in

consequence :—Held, that the trustees were liable to make good the loss to their cestuis que trust. *Hopgood* v. *Parkin*, L. R. 11 Eq. 74; 22 L. T. 772; 18 W. R. 908.

Fraud of Solicitor.]—A trustee will be liable to make good to the trust estate a loss which has been occasioned by the fraud and forgery of the solicitor whom he employed, although in employing such solicitor he may have exercised ordinary care and discretion. *Bostock* v. *Floyer*, 35 Beav. 603; 35 L. J., Ch. 23; L. R. 1 Eq. 26; 11 Jur. (N.S.) 962; 13 L. T. 489; 14 W. R. 120.

Upon the occasion of the investment of a trust fund on mortgage, the trustee employed the same solicitor as the mortgagor. Subsequently he had reason to suspect the sufficiency of the security, but took no steps to inquire into the matter. It afterwards turned out that the solicitor had practised a fraud on the trustee, and that the security was insufficient:—Held, that the trustee was liable for the loss occasioned to the trust estate. *Sutton* v. *Wilders*, L. R. 12 Eq. 373; 25 L. T. 292; 19 W. R. 1021.

Money allowed to remain in Solicitor's Hands.]—Trustees are not justified in allowing trust money to get into the hands of a solicitor, or in allowing him to hold the securities upon which the trust fund is invested; and the law is the same where the estate is being administered by the court. *Dewar, In re, Dewar* v. *Brooke*, 54 L. J., Ch. 830; 52 L. T. 489; 33 W. R. 497.

Trustees of an estate which was being administered by the court employed a solicitor to manage the trust estate, and allowed him to receive the trust moneys for the purpose of investment. The solicitor represented that he had duly made investments, and he rendered periodical accounts to the trustees purporting to show such investments, and paid the interest upon them. He had, in fact, never made any investments, but had misappropriated the money, and ultimately he filed a liquidation petition, and a part of the trust fund was thus lost:—Held, that the trustees were liable to make good the loss to the trust estate. *Ib.*

Trustees of stock sold it out, and committed the proceeds to their solicitor for investment, by whom it was misapplied, and lost:—Held, that the trustees were liable for a breach of trust, and that the cestuis que trust were entitled to relief against both the trustees and the solicitor, and that they might sue either the trustees alone or the trustees jointly with the solicitor. *Rowland* v. *Witherden*, 3 Mac. & G. 568; 21 L. J., Ch. 480.

Payment by Solicitor into Bank which subsequently failed.]—Preparatory to the final winding up of a trust, the agent and solicitor of the trustee paid the trust money to his bankers, to the credit of his general account with them, and informed the cestui que trust that the money was lying idle at his bankers. The cestui que trust took no notice of the information; and, more than a month afterwards the bankers failed:—Held, that, as the agent did not inform the cestui que trust that the money had been paid to the credit of his general account, and as the payment to the bankers was not necessary to the winding up of the trust, the agent and the trustee were jointly liable for the money. *Macdonnell* v. *Harding*, 7 Sim. 178; 4 L. J., Ch. 10.

Liability of Assignee of Bankrupt, although no Proof or Allegation of Fraud or Negligence.]—Assignee of a bankrupt, employing an attorney to sue for and recover debts due to the estate, is answerable for his receipts, and if he misapplies the money must make it good, although no proof or allegation of fraud or negligence. But there are two modes by which the assignee may relieve himself from this responsibility; by obtaining the assent of the creditors, or by having the approval of the master in respect to the person appointed agent. Account passed by the commissioners, ordered to be reviewed before a master. *Townsend, Ex parte*, 1 Moll. 139.

Delivery of Executed Deed to Solicitor.]—A., one of two trustees and executors of a will, and resident in London, authorised a person to get in three mortgages (part of the estate). The solicitor forwarded the deeds of conveyance to B., the other trustee, in the country, who executed and returned them. The solicitor received the money and paid it to A. alone, who misapplied it:—Held, that B. was liable for the amount. *Cowell* v. *Gatcombe*, 27 Beav. 568.

Where trustees for sale executed the conveyance, and placed the same, with the receipt indorsed, in the hands of a solicitor, who misapplied the purchase money, and became bankrupt:—Held, that the trustees were liable for a breach of trust. *Ghost* v. *Waller*, 9 Beav. 497.

A trustee to uses, with power of sale, which uses, in the event, became executed in A. for an absolute estate in fee, was held not liable to A. for the purchase money of part of the estates, where the sale was conducted and the money received by the solicitor of the trustee, although the evidence was conflicting, whether he acted in the matter by the direction of the trustee, or by the direction of A., the conveyance being executed by A. alone. *Waugh* v. *Wyche*, 2 Drew. 318; 23 L. J., Ch. 833; 2 W. R. 485.

A trustee of the legal estate in a mortgage in trust for A. absolutely, executed a reconveyance, and signed a receipt for the mortgage money, and handed it to one of A.'s executors, who was also his own solicitor, and who afterwards misapplied the money:—Held, that the money having got into the hands of the executor, the trustee was not liable. *Ib.*

Payment by Solicitor of Trust Funds to one Trustee only.]—A sum of 3,000*l.* was vested in A. and B. on certain trusts. The cestui que trust mortgaged it to C. for 1,200*l.*, and C. transferred the mortgage to E. and F. on family trusts, with power to E. and F. to give receipts. The solicitor of A. and B., having notice of the secondary trusts, paid the 1,200*l.* to F. alone:—Held, that A. and B. were personally liable to repay the money, with interest and costs. *Hall* v. *Franck*, 11 Beav. 519; 18 L. J., Ch. 362; 13 Jur. 222.

Dividend received by Solicitor of Trustee—Interest.]—An administratrix, who had permitted her solicitor to receive dividends of a fund set apart for an infant next of kin, was ordered to account for the dividends, with interest at the rate of 3*l.* per cent. with half-yearly rests. *Gilroy* v. *Stephens*, 51 L. J., Ch. 834; 46 L. T. 761; 30 W. R. 745.

c. Personal Liability of Agents.

i. *In General.*

General Principle as to Profits.]—Nothing can be better settled, or more in conformity with the dictates of justice, than the rule, that persons standing in the situation of trustees or of agents must account to their principals or cestuis que trust for all the benefits which they themselves obtain by virtue of that character or relation. *Williams* v. *Stevens*, 4 Moore, P. C. (N.S.) 235; 36 L. J., P. C. 21; L. R. 1 P. C. 352; 12 Jur. (N.S.) 952; 15 W. R. 409.

Co-Partners.]—A., a partner in a house of agency in India, died, having by his will directed his estate to be called in, and invested on certain trusts, and appointed two of his co-partners his executors; they, however, suffered his share of the partnership to remain in the house. After A.'s death, B. and C. were admitted as partners, and they knew that A.'s share was in the house, and that it was subject to the trusts of his will. They afterwards retired, and other partners were admitted. The house ultimately failed:—Held, that B. and C. were not responsible for the breach of trust committed by their co-partners, the executors. *Twyford* v. *Trail*, 7 Sim. 92.

Mere Agent of Trustee.]—A mere agent of the trustee may not be accountable to the cestui que trust, but otherwise with respect to a substituted trustee, who accounts to nobody else. *Myler* v. *Fitzpatrick*, 6 Madd. 360; 23 R. R. 247.

A trustee empowered S. to manage a trust estate. S. accounted to him. The trustee died, yet S. was decreed to account again to the cestui que trust. *Pollard* v. *Downes*, 2 Ca. Ch. 121.

A trustee, without any authority from the cestuis que trust, agreed with his agent that the latter should pay him 100*l.* a year from the trust property, and retain the residue (130*l.*) for himself. No fraud was proved against the agent (who denied any knowledge of the trust), but no explanation was given. In a suit for an account by a cestui que trust after the trustee's death:—Held, that, notwithstanding the general rule that a trustee's agent is accountable to the trustee only, an inquiry should be had of the circumstances attending the agent's appointment and his knowledge of the trusts affecting the property. *Archer* v. *Lavender*, Ir. R. 9 Eq. 220.

—— **Assisting at Breach of Trust.**] — An agent assisting in a breach of trust is personally responsible. *Att.-Gen.* v. *Leicester Corporation*, 7 Beav. 176.

Officers of a Corporation.]—A bill will lie against directors, committeemen, and other officers of a corporation, for relief against a breach of trust, fraud, and mismanagement; for they are agents to those who entrust them to superintend the affairs of the company, and a gross non-attendance makes them guilty of the breaches of trust in others. So a supine negligence, by which a great loss arises, makes them all equally guilty in the second degree, and liable; for they must not neglect to exercise the powers vested in them, to prevent the ill consequences arising from a confederacy. *Charitable Corporation* v. *Sutton*, 2 Atk. 405; 9 Mod. 349.

Clerk to Paving Trust.]—If trustees under a paving act sign cheques drawn by the clerk of the person who is clerk of the trust, those cheques being drawn so as to be alterable from small sums to larger, the trustees cannot charge the clerk to the trust with negligence if they are altered, it being their duty not to sign cheques drawn in such a manner; nor can they charge him with his clerk's misconduct, which would have been prevented had the trustees done their duty in the way in which the clerk to the trust had fair reason to expect they would. *Whitmore* v. *Wilks*, 3 Car. & P. 364.

Agent of Administrator.] — Agent of an administrator keeping money of the intestate's in his hands which he had proposed to his principal to lay out in the funds, ordered to pay interest with annual rests. *Brown* v. *Southouse*, 3 Bro. C. C. 107.

Disclaiming and Renouncing Trustee and Executor Acting as Agent.]—If one of two persons named trustees and executors disclaims and renounces and afterwards possesses himself of assets as the agent of the other, who has accepted the trust and proved the will, he does not thereby become accountable as a trustee and executor, and ought not to be made a party to a suit for the administration of the estate. *Dove* v. *Everard*, 1 Russ. & M. 231; Tam. 376.

Persons Acting under Power of Attorney.]—The commercial correspondents of executors, acting under a power of attorney:—Held, to be responsible to the testator's estate for the amount of the produce of stock, part of such estate, sold by them and applied by the direction of the executors in payment of a balance due from the latter, as partners in a commercial concern, to their correspondents, with full knowledge on the part of the correspondents, that the stock was part of the testator's assets. *Wilson* v. *Moore*, 1 Myl. & K. 127.

There is no primary liability in respect of breaches of trust, all parties to a breach of trust being equally liable; and it is no objection to a suit brought by parties seeking relief against a breach of trust, that one of the defendants against whom no relief is prayed, may have been a party to such breach of trust. *Ib.*

Executor who has not Disclaimed.] — A testator named A., a trustee of part of her personal estate, and appointed him, her son, and X.'s husband executors; the son and X.'s husband alone proved the will, but A. did not disclaim. The son and X. took life interests in the trust fund, to a part of which the plaintiff became, by X.'s appointment, entitled. A. had been the testator's agent, and acted in the management of the assets, under power of attorney from the executors who proved and X.; and, after the son's death, from the surviving executor and X., which authorised him to receive the assets for the uses and purposes of the will. On A.'s death, the defendant, his son and executor, acted under a similar power, and continued to do so after the death of X.'s husband. X. and her husband get possession of the entire assets:—Held, that A. and the defendant were responsible as trustees, and could not protect themselves as being agents only. *Montgomery* v. *Johnson*, 11 Ir. Eq. R. 476.

ii. *Accountants.*

Misapplication of Funds by Employers.]—Accountants employed by trustees, through whose hands the accounts of the trust estate passed, are in the nature of servants, and bound

to accept as correct statements made by one or other of the trustees with regard to the intended application of the trust fund, and are not liable for the misapplication of the trust fund by their employers, on the ground of negligence, by not seeing that the fund was applied properly. *Rodbard* v. *Cooke*, 36 L. T. 504; 25 W. R. 555.

iii. *Stockbrokers.*

Broker Authorised by only One of Two Trustees.]—Where A. and B. are trustees, and one of them desires a broker to sell stock standing in their joint names, and undertakes to procure his co-trustee to join in the transfer:—Held, that unless such co-trustee authorise or concur with the other trustee in making a transfer, the broker was not warranted to make the sale. *Leyton* v. *Sneyd*, 8 Taunt. 532; 2 Moore, 588.

Payment to Solicitor of Trustees—Notice.]—Four executors holding stock in their name directed their solicitor to sell the stock. The solicitor, in the name of his firm, gave to a stockbroker whom the solicitor had employed in stock exchange speculations directions to sell the stock. The stock was sold by the broker, and the solicitor returned to the stockbroker transfers of the stock, with receipts endorsed, signed by the four executors. The sale was completed, and the stockbroker sent to the solicitor a cheque for part of the purchase money for the shares, and carried the balance on the transaction to the credit of the solicitor in the account between them, which account was afterwards settled by a payment made to the stockbroker:—Held, that, under the circumstances, the stockbroker must be held to have had notice that the shares were not the property of the solicitor, and that, though the solicitors had from the executors authority to receive the purchase money, payment to him, by giving him credit in an account between them, that was not sufficient to discharge the stockbroker, who remained liable to the executors for the balance. *Pearson* v. *Scott*, 9 Ch. D. 198; 38 L. T. 747; 26 W. R. 796.

Firm of Stockbrokers—One Member a Trustee.]—A trustee, one of a firm of stockbrokers, misapplied the trust securities. His partners were, under the circumstances, made responsible. *De Ribeyre* v. *Barclay*, 23 Beav. 107; 26 L. J., Ch. 747.

A., who was in partnership with B., C., and D., as stockbrokers, was one of the trustees of the plaintiff's marriage settlement. Some Portuguese bonds belonging to her, which were in A.'s custody, were included in the settlement. After the marriage, the firm bought some Brazilian bonds on account of the trust. The court, from the course of dealing, considered the bonds to be in the custody of the firm, and A., the trustee, having applied them to his own use:—Held, that his co-partners were (as custodians) liable to replace them. *Ib.*

iv. *Bankers.*

Placing Trust Funds to Private Account—Trustee.]—Bankers, under the circumstances of the case, decreed to refund moneys which had been drawn by a trustee from a trust account standing in their books, and placed to the credit of the trustee's private account at the bank, upon the balance of which latter account the bankers were creditors. *Pannell* v. *Hurley*, 2 Coll. C. C. 241.

—— **Receiver.**]—P., being receiver of the rents of the R. estate, had a private account with certain bankers; he asked leave to overdraw that account, to which the bankers assented; and, at the same time, he promised to introduce the R. estate account to the bankers. He accordingly overdrew his private account, and opened a separate account called the "R. estate account." Afterwards the bankers, by his direction, transferred the balance of the R. estate account to the private account, which was then overdrawn. P. became insolvent:—Held, that the bankers were liable to the owner of the R. estate for the balance. *Bodenham* v. *Hoskins*, 2 De G. M. & G. 903; 21 L. J., Ch. 864; 16 Jur. 721.

Bankers not Cognisant of Intention to Commit Breach of Trust.]—In order to hold a banker justified in refusing to pay a cheque of his customer, the customer being an executor, and drawing a cheque as executor, there must be a misapplication of the money intended by the executor so as to constitute a breach of trust, and the banker must be cognisant of that intention. *Gray* v. *Johnston*, L. R. 3 H. L. 1; 16 W. R. 842.

The existence of a personal benefit to the banker, designed or stipulated for, as a consequence of the payment, would be strong evidence that the banker was privy to the breach of trust. *Ib.*

Bankers had acted as such to J., who carried on business with his son-in-law under the style of J. & M., but whose accounts with them were kept in his own name alone, and were unsettled at his death. He left a will, bequeathing all his property to the use of his wife for life, and after her death to be divided among their children as she might think fit; part of the property consisted of life policies which were put into the hands of the bankers, together with the probate of J.'s will, and they received the amount of the policies, made up their accounts, and, after deducting their own unsettled claims, declared a certain sum to remain due from themselves to the executrix. She continued her husband's business with his late partner under the style of J. & M., and a new account was opened with the bankers in the name of the new firm, and she, as executrix, drew a cheque for the amount stated to be due to her, and paid it in to the bankers to be credited to the firm of J. & M., and it was so credited and paid out, with other money, on account of cheques drawn by the new firm:—Held, that these circumstances were not in themselves sufficient to show that a breach of trust had been committed, and that the bankers knew of the intention to commit it so as to render them liable to replace the money. *Ib.*

Bankers, the agents of executors, authorised by them to receive certain assets, but prior to receiving them advancing the amount to the executors in the course of their duty as agents, and afterwards applying the assets when received in payment of the amount of such advances, are not responsible, in respect to the misapplication by the executor's agents, not being privy to any intention of such misapplication. *Keane* v. *Robarts*, 4 Madd. 332; 20 R. R. 306.

When a bank, with knowledge of the relative position of the parties, places the proceeds of a

promissory note, which has been made in its favour by A. (a person just come of age), unreservedly in the power of B. (a person who stands in loco parentis to A.), knowing at the time that B. claims to be a creditor of A. to a large amount for necessaries supplied, and B. afterwards misappropriates the money, the bank will be restrained from suing on the note. *Dettmar* v. *Metropolitan and Provincial Bank*, 1 H. & M. 641 ; 10 L. T. 63.

Transfer by Three Persons to Secure Loan—Authority to Sell—Transfer to Nominees of Customer.]—G., a stockbroker, who was one of three trustees and acted as broker to the trust, proposed to his co-trustees to sell B. stock belonging to the trust and reinvest in N. E. stock. The three trustees then, on the 27th of January, 1882, executed a transfer of the B. stock for a nominal consideration to two persons who were officers of a bank of which G. was a customer. G. gave the transfer to the bank as security for a loan by them to him, and the transfer was registered. G., in February, 1882, paid off the loan, and on the 15th of February the bank transferred the stock to purchasers from G., and, without giving any notice to G.'s co-trustees, allowed him to receive the purchase money. He invested it in N. E. stock in his own name. In 1883 he sold the N. E. stock and misappropriated the proceeds. Shortly after the sale of the B. stock G. had given an account to his co-trustees showing the sale of B. stock and a reinvestment in N. E. stock, and in 1884 he rendered another account in which he represented the N. E. stock as still forming part of the trust funds. In 1885 he absconded. The co-trustees remembered hardly anything about the transaction, but admitted the genuineness of their signatures to the deed of transfer :—Held, that the bank had occasioned the loss to the trust estate by allowing the purchase money to come to the hands of G. who had no authority to receive it, and whom they had no sufficient reason for believing to have authority to receive it, and that the bank must therefore make it good at the suit of the co-trustees, although the co-trustees had been negligent in not seeing that the N. E. stock was registered in the joint names of the trustees. *Magnus* v. *Queensland National Bank*, 57 L. J., Ch. 413 ; 37 Ch. D. 466 : 58 L. T. 248 ; 36 W. R. 577—C. A. Affirming 52 J. P. 246.

Deposit of Deeds with Bankers.]—B., having made a post-nuptial settlement on his wife, obtained from the trustees title deeds of the property and deposited them with his bankers as a security for money advanced :—Held, that the trustees were entitled to recover the deeds, the bankers not being purchasers within 27 Eliz. c. 4, s. 2. *Kerrison* v. *Dorrien*, 9 Bing. 76 ; 2 M. & Scott, 114 ; 1 L. J., C. P. 166.

—— **Mortgage Deed Deposited by Trustee.**]—B., a trustee, laid out the trust money, together with other money in his hands, upon mortgage in his own name, and executed a declaration of trust as to so much of the mortgage debt as represented the trust money. He afterwards deposited the mortgage deed with his bankers as security for money advanced to him, and absconded :—Held, in the absence of negligence on the part of the cestui que trust, that the deposit of the deed passed no interest in the trust fund to the bankers. *Stackhouse* v. *Jersey* (*Countess*), 30 L. J., Ch. 421 ; 7 Jur. (N.S.) 359 ; 4 L. T. 204 ; 9 W. R. 453.

Measure of Liability.]—Bankers of trustees wrongfully sold out stock, and applied it to their own purposes :—Held, that the measure of their liability was the amount paid in replacing the stock. *Sadler* v. *Lee*, 6 Beav. 324 ; 12 L. J., Ch. 407 ; 7 Jur. 476.

And see post, F. 2.

v. *Solicitors.*

Constructive Trustees—Absence of Fraud.]—Although the responsibility of trustees may be extended in equity to persons who are not properly trustees, if they are found either making themselves trustees de son tort, or actively participating in any fraudulent conduct of the trustee, to the injury of the cestui que trust, yet strangers are not to be made constructive trustees, merely because they act as agents of trustees in transactions within their legal power, even though such transactions may be such as the court would not approve of. *Barnes* v. *Addy*, 43 L. J., Ch. 513 ; L. R. 9 Ch. 244 ; 30 L. T. 4 ; 22 W. R. 505. S. P., *Hutchins* v. *Hutchins*, 10 Ir. Eq. R. 453.

A solicitor acting for the sole survivor of three trustees, prepared, by his direction, a deed appointing the husband of the cestui que trust sole trustee in his place, and another solicitor, acting for the cestui que trust and her husband, perused and approved of the draft. The deed was executed, and the trust fund transferred to the husband as new trustee, and by him sold out and never replaced. There being no ground for imputing to either of the solicitors knowledge or suspicion of any improper design in the transaction :—Held, that neither of them was liable for the loss occasioned by the breach of trust. *Ib.*

—— **Costs.**]—The court disapproves of the practice of making solicitors and others, who are properly witnesses, and who are not chargeable with any part of the relief prayed, parties to suits with a view of charging them with costs alone. *Ib.*

A party advising a loan unauthorised by the trust for the purpose of deriving a benefit therefrom, as by obtaining payment out of the money lent of a debt due to him by the borrower, is liable for any loss consequent on the breach of trust. But where the solicitors who were concerned for the borrower acted also usually, and to some extent in this case, as the solicitors of the trustee, but another solicitor who was called in on behalf of the trustee, and one of the cestuis que trust, assented to the loan, and the loss did not take place upon the original security, which was ample in point of value, but upon a security substituted for it in pursuance of a provision in the original mortgage deed, and it was not proved, though it was alleged, that the solicitors had applied part of the money lent in payment of a debt due to them by the borrower ; the bill of the cestuis que trust was dismissed as against the solicitors, but without costs. *Fyler* v. *Fyler*, 3 Beav. 550 ; 5 Jur. 187.

—— **Solicitor Acting for both Sides.**]—Quære, whether a solicitor acting for both sides, if he omits to call for payment of the trust moneys into court, may not be made answerable for any loss occasioned thereby. *Gresley* v. *Heathcote*, 3 L. J. (O.S.) Ch. 107.

—— **Money paid through Solicitor—Improper**

Investment.]—A solicitor who, as agent for a trustee, and with full notice of the trusts, receives from such trustee a cheque representing trust moneys intended for investment on a mortgage which is an improper security, and pays such cheque into his own banking account, and next business day pays the mortgage money to the mortgagor by his own cheque for the same amount, is not liable as a constructive trustee. Semble, the case would be the same if notes were given to the solicitor instead of a cheque. *Brinsden* v. *Williams*, 63 L. J., Ch. 713; [1894] 3 Ch. 185; 8 R. 574; 71 L. T. 177; 42 W. R. 700.

—— **Notice of Settlement—Sales of Land by Solicitor.**]—A settlement of land in Wales, the property of the husband, was executed shortly after a marriage, which took place in India. The husband and wife went to reside in Wales, and the husband employed a solicitor there to make his will and to sell part of the land, the solicitor concluding from the statements of the husband that there had not been any marriage settlement. The husband died, leaving his widow trustee and executrix, and directing his debts to be paid out of his estate. The widow employed the same solicitor to sell other parts of the land, and the solicitor received the purchase moneys and applied them in payment of the debts of the husband. The deed of settlement had been in the possession of the wife, but had been by her given to the husband. There was no evidence as to what had become of it, but after the sales had been made a copy was found. The solicitor had concluded from what he was told by the husband that there had been no settlement, and though, before all the sales were completed, his clerk had been told by the wife that there had been a settlement, the solicitor continued to believe that there had been none. An action was brought by the children of the marriage, entitled under the settlement, claiming to recover from the solicitor the money which had so passed through his hands:—Held, that under the circumstances, although the solicitor might have been negligent in that character, he could not be held to have had such notice of the settlement as to be treated as constructively a trustee, and therefore liable for the money which had passed through his hands. Notice to raise a constructive trust is different from notice to an actual trustee. *Cothay* v. *Sydenham* (2 Bro. C. C. 391) discussed. *Williams* v. *Williams*, 17 Ch. D. 437; 44 L. T. 573.

—— **Payment over to One Trustee.**]—A firm of solicitors, acting for two trustees, and receiving trust moneys from them, and paying over a portion of such moneys to one only of the trustees, who afterwards dies insolvent, is liable to the trust estate for the whole amount of moneys received from the two trustees. *Lee* v. *Sankey*, or *Ginger* v. *Sankey*, L. R. 15 Eq. 204; 27 L. T. 809; 21 W. R. 286.

—— **Payment by Solicitor to Credit of his General Account.**]—Preparatory to the final winding up of a trust, the agent and solicitor of the trustee paid the trust money to his bankers, to the credit of his general account with them, and informed the cestui que trust that the money was lying idle at his bankers. The cestui que trust took no notice of the information; and, more than a month afterwards the bankers failed:—Held, that, as the agent did not inform the cestui que trust that the money had been paid to the credit of his general account, and as the payment to the bankers was not necessary to the winding up of the trust, the agent and the trustee were jointly liable for the money. *Macdonnell* v. *Harding*, 7 Sim. 178; 4 L. J., Ch. 10.

—— **Solicitors of Trustees mixing Trust Funds with their Own.**]—In an action by cestuis que trust against their trustees, it was alleged that they had delegated their trusteeship to their solicitors, who had improperly mixed the trust funds with their own moneys:—Held, that if the allegations were well founded, they were amply sufficient to charge the solicitors as constructive trustees, and that they and the trustees were equally liable for breaches of trust. *Maw* v. *Pearson* (28 Beav. 196) considered and distinguished. *Cowper* v. *Stoneham*, 3 R. 242; 68 L. T. 18.

—— **Delegation—Primary and Secondary Liability.**]—Where a trustee has delegated his trust, there is no question of primary and secondary liability in respect of a breach of trust, but all are equally liable. *Ib.*

Money received by Solicitor for Investment—Representation that Money advanced on Mortgage.]—A client left moneys for investment in the hands of his solicitors. The solicitors represented that the sum of 11,000*l.*, part of these moneys, was invested on mortgage of freehold property at A., belonging to a firm, and the client made no further inquiry. The solicitors were in fact the holders of a mortgage for 55,000*l.* upon property X. at A., belonging to the firm, and they repaid themselves 11,000*l.* of the 55,000*l.* with the client's money. The firm afterwards bought property Y. at A., and mortgaged it in fee to a bank. The solicitors released the firm from the mortgage debt of 55,000*l.* on property X. and took from them a mortgage for 50,000*l.* on properties X. and Y., subsequently, by arrangement with the firm, purchasing the equity of redemption in both properties, and selling them for shares to a limited company into which the firm was, through their instrumentality, converted. These transactions all took place without the knowledge of the client:—Held, that the solicitors must be treated as having become trustees for the client of 11,000*l.* out of the 55,000*l.* secured by mortgage on property X.; and having improperly, as against the client, given up that mortgage in exchange, the client had a right under the circumstances to claim a charge for 11,000*l.* and interest upon property Y. (in which the legal estate was outstanding) as well as upon property X. *Vernon, Ewens & Co., In re*, 56 L. J., Ch. 12; 33 Ch. D. 402; 55 L. T. 416; 35 W. R. 225—C. A.

—— **On Specified Security.**]—The owner of a copyhold, which was subject to a mortgage by conditional surrender for 350*l.*, made by a former owner, instructed S., his solicitor, to procure him, on the security of the property, a loan of 550*l.*, out of which the old mortgage was to be paid off. S., in July, 1876, obtained the money from the plaintiff, who was also his client. In July, 1877, S. took a security for 700*l.* on the property in his own name, the mortgagee assigning the old mortgage debt, and the mortgagor covenanting to surrender. The old mortgagee was paid by a cheque drawn by S. on B. & Co., his bankers. S.'s account was already overdrawn, but on the same day he applied to them for leave further to overdraw, which was granted on his depositing

with them the security for 700*l.*, and the cheque when presented was honoured. B. & Co. had no notice of the plaintiff's claim. Some time after this S. put his account in credit, but it shortly afterwards became again overdrawn. S. handed over some of the other muniments of title to the plaintiff. The plaintiff commenced his action to establish his right to rank as incumbrancer for 550*l.* in priority to B. & Co. After this B. & Co. procured the old mortgagee to be admitted under the old conditional surrender, and to surrender to them:—Held, that after the account of S. with B. & Co. had once been put in credit, their security must, as against other incumbrances on the property, be taken to have been discharged, and that the plaintiff was entitled to priority over B. & Co. B. & Co. appealed, asking for priority over the plaintiff to the extent of the old mortgage which had been paid off with their money:—Held, on appeal, that S., having received money from the plaintiff for the purpose of being invested on a mortgage of specified property, and having taken a security on that property in his own name, was a trustee of that security for the plaintiff to the extent of the money received from him, and that this equitable title must prevail against the deposit with B. & Co., and that the 350*l.* mortgage could not be set up against the plaintiff. *Harpham* v. *Shacklock*, 19 Ch. D. 207; 45 L. T. 569; 33 W. R. 49—C. A.

—— **Misapplication by Solicitor.**]—Trustees of stock sold it out, and committed the proceeds to their solicitor for investment, by whom it was misapplied and lost:—Held, that the trustees were liable for a breach of trust, and that the cestuis que trust were entitled to relief against both the trustees and the solicitor, and that they might sue either the trustees alone or the trustees jointly with the solicitor. *Rowland* v. *Witherden*, 3 Mac. & G. 568; 21 L. J., Ch. 480.

Where an agent is authorised by trustees to receive trust money and receives it accordingly, the receipt of that money by the agent binds the trustees, and discharges the person who paid it. *Robertson* v. *Armstrong*, 28 Beav. 123.

Trustees authorised their solicitors to receive trust money. The solicitors received it and handed it over to the tenant for life, whereby it was lost:—Held, that a bill by a cestui que trust seeking to charge the solicitors only, and not the trustees, could not be maintained, for that it was only through the trustees that the solicitors could be made liable. *Ib.*

Suppression of Incumbrance by Mortgagor on Advice of Solicitor.]—A voluntary settlement of leaseholds was suppressed by the settlor with the privity of the trustees and under the advice of a solicitor, in order to enable money to be raised on mortgage of the trust estate. Two existing trustees had retired, knowing of the proposed dealing with the trust property, and with a view to the carrying out of the mortgage:—Held, that the mortgagee was entitled to a decree for payment of his advances and costs against the solicitor, the old and new trustees and the settlor, although he might, when he discovered the defect in title, have had an opportunity of obtaining further security for his money; and notwithstanding nine years had elapsed from such discovery to the filing of the bill. *Clark* v. *Hoskins*, 36 L. J., Ch. 689; 16 L. T. 730; 15 W. R. 1161.

Possession of Trust Fund—Liability of Solicitor to Account.] — An agent employed by a trustee is not accountable so long as his acts are merely acts of agency; but where a solicitor got possession of the trust moneys, and allowed the executrix, who was entitled to the income only, to misapply the principal, the court directed an account against him as if he were a trustee. *Morgan* v. *Stephens*, 3 Giff. 226; 7 Jur. (N.S.) 701; 4 L. T. 614.

In 1876 a sum of money, which, under the will of S., was vested in trustees on trust for the plaintiff's father for life, and after his death for the plaintiff, was in the hands of A., the solicitor of the trustees. A. invested the money on mortgage, and in January, 1879, it was repaid by the mortgagor to A. In that month and again in July, 1879, A. paid interest on the said sum to the plaintiff's father. In November, 1879, A. died. From that time till January, 1886, the plaintiff's father received half-yearly instalments of interest on the said sum from a person who had been a clerk of A., and was employed in winding up his business. In July, 1886, the plaintiff's father died. In February, 1891, the plaintiff, who was then the sole trustee of the will, brought an action against the executrix of A., claiming an account and payment of what might be found due:—Held, that A. was to be treated as an express trustee, and therefore the plaintiff's claim was not barred by the statute of limitations. *Soar* v. *Ashwell*, [1893] 2 Q. B. 390; 4 R. 602; 69 L. T. 585; 42 W. R. 165—C. A.

A solicitor to a trustee is under no greater liability to account as a constructive trustee than any other stranger to the trust; and if he receives money from the trustee which he knows to be part of the trust estate, he is not liable as a constructive trustee unless he had notice that the money is being applied in a manner inconsistent with the trust. *Staniar* v. *Evans* (56 L. J., Ch. 581; 34 Ch. D. 470; 56 L. T. 87; 35 W. R. 286) explained and distinguished. *Blundell, In re, Blundell* v. *Blundell*, 57 L. J., Ch. 730; 40 Ch. D. 370; 58 L. T. 933; 36 W. R. 779.

Solicitor Employed by Trustee—Right to Costs out of Estate.]—A solicitor or other agent properly employed by a trustee in the administration of a trust is entitled to accept payment direct out of the trust estate of his costs and expenses properly incurred. In order to deprive the agent of this right, it is necessary to prove, not merely notice that at the time of payment a breach of trust has been committed, but notice that the breach of trust is such as entirely to preclude the trustees from resorting to the trust estate for payment of costs. *Ib.*

In 1855 a bill was filed for the administration of an estate, and in February, 1857, a decree was made, which directed the personal representative V. to get in the outstanding estate, and to pay the moneys so received into court from time to time within two months after their receipt respectively. After this decree was made, an estate, which was mortgaged to the testator, was sold, and the purchase money was received by the solicitors of V., who, instead of paying it into court, retained a part of it in payment of some costs due to themselves, and allowed V. to receive the rest. V. having become a defaulter, a bill was filed by the beneficiaries against the solicitors:—Held, that the solicitors were liable to

make good the whole sum thus received by them, less the costs of actually realising it, together with interest. *Harries* v. *Rees*, 37 L. J., Ch. 102; 17 L. T. 418; 16 W. R. 91.

Two other sums were also received after the decree of February, 1857, in respect of two bonds, upon which, before that decree, part of the testator's estate had been invested by V. These investments had been disallowed in the administration suit:—Held, that these sums must be taken to have been throughout in the hands of V., and that the solicitors could not be held responsible for them. *Ib.*

Lien for Costs.]—Trust money was lent upon certain securities in breach of trust. One of the trustees was ordered to pay into court the whole amount of the trust money. He proceeded to realise the securities, and paid into court the produce, which was insufficient to answer the breach of trust:—Held, that his solicitor could not be in a better position than himself, and consequently had not a lien on the fund in court for the costs of realising the securities. *Thompson* v. *Francis*, 5 De G. M. & G. 108.

Purchase Money received by Solicitor who was a Trustee.]—Lands devised to three trustees, upon trust for sale, were sold, and the purchase money paid to one of them, who was a solicitor, and acted in the matter of the sale as solicitor for himself and the other trustees. The money having been retained by him and lost:—Held, after his decease, that it must be taken to have been received by him not in his capacity of solicitor, it being no part of his duty in that capacity to receive it, but in his capacity of trustee; and that the survivor of the three could not, upon a common decree for an account, be held liable for its loss. *Fryer's Estate, In re, Martindale* v. *Picquot*, 3 K. & J. 317; 26 L. J., Ch. 398; 3 Jur. (N.S.) 485; 5 W. R. 552.

Profits made by Solicitor.]—It is an established rule that a solicitor shall not, in any way whatever, in respect of any transactions in the relation between himself and his client, make gain to himself at the expense of his client, beyond the amount of his just and fair professional remuneration. *Tyrrell* v. *Bank of London*, 10 H. L. Cas. 26; 31 L. J., Ch. 369; 8 Jur. (N.S.) 849; 6 L. T. 1; 10 W. R. 359.

A solicitor had a private arrangement with R., by which he was to receive from R. a share in property belonging to R., and to share the profit to be obtained from the sale of that property. In his character of solicitor he acted for clients (a banking company) in the purchase of the larger portion of that property, never communicating to his clients the fact of his having an interest in it:—Held, that he was to be treated as a trustee for his clients in respect of his share of so much of the property as they had actually purchased. *Ib.*

And having made a large profit on the sale, he was ordered to pay back the amount of his profit with the full amount of interest given in cases of a breach of trust, namely, five per cent. *Ib.*

Liability of Firm.]—Trust money was sent to A. (one of a firm of solicitors, who was himself one of two trustees) for investment on mortgage. The money was paid into the bankers to the account of the firm, and was afterwards drawn out by A., and never invested:—Held, that the other member of the firm was liable. *Eager* v. *Barnes*, 31 Beav. 579; 7 L. T. 408.

Under a will 2,910*l.* stock was vested in the testator's three unmarried nieces, who were his executrixes, in trust for themselves for life, then for children, with ulterior trusts. Their confidential solicitors were a firm of two persons, of whom the senior, under his own advice, was associated as their co-trustee, and a declaration of trust, prepared by the firm, was executed by the four persons in 1822. Subsequently, on the advice of the senior solicitor, the fund was sold out, and paid to him alone; but he, on the same day, paid the precise amount to the credit of the banking account of the firm. In 1824 the senior partner untruly represented that the money had been laid out on specified freehold security; but in 1825 a sufficient freehold mortgage was taken by the senior partner to himself alone, and was treated by him as the security for the trust fund, less a very small balance, which was divided among the three ladies. The interest was duly paid to the ladies until 1828, when the senior partner realised that security without their privity, and again untruly alleged that he had laid out the amount on another specified security. The firm dissolved partnership in 1834, and each partner practised separately; the senior partner continued regularly to pay sums as the interest to the ladies until 1844, when he became bankrupt, and afterwards died abroad uncertificated. In a suit by the three ladies against the junior partner, charging him as liable to make good the amount:—Held, that a sufficient investment having been made in the name of the senior partner, and communicated to the parties, and adopted, the duty of the firm was discharged, and the subsequent loss was a breach of duty by the senior partner alone, and not by the partnership, and the suit was dismissed with costs. *Coomer* v. *Bromley*, 5 De G. & Sm. 532; 16 Jur. 609.

—— **Deposit of Bonds with One Partner.**]—Trustees under a will deposited certain bonds payable to bearer with P., a member of the firm of solicitors who were acting for the estate. His partners had no knowledge of this, but letters referring to the bonds were copied in the letter-book of the firm and were charged for in the bill of costs of the firm, and the bonds were included in a statement of account which the firm made out for the trustees. P. paid some of the interest of the bonds by cheques of the firm, but on each occasion recouped the firm by a cheque for the same amount on his private account. P. misappropriated the bonds:—Held, that the cheques, letters, and entries were too ambiguous to affect the other partners with acquiescence in P. having the custody of the bonds as part of the partnership business, and that they could not be held liable for their misappropriation. *Harman* v. *Johnson* (2 El. & Bl. 61; 3 Car. & K. 272; 22 L. J., Q. B. 297; 17 Jur. 1099) and *Dundonald (Earl)* v. *Masterman* (38 L. J., Ch. 350; L. R. 7 Eq. 504; 20 L. T. 271; 17 W. R. 548) considered. *Cleather* v. *Twisden*, 54 L. J., Ch. 408; 28 Ch. D. 340; 52 L. T. 330; 33 W. R. 435—C. A.

—— **Implied Authority of one Member—Constructive Trustee—Appointment of New Trustee.**]—It is not within the scope of the implied authority of a member of a firm of solicitors to

make himself a constructive trustee so as to make his partners liable. *Mara* v. *Browne*, 65 L. J., Ch. 225; [1896] 1 Ch. 199; 73 L. T. 638; 44 W. R. 330—C. A.

In January, 1884, the funds of a marriage settlement were suspected of being placed in jeopardy by the conduct of J., one of the two original trustees; and by a deed of January 7th, the husband and wife, who had power to appoint new trustees, purported to appoint R. to act as co-trustee with J. in the place of the other trustee, who had taken no part in the trust, and was willing to retire. This deed was executed by the husband and wife alone. By a deed of May 9th, 1884, executed by all parties, R. and another were appointed new trustees in the place of the original trustees. In the meantime, the trust funds were, through the intervention of B., a solicitor, paid by J. into a bank to the joint account of himself and R., and were then from time to time paid out by their joint cheques to B. for investment. B., with the full knowledge of R., invested the funds on securities held by the court to be improper. More than six years afterwards the beneficiaries and existing trustees brought an action against B. and his partner to make them liable for the loss arising from such improper investments:—Held, first, that the appointment of R. by the deed of January, followed by his intermeddling in the trust, operated as a valid appointment under s. 31 of the Conveyancing Act, 1881; secondly, that B. acted as the agent of J. and R., who were duly constituted trustees, and was not liable as constructive trustee; thirdly, that, even if he had been liable as constructive trustee, his partner could not be made liable. *Ib.*

—— **Judgment against one Member of Firm —Trustee Act, 1888, s. 4.**]—Money subject to the trusts of a settlement came into the custody of F., S. & F., a firm of solicitors, with notice of the trusts, and was advanced by them on mortgage in the names of the trustees. S., who afterwards became one of the trustees of the settlement, acted as solicitor for M. and B., the trustees in the matter of the mortgage, and for the work done by him the firm received payment. The security proved insufficient, and, in an action by the beneficiaries against the trustees, was declared to be improper, and the trustees were declared jointly and severally liable to make good the loss sustained. The money not being replaced, the beneficiaries brought an action against F. F., the surviving partner, and the representatives of M. F., a deceased partner in the firm, to recover the loss from them. Neither F. F. nor M. F. had any personal knowledge of the nature of the security at the time of the investment:—Held, that S. was acting within the scope of his authority as a partner, and his partners were consequently implicated in the breach of trust:—Held, also, that the liability of the members of the firm arising out of a breach of trust was joint and several, and the judgment already recovered against S. did not operate as a discharge of his partners:—Held, also, that the trustees not having been charged with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the mortgaged property, s. 4 of the Trustee Act, 1888, afforded the defendants no protection. *Blyth* v. *Fladgate*, 60 L. J., Ch. 66; [1891] 1 Ch. 337; 63 L. T. 546; 39 W. R. 422.

—— **Trustee entitled to Beneficial Interest in Reversion.**]—B. was entitled to a beneficial interest in reversion in the trust fund. M. claimed to be recouped out of such beneficial interest any money paid by him in replacing the trust fund:—Held, that, B. not having received any benefit from the breach of trust, and not having instigated it in any way, there were no circumstances which would entitle M. to throw the liability of it upon him. *Ib.*

—— **Contribution between Co-Trustees.**]—S. claimed against M. and B. contribution of a proportion of the sums necessary to replace the trust fund:—Held, that, having been guilty of negligence as solicitor to them, he was not entitled to any such contribution. *Lockhart* v. *Reilly* (1 De G. & J. 464; 27 L. J., Ch. 54) followed. *Ib.*

D. THE CESTUI QUE TRUST.

1. *Possession of Cestui que Trust*, 818.
2. *Alienation by and Transfer to Cestui que Trust*, 821.
3. *Dealings between Trustee and Cestui que Trust*, 825.
4. *Information as to Trust Fund*, 828.
5. *Production of Title-Deeds*, 828.
6. *Option as to Interest or Profits*, 829.
7. *Lien*, 829.
8. *Liability of Cestui que Trust for Loss of Trust Fund*, 831.
9. *Remedies for Breach of Trust.*
   - *a.* In General, 833.
   - *b.* Attachment, 835.
   - *c.* Receiver, 837.
   - *d.* Inquiries and accounts.
     - i. Inquiries, 840.
     - ii. Accounts, 842.
     - iii. Wilful Default, 844.
     - iv. Practice, 847.
     - v. Acquiescence or Delay, 849.

1. Possession of Cestui que Trust.

In General.]—It is not of course to let a cestui que trust under a will into possession of the estate; it must depend on the testator's intention. *Tidd* v. *Lister*, 5 Madd. 429; 21 R. R. 323.

The possession of the cestui que trust under the trusts of a settlement is the possession of the trustee, and gives the trustee a seisin of the estate, which is not interrupted by the death of the cestui que trust, but immediately inures for the benefit of the person next entitled to the equitable interest; and notwithstanding the adverse possession of another party soon afterwards commenced, the court cannot presume such adverse possession to have commenced so instantaneously on the death of the first cestui que trust as wholly to exclude the equitable seisin of the parties next entitled to the beneficial interest. *Parker* v. *Carter*, 4 Hare, 400.

Eviction of Cestui que Trust.]—Equity will never permit the trustee to evict his cestui que trust. *Shine* v. *Gough*, 1 Ball & B. 445.

Trustees, who joined with remainderman to eject cestui que trust for life, not excused from making good the whole rent reserved by subsequent accidental deficiencies. Inquiry directed as to the interference of remainderman. *Kaye* v. *Powel*, 1 Ves. 408.

Trustees shall not recover possession from, or dispute it with, their cestui que trust. *Armstrong* v. *Paise*, 3 Burr. 1898.

Cestui que Trust in Possession as Tenant at Will of Trustee.]—The doctrine that a cestui que trust who is in possession with the consent, or even the acquiescence of the trustee, must be regarded as his tenant at will, applies only to the case where the cestui que trust is the actual occupant. *Melling* v. *Leak*, 16 C. B. 652; 3 C. L. R. 1017; 24 L. J., C. P. 187; 1 Jur. (N.S.) 759; 3 W. R. 595.

If he is merely allowed to receive the rents, or otherwise deal with the estate in the hands of the occupying tenant, he stands in the relation of an agent or a bailiff of the trustee. *Ib.*

If, therefore, the actual occupier is, under such circumstances, permitted to occupy for more than twenty years without paying rent or acknowledging title, the trustee is barred by 3 & 4 Will. 4, c. 27. *Ib.*

In an action for an alleged injury to the plaintiff's reversionary interest in a house, he averred in his declaration that the premises were in the occupation of P. as tenant thereof to the plaintiff. It was proved that the house had been let to P. by a cestui que trust, to whom she had paid rent, the plaintiff being his trustee:—Held, to be no variance, as the legal estate was in the plaintiff, and the cestui que trust was to be considered as his agent or bailiff. *Vallance* v. *Savage*, 7 Bing. 595; 5 M. & P. 576; 9 L. J. (O.S.), C. P. 181.

The owner of an estate, a term in which had been assigned to a trustee to attend the inheritance, is, while in possession of the land, tenant at will to the trustee. It is only on the determination of the tenancy at will that there is such a vested right of entry as is contemplated by s. 2 of the statute of limitations, 3 & 4 Will. 4, c. 27. Section 3 of the statute does not apply to the case of a cestui que trust in possession under a trustee. *Garrard* v. *Tuck*, 8 C. B. 231; 18 L. J., C. P. 338.

A dissenting minister, placed in possession of a chapel and dwelling-house by persons in whom the legal estate is vested in trust to suffer the chapel to be used for the purpose of religious worship, is, at law, tenant at will to those persons. *Perry* v. *Shipway*, 1 Giff. 1; 5 Jur. (N.S.) 535; 7 W. R. 406. Affirmed, 28 L. J., Ch. 660; 5 Jur. (N.S.) 1015; 7 W. R. 574.

Possession of Grantor of Term to Secure Annuities.]—Where a trustee of a term of years, upon the usual trusts for securing annuities, has taken possession of the estates under the trusts, the court, although all arrears of the annuities may afterwards be paid, will not order possession to be given up to the grantor, except upon such terms as will enable the trustee to resume it, and to receive the rents, the moment the annuities are again in arrear. *Jenkins* v. *Milford*, 1 J. & W. 629; 21 R. R. 262.

Tenant for Life let into Possession on Terms.]—Tenant for life subject to a trust term not let in possession before account; nor till the trust is executed, unless on paying into court a sum sufficient to answer it; or where the best way of performing the trust appears to be by letting him into possession. *Blake* v. *Bunbury*, 1 Ves. 194; 1 R. R. 111. And see 19 R. R. 46; 21 R. R. 325.

Tenant for life let into possession on consent, and giving security to pay charges payable out of rents and profits, and to keep down interest of the fund to answer contingent charges. *Ib.* 514; 4 Bro. C. C. 21.

Upon the construction of a devise of real property:—Held, that an equitable tenant for life was entitled to the personal enjoyment of the property upon giving security for the due fulfilment of the objects of testator's will. *Baylies* v. *Baylies*, 1 Coll. C. C. 587.

Where a testator bequeaths a life interest in freeholds, by way either of legal or of equitable estate, and the freehold is dilapidated, and extensive repairs are required, the court will not withhold possession from the devisee for life, in order to impose upon him terms as to the execution of the repairs. *Warren* v. *Rudall*, 1 J. & H. 1; 29 L. J., Ch. 543; 6 Jur. (N.S.) 395; 2 L. T. 693; 8 W. R. 331.

And see *Bentley, In re*, *Wade* v. *Wilson*, 54 L. J., Ch. 782; 33 W. R. 610, ante, col. 526.

The fact that the court in its discretion might upon terms put an equitable tenant for life into possession, or take the receipt of the rents from the trustees and give them to him, does not make him a person "entitled to the possession, or to the receipt of the rents and profits," within s. 32 of the Sales of Settled Estates Act, 19 & 20 Vict. c. 120. *Taylor* v. *Taylor, Taylor, Ex parte*, 44 L. J., Ch. 727; L. R. 20 Eq. 297; 33 L. T. 89; 23 W. R. 947.

W. devised estates in trust to pay the rents, issues, and profits unto, or permit the same to be received and taken by, his daughter S. H., the wife of T. H., during her life, for her sole and separate use, free from the control of her husband, her receipt alone being a sufficient discharge for the same; and after the decease of S. H., to convert the estates into money, and to pay and divide such money unto and equally amongst her children as she should appoint. The trustees having, as alleged, refused to account for the rents and profits received, a bill was filed for the administration of W.'s estate. The court, on motion for that purpose by S. H., ordered that she should be permitted to enter into the possession of the receipt of the rents and profits of the estates devised in trust for her separate use. *Horner* v. *Wheelwright*, 2 Jur. (N.S.) 367.

Trustee allowing Cestui que Trust to have Trust Fund and Impounding Proceeds of Sale.]—A trustee allowed one of his cestuis que trust to have the trust fund, with a view to its investment in the foreign funds. The cestui que trust went to America, and invested it in his own name; he afterwards sold out a part, and, remitting the money to agents in London, came home. The trustee impounded the money so remitted, in the lord mayor's court, and this court granted an injunction, restraining proceedings on the part of the cestui que trust to get it out. *Hipkins* v. *Newton*, 9 L. J. (O.S.) Ch. 227.

Tenant for Life of Articles of Plate.]—A., being entitled under a will to the use of certain articles of plate for her life, pawned them with B., who kept an open pawnbroker's shop. Bill was filed by the representatives of the testator, after the death of A., against B., for a discovery of the different articles pawned, in order to enable the plaintiffs to proceed in an action at law, for the recovery of them. To this discovery the defendant pleaded, that certain articles of plate were deposited with him, for certain sums of money bonâ fide lent and advanced thereon to A.; but he did not by his plea (though he did by his answers), aver that he had no other articles of plate in his possession. For this

defect in point of form the plea was overruled. The defendant then insisted on the same point by his answer in bar to the discovery, but the court thought, that where a plea to a bill of discovery was overruled, the defendant could never insist on the same thing by answer. *Hoare* v. *Parker*, 1 Cox, 224; 1 Bro. C. C. 578. *And see* 2 Term Rep. 376; 1 R. R. 500.

Bequest of Household Effects to Wife for Life.]—The wife is not debarred of her paraphernalia, by a bequest of the use of all household goods, furniture, plate, jewels, linen, &c., for life. *Marshall* v. *Blew*, 2 Atk. 217.

Such a bequest entitles her to use the goods anywhere, or even to let them out to hire. *Ib.*

Action for Trespass—Defence of Occupant that a Breach of Trust had been Committed.]—To a declaration for breaking and entering a close and pulling down a wall, a plea that B. was seised in fee of the land in which, &c., in trust to pay the rents and profits to the defendant's wife for her life; and that whilst he and his wife were in the occupation of the land, B., in breach of trust, conveyed the land in fee to the plaintiff, who had notice of the breach of trust, and that afterwards, and whilst the defendant and his wife were in such occupation, the plaintiff wrongfully built the wall which incumbered the land, and prevented the defendant and his wife from enjoying it, wherefore the defendant in his own right, and by direction of his wife, pulled it down, affords no defence on equitable grounds to the action. *Drake* v. *Pywell*, 4 H. & C. 78.

As to Heirlooms.]—*See* SETTLEMENT.

Under Statute of Limitations.]—*See* LIMITATIONS (STATUTE OF).

2. ALIENATION BY AND TRANSFER TO CESTUI QUE TRUST.

Right to Alienate.]—Courts of equity have given the same power to cestuis que trust as to alienation, as if it was a use executed. *Hopkins* v. *Hopkins*, 1 Atk. 591; Cas. t. Talb. 44; 1 Vern. 268.

A trustee cannot prevent his cestui que trust from making an effectual gift of his interest in the trust property or any part of it. *Kekewich* v. *Manning*, 1 De G. M. & G. 176; 21 L. J., Ch. 577; 16 Jur. 625.

Right to Call upon the Trustees to convey Legal Estate.]—A cestui que trust in tail brings a bill against the trustees to the intent they should join in a recovery: this not proper; but it is proper to pray that the trustees may convey the premises to the cestui que trust in tail, who may then suffer a recovery, though, if the trustees are also trustees for any annuities subsisting, they are not compellable to part with the legal estate out of them, to the cestui que trust in tail. *Carteret* v. *Carteret*, 2 P. Wms. 133.

One buys an estate in the name of a trustee, who gives a bond in 200*l.* penalty to assign the estate as the cestui que trust or his executor shall direct: cestui que trust dies, and his executor brings debt on the bond and recovers judgment, and has the money paid him, after which he brings a bill to have a conveyance of the estate; trustee to convey to the plaintiff, and to account for the profits, but in account is to be allowed the 200*l.* and interest which he paid. *Moorecroft* v. *Dowding*, 2 P. Wms. 314; 2 Eq. Cas. Abr. 746. pl. 3.

In a clear case of a fee simple interest, the limitation being to the heir male of the tenant for life and the heirs of such heirs male, a conveyance was decreed, with costs, against the trustee of the will, who set up a title derived from the tenant for life, supposing her to have an estate of inheritance by virtue of the rule, and also a clause in the testator's will, which was clearly void for perpetuity, under which it was alleged the plaintiff had forfeited his interest. *Willis* v. *Hiscox*, 4 Myl. & Cr. 197; 4 Jur. 738.

Where a trust estate descended to one who refused to execute a conveyance to the cestui que trust, after it had been approved by his solicitor, unless he were paid a sum of money, the court ordered the conveyance, with costs against the defendant. *Watts* v. *Turner*, 1 Russ. & M. 634.

Where an infant died seised of an equitable estate, descended ex parte maternâ, his incapacity to call for a conveyance of the legal estate (by which the course of the descent might have been broken), is not reason for it to be considered as actually done, it being the trustees' duty not to convey till called upon. *Langley* v. *Sneyd*, 1 Sim. & S. 45; 1 L. J. (o.s.) Ch. 14.

By an indenture, made in contemplation of marriage, certain leasehold property, belonging to the intended wife, was conveyed to trustees on certain trusts; and the trusts of a sum of stock, also belonging to the intended wife, which had been transferred into the names of the trustees, were declared. The marriage did not take effect, and, soon after the date of the indenture, the lady married another person. In a suit instituted by the husband and wife against the trustees, it was ordered that the leasehold property should be conveyed to the husband, and the stock transferred into his name. *Thomas* v. *Brennan*, 15 L. J., Ch. 420; 11 Jur. 95.

—— **Copyholds.**]—Certain copyhold lands having been devised to trustees for the benefit of a charity, and the copyholds having been enfranchised, the court directed the trustees to convey the legal estate to the company. *Att.-Gen.* v. *Clothworkers' Co.*, 17 L. J., Ch. 456.

If A., for valuable consideration, undertakes to surrender a copyhold to B., and B., on borrowing money from C., enters into a written agreement with C. that he, B., will surrender the same copyhold to C., by way of mortgage security; A. is not justified in refusing to surrender the copyhold to B., because he, A., has received notice from C. of the agreement between him and B. The surrender by A. to B. does not prejudice, but promotes that agreement. —— v. *Walford*, 4 Russ. 372; 28 R. R. 129.

—— **On Failure of Trusts.**]—A testatrix, being seised of an equitable estate in fee, devised it to her executors in trust to sell, and out of the proceeds of such sale and her personal estate, to pay her debts, &c., and the legacies given by her in a certain paper, signed by her and marked A. The testatrix died without heirs, and the paper A. could not be found. The trustee of the legal estate insisted upon his right to hold the estate for his own benefit upon payment of the debts. On a bill by the executors:—Held, that the rule of law laid down in *Burgess* v. *Wheate* (1 Eden, 177) did not apply; and that the trustee of the legal estate was bound to convey to the executors, the devisees, without reference to the purposes for which the conveyance was required. *Onslow* v. *Wallis*, 1 Mac. & G. 506; 1 Hall & Tw. 513; 19 L. J., Ch. 27; 13 Jur. 1085. Affirming 16 Sim. 485.

A bare trustee who, under s. 31 of the 3 & 4 Will. 4, c. 74, is protector of a settlement, can insist on retaining the legal estate only so long as the purposes of the trust exist, that is, so long as, according to the rules of the court of equity, he is required to be a trustee. *Buttanshaw* v. *Martin*, John. 89 ; 5 Jur. (N.S.) 647.

Therefore, where there was a devise of lands to trustees upon trusts for the testator's daughter during her life, for her separate use without power of anticipation, with remainder to the use of her children as tenants in common in tail, with remainders over :—Held, that the testator's daughter, having become discoverte and being sui juris, could compel a conveyance by the trustees of the legal estate. *Ib.*

—— **Where the Equitable Estate is Conveyed.**]—The owner of an equitable estate conveyed it to trustees upon trust for sale, and by a deed of even date with the conveyance, declared the trusts upon which the produce of the sale was to be applied. The party who had the mere legal estate and no beneficial interest, refused to convey it to the equitable trustee, unless the persons interested as cestuis que trust under the deed of even date were made parties to the conveyance :—Held, that he was not justified in that refusal, but as he acted bonâ fide, under the advice of a conveyancer of character, the court made the decree against him without costs. *Angier* v. *Stannard*, 3 Myl. & K. 566 ; 3 L. J., Ch. 216.

When a purchaser of a mere equitable interest in property after a conveyance of it to him, files a bill to obtain from the trustees the legal estate, the vendors may, without filing a cross-bill, set up the invalidity of the purchase. *Hannah* v. *Hodgson*, 30 Beav. 19 ; 7 Jur. (N.S.) 1092 ; 9 W. R. 729.

Real estates, devised for sale, were vested in trust for parents for life, with remainder for their children. In 1839, the parents and children sold and conveyed their interests to the plaintiff, who remained in undisturbed possession until the death of the tenants for life. In 1858, the purchaser filed his bill against the trustee and the vendors, to obtain the legal estate. The court, on the ground of the unfairness of the transaction as regarded the children, dismissed the bill, but refused to grant any active relief to the defendants. *Ib.*

—— **Trustee of Mortgage.**]—The trustee of a mortgage holds the same in trust to the extent of the mortgage for the mortgagee, subject thereto for the mortgagors, and he cannot do anything to prejudice the mortgagors. The trust of a mortgage, as between mortgagor and mortgagee, differs from that of an outstanding term in a third person unconnected with either of the parties seeking the legal estate, the only question there being, which had the better equity to call for the legal estate. *Blennerhasset* v. *Day*, 2 Ball & B. 133.

—— **Trustee of Term to Secure Mortgage.**]—Trustee of a term in trust for securing to a mortgagee in fee (with a power of sale) his mortgage money, and subject thereto in trust for the mortgagor, his heirs, &c., decreed, in a plain case, to pay the costs of a suit brought against him to compel him to execute a deed for surrendering the term to a purchaser from the mortgagee. *Hampshire* v. *Bradley*, 2 Coll. C. C. 34.

Real estates were devised to a trustee upon trust, on a given event, to convey them to certain parties, upon one of them electing which he would take. A party, in whom, as satisfied mortgagee at the date of the will and death of the testator, a satisfied mortgage term in one of the estates was vested, was held bound to execute a deed of surrender of the term to the trustee, and the cestuis que trust were held not to be necessary parties thereto. *Poole* v. *Pass*, 1 Beav. 600 ; 8 L. J., Ch. 325.

If the trustees of a term and the cestui que trust are before the court, an intermediate trustee of the equitable interest need not be a party to the bill filed to carry the trusts of the term into execution. *Head* v. *Teynham*, 1 Cox, 57.

—— **Where Cestui que Trust has put an End to Trusts of Term.**]—Where cestui que trust of a term had put an end to the trusts thereof :—Held, that though the purchaser had a right to an assignment of it, yet the trustees not having received full information as to the determination of the trust, they were justified in refusing to execute an assignment without the sanction of the court, and were allowed their costs. *Holford* v. *Phipps*, 3 Beav. 434 ; 10 L. J., Ch. 209. And see *S. C.*, 4 Beav. 475 ; 5 Jur. 31.

Right of Cestui que Trust on Refusal of Trustee to Pay Trust Money.]—A trustee who, on untenable grounds, withholds trust money from his cestui que trust may commit what in equity may be considered a fraud, without being chargeable with personal fraud. *Thompson* v. *Eastwood*, 2 App. Cas. 215—H. L. (Ir.)

A legacy was given on an express trust in 1807 ; it was not paid to the original legatee. He became insolvent, released the legacy, and died. His only child came of age in 1849. Litigation on matters connected with the legacy, but not upon a direct claim to it, was going on in 1865. A. took an assignment of the legacy, and also became the administrator of the original legatee's estate, and the assignee under his insolvency ; in 1872 he filed a bill to enforce payment of the legacy with interest. He was held entitled to the assistance of a court of equity in respect of it. *Ib.*

—— **Wife's Fund to her Husband.**]—A trustee is always justified in refusing to pay over a wife's fund to the husband, even at her request, and insisting on affording her an opportunity of asserting her equity to a settlement. *Swan's Trusts, In re*, 3 H. & M. 34 ; 4 N. R. 53 ; 10 L. T. 334 ; 12 W. R. 738.

—— **Refusal on Ground of Wife's Adultery.**]—By a marriage settlement, the income of funds, part of which had previously been the property of the husband, was settled on the wife for her separate use. She was also entitled to the separate use under the same settlement of an annuity covenanted by the husband's father to be paid to her during his life. After having been married some years, the wife had eloped and was living in adultery. No proceedings had been taken in the divorce court. The trustees of the settlement having refused to pay to the wife since her elopement the income accruing to her from that part of the fund which was formerly her husband's, and the proceeds of the annuity, upon a bill by the wife to enforce the trusts of the settlement :—Ordered, that the trusts be

performed, with costs to be paid by the husband and the trustees. *Goldsmid* v. *Heathcote*, 10 L. T. 811.

The court of chancery does not undertake to vindicate the laws of morality, nor can the court interfere with the laws of property, and the adultery of the wife (in the absence of any clause of forfeiture in the settlement) furnishes no ground why the court should not compel trustees to fulfil the trusts of the settlement. *Ib.*

—— **Refusal on Ground of Doubt of Identity.**]—A testator left all his property to trustees on trust for his wife for life, and all the residue to A. H., daughter of his brother W., absolutely. The testator's brother W. had three daughters, E., M., and M. A., the plaintiff, who had long prior to the will been Mrs. S., and on the ground of the doubt of identity the trustees refused to pay over the residue:—Held, that the refusal was not warranted by the circumstances; that the plaintiff's second name being A., and she being a daughter of the testator's brother W., was sufficient. *Southwell* v. *Martin*, 21 L. T. 135.

—— **Refusal to Transfer without Indemnity.**]—The relation of father and daughter does not of itself render the validity of an arrangement between persons thus related, respecting a reversionary interest of the daughter, so doubtful as to justify a trustee in refusing to transfer a fund, in pursuance of the arrangement, without the indemnity of the court. A trustee so refusing, and who did not show that he had endeavoured to ascertain the real nature of the transaction, was decreed to pay costs. *Firmin* v. *Pulham*, 2 De G. & Sm. 99; 12 Jur. 410.

—— **Settlement of Reversion.**]—Where a fund is vested by a settlement in trustees for A. for life and over, and the reversion has been subsequently settled, the person entitled to the life interest and the trustees of the subsequent settlement are entitled to call for a transfer of the trust fund, and can give the original trustees an effectual discharge, although the settlement does not provide for a transfer or payment by anticipation. *Anson* v. *Potter*, 13 Ch. D. 141; 41 L. T. 582.

—— **Transfer to Trustees for Appointees under a Power.**]—A married woman having a general power of appointment by will over a fund vested in trustees, appointed the fund in favour of specific persons, and nominated executors of her will:—Held, that the administration of the fund was vested in the executors, and not in the original trustees. *Philbrick's Settlement, In re*, 34 L. J., Ch. 368; 11 Jur. (N.S.) 558; 12 L. T. 261; 13 W. R. 570.

When a person having a special power of appointment over a fund of personalty appoints trustees for the objects of the power, the court, though recognising the validity of such an appointment, will not, as a matter of right, transfer the fund to the trustees appointed by the donee of the power. *Bush* v. *Aldam*, L. R. 19 Eq. 16.

3. Dealings between Trustee and Cestui que Trust.

General Rules.]—A trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which can have a tendency to interfere with his duty in discharging it. Neither the trustee nor his representative can be allowed to retain an advantage acquired in violation of this rule. *Hamilton* v. *Wright*, 9 Cl. & F. 111.

A person who has accepted property as a trustee and held it as such is not at liberty to dispute the title of his cestui que trust, though that title may be doubtful. *Neligan* v. *Roche*, 7 Ir. Eq. R. 332.

If a trustee has a power or a trust to sell property, he must bonâ fide have some one to deal with in the sale of it. *Lewis* v. *Hillman*, 3 H. L. Cas. 607.

If an attorney or an agent can show he is entitled to purchase property, notwithstanding his character of attorney or agent, yet if, instead of openly purchasing it, he purchases it in the name of a third person, as his trustee or agent, without disclosing the fact, such purchase is void. *Ib.*

The circumstance that two parties stand to each other in the relation of trustee and cestui que trust does not affect any dealings between them unconnected with the subject of the trust. Thus the rule, that a purchaser cannot purchase from his cestui que trust, does not extend to a purchase by a mortgagee from his mortgagor. *Knight* v. *Marjoribanks*, 2 Mac. & G. 10; 2 Hall & Tw. 308. Affirming 11 Beav. 322; 13 Jur. 136.

Solicitor's Lien on Trust Deed.]—Where a trustee, at the request of the tenant for life, lends the trust deed to the solicitor of such tenant for life, he not being the trustee's solicitor, such loan gives no lien to the solicitor for his costs due from his client. *Mayhew, In re*, 7 W. R. 351.

Dealing with Agent of Trustee.]—A legatee, by dealing with the agent of a trustee, under the impression that such agent is the only person accountable to her, does not exonerate the trustee from his liability. *Adams* v. *Clifton*, 1 Russ. 297.

Sale—Setting aside—Inadequate Price—Concealment of Value.]—Part of the estate of a testator consisted of two-thirds shares of the money to arise from the sale of certain messuages and hereditaments in Sydney, which during the life of the testator had, by deed in 1846, been vested in trustees there upon trust for sale, with power to suspend the sale and to manage and to lease the property. The testator, at the time of his death in 1868, was supposed by the trustees of his will in England, and the beneficiaries, to be seised in fee simple of the two-thirds shares. As the property was expected to increase in value, all the beneficiaries agreed that the sale should be postponed, and under the mistaken impression as to the nature of the testator's interest they, by deed, in 1869, requested the trustees of the will to postpone the sale. In 1870 the sum of 10,000*l.* was offered for the entire property, but was refused. In 1875 one of the beneficiaries sold his one-fifth share of the testator's two-thirds for 1,000*l.* In March, 1880, A., another of the beneficiaries, being ill, and in pecuniary difficulties, sold his one-fifth share to S., one of the trustees of the will, for 900*l.* Shortly afterwards, both A. and S. died. In September, 1881, the entire property was sold for 30,000*l.*, and consequently A.'s share therein proved to be worth over 4,000*l.* eighteen months after the sale of it to S. for 900*l.* In an action by A.'s wife against L., the executor of S., to set aside the sale of A.'s share

to S., she did not aver that A. had been guilty of fraud in the transaction, or that A. was not fully aware of what he was doing at the time of the sale; but she prayed for relief on the ground that S. stood in the position of trustee to A., who at the time of the sale was in very embarrassed circumstances, as S. knew; that the price was considerably below the real value of the share, as S. also knew; and that A. had no independent advice in the transaction:—Held, that as the purchaser and vendor stood in the positions of trustee and cestui que trust, although the trustee was not the donee of a power of sale, his duty was to see that the property realised its full value; and that the vendor being in embarrassed circumstances to the knowledge of the trustee, and the price given by the trustee for the property being greatly inadequate, the relief asked for must be granted. *Plowright* v. *Lambert*, 52 L. T. 646.

Held, also, that L. must pay the costs of the action, and was not entitled to deduct them from the share sold to S. *Ib.*

—— **Purchase by Executor who has not Proved.**]—A sale is not to be avoided merely because, when entered upon, the purchaser has the power to become trustee of the property purchased, as for instance by proving the will which relates thereto, though in point of fact he never does become such. Such a purchaser is under no disability, and in order to avoid such sale it must be shown that he in fact used his power in such a way as to render it inequitable that the sale should be upheld. *Clark* v. *Clark*, 53 L. J., P. C. 99; 9 App. Cas. 733—P. C.

—— **Sale to Stranger—Repurchase by Trustee.**]—The fact that a trustee has sold trust property in the hope of being able to repurchase it for himself at a future time is not of itself a sufficient ground for setting aside the sale, where the price was not inadequate or the sale improper in other respects. In a case of suspicion of improper dealings with trust property, when the parties suspected and who might have been able to give a satisfactory explanation, are all dead, if a reasonable explanation of the evidence, consistent with the honesty of the suspected transaction, can be found, the court will adopt it rather than draw inferences from the evidence which are unfavourable to the good faith of those who are no longer able to explain their acts and written words. That a transaction was legal and honest is a presumption of law which is strengthened by lapse of time. *Postlethwaite, In re, Postlethwaite* v. *Rickman*, 60 L. T. 514; 37 W. R. 200; 53 J. P. 357—C. A.

Purchasing from Cestui que Trust.]—Where a trustee purchases of his cestui que trust, the onus of proving the fairness of the transaction is not shifted by the fact that the vendor is a co-trustee. *Biel's Estate, In re, Gray* v. *Warner*, 42 L. J., Ch. 556; L. R. 16 Eq. 577; 28 L. T. 835; 21 W. R. 808.

Trustees of the marriage settlement of H.'s wife, purchased at his instigation real estate of which he was sole trustee for sale. He was employed as solicitor in the purchase, and advanced some of the purchase money. H.'s cestuis que trust disputed the sale:—Held, that the sale was not impeachable. *Hickley* v. *Hickley*, 45 L. J., Ch. 401; 2 Ch. D. 190; 34 L. T. 441; 24 W. R. 604.

There is no rule that a trustee to sell cannot be the purchaser: but however fair the transaction, it must be subject to an option in the cestui que trust, if he comes in a reasonable time, to have a resale: unless the trustee, to prevent that, purchases under an application to the court. *Campbell* v. *Walker*, 5 Ves. 678; 5 R. R. 135.

To set aside a purchase by a trustee of the trust property, it is not necessary to show that he has made an advantage. *James, Ex parte*, 8 Ves. 348; 7 R. R. 56.

The principle against purchases by trustees of the trust property is most strictly applicable to assignees in bankruptcy and their agents. *Ib.*

Form of a decree against a trustee purchasing the trust estate at an alleged under-value, and making permanent improvements thereon. *Williamson* v. *Seaber*, 3 Y. & C. 717.

The employment of counsel as confidential legal adviser disables him from purchasing for his own benefit charges on his client's estates, without his permission; and although the confidential employment ceases, the disability continues as long as the reasons on which it is founded continue to operate. *Carter* v. *Palmer*, 8 Cl. & F. 657.

The rule that a trustee cannot purchase from his cestui que trust, does not extend to a purchase by a mortgagee from his mortgagor. *Knight* v. *Majoribanks*, 2 Mac. & G. 10; 2 Hall & Tw. 308.

Mortgage from Cestui que Trust—Priority over Prior Incumbrance.]—A trustee, who takes, without notice of a prior equitable incumbrance, a mortgage from his cestui que trust upon the property in which he holds the legal estate, is entitled to the advantage given by that legal estate, and by virtue thereof obtains priority for his mortgage over the prior incumbrance. Dictum of James, V.-C., in *Phipps* v. *Lovegrove* (L. R. 16 Eq. 80) approved and followed. *Newman* v. *Newman*, 54 L. J., Ch. 598; 28 Ch. D. 674; 52 L. T. 422; 33 W. R. 505.

4. Information as to Trust Fund.

Right of Cestui que Trust—Reversionary Legatee.]—A person entitled to a vested reversionary pecuniary legacy of small amount is entitled to have from the trustees of the will, at his own expense, full information as to the state of that part of the trust fund out of which his legacy is payable, or, if there has been no appropriation of securities, of the whole trust fund. This right exists although less than a year may have elapsed since the testator's death. *Dartnall, In re, Sawyer* v. *Goddard*, 64 L. J., Ch. 341; [1895] 1 Ch. 474; 12 R. 237; 72 L. T. 404; 43 W. R. 644—C. A.

Distringas—Charging Order.]—A person contingently entitled, after the death of a tenant for life, to a share of a trust fund, although assured by the trustees that the fund is invested in consols standing in their names, and free from any claims, is nevertheless entitled to an authority from the trustees enabling him to ascertain for himself at the Bank of England if there be any charging order or distringas against the consols. *Tillott, In re, Lee* v. *Wilson*, 61 L. J., Ch. 38; [1892] 1 Ch. 86; 65 L. T. 781; 40 W. R. 204.

5. Production of Title-Deeds.

To Cestui que Trust.]—Primâ facie, and in the absence of any special circumstances, a

cestui que trust, even though he be only interested in the proceeds of the sale of land, is entitled to the production and inspection of all title-deeds and other documents relating to the trust estate which are in the possession of the trustees. One cestui que trust can enforce this right against the trustees, without bringing before the court the other persons beneficially interested in the property when they have no higher right than himself. *Cowin, In re, Cowin* v. *Gravett*, 56 L. J., Ch. 78 ; 33 Ch. D. 179 ; 34 W. R. 735.

Inspection.]—A cestui que trust is entitled to inspection of the deed creating the trust, notwithstanding that the trustee alleges that by exercise of a power contained in the deed the cestui que trust's interest under it has ceased. *Bugden* v. *Tylee* or *South*, 21 Beav. 545 ; 26 L. J., Ch. 425 ; 3 Jur. (N.S.) 783 ; 5 W. R. 128.

Opinion of Counsel.]—A trustee is not bound to produce to his cestui que trust cases laid before counsel with a view of resisting a claim by such cestui que trust, although the trustee is not personally interested. *Thomas* v. *Secretary of State for India*, 18 W. R. 312.

6. Option as to Interest or Profits.

Trust Funds Employed in Trade.]—Where a trustee has an infant's money to lay out for his benefit, and employs it in his trade, the court will give an option for the benefit of the infant either to have interest or the profits of the trade. *Anon.*, 2 Ves. 630. S. P., *Bate* v. *Scales*, 12 Ves. 402.

If a trustee mixes trust fund with his private moneys and employs both in a trade, an adventure of his own, the cestui que trust may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds so employed. *Docker* v. *Somes*, 2 Myl. & K. 655 ; 3 L. J., Ch. 200. And see *Vyse* v. *Foster*, 44 L. J., Ch. 37 ; L. R. 7 H. L. 318 ; 31 L. T. 177 ; 23 W. R. 355.

Where trust property is employed in trade without authority, the cestuis que trust must elect to take either the profits for the whole period, or interest for the whole period. Circumstances may arise to entitle them to take profits for one and interest for another part of the period ; but a notice of dissolution of partnership, published for a particular purpose, and not accompanied by a settlement of accounts or transfer of the property, is not sufficient. *Heathcote* v. *Hulme*, 1 J. & W. 122.

Difficulties of enforcing a cestui que trust's right (however clear) to participate in profits of trade carried on in part with trust fund. See *Wedderburn* v. *Wedderburn*, 2 Myl. & Cr. 41 ; 8 L. J., Ch. 177 ; 3 Jur. 596. Affirming 2 Keen, 722.

See also, ante, C. 11. b.

7. Lien.

Lien of Cestuis que Trust inter se.]—Where one cestui que trust procures the trust money to be laid out improperly, and part of it is consequently lost, the other cestuis que trust are entitled, as against him, in a suit properly constituted for that purpose, to have their shares of the trust money made good out of his share of that which is ultimately recovered. But if the bill prays relief against the trustees only, the liability of the share of that cestui que trust cannot be enforced against him. *Phillipson* v. *Gatty*, 2 Hall & Tw. 459. Affirming 7 Hare, 516 ; 13 Jur. 318.

Under a will, a trustee held an aggregate fund in trust, as to one-third each for A., B., and C. respectively for life, with remainder to their respective children. He, without any authority under the will, transferred one-third of the fund to the trustees of the respective settlements of A., B., and C. The share of B. having been dissipated by her trustees :—Held, that B.'s children were entitled to participate in A.'s third, which was still remaining in her trustees' hands. *Browne* v. *Butter*, 24 Beav. 159.

Lien of Cestuis que Trust on Beneficial Interest of Trustees.]—A plaintiff sued his trustee, to make him responsible for a trust fund which had been wrongfully paid to the plaintiff's father. The plaintiff had, as one of the next of kin of his father, received two-thirds of his estate :—Held, that the father's assets in the hands of the plaintiff were primarily liable to make good two-thirds of the trust fund in exoneration of the trustee. *Orrett* v. *Corser*, 21 Beav. 52 ; 1 Jur. (N.S.) 882 ; 3 W. R. 604.

—— **Fund in Court.**]—The personal interests of a trustee in a trust fund in court will be made applicable to the discharge of all claims against him as trustee. *Irby* v. *Irby*, 25 Beav. 633 ; 4 Jur. (N.S.) 989 ; 6 W. R. 853.

A. was entitled to a share of funds held upon the trusts of his father's marriage settlement, and for which his father's estate was liable. He was one of his father's executors. In a suit to administer the trusts of the settlement and his father's estate, a large balance was found due from A. as executor :—Held, that the trustees of the settlement were entitled to retain such balance out of A.'s share, and that purchasers from A., pending the suit, with notice of the proceedings, were bound by the same equity. *Ib.*

—— **Executrix and Tenant for Life.**]—An executrix and tenant for life unnecessarily and improperly sold out a sum of stock. A common decree for an account was made against her representatives :—Held, that her estate was liable to replace the stock and dividends, and that relief might be had on further directions, though the particular matter was not charged by the bill. *Davenport* v. *Stafford*, 14 Beav. 319.

—— **Trustee and Cestui que Trust of Voluntary Deed.**]—A trustee of a voluntary deed, under which he is also a cestui que trust, having concurred in allowing the settlor to dispose of parts of the trust property :—Held, that he was not entitled to have relief granted on a bill filed by one of the cestuis que trust extended for his benefit. *Parnell* v. *Hingston*, 3 Sm. & G. 337 ; 4 W. R. 794.

—— **Cestui que Trust enforcing Remedy against Defaulting Trustee.**]—Cestuis que trust do not, by enforcing their remedy against a defaulting trustee personally, lose their lien on the security on which the trust money has been invested. *Francis* v. *Francis*, 5 De G. M. & G. 108.

—— **Interest under Will acquired by Trustee—Assignee from Trustee—Beneficial Derivative Interest.**]—The rule that a defaulting trustee cannot claim, as against his cestui que trust, any beneficial interest in the trust estate until he has made good his default, and that his assignee is in no better

position, even where the default has been committed after the assignment, applies not only to shares taken by the trustee under the instrument creating the trust, but also to derivative interests acquired by him in the trust estate. *Doering* v. *Doering*, 58 L. J., Ch. 553 ; 42 Ch. D. 203 ; 37 W. R. 796.

Mrs. D., an executor and trustee entitled under a will to a life interest in a trust fund, took assignments from two of the beneficiaries of their reversionary shares in the fund, and mortgaged the two shares so acquired to F. Mrs. D. was afterwards found a defaulter, and died insolvent : —Held, that F. took subject to all the equities against his mortgagor, and that the beneficiaries under the will were entitled to have the default of Mrs. D. made good out of the shares in the estate which had been acquired by her in priority to the claims of her mortgagee. *Ib.*

—— **Bankruptcy of Trustee.**]—A testator devises freehold property to trustees, of whom the bankrupt is one, upon trust to sell and divide the proceeds equally amongst his brothers and sisters, including the bankrupt and his co-trustee. The cestuis que trust, in consideration of a specific sum stated in the deed to be paid to each of them, but which was in fact not paid, convey the estate to the bankrupt, who a few days afterwards gives each of the cestuis que trust two promissory notes for the payment of the money by instalments, but the notes are never paid :—Held, that the cestuis que trust had a lien on the estate in the hands of the bankrupt's assignees, for the money still remaining unpaid. *Latey, Ex parte*, 1 Deac. 557 ; 2 Mont. & Ayr. 609 ; 5 L. J., Bk. 27.

—— **Bankrupt Trustee entitled to Equitable Interest.**]—A testator devised real estate to his nine children, nominatim as tenants in common, giving a power to three of them to sell the whole to avoid the difficulties of partition. W., one of the three, conducted certain sales under the power, retained more than his share of the purchase moneys, and went into liquidation. Further sales were effected, and out of the proceeds a further sum was paid to W.'s trustees in liquidation in respect of, and in excess of, his share :—Held, that all purchase moneys received by the trustees were impressed with a trust under the will, and that W.'s equitable interest therein was liable to recoup the other beneficiaries. *Brown, In re, Dixon* v. *Brown*, 55 L. J., Ch. 556 ; 32 Ch. D. 597 ; 54 L. T. 789.

—— **Bankrupt Trustee's Reversionary Interest.**]—A bankrupt's reversionary interest under the trusts of a will ordered to be sold, and the proceeds applied in making good moneys which had come to his hands as trustee under the same trusts, and had been misapplied. *Hardman, Ex parte, Molyneux, In re*, 3 Mont. D. & D. 559.

A trustee and executor, who took a life interest in his testator's residuary real and personal estate, misappropriated and wasted portions of the estates specifically devised and bequeathed, and subsequently became bankrupt :—Held, that his estate in the residuary realty being legal could not be applied in making good his breaches of trust. *Fox* v. *Buckley*, 3 Ch. D. 508 ; 25 W. R. 170.

8. Liability of Cestui que Trust for Loss of Trust Fund.

In General.]—Where a trust fund is directed to be laid out in public funds till a purchaser can be found, and loss happens, it must fall in average on all those entitled to it. *Chambers* v. *Chambers*, Fitzg. 127.

The interest which a party takes under a settlement, is liable to make good any breach of trust or other liability which he may have incurred under it, and that though the settlement is effected by distinct deeds. *Woodyatt* v. *Gresley*, 8 Sim. 180.

A plaintiff sued his trustee, to make him responsible for a trust fund which had been wrongfully paid to the plaintiff's father. The plaintiff had, as one of the next-of-kin of his father, received two-thirds of his estate :—Held, that the father's assets in the hands of the plaintiff were primarily liable to make good two-thirds of the trust fund, in exoneration of the trustee. *Orrett* v. *Corser*, 21 Beav. 52 ; 1 Jur. (N.S.) 882 ; 3 W. R. 604.

Part of Fund Distributed.]—Where, in the case of an authorised investment of trust funds, a loss has arisen after the distribution of a part of the funds among some only of the beneficiaries, such loss must be borne by the beneficiaries in the proportions of their several and respective shares remaining undistributed. *Bacon's Settlement Trusts, In re, Hutton* v. *Anderson*, 58 L. J., Ch. 823 ; 42 Ch. D. 559 ; 61 L. T. 458.

Liability of Tenant for Life—Satisfaction.]—By a marriage settlement of 1832, real and personal estate of H., the intended wife, was conveyed to trustees in trust for R., the intended husband, for life, and after the death of the survivor of R. and H., in trust for the children of the marriage, as R. and H. or the survivor should appoint, and in default of appointment for the children equally. The trustees allowed R. to obtain possession of the trust fund, which he mixed with moneys of his own, and in 1861 one of the trustees commenced a suit to compel him to replace the fund. By arrangement of the trustees with R., he and H., by deed of the 25th September, 1861, irrevocably appointed the fund equally among the children, four of whom were of age, and one (the plaintiff) a minor. On the following day the four adult children, and two years afterwards the plaintiff, when of age, executed a deed releasing the trustees from the trusts of the settlement. The children executed the release by the direction of their father, without any professional advice or assistance, and in ignorance of its contents or effect, and of their rights under the settlement. R. from time to time paid sums of money for the plaintiff ; he purchased for the plaintiff a commission in the army, paid for his outfit, &c., made him an adequate yearly allowance, and paid a large sum for his promotion. No one of the sums so advanced was equal in amount to the plaintiff's share of the trust fund, nor was there any evidence that it was stated at the time of the advances, or understood between the plaintiff and R., that they were made out of the trust fund in R.'s hands:—Held, 1st, that the release should be set aside ; 2nd, that R.'s position was that of a debtor to his five children for their respective shares of the trust fund ; 3rd, that the sums advanced being respectively less in amount than the plaintiff's share was not a satisfaction of it, pro tanto, and that R. was not entitled to credit for them. *Reade* v. *Reade*, 9 L. R. Ir. 409—C. A.

When Estate Discharged.]—An estate having

once borne a charge in favour of legatees or creditors, is discharged, though the fund has been misapplied by the trustees. *Omerod* v. *Hardman*, 5 Ves. 736. *See* 6 R. R. 19 n.

A loss happening by the default of a trustee appointed by a testator falls on the legatees, and the estate is discharged from it. *Hutchinson* v. *Massareene*, 2 Ball & B. 54.

Where lands are devised to trustees to raise money for several purposes, and they raise the money out of the profits, the land is thereby discharged, and the persons concerned must resort to the trustees. *Juxon* v. *Brain*, Pre. Ch. 143.

Trustee appointed for raising and paying a portion of 500*l.* to A. Trustee enters and gives judgment to A. for paying the 500*l.* to A. when raised; the trustee raises the 500*l.* and more, and becomes insolvent; whether the land is discharged. *Harrison* v. *Cage*, 2 Vern. 85.

Land settled in trust to pay debts is discharged as soon as the money is raised, though misapplied by the trustees. *Anon.*, 1 Salk. 153.

If lands are appointed to pay debts, the heir is entitled to them when the debts are paid; and if to be sold, he is entitled to the surplus; but if there be any abuse, his remedy is against the trustee, and not against the purchaser. *Culpepper* v. *Aston*, 2 Ch. Ca. 115. Sed quære, if a purchaser with notice might not be affected. *Ib.*

Where a trustee was directed to apply the rents of a leasehold estate in paying the fines on renewal, and he misapplied the rents which ought to have been so employed:—Held, that the loss must fall on the tenant for life, and not upon the trust estate generally. *Solley* v. *Wood*, 29 Beav. 482; 30 L. J., Ch. 813; 7 Jur. (N.S.) 1225.

Where trust funds have been lost by a breach of trust, moneys recovered from the estate of a trustee who has made default for both principal trust funds and the income thereof, are applicable in the first instance in reduction of the principal debt. *Grabowski's Settlement, In re*, 37 L. J., Ch. 926; L. R. 6 Eq. 12.

Sale — Collusion Between Creditors and Tenants for Life.]—Sale declared to be made subject to the trusts of the testator's will, where, under a decree that his real estate (which was devised in strict settlement, subject to debts) should be sold, the sale had been effected by collusion between the creditors and tenants for life. *Manaton* v. *Molesworth*, 1 Eden, 18.

9. Remedies for Breach of Trust.

a. In General.

Remedy by Way of Injunction.]—When any act involving a breach of trust is intended to be done, though not in its consequences irremediable, the court will prevent it by injunction. *Att.-Gen.* v. *Aspinall* or *Liverpool Corporation*, 2 Myl. & Cr. 613; 7 L. J., Ch. 51; 1 Jur. 812.

Injunction to restrain an action at law to recover money lent in breach of trust refused. *Lambert* v. *Lambert*, 5 Ir. Eq. R. 339. And see *Snare* v. *Baker*, 13 Jur. 203.

Quære, whether a cestui que trust can have an injunction to restrain his trustees from assenting to a bill in parliament. *Parker* v. *Dunn River Navigation Co.*, 1 De G. & Sm. 192; 11 Jur. 624.

Criminal Proceedings for Breach of Trust.]—The court sanctioned criminal proceedings under s. 13 of the 20 & 21 Vict. c. 54 (similar to the 24 & 25 Vict. c. 96, s. 80), upon an affidavit that a trustee had paid 1,409*l.* into his own bankers, had drawn out the whole with the exception of 28*l.*, and had paid a private debt of 150*l.* out of the trust fund. *Wadham* v. *Rigg*, 1 Dr. & Sm. 216.

Writ de Contumace Capiendo.]—The ecclesiastical court had no jurisdiction over trusts, and therefore, where a party, sued as a trustee, was arrested on a writ de contumace capiendo, the court of king's bench discharged him out of custody. *Jenkins, Ex parte*, 1 B. & C. 655.

Decree for Execution of Trusts.]—Under 15 & 16 Vict. c. 86, s. 42, a cestui que trust is not entitled as of right to a decree for execution of the trusts unless the case is in its particular circumstances a proper one for making such a decree. *M'Wade* v. *Brodhurst*, 24 W. R. 232.

Decree for Repayment of Money Wrongfully Lent.]—Where trustees lent the trust moneys to one of the cestuis que trust upon a contract which constituted a breach of trust, the court, in a suit by the trustees against all the cestuis que trust, refused, as against the cestuis que trust who had obtained the loan, to make a decree for the repayment of the money, contrary to the terms of the contract. *Phillipson* v. *Gatty*, 2 Hall & Tw. 459. Affirming 7 Hare, 516; 13 Jur. 318.

On a bill filed, by an incumbrancer of the interest of a deceased tenant for life in a fund, against a party sought to be made accountable in respect of a breach of trust affecting the whole fund, to which suit the cestuis que trust in remainder were also made parties, a decree directing the restitution of the whole fund was varied, on appeal, by limiting the relief to the restitution of so much only of the interest of the fund as had accrued in the lifetime of the tenant for life. *Rackham* v. *Siddall*, 1 Mac. & G. 607; 2 Hall & Tw. 44. Varying, on this point, 16 Sim. 297; 12 Jur. 640.

Bankruptcy Act—Repayment of Money by Trustee on Eve of Bankruptcy.]—An actual sale of goods for money, the vendor intending to use the purchase-money in making a voluntary payment, and the purchaser, knowing of that intention, is not a fraudulent transfer within s. 6, sub-s. 2, of the Bankruptcy Act, 1869. If a debtor on the eve of bankruptcy voluntarily makes good trust money which he has misapplied, the payment cannot be set aside as a fraudulent preference of the trust estate. *Stubbins, Ex parte, Wilkinson, In re*, 50 L. J., Ch. 547; 17 Ch. D. 58; 44 L. T. 877; 29 W. R. 653.

Within three months before the filing of a liquidation petition the debtor, who was one of the executors of a will, sold some goods to his co-executor with the intention of applying the purchase money in repaying to the testator's estate money which he had improperly abstracted from it. This intention was known to the co-executor, and the purchase money was, with his knowledge, immediately after its payment by him, paid by the vendor into a bank to the credit of the executors:—Held, that the transaction was not either a fraudulent preference within s. 92 of the Bankruptcy Act, 1869, or a fraudulent transfer of property within s. 6, sub-s. 2, and that neither the co-executor nor the testator's

estate could be compelled to refund the money. *Ib.*

Attachment.]—*See* DEBTORS ACT.

Proof in Bankruptcy.]—*See* BANKRUPTCY.

Right to Proceed against one Trustee.]—Right of a cestui que trust to proceed separately against one trustee implicated in a joint breach of trust. *Walker* v. *Symonds*, 3 Swanst. 75 ; 19 R. R. 155.

—— **Different Sets of Trustees.**]—A bill by a widow and children (who were infants), against A., B., C., and D., to have the trusts of two deeds and of a will, under which they were interested, carried into execution, is not multifarious, though A. and B. were the trustees of one of the deeds, C. and D. of the other, and A. B. and C. of the will. *Campbell* v. *Mackay*, 7 Sim. 564 ; 1 Myl. & Cr. 603.

Two classes of trustees had committed a breach of trust :—Held, that the cestuis que trust might proceed against the one class, without making the other class parties. *M'Gachen* v. *Dew*, 15 Beav. 84.

—— **Estate of Trustee Secondarily Liable.**]—Where the estate of a trustee is secondarily liable, in consequence of a breach of trust by a co-trustee, the cestui que trust is bound to pursue his demand against the former estate with due diligence. *Newham* v. *Newham*, 1 L. J. (o.s.) Ch. 23.

Right to Intervene on Garnishee Summons.]—A garnishee summons having been issued to attach certain moneys due to the judgment debtor on a judgment. the judgment creditor received notice from a third person that she claimed the said moneys as trust moneys recovered for her benefit by the judgment debtor as her trustee. On the hearing of the summons no suggestion was made by the garnishee under Ord. XLV. r. 6, that the moneys sought to be attached belonged to some third person, and the master refused to hear a solicitor on behalf of the claimant, on the ground that no such suggestion, as aforesaid, having been made he had no power under Ord. XLV. rr. 6, 7, to hear him, and made the order absolute :—Held, that where in garnishee proceedings circumstances are brought to the knowledge of the master which afford reasonable ground for supposing that the money sought to be attached is trust money, the master should exercise an equitable jurisdiction, and withhold the order absolute, and order the money to be paid into court to abide the event of the inquiry. *Roberts* v. *Death*, 51 L. J., Q. B. 15 ; 8 Q. B. D. 319 ; 46 L. T. 246 ; 30 W. R. 76—C. A.

Sufficiency of Interest to Maintain Administration.]—A member of a class, designated as the objects entitled to a trust fund in the event of the happening of one or more contingencies, has a sufficient interest to maintain an action for the protection of the fund if at the time of action brought the maximum number of the class is ascertained, although it be still uncertain whether he will ultimately form one of the members of that class. *Peacock* v. *Colling*, 54 L. J., Ch. 743 ; 53 L. T. 620 ; 33 W. R. 528—C. A.

b. Attachment.

For Non-Payment of Money—Debtors Act, 1869.]—A trustee who has received trust money is deemed to have it in his possession until he discharges himself of his trust, and he may be attached, as being within the third exception to s. 4 of the Debtors Act, 1869, for making default in payment of a sum so received, and ordered by a court of equity to be paid by him, notwithstanding that he may have parted with the actual possession of, or control over, the money prior to the order for payment. *Middleton* v. *Chichester*, 40 L. J., Ch. 237 ; L. R. 6 Ch. 152 ; 24 L. T. 173 ; 19 W. R. 299, 369.

But interest, due from him in respect of trust money so received is not money in his possession or under his control, and an attachment will not issue for non-compliance with an order directing payment of such interest. *Ib.*

The court has no discretion to refuse an application for leave to issue a writ of attachment against a person making default in payment of money in a case falling within exception 3 of s. 4 of the Debtors Act, 1869. *Evans* v. *Bear*, L. R. 10 Ch. 76 ; 31 L. T. 726 ; 23 W. R. 67.

A trustee, who had been ordered in a suit to pay into court an amount admitted to be due from him, and mixed with his own moneys, was adjudicated bankrupt :—Held, that although the debt was one from which an order of discharge would not release him, still, as it was a debt provable under the bankruptcy, he was, pending the bankruptcy proceedings, protected by the Bankruptcy Act, 1869, s. 12, from attachment for disobedience to the order. *Cobham* v. *Dalton*, 44 L. J., Ch. 702 ; L. R. 10 Ch. 655 ; 23 W. R. 865.

A residuary legatee, being entitled to a sum of money which the trustee of the will admitted having received, obtained judgment against the trustee in an action in the exchequer division, and levied execution. The execution did not produce sufficient to satisfy the judgment ; and the plaintiff applied for an order on the trustee to pay the money within a definite time, intending, on his making default, to attach him under s. 4, sub-s. 3 of the Debtors Act, 1869 :—Held, that the order asked for could not be obtained after judgment in a common law division. *Drewitt* v. *Edwards*, 37 L. T. 622 ; 26 W. R. 122—C. A.

The 32 & 33 Vict. c. 62, s. 4, extends to an application under 41 Geo. 3, c. 90, to commit for disobedience to a decree of the Irish court of chancery. *Ferguson* v. *Ferguson*, 44 L. J., Ch. 615 ; L. R. 10 Ch. 661.

But a trustee who has been ordered to pay money which he had neglected to recover is not within the third exception of that section, and cannot be committed for default in paying the money. *Ib.*

Application, how made.]—Semble, that an order for an attachment against a defendant who is said to be within that exception ought not to be made ex parte. *Ib.*

For Non-Transfer of Funds.]—When a trustee is ordered to transfer a fund of consols admitted to be due from him and subsequently default is made, a writ of attachment will issue. *Digby* v. *Turner*, 28 L. T. 296 ; 21 W. R. 471.

For Non-Execution of Lease.]—When a person has been directed to execute a lease, but refuses to do so, the court can only enforce such execution by attachment, the Trustee Act, 1850, having omitted to provide for such a case. *Grace* v. *Baynton*, 25 W. R. 506. But see *Hall* v. *Hale*, 51 L. T. 226. *See also* Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 14, Ord. XLII. r. 7.

c. Receiver.

Appointment—Constructive Trust.]—The 3 & 4 Vict. c. 105, s. 21, does not authorise the appointment of a receiver in a case of constructive trust; therefore the court refused to appoint a receiver where the interest of the conusor of a judgment in a lease had been evicted for non-payment of rent, and a new lease had been granted to a third party under circumstances which would constitute the new lease a graft. *Cassidy* v. *Hopkins*, 10 Ir. Eq. R. 208.

—— **Trustee with Power of Entry and Distress.**]—Receiver ought not to be appointed where there is a trustee with power of entry and distress. *Buxton* v. *Monkhouse*, G. Cooper, 41.

—— **Rent in Arrear.**]—Where the payment of rents, in consequence of disputes among the trustees, had been permitted to fall into arrear, on a bill filed by the plaintiff, who was entitled to the rents and profits for her life, against the trustees, the court ordered a receiver to be appointed, and the costs of the suit to be paid by the trustees. *Wilson* v. *Wilson*, 2 Keen, 249.

—— **Corporation.**]—The court refused to appoint a receiver of a charity estate against a corporation as trustees. *Att.-Gen.* v. *Stafford Corporation*, Barnard. 33.

—— **West India Estate.**]—Receiver of a West India estate applied for by one of the parties entitled to a charge thereon against the trustee, refused, notwithstanding the estate was depreciated in value, and incumbrances thereon were increasing, the management of the trustee not appearing to be improper. *Barkley* v. *Reay* (*Lord*), 2 Hare, 308.

—— **Heir substituted as Trustee to Execute Devise to Charity.**]—Where an heir had, by decree, been substituted as trustee to execute a devise to charity, upon his laches, an account decreed, and receiver appointed. *Att.-Gen.* v. *Bowyer*, 3 Ves. 714; 4 R. R. 132.

—— **Trustee becoming Bankrupt.**]—Executor and trustee becoming bankrupt, a receiver was appointed, though testator knew the commission had issued. *Langley* v. *Hawk.* 5 Madd. 46.

A receiver will be appointed where an executrix and trustee is bankrupt. *Gladdon* v. *Stoneman*, 1 Madd. 143 n.

—— **Majority of Trustees Acting alone.**]—There being some disagreement between three trustees, the majority acted alone and took securities in their own names, omitting the name of the dissentient trustee:—Held, that the plaintiff, who was interested in the trust property, was entitled to a receiver. *Scale* v. *Scale*, 22 Beav. 584.

—— **Trustees making Default in Passing Accounts.**]—In an administration suit, where an order had been made that the trustees of the estate of the testator in the cause should continue to receive the rents and profits and proceeds of the estate, and keep down the annuities bequeathed by his will, and from time to time pass their accounts in chambers, and pay in their balances, an order appointing a receiver was made in chambers, by a vice-chancellor personally, upon the application of some of the beneficiaries. upon the ground that the trustees had made default in passing their accounts. The trustees and other parties opposed the application:—Held, that this was a matter connected with the management of property within the 15 & 16 Vict. c. 80, s. 26, and that the judge had jurisdiction to make the order in chambers. *Booth* v. *Coulton*, 16 W. R. 683.

—— **On Breach of Trust.**]—A receiver appointed where the trustees and executors had neglected to get in the testator's estate, and had thereby deprived infant legatees of their maintenance, and in consequence of non-performance of duty and general misconduct. *Richards* v. *Perkins*, 3 Y. & C. 299; 8 L. J., Ex. Eq. 57; 3 Jur. 168.

Mortgagee in trust had been guilty of breaches of trust, in respect of which a suit by his cestuis que trust (infants) was pending against him. He was restrained, on the petition of the cestuis que trust, from receiving the mortgage money under a decree which had been made in a prior foreclosure suit, and the solicitor of the cestuis que trust, the plaintiffs in the subsequent suit, was appointed in his stead to receive the same, without giving the usual security. The court refused to appoint a nominee of the cestuis que trust mentioned in the petition, without security, he not being an officer of the court. *Snare* v. *Baker*, 13 Jur. 203.

Held, too, that the application was rightly made by petition. *Ib.*

A husband contracted for a lease of some premises, and he afterwards induced the trustees of his marriage settlement, who held moneys for the separate use of his wife, without power of anticipation, to act in breach of their trust, and to purchase the property. The property was conveyed to the trustees, and, by a deed executed by the husband and wife, it was declared that it should be held for their indemnity and on the trusts of the settlement. The husband laid out very considerable sums of money in buildings and repairs, and, with the consent of the wife, was permitted to receive the rents. After some years, disputes arose; the trustees insisted on receiving the rents, and proceeded at law to enforce their rights; whereupon the husband filed a bill against the trustees and his wife, claiming a lease under the agreement, and asking for a sale of the property, and for the application of the produce, first, in replacement of the trust funds, and afterwards, in reimbursing the plaintiff his outlay. A motion for a receiver was refused with costs. *Wiles* v. *Cooper*, 9 Beav. 294; 15 L. J., Ch. 129.

Where by one deed of settlement a fund and estates of the wife were settled to her for life, remainder in trust for the children of the marriage, and by another deed the husband settled a rent-charge on his estates in trust for the wife for life, she, after her husband's death, obtained, by fraud and concealment of the settlement, the fund to be transferred to her, and assigned her life interest in her estates to a party with notice of the fraud:—Held, that the rents of her estates and the rent-charge were liable to be applied in replacing the fund, and a receiver appointed. *Woodyatt* v. *Gressley*, 8 Sim. 180.

Where property has been administered and

applied without complaint according to a uniform course of management for a long series of years, the court will not, by an interlocutory order, disturb the possession upon the ground that such application is a breach of trust, unless it is perfectly clear that the party in whom the property is vested is a mere naked trustee, and has not, even to a limited extent, any of the rights or interests of an owner. A motion for appointment of a receiver of the estates vested in the Irish Society, at the instance of one of the London companies, claiming a beneficial interest in the income of the estates, was therefore refused. *Skinners' Co.* v. *Irish Society*, 1 Myl. & Cr. 162. And see *S. C.*, 12 Cl. & F. 425; 9 Jur. 1043—H. L. (E.)

Receiver refused, though as between parties who stood in the relative situation of cestui que trust and trustee, and though the latter, against whom the receiver was prayed, admitted that he had purchased the trust property, the ground of the decision being, though the case was one of suspicion, that the court could not interfere till the purchase was actually set aside. *George* v. *Evans*, 4 Y. & C. 211.

Where a portion of a trust fund had been lost, that is primâ facie a breach of trust, and a sufficient ground for the appointment of a receiver on an interlocutory application. *Evans* v. *Coventry*, 5 De G. M. & G. 911; 3 Eq. R. 545; 3 W. R. 149.

Held, also, that objections to the bill on the ground of misjoinder, multifariousness, or want of parties, were no answer to such an application. *Ib.*

—— **On Disclaimer.**]—Where one of two trustees of real estate declines to act, the court will appoint a receiver on behalf of infant cestuis que trust, but with liberty to either of the trustees to offer himself. *Tait* v. *Jenkins*, 1 Y. & C. C. C. 492.

Where there are several trustees, the disclaimer of some of them is not alone a sufficient ground for the appointment of a receiver, without the consent of those who remain. *Browell* v. *Reed*, 1 Hare, 434; 11 L. J., Ch. 272; 6 Jur. 530.

Receiver appointed before answer in a case of a devise to four trustees, of whom two declined to act, all parties being before the court, and consenting. *Brodie* v. *Barry*, 3 Mer. 695.

—— **Where Trustee abroad.**]—Receiver appointed of a government pension, the trustee being out of the jurisdiction. *Node* v. *Backhouse*, 2 Y. & C. C. C. 529; 12 L. J., Ch. 446; 7 Jur. 808.

A receiver appointed over lands in Ireland conveyed by a trust deed, the trustee not being before the court, and although the trustee had an interest in his own right, being one of the creditors to be paid off, and appeared upon the pleadings as in possession. *Malcolm* v. *Montgomery*, 2 Moll. 500; 1 Hog. 93.

A receiver appointed of real and personal estate where the devisee in trust and personal representatives were in Jersey, and therefore out of the jurisdiction. *Smith* v. *Smith*, 10 Hare (App.) lxxi.

Discharge of Receiver on Appointment of New Trustees by Court.]—A receiver, who had been appointed in consequence of the misconduct and incapacity of trustees under a will, discharged upon the appointment of new trustees by the court. *Bainbrigge* v. *Blair*, 3 Beav. 421.

And see EXECUTOR AND ADMINISTRATOR.

When a Trustee may be appointed Receiver.]—*See* PRACTICE (RECEIVER).

d. Inquiries and Accounts.

i. *Inquiries.*

See R. S. C. Ord. XV. and XXXIII.

Whether Defendant Trustee remained Liable for Acts done by him as Trustee.]—On motion a reference directed to inquire, whether the defendant, a trustee, remains accountable for any acts done by him as such, and, if not, to settle a release. —— v. *Osborne*, 6 Ves. 455.

Whether Trustees Released.]—Estates being devised to trustees to be sold for payment of debts, and subject thereto for the testator's infant children, the surviving trustee retains possession of one of the estates in satisfaction of debts, which he alleges himself to have paid, the testator being insolvent. On a bill for an account and conveyance of this estate by one of the children, and the representatives of another, forty-five years after the testator's death, stating that they had recently discovered the facts, special inquiries directed to ascertain whether they had any notice of the circumstances, whether they had in any manner released, and whether the trustee had advanced to the amount of the value of the estate. *Chalmer* v. *Bradley*, 1 J. & W. 51; 20 R. R. 216.

Where Discretion of Trustee on Matters of Fact.]—Where the discretion of a trustee is to be exercised upon matter of fact, the court will substitute the master, but not where the discretion is to be exercised upon matter of opinion and judgment. *Walker* v. *Walker*, 5 Madd. 424; 21 R. R. 320.

Whether Cestuis que Trust had Assented to Breach of Trust.]—In the answer to a bill for relief in respect of a breach of trust, it was alleged that some of the cestuis que trust had assented thereto:—Held, that the parties sought to be charged were entitled to an inquiry as to that fact. *Fyler* v. *Fyler*, 3 Beav. 550; 5 Jur. 187.

Inquiry refused as to the concurrence of cestui que trust, in a breach of trust, where it was not alleged by the answer, and was unsatisfactorily proved by the evidence. *Lincoln* v. *Wright*, 4 Beav. 427; 10 L. J., Ca. 331.

A suit was instituted, after a great lapse of time, and after the death of all the trustees of a will, to make the estates of such trustees liable for breaches of trust in the administration. Their representatives being personally ignorant of the matters, the court refused to declare the liability in the first instance, but directed inquiries. *Kirkman* v. *Booth*, 11 Beav. 273; 18 L. J., Ch. 25; 13 Jur. 525.

On the hearing of a cause, commenced in 1838, to charge a trustee with the loss occasioned by the bankruptcy of his co-trustee, whom, ten years before, he had permitted to acquire sole possession of the trust fund, the court not being satisfied that all the circumstances as to the fact and time of the cestui que trust's knowledge of the breach of trust were in evidence,

directed an inquiry as to that fact, with liberty to either party to examine the co-trustee. *Broadhurst* v. *Balguy*, 1 Y. & C. C. C. 16.

A cestui qui trust concurring or acquiescing in breach of trust, not entitled to relief; subject to inquiry into circumstances which induced concurrence or acquiescence. *Walker* v. *Symonds*, 3 Swanst. 64; 19 R. R. 155.

As to how Trustee ought to have acted.]—Where a trustee of navy 5*l.* per cent. stock dissented from the conversion of it to 4*l.* per cents., under the statute 3 Geo. 4, c. 9, and it was charged by the bill that the dissent was given under circumstances injurious to the property, an inquiry was directed as to how he ought to have acted. *Angell* v. *Dawson*, 3 Y. & C. 308; 8 L. J., Ex. Eq. 50.

Where by the terms of a settlement 7,000*l.* stock was vested in trustees, upon certain specific trusts, and the bill alleged that one of the trustees had sold out the stock and applied part of it in discharge of a claim in no way connected with the trust:—Held, although the bill did not make a case or pray for inquiry upon this point, that the plaintiffs were, nevertheless, entitled to an inquiry; the trustee, by his answer, stating that the stock so applied had been included in the settlement by mistake, notwithstanding that he himself had been a party to, and had executed the settlement. *Ib.*

Corporation liable for Breach of Trust—Inquiry as to Corporate Property.]—Where a decree has declared that a corporation is liable to make good the loss occasioned by a breach of trust, the court will not specifically charge the loss upon the general corporate property; but will leave the plaintiff to enforce his remedy by the usual process against a corporation. An order, therefore, contained in such a decree, directing inquiries into the corporate property and the special trusts to which it was subject, with a view to charge the loss upon such portion of that property as should be subject to any special trust, was reversed. *Att.-Gen.* v. *East Retford Corporation*, 3 Myl. & Cr. 484; 8 L. J., Ch. 49; 2 Jur. 1079.

Admission of Breach of Trust by Representatives of Deceased Trustee—Denial by Beneficiaries.]—In a suit for the administration of the estate of a deceased trustee which was instituted by persons claiming to be his creditors by virtue of a breach of trust, against his executor and devisee in trust, subject to the payment of debts, and the persons beneficially interested under his will, and in which the executor and devisee in trust by answer admitted his testator's breach of trust, but the persons beneficially interested by answer denied it, and in which no evidence was entered into on the part of the plaintiffs, the common administration decree in a creditors' suit was made, without any special direction for inquiry respecting the breach of trust. *Teague* v. *Fisher*, 3 W. R. 587.

As to Proceeds of Trust Property received by Cestui que Trust.]—A trustee having sold certain trust property, and allowed the proceeds to be received by one of the cestuis que trust, an inquiry was directed as to the application of such proceeds, in order to ascertain the specific remedy which the trustee might have against such cestui que trust. *Rackham* v. *Siddall*, 1 Mac. & G. 607; 2 Hall & Tw. 44; 16 Sim. 297; 12 Jur. 640.

As to what Sum should have been Invested to meet Annuity.]—A testator directed his trustees to invest a sufficient sum on government or real securities or railway stock to produce an annuity of 100*l.* a year, and after the death of the annuitant to call in and divide the principal among his brothers then living, or the children of such as should be then dead. The testator left three brothers; and the trustees (of whom the annuitant was one) provided for the annuity in part by appropriating a railway debenture for 1,500*l.*, which bore interest at first at 5*l.* per cent., and afterwards at 4*l.* per cent., and in part by interest paid by one of the brothers upon a loan to him of moneys of the testator. A child of another brother who was dead, having filed a bill, during the annuitant's life, against the surviving trustees, to have a sufficient fund properly invested:—Held, that he was entitled to an inquiry as to what sum should have been invested at the end of a year from the testator's death to meet the annuity, and to a declaration that the trustees were liable to make good the sum so ascertained. *Starkey* v. *Dyson*, 24 W. R. 37.

ii. *Accounts.*

In General.]—Account decreed against a trustee, who having engaged the trust property in an adventure, afterwards renounced it for the trust, and declared it to be on his own account, though no part of the trust money actually laid out. *Wilkinson* v. *Stafford*, 1 Ves. 32.

The court views trustees with jealousy; and in case of two estates, one in trust, the other belonging to the trustee, will not permit him to act for his own or infant's benefit, as he pleases. *Ib.* 42.

Where lands are devised in trust to maintain an infant till twenty-three, and then to account, and for want of a devise over, the lands belong to the heir; the infant and heir may have an account in the meantime, upon suggesting the insolvency of the trustee. *Tilly* v. *Simpson*, Mosely, 244.

Where property is vested in trustees for the benefit of A.,—on a bill filed for the purpose of establishing securities given by A., the court will not direct any accounts against him in his absence, nor appoint a receiver. *Brown* v. *Blount*, 9 L. J. (o.s.) Ch. 74.

As to settlement of accounts between trustees not binding cestuis que trust, see *Fish, In re, Bennett* v. *Bennett*, 62 L. J., Ch. 977; [1893] 2 Ch. 413; 2 R. 467; 69 L. T. 233—C. A.

Account of Moneys received by Trustee during Infancy.]—In an action against trustees of a settlement, asking (inter alia) that each should furnish and vouch their accounts of the trust declared thereby, one of the trustees (R.) had only recently attained twenty-one. Bacon, V.-C., directed that in taking the account, the same was, as regards R., to be limited to any moneys and properties received by him since he attained twenty-one. On appeal, the court, without then determining the liability of such infant trustee, held that the proper form of decree was to order the account against the adult trustee in the usual form, directing an inquiry whether all or any and what parts of the trust property had come to the

hands of R., and what had been his dealings and transactions in respect of the same, and as to the dates of, and circumstances attending, such receipts, dealings, and transactions. *Garnes, In re, Garnes* v. *Applin*, 55 L. J., Ch. 303 ; 31 Ch. D. 147 ; 54 L. T. 141 ; 34 W. R. 127—C. A.

Executors and Trustees of Deceased Partner.]—In a case where, according to the deed of partnership, a date had been fixed for payment of the share of a deceased partner, an account was directed against the surviving partners, who were also executors and trustees of the deceased partner, and had improperly retained in the property the share of the deceased partner, and accounts, in accordance with the deed of partnership, were directed up to the date fixed by the partnership deed. *Townend* v. *Townend*, 1 Giff. 201 ; 5 Jur. (N.S.) 506 ; 7 W. R. 529.

An entry in an account by trustees under a will crediting a legatee with the amount of her legacy, is binding on them when it is made knowingly, and there is nothing to show that it was done in error. *Ib.*

Allottee of Scrip Shares Selling.]—The purchaser of scrip shares in a provisionally registered railway company neglected to send in his scrip to be registered, after the act of parliament incorporating the company had been obtained. The company, in consequence, registered the original allottee of the shares as the owner liable to the company for calls, and, in compliance with the provisions of the Railway Act, sent him the sealed certificate of ownership. The allottee, being unable to find the scripholder, sold the shares in the market:—Held, in a suit afterwards brought by the scripholder, that the allottee was a trustee of the proceeds of the shares for the plaintiff, and liable as such to account; held, also, that the plaintiff was entitled, under the circumstances, to the costs of suit as against the defendant, although the sum recovered did not exceed 9*l.* *Beckitt* v. *Billborough*, 8 Hare, 188 ; 19 L. J., Ch. 522 ; 14 Jur. 238.

Cestui que Trust Impeaching prior Security claimed by Trustee.]—Bill by cestuis que trust and two of the trustees under a marriage settlement, against the executrix of the settlor and the remaining trustee, praying payment of the trust money, or a general administration of the settlor's assets, and seeking to impeach a prior security, claimed over the settlor's property by the defendant trustee:—Held, that a demurrer by the trustee for multifariousness and for general want of equity, must be overruled: first, because the matters contained in the bill were all matters of account, and the defendant was interested in taking the account; and, secondly, because there was a general equity against him in his character of trustee. But, semble, that a partial demurrer for want of equity would have been sustainable. *Addison* v. *Walker*, 4 Y. & C. 442 ; 10 L. J., Ex. Eq. 73.

Refusal to allow Solicitor of Cestui que Trust to Inspect Accounts.]—A testator, who died in 1852, bequeathed all the residue of his real and personal estate to trustees, unto and to the use of his granddaughter, who, with her husband, in 1856, requested the trustees to render an account. The trustees offered to allow them, "or any other person, or an accountant named by them," to inspect the accounts, but the acting trustee refused to allow their solicitor to do so, on the ground that he had lent money to them and was not inquiring in their interest, but in his own. A bill was filed for an account, which was ordered, and also that the defendants pay all the costs up to the hearing. *Kemp* v. *Burn*, 1 N. R. 257 ; 9 Jur. (N.S.) 375 ; 7 L. T. 666 ; 11 W. R. 278.

Mere Agent of Trustee.]—A mere agent of the trustee may not be accountable to the cestui que trust, but otherwise with respect to a substituted trustee, who accounts to nobody else. *Myler* v. *Fitzpatrick*, 6 Madd. 360 ; 23 R. R. 247.

A trustee, without any authority from the cestuis que trust, agreed with his agent that the latter should pay him 100*l.* a year from the trust property, and retain the residue (130*l.*) for himself. No fraud was proved against the agent (who denied any knowledge of the trust), but no explanation was given. In a suit for an account by a cestui que trust after the trustee's death:—Held, that, notwithstanding the general rule that a trustee's agent is accountable to the trustee only, an inquiry should be had of the circumstances attending the agent's appointment and his knowledge of the trusts affecting the property. *Archer* v. *Lavender*, 9 Ir. Eq. R. 220.

Annuity given in Trust to Apply it for Benefit of Another.]—When an annuity was given to A. in trust to apply it at his discretion for the benefit of B. during his life, and for his advancement, maintenance, support, or otherwise for his benefit, without being answerable for any of the moneys so laid out, or the exercise of the discretion so vested in the trustee as to the mode and extent of expending and laying out the same:—Held, that A. could not apply any portion of the annuity for his own benefit, but was bound to account for all sums not shown to be applied for the advancement, maintenance, support, or benefit of B. *Wainford* v. *Heyl*, 44 L. J., Ch. 567 ; L. R. 20 Eq. 321 ; 33 L. T. 155 ; 23 W. R. 848.

iii. *Wilful Default.*

General Rule as to Inquiry on Footing of Wilful Default.]—The rule of the court is, that in order to obtain an inquiry as to wilful default, the plaintiff must allege a case for such an inquiry, must pray for it, and must prove at least one act of wilful default: and although it may not be necessary in order to obtain a preliminary inquiry upon which an inquiry as to wilful default may be afterwards founded, that he should conclusively establish such an act, yet there must be such a case made out with respect to some specific item alleged in the bill as raises a doubt in the mind of the court. *Sleight* v. *Lawson*, 3 K. & J. 292 ; 26 L. J., Ch. 553 ; 5 W. R. 589. S. P., *Massey* v. *Massey*, 2 J. & H. 728 ; 1 N. R. 15 ; 32 L. J., Ch. 13 ; 7 L. T. 311 ; 11 W. R. 19.

Lord Eldon's rule, that in order to obtain an inquiry as to wilful neglect and default against an executor or a trustee, the plaintiff must allege and prove at least one act of wilful neglect or default, is still the rule, and was not intended to be relaxed by *Coope* v. *Carter*, infra. *Ib.*

Dicta in that case, from which the contrary has been inferred, explained. *Ib.*

In order to let in evidence of wilful default by a trustee, there must be specific allegation of default. *Lambert* v. *Lambert*, 10 Ir. Ch. R. 500.

A general charge of wilful omission to let lands is not sufficient to lay a ground for evidence of any particular omission. *Ib.*

A bill was filed against trustees, praying that the amount of the trust fund which the trustees "had, or but for their wilful neglect or default might have, received might be ascertained." At the hearing the bill was dismissed as against one trustee, and the amount and particulars of the trust fund were directed to be ascertained. Nothing was said about wilful default, nor did the trustee ask that the bill might be dismissed as to wilful default. The master made his report, which stated certain facts, and referred to certain documents, from which it was alleged that it would appear that there had been wilful default. At the hearing upon further directions, a decree was made referring it to the master to inquire whether the trustee "could with due diligence, and without wilful neglect or default, have received" more than a particular stated fund; but upon appeal it was held, that the direction as to wilful default should be struck out of the decree. *Coope* v. *Carter*, 2 De G. M. & G. 292; 21 L. J., Ch. 570.

As a general rule, in order to obtain a direction for inquiry as to wilful default against an executor or trustee, the bill must allege a case, pray for it, and one case at least must be proved; and semble, that if from admission or proof a suspicion arises whether wilful default has or has not been committed, and it appears likely that further evidence can be obtained, the court ought to direct an inquiry short of directing wilful default, but in such a way as to call the defendant's attention to it, with the view to ground thereon a new order at a future stage, directing an inquiry as to wilful default. *Ib.*

No Charge of Wilful Neglect or Default.]—When on a bill, against a firm of solicitors who were the trustees of a settlement, for an account, but in which there was no charge of wilful neglect or default, and no relief prayed as against it, the plaintiff succeeded in establishing his case: the court directed an inquiry as to the defendants' dealings with the trust fund, and if on taking the accounts it should appear that they had been guilty of wilful neglect or default in the discharge of their duty, they should be charged, in taking the accounts, with such wilful neglect or default. *Nash* v. *Howell*, 21 L. T. 743.

A solicitor purchased an estate from his client and took possession thereof: the sale was set aside:—Held, that A. was chargeable with the rents which, without wilful default, he might have received, although no special charge of wilful default was made by the bill. *Adams* v. *Sworder*, 4 De G. J. & S. 448; 3 N. R. 623; 33 L. J., Ch. 318; 10 L. T. 49; 12 W. R. 615.

Decree confined to Wilful Default as to Capital where Tenant for Life not Party to Suit.]—A bill to administer the estate of a testator, charging the trustee with wilful default, was filed by a person interested in the estate in remainder, the tenants for life not being parties to the suit:—Held, that the decree must be confined to an account of wilful default as to the capital, and that no relief could be obtained with respect to the income of the estate. *Whitney* v. *Smith*, L. R. 4 Ch. 513; 20 L. T. 468; 17 W. R. 579.

Trustees mere Stakeholders.]—Trustees are mere stakeholders, and cannot be affected with more than they actually received without wilful default. Sed quære. *Pybus* v. *Smith*, 1 Ves. 189.

Creditor Entitled to Decree after Prior Suit in which Common Decree for Account made.]—A creditor, who makes out a primâ facie case of misconduct in trustees, is entitled to a decree that they shall account for whatever they might have received without their wilful default or neglect; though, in a prior suit instituted by another creditor, and conducted without collusion, a common decree for an account has been previously made against them. *Shepherd* v. *Towgood*, Turn. & R. 379.

Leaseholds Settled to Separate Use of Married Woman—Non-payment of Head-rents.]—Whether the trustee of leaseholds settled to separate use of married woman, bound to see that head-rents are paid, or liable as for wilful default, if the premises are evicted for non-payment of rent, quære. *Booth* v. *Purser*, 1 Ir. Eq. R. 40.

Trustee not Recovering Moneys only Recoverable in Equity—Discretion.]—In ordinary cases it is the duty of trustees to get in the funds, but where under the terms of the instrument constituting the trust it is the duty of the trustees not to do so if in their discretion they consider it inexpedient, misconduct on their part must be proved in order to render them liable for loss, and the ordinary rules as to wilful neglect and default have little application. A cestui que trust sought to charge a trustee with breach of trust in not recovering moneys, which were recoverable only in equity:—Held, that as under the circumstances the cestui que trust might have himself sued, he could not make the trustee liable for not doing what he could at any time have himself done. *Paddon* v. *Richardson*, 7 De G. M. & G. 563; 3 Eq. R. 933; 1 Jur. (N.S.) 1192.

Liability of New Trustee for Wilful Default—Covenant to Settle After-acquired Property.]—P., a member of a firm of bankers, was trustee of a marriage settlement; and, by a breach of trust, paid a sum of 17,000*l.*, part of the trust fund, into the bank to his separate account. S., another partner of the firm, subsequently was introduced into the trust; and a deed was executed, reciting that the trust fund consisted of 13,000*l.*, and assigning certain bond debts belonging to the firm to the trustees by way of security for the 13,000*l.* These bonds were placed in a box, and remained at the bankers'; but all except one were afterwards paid off, and other bonds substituted for them. It did not appear that S. had any notice that any further sum than 13,000*l.* ever belonged to the trust. Afterwards the firm became bankrupt, and new trustees of the settlement were appointed:—Held, first, that the new trustees could prove against S.'s separate estate for the 13,000*l.*, but not for the remaining sum of 4,000*l.* Secondly, that as to the original bond, which still remained, and of which P. was sole obligee, he was both reputed and true owner, and therefore the "order and disposition" clause of the Bank-

ruptcy Consolidation Act did not apply. Thirdly, that as to the substituted bonds, of which the firm were obligees, the firm were both reputed and true owners, but fixed with a trust for the cestuis que trust of the settlement; and therefore, in this case also the "order and disposition" clause did not apply. Fourthly, that a trustee who comes in as a new trustee of a settlement in which there is a covenant to settle after-acquired property, will not be held liable for wilful default in not securing any property that may fall in either before or after he has been appointed a trustee, unless he has had notice, or reasonable ground for suspicion, that such property exists. *Geaves, Ex parte, Strahan, In re*, 8 De G. M. & G. 291: 25 L. J., Bk. 53; 2 Jur. (N.S.) 651; 4 W. R. 536.

Liability of Trustee for allowing Purchase Money to Remain in Hands of Co-trustee.]—The surviving trustee of a will cannot be made liable for wilful default in respect of purchase money which was received from the sale of part of the testator's estate by a deceased co-trustee alone and misappropriated, though he joined in the receipt for the sake of conformity. *Fryer's Estate, In re, Martindale* v. *Picquot*, 3 K. & J. 317; 26 L. J., Ch. 398; 3 Jur. (N.S.) 485; 5 W. R. 552.

An executrix and trustee under a will directing an immediate sale, allows her co-trustee to sell and retain the money, joins in the conveyance and signs the receipt, and also in an assignment of railway shares where the receipt of both was necessary. On an administration summons and decree for common accounts:—Held, that she could not be made liable for wilful neglect or default on such a decree; and a certificate of the chief clerk declaring her liable was disallowed. *Blakely* v. *Blakely*, 1 Jur. (N.S.) 368; 3 W. R. 288.

—— **Auctioneer Trustee.**]—Where an auctioneer trustee sold property of a testator, and died thirteen months afterwards insolvent, with the purchase money in his hands, his co-trustee not having in the meantime taken any proceedings to compel him to pay over or invest the money:—Held, that there had been wilful default on the part of the surviving trustee, and that he must be charged with all moneys which, but for such default, he might have received. *Williams* v. *Higgins*, 18 L. T. 525; 16 W. R. 390.

iv. *Practice.*

See R. S. C., Ord. XV. and Ord. XXXIII.

In General.]—Motion by trustee under a will for the master to take the accounts, refused; wilful default being charged against him, and a cross-bill filed. *Wallis* v. *Sarel*, 8 Jur. 640.

A petition to carry into execution the trusts of a will, even though it seeks to charge a trustee for wilful default, may be rendered to the master under s. 15 of the Chancery Regulation Act (Ireland). *Johnston* v. *Johnston*, 5 Ir. Ch. R. 493.

Special decree in a bill for an account, where the accounts and vouchers were alleged, under special circumstances, to be beyond the control and power of the accounting party. The plaintiff conveyed his property to trustees for the benefit of his creditors. The trustees, who were authorised to employ an agent, committed the management of the property to an agent. The agent rendered his account to the defendants, and left England taking with him the vouchers. The trustees being unable, from the absence of the documents, to furnish a satisfactory account, the plaintiff asked that they might be charged for what, without their wilful default, they might have received. The court, however, in the first instance made a special decree ordering a general account; and if, in taking the account, it should appear that the defendants could not render a satisfactory account by reason of the non-production of the documents and vouchers, it was referred to the master to inquire, whether it was by the neglect or default of the trustees that they were unable to render a better account, with liberty to state special circumstances. *Turner* v. *Corney*, 5 Beav. 515.

A case of breach of trust was alleged on the pleadings against trustees and executors for not having sold an estate, but at the first hearing the common accounts only were directed:—Held, on further directions, that the defendants could not then be charged with the breach of trust, and that inquiries could not then be directed with that object. *Green* v. *Badley*, 7 Beav. 274.

Power to Add to or Vary Decree for Common Accounts in Chambers on Footing of Wilful Default.] — Where a decree for the common accounts against trustees, alleged to have committed a breach of trust, has been directed at the hearing of a cause, the court has no power to vary or add to the decree in chambers, by directing an account as for wilful default. *Cary* v. *Knowles*, 19 L. T. 482.

Effect of Taking of Account on Persons Born Subsequently.]—A. is tenant for life of a trust, remainder to his sons. A., before a son is born, brings a bill against the trustees, and an account is decreed and afterwards taken. This account shall bind the sons, for all persons that could be made parties were parties to the suit. *Leonard* v. *Sussex*, 2 Vern. 527.

Discretion of Court as to Date from which Account to be Taken.] — Trustees entered into possession of rent and profits, and paid them over under a trust deed to a married woman to her separate use: it afterwards appeared that she was not entitled to receive them, but that upon the true construction of a will they ought to have gone to another person. That person filed a bill, and a decree was made in his favour, but an account of the rents and profits was only ordered from the date of the filing of the bill:—Held, that whether an account should be directed from the filing of the bill, or from an anterior time, is a matter of discretion, and that the discretion had been rightly exercised. *Vernon* v. *Wright*, 7 H. L. Cas. 35.

Refusal of Trustees to Admit Assets.]—To a bill by cestuis que trust against the representatives of the trustees, charging breaches of trust, and asking, as consequential to other relief, that they might admit assets or set out accounts, one of the defendants put in an answer denying the breaches of trust, and alleging that the accounts had been settled, and a release given in the lifetime of the trustees, and refusing to admit assets or set out accounts. Exceptions to such answer were allowed, and the court refused to let them stand over till the hearing, on the ground that the plaintiffs were entitled, before going to the expense of establishing their case, to know whether

there would be assets to satisfy their claim in case of success. *Brookes* v. *Boucher*, 31 L. J., Ch. 821 ; 8 Jur. (N.S.) 639 ; 10 W. R. 708.

Same Persons Trustees and Executors — Accounts to be Taken Separately.]—A testator made two persons his executors, and the same persons, with one other, the trustees of his real and personal estate. A decree was made for the administration of the estate, and the usual accounts ordered to be taken. The chief clerk required separate accounts to be taken of the receipts and payments of the executors, and of the receipts and payments of the trustees :—Held, that the accounts of the executors and trustees were rightly taken separately, and that the percentage for court fees was payable both on the gross receipts of the executors, and on the gross receipts of the trustees ; and that the receipts of the trustees properly included (1) the residue handed over to them by the executors, (2) temporary loans advanced to them by their bankers, and (3) sums transferred from the trustees' deposit account at their bankers to their drawing account. *Armitage* v. *Elworthy*, 13 Ch. D. 91 ; 41 L. T. 608 ; 28 W. R. 283.

Suit by Remainderman — Tenant for Life a Defendant — Arrears of Interest.] — In a suit instituted by the remainderman against the trustee for the restitution of the trust fund, which had been improperly invested, to which suit the tenant for life was a party defendant :—Held, that the latter could not have an account against the trustee of the arrears of interest, although he had asked such relief by his answer, the point not being raised by the bill, and there being no admission of the claim in the answer of the trustee. *Goodwin* v. *Clewley*, 2 Beav. 30 ; 3 Jur. 552.

v. *Acquiescence or Delay.*

Acquiescence—Knowledge of Breach of Trust.] —Trustee not protected by acquiescence of the cestui que trust, not duly informed. *Ryder* v. *Bickerton*, 3 Swanst, 81.

Trustees lending money on personal security is not of itself such gross neglect as to amount to a breach of trust, and the legatee (and afterwards his assignee) having acquiesced in such loan a bill to charge the trustees was dismissed. *Harden* v. *Parsons*, 1 Eden, 145.

Devisees in trust to sell for payment of debts, assign to the son of the devisor ; the creditors receive the interest from him for eleven years, and agree with him for an increase of interest on their debts ; the original trustees continue liable. *Hardwich* v. *Mynd*, 1 Anst. 110 ; 3 R. R. 562.

Trustees having committed a breach of trust by granting longer leases than they had power by deed to do ; the fact of the cestui que trust receiving rent from the lessees in ignorance of the invalidity of their leases, did not operate as a new agreement. But the cestui que trust having neglected to look into his rights, no account was directed beyond the filing of the bill, and no costs given to the plaintiff. *Bowes* v. *East London Waterworks*, 3 Madd. 375 ; 23 R. R. 84.

A cestui que trust concurring or acquiescing in a breach of trust :—Held, not entitled to relief subject to inquiry into the circumstances which induced concurrence or acquiescence. *Walker* v. *Symonds*, 3 Swanst. 64 ; 19 R. R. 155.

On the hearing of a cause, commenced in 1838, to charge a trustee with the loss occasioned by the bankruptcy of his co-trustee, whom, ten years before, he had permitted to acquire sole possession of the trust fund, the court not being satisfied that all the circumstances as to the fact and time of the cestui que trust's knowledge of the breach of trust were in evidence, directed an inquiry as to that fact, with liberty to either party to examine the co-trustee. *Broadhurst* v. *Balguy*, 1 Y. & C. C. C. 16.

The plaintiff, deliberately and with full notice, accepted the benefits under his mother's will, which prohibited him from setting up any claim on account of any error, irregularity, or impropriety in the execution of the trusts of her father's will :—Held, that he could not maintain a suit against the executor of the father's will, to make him accountable for the profits made by the employment of part of the trust funds in his business. *Egg* v. *Devey*, 10 Beav. 444 ; 16 L. J., Ch. 509 ; 11 Jur. 1023.

—— **Non-transfer of Fund to New Trustees.**]— Half of a trust fund, held on the trusts of a settlement of 1778, was resettled by a settlement of 1791. In a suit to administer the trusts of the settlement of 1778, that half was, in the year 1809, ordered to be transferred to the trustees of the settlement of 1791. The transfer was never made, nor was it ever applied for by the trustees of the settlement of 1791. In 1827 the parties beneficially entitled under the settlement of 1791 were adult and sui juris. The then present investment of the trust fund was, as it had for many years before been, an investment in India, subject to the control of the trustees of 1778 ; but those trustees were, and had long been, in England. The parties so beneficially entitled knew of and acquiesced in the investment, and never required that their half of the fund should be transferred to the trustees of 1791. The trust fund was afterwards lost by the failure, in 1830, of a house of business in India :—Held, that the parties beneficially entitled were precluded from insisting that the trustees of 1778 were liable to make good the loss by reason of their not having made the transfer to the trustees of 1791. *Munch* v. *Cockerell*, 5 Myl. & Cr. 179 ; 9 L. J., Ch. 153 ; 4 Jur. 140.

Distinction between the degree of knowledge and sanction necessary to exonerate trustees from a breach of trust, and that which is necessary to preclude the cestuis que trust from complaining of an omission which, if concurred in by the cestuis que trust, did not constitute a breach of trust. *Ib.*

If a person interested under a will files a bill for an account against the executors, not seeking to charge them for wilful default, and dies pending the suit, his personal representative cannot charge them by bill of revivor and supplement, if the acts complained of were known to the deceased plaintiff. *Garrett* v. *Noble*, 6 Sim. 504 ; 3 L. J., Ch. 159.

S. deposited 300*l.* in a scrivener's hands, who, without his consent, laid it out on a defective mortgage ; S. received the interest for many years, and noticed the mortgage in his receipts ; decreed, he shall bear the loss. *Clark* v. *Perrier*, 2 Free. C. C. 48.

—— **Cestui que Trust not recognising Transaction.**]—A cestui que trust discovering a breach

of trust, but not receiving any benefit from it, or conniving in it for any purpose, and not recognising the transaction, is not precluded from complaining of it merely on the ground that he abstained from making such complaint until long after he first knew of it. *Phillipson* v. *Gatty*, 7 Hare, 516; 13 Jur. 318. Affirmed 2 Hall & Tw. 459.

Where stock stood invested in trust, for the mother for life, with remainder to her son and daughter and their children, the daughter knew of an application by the son for a loan from the trustees of part of the trust moneys, upon his personal security, and that the trustees were willing to make the loan, with the consent of her mother, the tenant for life, and that the loan was, in fact, afterwards made. The daughter objected to the loan in her communications with her mother, but did not otherwise oppose it, and had not any communication with the trustees on the subject:—Held, that this was not such acquiescence on the part of the daughter to the loan as to preclude her from charging the trustees with the breach of trust, in a suit instituted seven years after the transaction took place; held, also, that the daughter was not precluded from so charging the trustees, by the fact that she knew that the mother had (untruly) stated to her son that she (the daughter) had consented to the loan, such statement of the daughter's consent never having been communicated to the trustees, or constituted any part of the sanction or authority under which they acted. *Ib.*

It was not necessary to decide the simple case, whether, if the daughter had permitted the son, in the belief that the daughter assented to it, to obtain the loan from the trustees, they could have availed themselves of any defence to the suit, which the son might have, as against the daughter: for, in this case, the letters of the son to the mother, requesting the loan, and upon which the mother's consent was given, proposed not to affect the daughter's rights as against the trustees. *Ib.*

—— **Uniform Course of Management for Years.**]—Where property has been administered and applied without complaint according to a uniform course of management for a long series of years, the court will not, by an interlocutory order, disturb the possession, upon the ground that such application is a breach of trust, unless it is perfectly clear that the party in whom the property is vested is a mere naked trustee, and has not, even to a limited extent, any of the rights or interests of an owner. A motion for the appointment of a receiver of the estates vested in the Irish Society, at the instance of one of the London companies claiming a beneficial interest in the income of the estates, was therefore refused. *Skinners' Co.* v. *Irish Society*, 1 Myl. & Cr. 162.

—— **Mistaken Construction of Doubtful Clause in Settlement.**]—Construction of a clause in a marriage settlement. A court of equity will not direct payments made under a mistaken construction of a doubtful clause in a settlement, to be refunded after many years of acquiescence by all parties and after the death of one of the authors of the settlement, especially where subsequent family arrangements have proceeded on the footing of that construction. *Clifton* v. *Cockburn*, 3 Myl. & K. 76.

—— **Knowledge by Person having no Interest at the Time.**]—Where a party at the time of the misapplication of a trust fund by the trustee was cognisant of the fact, but had then no right or interest whatever to the fund, and afterwards acquired such right as administrator to the cestui que trust:—Held, that his rights as administrator were not affected by such previous knowledge on the ground of acquiescence. Where, therefore, the trustee in such a case became bankrupt after committing a breach of trust, the administrator of the cestui que trust was not prevented from proving for the amount of the interest on the trust fund which accrued due in the lifetime of the cestui que trust. *Smith, Ex parte, Clark, In re*, 2 Mont. D. & D. 113.

—— **Receipt for Money left in Hands of One Trustee.**]—C. and G. being trustees of a sum of money for B., B. gave a receipt for the money to G., and left the money in his hands on the security of his bond. G. having become insolvent, C. was held liable to make good the deficiency, there having been no acquiescence sufficient to bind B. *Byass* v. *Gates*, 2 W. R. 487.

A cestui que trust held under the circumstances not barred by delay or acquiescence. *Hawkins* v. *Gardner*, 2 Sm. & G. 441.

—— **Evidence in Writing of Acquiescence.**]—It is not necessary that acquiescence on the part of a cestui que trust in an improper investment should be evidenced by writing, if otherwise proved. *Macleod* v. *Annesley*, 16 Beav. 600; 22 L. J., Ch. 633; 17 Jur. 608; 1 W. R. 250.

A testator gave all his residuary real and personal estate upon trust to convert, part on his own decease and part on his wife's death, and gave the proceeds among his seven children. By a codicil this will was revoked as to one-seventh, out of which a legacy was given, and the residue to his daughter for life, and after to her children. The property was converted, and the income paid until 1838, when it appeared that a security of a malthouse, &c., upon which it had been invested was deficient by the insolvency and death of the mortgagor and the existence of deeds by which it had been previously assigned over. The trustees' defence was, that they were protected by a clause of indemnity in the will which referred to diminution by insolvency or insufficient security, and that the cestuis que trust had acquiesced by a letter and subsequent acts:—Held, that the clause referred to was not an indemnity, as the words "without their wilful default" controlled the others; that no sufficient acquiescence was proved; and that the onus of showing diligent inquiry on the part of the trustees (which had not been shown) lay upon them and not on the cestuis que trust. *Stretton* v. *Ashmall*, 3 Drew. 9; 24 L. J., Ch. 277; 3 W. R. 4.

A. a husband and B. his wife conveyed real estate belonging to the wife to trustees upon trusts for sale, and directed them to invest the purchase money in certain specified securities, and to stand possessed of them upon trust for such persons as B. should by deed or will appoint, and, in default of appointment, to pay the income to B. for her life, for her separate use, and, after her death, to stand possessed of the capital for her next of kin under the Statutes of Distribution as if she had died intestate and not under coverture. The trustees, with the assent and know-

ledge of B., put out the money on securities not authorised by the deed of trust, and the whole was lost. B. did not give any writing to the trustees as to the disposition of the trust money. After the money was lost B. appointed the fund to her infant children, and, shortly after, a bill was filed by these children against the trustees to make good the loss :— Held, that the plaintiffs had no claim against the trustees, and the bill was dismissed. *Brewer* v. *Swirles*, 2 Sm. & G. 219 ; 2 Eq. R. 493 ; 23 L. J., Ch. 542 ; 18 Jur. 1069 ; 2 W. R. 339.

—— **Duty of Trustees to Explain to Cestuis que Trust their Rights.**]—A testator by his will bequeathed the residue of his property to his executors, W. C. and N., in trust to invest and pay the income to his widow for life, and after her decease (in the events which happened) to five children. The eldest child attained twenty-one in 1839, and the youngest in June, 1846. The three executors proved the will, but N., a solicitor, was almost entirely the acting trustee. The money was left by his co-trustees in the hands of N. alone ; and on the youngest child attaining twenty-one, he, on behalf of himself and the other children, attempted to obtain payment from N., and in 1848 addressed a letter to N. consenting in effect to receive payment by instalments of 50*l.* In 1849 a bill was filed by the five children for the purpose of making the three trustees responsible :—Held, that it was the duty of the trustees N. and C., not only to have the money in their hands, but to explain to their cestuis que trust what their rights were ; and that not having been fully informed at the time of what their rights were, there was nothing in the conduct of the plaintiffs, whether in the way of acquiescence or of giving time, to deprive them of their remedy against the trustees, who were held jointly and severally liable accordingly. *Burrows* v. *Walls*, 5 De G. M. & G. 233 ; 3 Eq. R. 960 ; 3 W. R. 327.

—— **Non-conversion by Trustees—Receipt by Tenant for Life of Dividends.**]—A testator gave the residue of his property to trustees, with a direction to convert all his personal estate and invest the amount in the Bank of England, in trust to permit his wife to receive the rents and profits, dividends, or other annual produce for her life, and after her death to go among her children in the manner limited in the will. Part of the property was 24*l.* per annum long annuities. The trustees did not sell these long annuities, but paid the dividends for many years to the tenant for life. Two of the children joined with her in an assignment by way of mortgage of their shares in the residue. It appeared that the tenant for life had asked the trustees to convert :—Held, that the non-conversion was a breach of trust ; that the children had not acquiesced, because the dividends received by the mortgagee were received in respect of the life interest ; and that the tenant for life did not acquiesce by merely receiving the dividends which were paid to her. *Bate* v. *Hooper*, 5 De G. M. & G. 338 ; 3 W. R. 639.

—— **Original Acquiescence — Subsequent Laches.**]—A tenant for life acquiesced in a breach of trust by sanctioning a trustee in lending the trust moneys upon what at the time were insufficient securities. Subsequently the securities were increased in value, and but little was lost by the improper investment ; but owing to continued neglect on the part of the trustee, considerable costs were incurred, and the fund thereby decreased :—Held, that the right of the tenant for life against the trustee for subsequent laches was not lost by his original acquiescence. *Lockhart* v. *Reilly*, 25 L. J., Ch. 697 ; 4 W. R. 438.

—— **Investment on Mortgage — Insufficient Security.**]—The court will not visit a trustee with the consequences of a breach of trust, committed with the sanction or by the desire of the cestui que trust, or of one committed without such sanction or desire, if when it comes to the knowledge of the cestui que trust he has acquiesced in and obtained the benefit for a long period. *Griffiths* v. *Porter*, 25 Beav. 236.

Two trustees, A. and B., joined in the receipt of trust money. A. allowed B. to retain the cheque for the money, which, against the remonstrances of D., he placed in the hands of a solicitor, to invest on mortgage, and it was lost :—Held, that both were liable. *Ib.*

Two trustees, A. and B., had allowed trust money to be received by their solicitors. The cestui que trust authorised its investments on a mortgage by B. alone. The money being in danger, and the solicitors pressed, a mortgage was given, but as to which B. exercised no judgment, and it turned out insufficient :—Held, that both trustees were liable for the loss. *Ib.*

A widow, a tenant for life, desiring an increase of income, induced a trustee to invest out of a trust fund a sum exceeding two-thirds of its value on mortgage of copyhold house property, at interest at 5*l.* per cent. After the rents had become insufficient to pay the interest, her daughter, on her marriage, became entitled to one-fourth of the trust fund. The trustee having stated to the husband and wife the deficiency in the widow's income, and its cause, they accepted a small sum of money in hand in lieu of their one-fourth, and made no objection for ten years, when the widow died. Becoming then entitled to the three-fourths part of the fund, they sought by suit to charge the trustee with the deficiency :—Held, that they had so far acquiesced in the investment, and could not complain of it. *Farrar* v. *Barraclough*, 2 Sm. & G. 231 ; 2 W. R. 244.

——**Cestui que Trust Receiving Income of Improper Investment.**]—A tenant for life received 5*l.* per cent. on a mortgage improperly taken by trustees, and for which, on a loss, they were made responsible :—Held, that he was only entitled to 4 per cent. in taking the account of income, and that 1 per cent. must be taken as part of the subsequent income. *Ib.*

A cestui que trust having, with knowledge, received the income of an improper investment : —Held, bound to give credit for the difference between it and the income which would have arisen from a proper investment of the trust fund. *Davies* v. *Hodgson*, 25 Beav. 177 ; 27 L. J., Ch. 449 ; 4 Jur. (N.S.) 252 ; 6 W. R. 355.

—— **Married Woman Restrained from Anticipation.**]—Quære, whether a married woman who is entitled to the interest of a fund for her separate use, without restraint upon anticipation, can be bound by acquiescence in an improper investment of the fund. *Ib.*

Trustee of separate property of feme covert, without power of anticipation, joining in a lease for which a fine was paid and received by

a third person:—Held, a breach of trust, although the feme covert (being a minor at the time) joined in the lease. *Booth* v. *Purser*, 1 Ir. Eq. R. 37.

—— **Length of Time in which Acts Acquiesced in to be taken into Account.**]—In a marriage settlement, a husband covenanted with the trustees, that his heirs, executors, administrators, and assigns would, after his death, pay to his wife a jointure of 40*l.* per annum; and that they would pay the trustees 400*l.* for the benefit of the children of the marriage, in case there should be any. The husband became indebted to one of the trustees, who entered up judgment against him, and insured the husband's life for the amount of the judgment. Upon the sale of the trust property:—Held, that the assignee of the trustees' judgment was entitled, in respect of the incumbrance, to priority to the settlor's wife and children; and that in considering the dealings between a trustee and his cestui que trust, the length of time in which the acts of the former had been acquiesced in, with the knowledge of the latter, was to be taken into account in favour of the trustee. *M'Kenna, In re, Busteed, Ex parte*, 5 L. T. 241.

—— **Release to Trustee.**]—A trustee permitted his co-trustee, the father of one of the cestuis que trust, to sell out the trust fund, the co-trustee depositing with him a packet of title deeds by way of indemnity. The son on coming of age, in 1851, had an interview with the trustee upon the subject. In 1855 the father, when dangerously ill, spoke to the son about the breach of trust, and desired him to call on the trustee, and obtain from him and keep the packet of deeds, which the son did. The son afterwards received a letter from his father, while still dangerously ill, requesting the son, in the event of the father's death, not to hold the trustee responsible, and inclosing the form of a memorandum for the son to copy and sign and send to the trustee, and by which the son, in consideration of the delivery up of the deeds, discharged the trustee from all liability. The father died in 1859, and in 1861 the son filed a bill, seeking to make the trustee liable for the breach of trust:—Held, that the son had by his conduct so acquiesced in the breach of trust as to preclude him from complaining of it. *Farrant* v. *Blanchford*, 1 De G. J. & S. 107; 33 L. J., Ch. 287; 9 Jur. (N.S.) 423; 7 L. T. 770; 11 W. R. 294.

When a breach of trust has been committed, from which a trustee alleges that he has been released, it is incumbent upon him to show that such release was given by the cestui que trust deliberately and advisedly, with full knowledge of all the circumstances, and of his own rights and claims against the trustee. Acquiescence may, however, be an answer to the cestui que trust; and therefore where a cestui que trust, with full knowledge of all the circumstances of the breach of trust, had taken no proceedings for ten years:—Held, to amount to acquiescence on his part. *Ib.*

A trustee holding a fund in trust for three children allowed their father to receive the income of their shares during their respective minorities, considering him to be unable to maintain them. Two of the children attained twenty-one in the father's lifetime, and received their shares of the capital. The father died bequeathing his property to the three children equally, and appointed the trustee his executor. The youngest child attained twenty-one soon after his death, and within a few weeks received her share of the capital of the trust fund, and signed a receipt expressing her approbation of the mode in which the income had been applied during her minority. About half a year afterwards she and her two sisters received their shares of the father's estate and gave a release by deed to the trustees. After this she filed a bill to charge the trustees with the dividends accrued on her share of the trust fund during her minority:—Held, that after having, with a knowledge of the facts, received from the trustee her share of her father's estate, which was primarily liable to the claim, and given him a release, she could not maintain the claim against him. *Areline* v. *Mellhuish*, 2 De G. J. & S. 288; 10 Jur. (N.S.) 781; 10 L. T. 830; 12 W. R. 1020.

A trustee, by omitting to invest a sum of money sufficient to pay an annuity of 100*l.* a year to a party for life, is liable, when the parties in remainder become entitled to the fund, to make good any rise in the stock, assuming it had been purchased; and although the principal directed to be invested was paid, and a release obtained, still it was set aside after a subsequent delay of ten years, and the difference in value was directed to be paid to the cestuis que trust who were illiterate and ignorant of their rights. *Aspland* v. *Watte*, 25 L. J., Ch. 53; 1 Jur. (N.S.) 968; 3 W. R. 526.

A. being tenant for life, with remainder to his children as he might appoint, and being indebted to one of the trustees of the fund, soon after his eldest son came of age, he executed the power in his eldest son's favour, and the whole fund was retained by the trustee in satisfaction of the debt. The son, who was twenty-three years of age, executed to the trustees a release of all claims in respect thereof; and eighteen years afterwards, he in conjunction with a younger brother and sister, filed a bill against the trustees to set aside the transaction. The court declared the whole transaction fraudulent and void. The trustees were ordered to restore the fund, and the father was also held responsible. *Wade* v. *Cox*, 4 L. J., Ch. 105.

—— **Agreement to Release by Married Woman Restrained from Anticipation.**] — A married woman, restrained from anticipation, cannot agree to release her trustees from liability incurred by their disregard of that restraint. *Dickson* v. *Hook*, 14 W. R. 552.

—— **Cestui que Trust Entitled in Reversion.**]—A cestui que trust, whose interest is reversionary, is not bound to assert his title until it comes into possession. He is not, however, less capable of giving his assent, by acts or otherwise, to a breach of trust by reason of his interest being in reversion. *Life Association of Scotland* v. *Siddall*, 3 De G. F. & J. 58; 7 Jur. (N.S.) 785; 4 L. T. 311; 9 W. R. 541.

A cestui que trust is not bound by acquiescence, unless fully informed of his rights, and of all the material facts and circumstances of the case. *Ib.*

—— **Onus on Trustees to Prove Acquiescence.**]—Although the onus lies upon a party relying upon acquiescence to prove the facts upon which the consent of the cestui que trust is to be inferred, there may be cases in which, from great length of time, such facts would be presumed. *Ib.*

When trustees have committed a breach of trust, in order to discharge themselves they must clearly show that their cestui que trust, on becoming beneficially entitled, adopted the transaction. *Cope* v. *Clark*, 18 W. R. 279.

In the year 1810 a sum of stock was transferred into the names of A. and B., in trust for a father and mother, in certain proportions, for their respective lives, with remainder to their children. Shortly afterwards, the stock was transferred by A. and B. into the name of B. only, who appropriated it to his own use. In the year 1818, the father and mother filed a bill against A. and B. to have the stock replaced; and the children (two in number) were co-plaintiffs, and, being infants, sued by their father as their next friend; but that suit was soon afterwards compromised, upon B. giving security for the payment of interest for the time past and for the time to come. A. subsequently died, and his personal estate was distributed among his legatees; and two of those legatees then died, having received their legacies; and the residuary personal estate of one of them was paid over to her residuary legatee. These distributions were made in ignorance of any demand arising out of the breach of trust in which A. had concurred. The elder of the two children attained twenty-one in 1821, and the other in 1823. In 1833 they filed a bill alone against B. and the personal representative of A. and his surviving legatees, and the personal representatives of his deceased legatees, and the residuary legatee of one of those deceased legatees, and against the father and mother of the plaintiffs, praying to have the fund replaced:—Held, that the plaintiffs were entitled to call upon the surviving legatees of A., and the personal representatives and legatees of his deceased legatees to refund; and that, without any previous inquiry as to whether the plaintiffs had known of or acquiesced in the breach of trust, or the compromise of the suit of 1818. *March* v. *Russell*, 3 Myl. & Cr. 31; 6 L. J., Ch. 303; 1 Jur. 588.

—— **Same Person Trustee and Cestui que Trust.**]—The trustees of a marriage settlement permitted the husband to retain the trust funds, which he appropriated to his own use. One of the trustees ultimately became entitled under the settlement to half the trust funds:—Held, that the estate of the husband was liable to refund his moiety. *Butler* v. *Carter*, 37 L. J., Ch. 270; L. R. 5 Eq. 276; 18 L. T. 11; 16 W. R. 388.

—— **Will — Appointment to Second Set of Trustees—Character in which Plaintiff Sues.**]—Under a settlement certain funds were held by trustees upon trust for the issue of L. S. in such manner as she should by will appoint. L. S., by her will, appointed the funds to trustees—as to two-fifths, upon trust to pay the income to her son until he should attain the age of forty years, and when and as soon as he should attain that age she directed that the trust premises should be held in trust for her said son, his executors and administrators, and provided that her said son should sell, assign, or otherwise part with his said share, the appointment in his favour should be void, and the said share should be held upon the trusts declared of the remaining three-fifth parts for the benefit of her daughter. The son died under forty without having forfeited his interest. N., the surviving trustee of the will of L. S., and who was also co-trustee with L. of the original settlement, got possession of the two-fifths and misappropriated it, and the beneficiaries under the will of the son obtained judgment for the amount against B., who was the surviving executor and trustee of the son's will, on the ground of his negligence and wilful default in not getting in the trust fund. B. having died, his executor brought this action against L. and N., seeking a declaration that they were jointly and severally liable to replace the amount so found due from B. N. had become bankrupt:—Held, that L. was not liable, on the ground that the plaintiff must be treated as representing B.; and it appearing upon the evidence that B. had, in 1872, treated N. as solely accountable to him for the two-fifths, and had done nothing to recover the fund, the plaintiff was barred by the delay and acquiescence of B. *Scotney* v. *Lomer*, 55 L. J., Ch. 443; 31 Ch. D. 380; 54 L. T. 194; 34 W. R. 407—C. A.

Lapse of Time—Settled Accounts.] — Even where the statute of limitations does not apply, the court will not entertain a suit by a cestui que trust, instituted for the purpose of challenging the accounts settled by his trustees, when the accounts and matters had been investigated twenty years before, and he had every opportunity of going into them. Lapse of time alone will be a sufficient bar to such a suit. *Bright* v. *Legerton*, 29 L. J., Ch. 852; 6 Jur. (N.S), 1179; 8 W. R. 678. Affirmed 30 L. J., Ch. 338; 7 Jur. (N.S.) 559; 3 L. T. 713; 9 W. R. 239.

—— **Sale of Trust Property to a Trustee.**]—A testator devised a farm to his son, to be valued by A., and one-third of the valuation to be paid to the plaintiff. In 1833 A. bought the farm himself for 750*l.*, and paid one-third to the plaintiff, who accepted it. In 1850, A. being dead, the plaintiff filed a bill to set aside the sale for inadequacy of consideration:—Held, that considering the lapse of time and the death of A., the plaintiff was too late, and the bill was dismissed. *Baker* v. *Read*, 18 Beav. 398. On appeal 3 W. R. 118.

—— **Mistake of Law.**]—A husband survived his wife, who was one of several equitable tenants in common. He was advised by counsel that he had no title as tenant by the curtsey, his wife never having been in possession, and that if he intended to set up such a title, he ought not to sue with his infant daughter in a partition suit which was then in contemplation. The suit was nevertheless instituted by him as the next friend of the daughter, and in 1830 a decree was obtained. A partition was made under the decree, and the legal estate in the daughter's share conveyed to the use of the father during the infancy of the daughter, in trust for her maintenance, and afterwards to her own use in fee. The daughter attained twenty-one in 1843, and married in 1847. In 1852 the father filed a bill to be relieved from the trusts, on the ground of mistake, and to have his title as tenant by the curtsey established:—Held among other things, that length of time and acquiescence and the marriage of the daughter, although without the father's consent, before the father disputed the daughter's title, constituted a sufficient answer to the suit; and that possession obtained in the character of trustee cannot be retained as one adverse to the

cestui que trust, after the legal estate under which the possession was taken has determined. *Stone* v. *Godfrey*, 5 De G. M. & G. 76; 23 L. J., Ch. 769; 18 Jur. 524.

At the time when the conveyance was completed, the trustee of the will of a testator whose property was at the date of the will under contract for sale to a railway company, and who was a solicitor, took counsel's opinion as to the person to whom the purchase money was payable, and who ought to join in the conveyance, and the opinion was given in favour of the devisee. The trustee accordingly paid the money to her, and informed the plaintiff of the result, but no settlement of accounts was come to between the plaintiff and the trustee up to the time of the institution of the action, and the plaintiff had not executed any release or discharge to the trustee. This action was brought to recover the money out of the trustee's estate, after his death, and nearly five years after the payment had been made:—Held, that no case of acquiescence was made out against the plaintiff, and that he was entitled to recover from the trustee's estate the moneys received from the railway company, the amount to be recouped to the trustee's representative by his co-defendant, the devisee. *Wilson* v. *Donald, Jackson, In re*, 44 L. T. 467.

—— **Waiver of Breach of Trust—Stale Demand.**]—A cestui que trust who with knowledge that his trustee has committed a breach of trust obtains from him a part only of that to which he is entitled, does not thereby waive his right to such relief as he may be able to obtain unless an intention so to do can be clearly inferred from the surrounding circumstances. *Cross, In re, Harston* v. *Tenison*, 51 L. J., Ch. 645; 20 Ch. D. 109; 45 L. T. 777; 30 W. R. 376—C. A.

In November, 1860, an order was made in a suit for administering the trusts of the will of J. C., to which H. C., a former trustee, was defendant, directing her to pay into court a sum of money in respect of breaches of trust committed in 1843 and 1845, the amount of which had been ascertained by the chief clerk in the suit. H. C. went abroad, and substituted service of the order was made upon her. By the order on further consideration in 1863, H. C. appearing by counsel, certain sums of money to which she was entitled, and her life interest under the testator's will, were ordered to be impounded and paid over "to the account of H. C. funds applicable for the repayment of trust funds misappropriated," and an inquiry was directed as to what steps should be taken to obtain restitution of the funds. Certain other orders were made in the suit, but no personal order was made on H. C. for payment of the amount of her defalcation, nor any steps taken against her, although she returned to England in 1870, where she remained till her death in 1880, and her residence was known to the then trustees of the will and some of the cestuis que trust. On her death the surviving trustee of the will of J. C. brought this action against her executors, claiming the administration of her real and personal estate on behalf of himself and all other the creditors, alleging himself a creditor in respect of the unpaid balance of the sum representing the breach of trust. At the date of the institution of the action several beneficiaries under J. C.'s will were infants:—Held, that the action was not an attempt to enforce a stale demand, and that the cestuis que trust must not be taken to have elected to abandon their claim against her and to rest content with impounding her life interest: that, there being a debt due from H. C. at her death to the estate of J. C., and the trusts of his will not being completed, the surviving trustee was the proper person to bring the action, and that the cestuis que trust need not be parties. *Ib.*

Although as between the cestui que trust and a stranger the claim of the cestui que trust is barred by lapse of time operating against his trustee, lapse of time is no bar as between cestui que trust and trustee. *Ib.*

—— **Married Woman Restrained from Anticipation.**]—Personal estate was by settlement vested in trustees for R., a married woman, for life, without power of anticipation; and in case there should be no issue of the marriage, in case M., her husband, should survive her, as she should by deed or will appoint, and in case she should survive, for her absolutely. W., the acting trustee of the settlement, at the instance of the wife, applied the property in discharge of her husband's liabilities. M. died; and by R.'s request the trustee took no steps to realise M.'s assets. R. married again, after the lapse of some years, and in her marriage settlement recited her wish to give credit to W. for all payments made by the trustees at her request:—Held, that R. had lost her right to make the trustee liable for his breaches of trust. *Rutherfoord* v. *Maziere*, 13 Ir. Ch. R. 204.

Slaves in the West Indies were bequeathed to executors, upon trusts for a niece of the testator for her life with remainder to her children. The executors having renounced and disclaimed, administration with the will annexed was granted to the niece, who afterwards married a minor. Before her husband had attained twenty-one the husband and wife executed a settlement, reciting that the husband was, in right of the wife, possessed of the slaves, theretofore the property of her late uncle; but not in any manner referring to the will. The settlement purported to assign the slaves to trustees in trust to sell and invest the proceeds and pay the income for the separate use of the wife for life, without power of anticipation, with trusts by way of remainder to the children of the marriage. Before the husband came of age, the husband and wife sold the slaves without noticing the settlement in the contract, but paid part of the purchase money to one of the trustees of the settlement, the other trustees not concurring in or being in fact aware of the sale or payment. An amicable bill was then filed on behalf of the infant children of the marriage, to have the trusts of the settlement carried into execution, or a new settlement made in conformity with an offer of the husband to execute such settlement on receiving 3,500*l.* out of the wife's fortune. This bill contained an allegation that the proceeds of the slaves had been invested in the names of the trustees. The trustees, by their answer, admitted the truth of this allegation. The husband and wife, answering separately, disputed the validity of the settlement, and refused to be bound by it; but the husband offered to execute a settlement on the terms above mentioned. The decree declared the settlement void, and directed a new settlement to be made upon the footing of the offer made by the husband. A settlement was accordingly executed, and the 3,500*l.* paid to the husband.

Afterwards it was discovered that the admission in the trustees' answer was incorrect, the trustee who received the proceeds of the slaves having applied the money to his own use, and having by false statements induced his co-trustees to believe and admit upon the answer that the investment in their names and his had been made as there stated. His circumstances were such that any attempt to recover the amount at any period would have been hopeless. More than twenty years after the wife was aware of these circumstances she instituted a suit against the co-trustees to make them personally liable for the breach of trust:—Held, first, that the above facts, independently of the admission of the co-trustees in their answer, did not render them personally liable in respect of the proceeds of the sale of the slaves, the title of the settlors not having been such as to enable the trustees legally to possess themselves of the fund; and, secondly, that in the circumstances of the case, the admission did not create any such liability. *Derbishire* v. *Home*, 3 De G. M. & G. 80.

Semble, that a clause restraining a married woman from anticipation does not exempt her from the ordinary consequences of lapse of time and acquiescence; also, that in the circumstances above stated, the administratrix committed a breach of trust by marrying without providing for the security of the trust property; also, that having, by her separate answer in the first suit, refused to be bound by the first settlement, she could not afterwards sue the trustees for non-performance of the trusts of it; also, that her having concealed from them the nature of her title when she assumed to settle the funds, would of itself have been a defence to such a suit. *Ib.*

—— **Express Trust—Laches.**]—Where an express trust is established, mere lapse of time, if not coupled with other circumstances rendering it unjust to give relief, will not, apart from any statute of limitations, bar the claim of a cestui que trust. *Cross, In re, Harston* v. *Tenison*, supra, followed on this point. *Rochefoucauld* v. *Boustead*, 66 L. J., Ch. 74; [1897] 1 Ch. 196; 75 L. T. 502; 45 W. R. 272—C. A.

—— **Constructive Trust.**]—A constructive trust may be barred by long acquiescence. *Hasell, Ex parte*, 3 Y. & C. 617; 3 Jur. 1101.

Though no time bars a direct trust, as between cestui que trust and trustee, a constructive trust barred by long acquiescence, though the true state of the fact may be easily ascertained, and the ground of original relief was clear, and even arising out of fraud. *Beckford* v. *Wade*, 17 Ves. 97; 11 R. R. 20.

A testator died in 1810, in India, having bequeathed his English property to two infants, whom he acknowledged as his natural children; and having appointed his nephew, E., to be their guardian. Part of his property consisted of a bond, dated in 1810, in which he was obligee, the obligor being seised of real estate in Ireland. In 1811 E. obtained possession of the bond from the testator's executor; but he did not register it, nor did he ever take any steps towards realising the security. In 1821 the elder of the infants attained twenty-one; in 1832 she married; and in 1833, when the bond had become irrevocable, E., for the first time, informed the elder child and her husband of the existence of the bond; and upon finding it was then too late to register it, he handed it to the husband, directing him to see to it. No step was taken until E.'s death in 1870, after which, in 1871, a bill was filed, seeking to make E.'s estate liable as for a breach of trust. At this time the younger infant was dead, and had no legal personal representative; but his son, who was entitled to administer, was made a defendant:—Held, that the parties, by acquiescing for thirty-eight years, and waiting till E.'s death, had lost their right to make any claim against his estate. Semble, that E. was not at any time liable for any breach of trust. *Sleeman* v. *Wilson*, L. R. 13 Eq. 36; 25 L. T. 408; 20 W. R. 109.

—— **Misapplication of Rates by Commissioners—Costs.**]—Certain commissioners were empowered by an act of parliament to levy rates and to apply them for certain specified purposes. They had applied part, and intended to apply more, of the proceeds of such rates towards defraying the expenses of an application to parliament for an extension of their powers, such an application not being one of the purposes mentioned in the act. An injunction was granted (*see* 1 W. R. 323) restraining the commissioners from such further intended application. And on the hearing of the cause on a motion for decree:—Held, that although, if an earlier application to the court had been made, the misapplication of the trust funds might have been prevented, yet that the commissioners were bound to replace the trust funds; but under the circumstances, delay having taken place in applying to the court, the commissioners were excused from payment of the costs personally. *Att.-Gen.* v. *Eastlake*, 2 Eq. R. 145; 17 Jur. 801.

See also LIMITATIONS (STATUTE OF).

E. ACTIONS BY AND AGAINST TRUSTEES.

1. *In General*, 862.
2. *Parties.*
   a. Settlor or his Representatives, 866.
   b. Cestuis que Trust, 868.
   c. Trustees, 874.
   d. Third Parties, 889.
3. *The Statute of Limitations*, 891.

1. IN GENERAL.

Service out of Jurisdiction.]—Upon a petition under the Trustee Relief Act the court has jurisdiction to order service on a respondent out of the jurisdiction, and also substituted service. *Bonelli's Electric Telegraph Co., In re, Cook's Claim*, 43 L. J., Ch. 720; L. R. 18 Eq. 655; 31 L. T. 83; 22 W. R. 856.

The court has authority to order service, upon minors residing out of the jurisdiction, of a petition under the Trustee Acts, 1850 and 1852 (13 & 14 Vict. c. 59, and 15 & 16 Vict. c. 55); and also of a petition under the Trustee Relief Act (11 & 12 Vict. c. 68). *Wycherley, In re, Dunne, In re*, 1 L. R. Ir. 12.

The court has jurisdiction to order service of a petition under the Trustee Relief Act (10 & 11 Vict. c. 96), on a party out of the jurisdiction. *Haney, In re*, 44 L. J., Ch. 272; L.R. 10 Ch. 275; Affirming 31 L. T. 645.

No action will lie against trustees, either by their cestui que trust, or, in case of his bankruptcy, by the assignees of such cestui que trust. *Allen* v. *Imlett*, Holt, 641.

Action by Trustees—Trover—Right to Sue—Conversion of Chattels.]—Trustees having a title to chattels with an immediate right of possession can sue in trover for the chattels, although they may never have taken actual possession, but have allowed the goods to remain in the occupation of their cestui que trust; and although the title may be liable to be defeated by the claim of some third party, yet the wrongdoer cannot set up the title of that third party as a defence to an action against himself for the recovery of the goods. *Barker* v. *Furlong*, 60 L. J., Ch. 368; [1891] 2 Ch. 172; 64 L. T. 411; 39 W. R. 621.

—— **Lease by Trustees—Use and Occupation.**]—A., being in possession of premises under a lease from two trustees for a term which had expired, a new lease was granted for a further term, but was executed by one of the trustees only. A. paid rent to both trustees until one of them died, and for the rent due after his death the other trustee brought an action:—Held, that he might maintain the action in his own right, and was not bound to sue as surviving trustee. *Wheatley* v. *Boyd*, 7 Ex. 20; 21 L. J., Ex. 39.

—— **On Covenants in Lease.**]—It is no defence to an action on an indenture of lease by the trustee of a party who has become bankrupt, that the lessees have performed their covenants with the assignees of the cestui que trust. *Britten* v. *Britten or Perrott*, 2 C. & M. 597; 4 Tyrw. 473; 3 L. J. Ex. 181.

—— **Policy of Insurance on Goods—Bankrupt Trustee for Assignee.**]—Action on a policy of insurance on a ship and cargo, alleging an average damage or loss on a portion of the cargo insured, and a breach of the policy by reason of non-payment of the proportion of the average loss. Plea, bankruptcy of the plaintiff before action. Replication, a contract of insurance to A. before the bankruptcy, with an averment that the plaintiff sued as trustee for A. Rejoinder, that the risk ended before bankruptcy, and that the right to have a return of premium was not transferred from the plaintiff before bankruptcy:—Held, that the causes of action being both vested before bankruptcy, and being such that distinct actions might have been brought by him whilst sui juris, he was entitled to sue in his own name as trustee for that cause of action in which he had no beneficial interest at the time of his bankruptcy. It would have been otherwise had he then any beneficial interest, however small, in the cause of action itself. *Boddington* v. *Castelli*, 1 El. & Bl. 879; 1 C. L. R. 281; 23 L. J., Q. B. 31; 17 Jur. 781; 2 W. R. 359—Ex. Ch.

—— **Trustee Plaintiff on Record—Cestui que Trust suing in his Name.**]—Whatever constitutes an answer to a demand for which an action is brought, as against the plaintiff on the record, is a bar to the action, although brought for the benefit of others who have no mode of enforcing their claim, except by suing in the name of the plaintiff. *Gibson* v. *Winter*, 2 N. & M. 737; 5 B. & Ad. 96; 2 L. J., K. B. 130.

—— **Objection of Cestui que Trust.**]—The court will not add a party to the record under s. 19 of 23 & 24 Vict. c. 126, who is a trustee for a person who objects to his being so added. *Sturgis* v. *Smith*, 5 L. T. 186.

—— **To Set Aside Deed.**]—A testator devised his real estate to the plaintiff, and gave various legacies to his other relations; and then, after reciting that he held a farm from year to year, he declared it to be his wish, and he authorised his trustees, to give up the tenancy in favour of the plaintiff, provided the landlord would accept him as tenant, and in that event he bequeathed to him all the stock on the farm. On the testator's death it appeared that his personalty, other than the farming stock, would be insufficient to pay his debts and legacies, and the trustees of the will, one of whom was the landlord's agent, induced the landlord to refuse to accept the plaintiff as tenant of his farm, unless he agreed to take 200*l.* and give up the testator's realty for payment of his debts and legacies. The plaintiff agreed accordingly, was accepted as tenant, and executed a deed conveying the realty to the trustees. About four years afterwards he filed a bill to set aside this transaction:—Held, that the trustees had been guilty of a clear breach of trust in what they had done to induce the plaintiff to execute the deed, and that it must be set aside, and the trustees must pay the costs of the suit. *Ellis* v. *Barker*, 41 L. J., Ch. 64; L. R. 7 Ch. 104; 25 L. T. 688; 20 W. R. 160.

—— **To Recover Commission.**]—The plaintiffs chartered from the defendant a ship to convey a cargo from Liverpool to Calcutta, under a charter party which stipulated that the ship was to be consigned to E. & Co., Calcutta, "on the usual terms," one of which was that E. & Co. might procure the homeward freight at a commission of 5*l.* per cent. The defendant accordingly consigned the ship to E. & Co., but made an agreement with a third party for the homeward freight. The plaintiffs, who had previously agreed with E. & Co. for a share in the commission, thereupon sued the defendant for a breach of his agreement, but were unable to prove at the trial in what proportion the commission was to be divided between themselves and E. & Co.:—Held, that the stipulation as to the commission having been inserted for the benefit of E. & Co., the plaintiffs, notwithstanding their inability to prove their interest in the commission, were entitled to recover as trustees of E. & Co. *Robertson* v. *Wait*, 8 Ex. 299; 22 L. J., Ex. 209; 1 W. R. 132.

—— **Evidence.**]—In an action by a trustee, he is not bound by the statements of a party admitted to be cestui que trust, unless the nature of the interest of such party in the trust estate is shown. *May* v. *Taylor*, 6 Man. & G. 261; 6 Scott (N.R.) 974; 12 L. J., C. P. 314.

An authority to a married woman to receive the rents from parties professing to be her trustees, is admissible in an action against them, or a party who has acted as their bailiff in distraining. *Roberts* v. *Shalless*, 1 F. & F. 139.

Bill by Assignee of Trust Fund—Preliminary Inquiry.]—Bill by assignee of trust fund to obtain payment. The trustees having stated that they were ignorant as to the execution of the assignment, the plaintiffs moved under general order 5 of May 9th, 1839, for a preliminary inquiry as to that fact:—Held, that the case was not within the order. *Frost* v. *Hamilton*, 4 Beav. 33.

Actions against Trustees—For Money paid for

the Use of Cestui que Trust.]—An infant having been injured by a railway accident, her claims were compromised for a sum of money, which was paid by the company to her attorney. The money was intended for her exclusive benefit, and it having been arranged between her parents and the company that the money should be settled, it was paid over to trustees of a settlement, the trusts of which gave the income only of the money to her for life. When she came of age she repudiated this arrangement, and sued the trustees for money received to her use:—Held, that the contract entered into by the trustees was to hold the money on the trusts of the settlement, and that they were not liable to her in that form of action. *Schofield* v. *Robinson*, 24 L. T. 591; 19 W. R. 958.

If a trustee admits that a balance belonging to the cestui que trust is in his hands, an action for money had and received may be maintained by the cestui que trust on such admission. *Roper* v. *Holland*, 4 N. & M. 668; 3 A. & E. 99; 1 H. & W. 167; 4 L. J., K. B. 156.

Where the trustee of an estate, who had funds belonging to his cestui que trust in his hands, said that he was ready to pay him 10*l.* down if he would give credit for certain repairs:—Held, that it was such a statement of account and declaration of a balance due as would maintain an action. *Ib.*

An action for breach of duty is not maintainable by a cestui que trust against his trustees, where the only breach complained of is the non-payment of money which the trustee holds, as such, to be paid by him to the cestui que trust, but which he has not specifically appropriated for that purpose. *Edwardes* v. *Lowndes*, 1 El. & Bl. 81; 22 L. J., Q. B. 104; 17 Jur. 412.

Trustees of a sum of money bequeathed to the separate use of a wife acknowledged, by letter, that they held a sum due as interest, ready to be paid to the wife upon her own receipt and execution of a trust deed, prepared by order of the court of chancery:—Held, that though they had no right to require execution of the deed, an action would not lie against them for money had and received, or for money due on an account stated, until the wife's receipt was produced. *Bond* v. *Nurse*, 10 Q. B. 244; 16 L. J., Q. B. 196; 11 Jur. 655.

Property was given in trust "for the sole and absolute use" of a female infant. She afterwards married under age, and a settlement was made, giving half to the wife for her separate use, and the other half to the husband. A bill was filed by the husband and wife, after the latter had come of age, against the trustees, seeking to charge them with a breach of trust. The court thought the frame of the suit improper, but gave leave to amend; and the wife being, by amendment, made to sue by her next friend, a decree was made. *Davis* v. *Prout*, 7 Beav. 288.

—— **For Detinue of Deed under which Trust Arises.**]—The cestui que trust cannot maintain, against a bailee of the trustee, detinue for the deed under which the trust arises, even although before the detention the cestui que trust had first obtained possession of the deed; for the right to hold a deed is not permanently attached to the first possessor of it, so as to prevent another having an equal interest in the deed from holding it, even against such first possessor. *Foster* v. *Crabb*, 12 C. B. 136; 21 L. J., C. P. 189; 16 Jur. 835.

—— **Innocent Mistake.**]—Trustees are not answerable for an innocent mistake, and from which they derive no advantage; and a court of equity will grant a perpetual injunction against proceedings at law grounded on such mistake. *Crookshanks* v. *Turner*, 7 Bro. P. C. 255.

—— **For Return of Money paid under Mistake of Fact.**]—The trustee of a settlement invested some of the funds on mortgage of the plaintiff's land. The mortgage provided for interest at five per cent. but at four per cent. if paid punctually; the mortgagor, in ignorance of this proviso, paid interest punctually at five per cent.; on discovering his mistake he commenced an action against the trustee for the extra one per cent.:—Held, that the action was rightly brought against the trustee though the amount had been handed over to the cestui que trust. *King* v. *Stewart*, 66 L. T. 339.

—— **Powers of Court to Sanction Compromise—Married Woman.**]—The court has jurisdiction to sanction on behalf of a married woman a compromise of a suit to make a trustee liable for a breach of trust in relation to a fund in which she has a reversionary interest. *Wall* v. *Rogers*, *Wall* v. *Ogle*, 39 L. J., Ch. 204, 381; L. R. 9 Eq. 58; 21 L. T. 654; 18 W. R. 203.

—— **Refusal of one Trustee to join in Discharge to Insurance Office.**]—C. was appointed, with five other trustees, under a deed which provided that every act done under the trust should be with the concurrence of at least three of the trustees. Three of the trustees advanced part of the trust fund to K., one of the parties interested, upon the security of an insurance upon his life, in which act O. refused to concur. Upon the death of K. the insurance office, before payment of the money, required a discharge from all the trustees, of whom only three remained alive, in which discharge O. having refused to concur—upon a suit in the court of session, it was decreed that he should execute the discharge, and concur in all lawful and necessary acts to give effect to the trust. *Ouchterlony* v. *Lynedoch*, 7 Bligh (N.S.) 448.

Where one of several plaintiffs (trustees under a composition deed) dissents to bring an action the court will not interpose, unless upon a suggestion of fraud. *Emery* v. *Mucklow*, 10 Bing. 23; 3 M. & Sc. 384.

——**Ejectment—Trustee of Outstanding Term.**]—If there were a dispute as to the inheritance, the court would not compel the trustee of an outstanding term attending the inheritance to lend his name to either party in an action of ejectment. *Doe* d. *Prosser* v. *King*, 2 D. P. C. 580.

2. PARTIES.

See R. S. C., Ord. XVI. r. 8.

a. Settlor or his Representatives.

Performance of Perfected Voluntary Trust.]—Where a voluntary trust is perfected, the settlor is not a necessary party to a suit by the cestui que trust against the trustee, to compel its performance. *Reed* v. *O'Brien*, 7 Beav. 32.

Suggestion of Doubt whether Part of Property Possessed by Trustees belongs to Settlor.]—In a

suit by cestuis que trust against the trustees of a settlement for an account and execution of the trust, the suggestion by the defendants of a doubt whether some part of the property, of which they have possessed themselves as trustees, may not belong to the estate of the settlor, does not render the representative of the settlor a necessary party. *Gaunt* v. *Johnson*, 7 Hare, 154; 18 L. J., Ch. 45; 12 Jur. 1057.

Enforcing Note given by Settlor to secure Settled Money.]—In a suit to charge a trustee for a breach of trust in not calling in and investing money due on a note given to him by the settlor to secure the money settled, it was held that the representatives of the settlor (the maker of the note, who was dead) were not necessary parties. *Platel* v. *Craddock*, C. P. Cooper, 481.

Enforcing Trusts of Creditors' Deed.]—The author of a trust for creditors, or his personal representative, is a necessary party to a suit by the creditors: and he is not regularly or properly a party thereto by being a defendant to a bill of revivor or revivor and supplement against the representatives of a trustee who died after the institution of the suit, even though all the trustees are (unnecessarily) parties to such bill of revivor or revivor and supplement; he must be made a party to the original bill, or to a bill in which the trustees are all properly defendants. *Bateman* v. *Margerison*, 6 Hare, 496.

A suit by creditors under a trust deed allowed to proceed against the trustees without a personal representative of the deceased debtor, the author of the trust, where no such representative existed and his estate was insolvent. *Chaffers* v. *Headlam*, 9 Hare (App.) xxxii., n.

—— **Surplus for Debtor.**]—To a suit for the execution of a trust, created for the benefit of the plaintiffs and other specified creditors, against the trustees (the fund having been brought into court), the person who created the trust, to whom the surplus (if any) was reserved by the trust, or his personal representative, is a necessary party; and it is not a case in which the court will, under Ord. XL. of August, 1841, make a decree, saving the rights of such party when absent, although the defendants say that the trust fund is insufficient for the purposes for which it was created, and that there is, therefore, no surplus to be paid to the absent party. *Kimber* v. *Ensworth*, 1 Hare, 293; 11 L. J., Ch. 151; 6 Jur. 162.

Quære, whether this case can be considered as deciding that the author of a trust who reserves no interest to himself is a necessary party to a suit for administering the trust. *Ib.*

Bill to enforce the trusts of a creditors' deed containing an ultimate trust for the debtors, must, in order to avoid the necessity of making the debtors parties, contain a distinct allegation as to the amount of fund to be distributed, and that there will be no surplus. If it pray for the administration of the whole estate without making the debtors parties it will be demurrable. *Bedford* v. *Gates*, 4 Y. & C. 21.

Bill by a creditor on behalf of himself and all others, parties to a trust deed, must show that they have all a common interest; therefore it cannot be brought to enforce an equity for payment of a larger amount of debt than that for which the plaintiff has signed, or to rescind a sale (however inequitable) which has been sanctioned by a great body of the creditors. *Ib.*

b. Cestuis que Trust.

Proceedings by Trustees.]—A cestui que trust must in all cases be a party, but the trustee need not, especially if cestui que trust undertakes for him. *Kirk* v. *Clark*, Pre. Ch. 275.

It is a salutary rule that the trustee cannot institute a suit, without his cestuis que trust being parties; but it is a subject to be modified according to circumstances. *Bifield* v. *Taylor*, Beat, 23; 1 Moll. 193.

On a bill by a trustee, to raise the arrears of an annuity, the cestuis que trust are not necessary parties; it appearing, on the face of the contract, that it was the intention of the parties to exclude the cestuis que trust from the necessity of taking any part in the transactions relating to the management of the trusts. *Ib.*

A trustee cannot file a bill concerning the trust, without making the cestuis que trust parties; if they are numerous it ought to be filed by some of them on behalf of themselves and the others. *Douglas* v. *Horsfall*, 2 Sim. & S. 184; *Anon.*, 3 L. J. (o.s.) Ch. 99.

A trustee cannot prove a debt alone; the cestui que trust must join in the proof. *Du Bois, Ex parte*, 1 Cox, 310.

On motion by trustees to dissolve an injunction obtained against them, cestuis que trust not parties to the suit cannot be heard. *Ball* v. *Tunnard*, 6 Madd. 275.

A. purchased a leasehold of B., and paid the purchase money, but no conveyance was executed. A. bequeathed it to B. for life, with remainders over. A.'s executor filed a bill against B. alone, for a conveyance of the property upon the trusts of the will, not, however, seeking to recover it as assets for the purposes of the executorship:—Held, that the other cestuis que trust were necessary parties; and, semble, that such a suit might be maintained. *Josling* v. *Kerr*, 3 Beav. 494.

Bill, by trustee, against one of several cestuis que trust, to recover the trust securities. The other cestuis que trust are unnecessary parties. *Bridget* v. *Hames*, 1 Coll. C. C. 72.

By the statements in a bill, it appeared that the testator devised his real estate to trustees, on trust for several persons, amongst whom were S. and W.; and he appointed S. and W. executrixes: and he gave a moiety of his residuary personal estate to his trustees, on the same trusts as his residuary real estate. A bill was filed by S., W., and others, and the trustees, for an account of certain damage done to the real estate in the testator's life, and after his death:—Held, not a misjoinder. *Smyth* v. *Fryer*, 14 Jur. 609.

Conduct of Suit by Cestui que Trust.]—Where one of several cestuis que trust institutes a suit for relief in respect of a breach of trust, he is bound, in the conduct of the suit, to take care of the interests of the others as well as of his own. *Williams* v. *Powell*, 2 Ph. 329.

Action against Trustees.]—In a bill against executors who are only executors in trust, it is not necessary to make the cestuis que trust or residuary legatees parties. *Anon.*, 1 Vern. 261.

Semble, where the cestuis que trust convey their beneficial interest in a portion of the

property to a purchaser, the purchaser may file a bill against the trustee for a conveyance of the legal estate, without making the cestuis que trust who sold to him parties to the suit. *Goodson* v. *Ellisson*, 3 Russ. 583; 27 R. R. 127.

If there are cestuis que trust, who ought, in strictness, to be made parties to such a suit, and they are not so brought before court, their interests may be ascertained and protected (by indulgence of court), by a petition to be presented by them for that purpose, to obviate further delay and expense. *Drew* v. *Harman*, 5 Price, 319.

Specific Legatees.]—A trustee of a fund belonging to a deceased person refused to pay it over to his legal personal representative, on the ground that there was a question, under the will of the deceased, whether it was not specifically bequeathed, and requiring the assent of the alleged specific legatees. He was ordered to pay it to the legal personal representative, together with the costs of suit, to which suit it was held that such specific legatees were not necessary parties. *Smith* v. *Bolden*, 33 Beav. 262.

Creditors' Trust Deed.]—A plaintiff filed a bill for the administration of the trusts of a creditor's deed, and for relief against a purchase (alleged to be fraudulent) by one of the defendants from the trustee. The plaintiff alleged that he was the assignee of the debt of a defendant who had executed the deed as a creditor, and who admitted the plaintiff's title:—Held, on a demurrer by the purchaser, that this was an insufficient averment of title. *Jerdein* v. *Bright*, 2 J. & H. 325; 30 L. J., Ch. 336; 4 L. T. 12; 9 W. R. 267.

Refusal of Trustee to Sue.]—No collusion in the purchaser's fraud was alleged against the trustee: but it was averred that, after he discovered the fraud, he refused, and still refuses, to take proceedings against the purchaser; but the bill did not state by whom he was asked to do so:—Held, also, on demurrer by the purchaser, that this was not sufficient to entitle the plaintiff to sue. *Ib.*

Semble, that a refusal by the trustee to sue on the application of a cestui que trust would have sufficed to sustain the bill on this point. *Ib.*

Held, also, that the bill was multifarious for joining a prayer for accounts with that for relief against the purchaser. *Ib.*

—— **Heir at Law.**]—Where the plaintiff, in his original bill, made out title to an estate, and prayed relief, as heir at law, but afterwards, and after all the defendants had answered, discovered a marriage settlement by which the estate stood limited to a trustee for the use of the plaintiff, his brother, and sister, in equal shares:—Held, that the plaintiff might, in his amended bill, vary his case, so as to make out title, and pray relief according to his real rights. *Peed* v. *Cussen*, Sau. & Sc. 161.

And it being doubtful, upon the construction of the settlement, whether the plaintiff, his brother, and sister were entitled to vested, or merely to contingent interests:—Held, also, that the estate being limited to the heir of the settlor, in case the supposed contingency should never arise, and the trustees having refused to become plaintiffs, the plaintiff might, in the character of heir at law, maintain a suit for the purpose of protecting the property. *Ib.*

And see *Gandy* v. *Gandy*, 54 L. J., Ch. 1154; 30 Ch. D. 57; 53 L. T. 306; 33 W. R. 803—C. A.; and *Meldrum* v. *Scorer*, 56 L. T. 471.

Devise on Trust for Sale.]—In a devise to sell and the produce to be divided, all the persons interested in the fund must be made parties, though the land is sold before suit. *Faithful* v. *Hunt*, 3 Anst. 751.

Where there is a devise of a fee simple, with an absolute power to raise by sale or mortgage sums of money for certain purposes, and in the same devise are contained provisions enabling the trustee to give receipts to the purchasers, such trustee sufficiently represents the estate in a suit for a sale, though the person to whom, subject to such power, the first estate of inheritance was limited, is not a party in the cause. *Keon* v. *Magawly*, 1 Dr. & War. 401.

Bill by devisees in trust to sell for specific performance of an agreement to purchase: exception to the report in favour of the title, that the persons entitled to the purchase money, subject to debts, legacies, and other charges, were not parties to the suit: the lord chancellor was of opinion they ought not to be parties to the conveyance; and if they were, their covenant ought to extend only to their own acts, and those of the devisor; not to a general warranty, without a special contract for it: but as the point must come properly upon objections to the conveyance, the exception was overruled upon the form. *Wakeman* v. *Rutland* (*Duchess*), 3 Ves. 233.

An agreement by trustees of a will to grant an under-lease of their testator's leasehold property, is primâ facie inconsistent with a trust for sale of it. There may be, however, circumstances to justify the agreement; but the court cannot enter into the consideration of those circumstances in a suit for specific performance between the trustees and the under-lessee, the cestuis que trust not being parties to it. *Evans* v. *Jackson*, 8 Sim. 217; 6 L. J., Ch. 8.

Parties to bill by creditors against trustees for sale. *Routh* v. *Kinder*, 3 Swanst. 144.

Suit for Renewal of Lease for Lives.]—A portion of the interest under a lease for lives renewable for ever, was assigned to A., in trust for B. There was no declaration of trust in the deed of assignment, nor indorsed on it. To a suit for renewal, A. and B. were made parties. The bill contained an allegation that the assignment was made in trust for B.:—Held, that there was no misjoinder, and that B. had been properly made a party. *Butler* v. *Portarlington* (*Earl*) 1 Con. & L. 1; 1 Dr. & War. 20; 4 Ir. Eq. R. 1.

Presumptive Next of Kin.]—Where property is settled in trust in remainder for the persons who should be the next of kin of the tenant for life at his death, the presumptive next of kin are not necessary parties to a suit instituted for the execution of the trust during the lifetime of the tenant for life. *Fowler* v. *James*, 1 Ph. 803; C. P. Cooper, 290; 16 L. J., Ch. 266.

Suit by New Trustees to Compel Payment of Trust Fund.]—In 1830, A. and B. were appointed trustees of a part of a sum vested in other trustees. The deed contained a power for the settlors to appoint new trustees, in case any trustee should wish to be discharged from, or

should decline to act in, the trusts. B. did not execute. In 1848, B., alleging that he had never acted, disclaimed, and A. retired, and thereupon two new trustees were appointed, and the fund assigned to them only:—Held, that whether B. had acted or not, the new trustee had been duly appointed, and that the cestuis que trust were not necessary parties to a suit by such new trustees against the persons, who held the fund, to compel payment to the new trustees. *Noble* v. *Meymott*, 14 Beav. 471; 20 L. J., Ch. 612.

Proceedings by Parties Entitled to Part of Fund.]—Bequest in trust to invest and pay the interest of a moiety to A., and afterwards to her children, and the other moiety to R. and afterwards to her children. The interest on a moiety of 1,000*l.* invested on mortgage was paid to A. for thirty years. On her death the mortgage was got in:—Held, that A.'s children could maintain a suit for their moiety, without making B. and her children parties. *Hares* v. *Stringer*, 15 Beav. 206.

Where A. and B. were entitled in equal moieties to a trust fund, which had been wasted:—Held, that A. was a necessary party to a suit by B. against the trustees for the recovery of B.'s moiety, although, in a former suit for carrying the trusts into execution, a moiety was decreed to be transferred for B.'s benefit. *Munch* v. *Cockerell*, 8 Sim. 219; 6 L. J., Ch. 9. And see *S. C.*, 5 Myl. & Cr. 179; 9 L. J., Ch. 153; 4 Jur. 140.

Where the fund, in respect of which the breach of trust has been committed, has been made the subject of a second settlement by parties claiming an interest under the first, the trustees of such second settlement, though appointed previous to, or during the continuance of, the breach of trust complained of, are not necessary parties to a suit by the cestuis que trust of such settlements, against the trustees of the original settlement, for a breach of trust committed by them while the fund was under their control. *Ib.*

Held, that a party entitled to a moiety of an ascertained fund may alone maintain a suit for relief in respect of a breach of trust affecting the whole fund. *Perry* v. *Knott*, 5 Beav. 293.

A party, entitled to a moiety of an ascertained fund, cannot maintain a suit for payment of his share without making the person entitled to the other moiety a party, if owing to breach of trust, the whole fund is not forthcoming; semble, and the decision in *Perry* v. *Knott*, supra, to the contrary, disapproved. *Lenaghan* v. *Smith*, 2 Ph. 301; 16 L. J., Ch. 376; 11 Jur. 503.

To a bill by a person entitled to a certain aliquot portion of a certain ascertained sum in the hands of trustees, the co-cestuis que trust are not necessary parties. *Smith* v. *Snow*, 3 Madd. 10; 18 R. R. 186.

To a bill filed by a husband as administrator of his wife against the trustees of her father's will (the father having covenanted to leave an equal share of his property to all his children but did not), the cestuis que trust under the will held necessary parties. *Jones* v. *How*, 17 L. J., Ch. 369; 12 Jur. 227. And see *Hill* v. *Hill*, 12 Jur. 972.

A widow concurred in a breach of trust, but her interest in the testator's estate had been separated:—Held, that she was not a necessary party to a suit by a cestui que trust, not seeking to charge her interest, and that the trustees seeking to charge her interest must make their equity effective by some proceeding of their own. *Ling* v. *Colman*, 10 Beav. 370.

A bill having been filed by parties entitled under a will to one-fourth of a fund (which since the testator's death had been ascertained and appropriated) against the trustee alone, without making the parties entitled to the other three-fourths parties to the suit, a demurrer for want of parties was overruled. *Hutchinson* v. *Townsend*, 2 Keen, 675; 6 L. J., Ch. 13.

Suit to Restore Trust Property belonging to Dissenting Congregation.] — The trustees of land belonging to a dissenting congregation mortgaged it, with the sanction of the subscribers, pursuant to the trust deed. The mortgagee afterwards conveyed the estate to another party, who sold it to a railway company. The trustees thereupon filed a bill to make the transferee of the mortgage account for the difference between the amount of the debt and the purchase money, on the ground that the balance was part of the trust property:—Held, that the suit not having been sanctioned by the subscribers, or a majority of them, they were all necessary parties to the suit. *Minn* v. *Stant*, 15 Beav. 49; 20 L. J., Ch. 614; 15 Jur. 1095.

The lease of a chapel was held on trust for a particular form of worship. The chapel was afterwards, in breach of trust, used for a different form of worship:—Held, that two of the persons interested might sue on behalf of themselves and all others interested, for the due performance of the trusts on which the lease was held. *Milligan* v. *Mitchell*, 3 Myl. & Cr. 72; 7 L. J., Ch. 37; 1 Jur. 888.

Personal Indemnity by One Trustee to Another.]—E. K., being entitled for life to the income of a fund, and trustee of it with K., allows K. to sell out 1,000*l.* on his giving a promissory note and deposit of deeds of freeholds. K. is bankrupt, and under an order of a commissioner the freeholds are sold, and the conditions provide that the order in bankruptcy shall be conclusive: on objection that cestuis que trust were necessary parties:—Held, that they were not, the deposit and memorandum being a personal indemnity only by one trustee to another. *Groom* v. *Booth*, 1 Drew. 548; 22 L. J., Ch. 961; 17 Jur. 927; 1 W. R. 423.

Trustee Called to Account.]—A trustee for three persons is called to account. All the cestuis que trust must be parties. *Hamm* v. *Stevens*, 1 Vern. 110.

Foreign Trustees and Cestuis que Trust.]—Where a trust fund is to be administered under the direction of the court, the general rule requiring the cestuis que trust to be parties is applicable to foreign trustees and cestuis que trust residing out of the jurisdiction, unless a special case of difficulty or inconvenience in the application of the rule be shown. *Weatherby* v. *St. Giorgio*, 2 Hare, 624; 12 L. J., Ch. 412; 7 Jur. 717.

Proceedings to Set Aside Sale to Trustee.]—Bill by one of several cestuis que trust against the devisee of the trustee to set aside the sale of an estate, which was made to the trustee by all the cestuis que trust for one sum, and conveyed by one instrument:—Held, that all the

cestuis que trust were necessary parties to the suit. *Roberts* v. *Tunstall*, 4 Hare, 261.

Motion for Order on Trustees to Bring Funds into Court.]—In a suit instituted by one of the cestuis que trust against the trustees, to administer the trusts of a will, a motion was made by the plaintiff that the trustees might be ordered to bring into court certain sums of stock admitted to form part of the trust funds:—Held, that the remaining cestuis que trust were not necessary parties to the suit, and it was not requisite to serve them with notice of this motion. *Marryat* v. *Marryat*, 23 L. J., Ch. 876; 2 W. R. 576.

Suit to Restore Fund held in Trust for a Class.]—To a suit by one or more cestuis que trust against the trustees, alleging that the trust fund had been invested on improper security, and seeking to have it restored, all the cestuis que trust of the fund must be parties; and if the fund be held in trust for a class of persons, there must, before the case is heard on the question between the plaintiffs and the trustees, be evidence that all the members of the class are before the court. *Phillipson* v. *Gatty*, 6 Hare, 26; 17 L. J., Ch. 241; 12 Jur. 430.

Suit against Trustee of Deed of Arrangement and subsequent Settlement.]—One of the cestuis que trust under a deed of family arrangement made a settlement of his share. There were two trustees of the settlement, one of whom was also a trustee of the deed of arrangement. In a suit to administer the trusts of the deed of arrangement, and make the trustees of it responsible for breaches of trust:—Held, that, since one of the trustees of the settlement was an accounting party as a trustee of the deed of arrangement, the cestuis que trust under the settlement ought to be made parties. *Payne* v. *Parker*, L. R. 1 Ch. 327; 12 Jur. (N.S.) 221; 14 L. T. 157; 14 W. R. 562.

Receipt of Trust Fund by Tenants for Life.]—In a suit to make a trustee liable for a part of the trust fund which was not forthcoming, he stated that it had been received by the tenants for life, who were dead:—Held, that their personal representatives were necessary parties. *Williams* v. *Allen*, 29 Beav. 292; 30 L. J., Ch. 810; 3 L. T. 649; 9 W. R. 227.

A fund was vested in trustees for A. for life, and after his death for his son B. The trustees allowed A. to receive it. A. died leaving assets; and having by his will bequeathed personal property, far exceeding the trust fund, subject to life interests to B., expressly in satisfaction of the trust fund claimed by him; B. filed a petition against the trustees, to compel them to replace the fund, and claiming a right to elect to take it against the devisee:—Held, that the personal representative of A. was a necessary party to the suit. *Burrowes* v. *O'Brien*, 15 Ir. Ch. R. 423.

Failure of Action by Trustees—Subsequent Suit by Cestuis que Trust.]—A suit was instituted by trustees in their representative character to establish their claim to policy moneys. The cestuis que trust were not made parties. The suit failed for want of evidence. The cestuis que trust, having obtained fresh evidence, filed a bill in their own names to establish their right to the moneys:—Held, that the suit was right in point of form; and upon the new evidence a decree was made in their favour. *Peirce* v. *Brady*, 26 L. J. Ch. 257; 2 Jur. (N.S.) 772; 4 W. R. 736.

Actions between Co-Trustees—To recover Trust Funds.]—Bill by one trustee of stock against the other to compel him to replace it or give security according to his engagement, when the plaintiff joined in transferring the stock into his name; demurrer, because the cestuis que trust were not parties, overruled with costs. *Franco* v. *Franco*, 3 Ves. 75; 3 R. R. 50.

A trustee may file a bill against a co-trustee to recover the trust fund, without making the cestuis que trust parties; and where the trust is under a devise of real estate for sale, with power to give receipts, this general rule of pleading is corroborated by the 30th of the Orders of August, 1841. *May* v. *Selby*, 1 Y. & C. C. C. 235; 6 Jur. 52.

The 40th of those Orders is also applicable in such a case, where the objection is only taken at the hearing. *Ib.*

Suit by surviving trustee to recover back trust funds wrongfully misappropriated by the defendant:—Held, that the cestuis que trust were not necessary parties. *Horsley* v. *Fawcett*, 11 Beav. 565.

There is no such general rule that a wrong-doer cannot file a bill. *Baynard* v. *Woolley*, 20 Beav. 583.

Thereupon if A. and B., two trustees, have committed a breach of trust, and are equally liable, but B. received the produce, A. may sustain a bill against B. alone to recover the amount for the benefit of the trust. *Ib.*

Where one of two executors was indebted to the testator at the time of the testator's decease, and was sued by his co-executor for the recovery of the debt, and the realisation of a security which had been given for it:—Held, that the cestuis que trust under the will were not necessary parties to the suit. *Peake* v. *Ledger*, 4 De G. & Sm. 137; 8 Hare, 313.

—— **For Contribution from Co-Trustee.**]—Although one of two executors or trustees may sue the other executor or trustee for contribution in respect of a breach of trust, without making the cestuis que trust parties to the suit, yet where such cestuis que trust have participated in the breach of trust they are necessary parties. *Jesse* v. *Bennett*, 6 De G. M. & G. 609; 26 L. J., Ch. 63; 2 Jur. (N.S.) 1125; 5 W. R. 56.

c. Trustees.

Cestui que Trust about to commence Proceedings.]—A cestui que trust about to file a bill, should apply to his trustee to become a co-plaintiff, indemnifying him against costs. If he refuses, he must abide his own costs as a defendant. If he is not applied to, plaintiff must pay his costs. *Reade* v. *Sparkes*, 1 Moll. 8.

Conveying Real Estate without Notice of Trust.]—Where the real estate is in the hands of trustees, and the trustees convey it over without notice of the trust, if a bill is brought by the cestui que trust, the trustees must be made defendants. *Harrison* v. *Pryse*, Barnard. 324.

Parties to alleged Forged Lease.]—A bill charges forgery in a lease, and prays relief; the trustees who were parties to the lease, and to

whom the fraud and breach of trust is imputed, must be parties. *Jones* v. *Jones*, 3 Atk. 110.

Trustee abroad remitting Trust Moneys to his London Agent.]—A., resident out of the jurisdiction, held moneys upon certain trusts in favour of B., and remitted them to C., his London agent, whom he informed of the trusts. B. was not informed that the moneys had been so remitted:—Held, on demurrer, that B. might maintain a suit in equity against C. for the recovery of the moneys, and that A. was not a necessary party to such suit. *Steele* v. *Stuart*, 3 N. R. 686.

Trustee of Term.]—If the trustee of a term, and the cestui que trust, are before the court, an intermediate trustee of the equitable interest need not be the party to a bill filed to carry the trusts of the term into execution. *Head* v. *Tejnham*, 1 Cox, 57.

—— **Proceedings for Ejectment.**]—On demurrer to an ejectment bill, alleging that plaintiff had abandoned his action of ejectment at law by reason of the defendant's threatening and intending to set up an outstanding term:—Held, that the trustee of such term was not a necessary party. *Brookes* v. *Burt*, 1 Beav. 106; 8 L. J., Ch. 43.

—— **Trustee of Expired Term.**]—The trustee of a term was improperly made a party, the term having expired before the institution of the suit. *Talbott* v. *Minnett*, 6 Ir. Eq. R. 83.

—— **Suit for Portions for Younger Children.**]—In a suit for portions of younger children, raisable under the trusts of a term, the trustee to whom the term had been assigned (but not the original termors or the representative of the survivor) is a proper party. *Young* v. *Waterpark* (*Lord*), 8 L. J., Ch. 214.

To sustain a demurrer for want of parties, the defendant must show that the absent person is a necessary party according to the case of such defendant. An estate was charged with a mortgage and with portions, and a term was vested in trustees for securing the portions. A second estate was conveyed on trust to sell and pay the mortgage and portions. In a suit for the execution of the trusts, the mortgagee objected that the trustees of the term were not parties; but the objection was overruled. *Dalton* v. *Hayter*, 7 Beav. 313.

Trustees to preserve Contingent Remainders.] Trustees to preserve contingent remainders are not necessary parties to a suit to raise a charge affecting the inheritance. *Stewart* v. *Donegal* (*Marquis*), 2 Jo. & Lat. 636; 8 Ir. Eq. R. 621.

Property vested in Trustees for Separate Use of Feme Covert.]—To a bill to raise a demand out of property vested in trustees for the separate use of a feme covert, the trustees ought to be made answering parties. *Peppard* or *Pepper* v. *Kelly*, 2 Jo. & Lat. 558; 8 Ir. Eq. R. 502.

Covenant to Pay Money to Wife—Annuity.]—A husband covenanted with a trustee to pay an annuity to his wife, or to the trustee for her use, and assigned property to a trustee to secure it, but the husband paid it without the interference of the trustee, and the wife afterwards borrowed money on the annuity, and the lender afterwards filed a bill against the husband and wife for payment of his debt out of the annuity:—Held, that the trustee was a necessary party to the suit. *Palmer* v. *Fraser*, 3 Y. & C. 491; 3 Jur. 890.

A. covenanted with B. to transfer stock into the names of C. and D., or some other person to be named by A., upon trust for B., his wife, and issue; afterwards B. became absolutely entitled to the fund. In a suit by B. against the representatives of A., to obtain satisfaction out of his estate in respect of his covenant:—Held, that C. and D. were not necessary parties. *Watson* v. *Parker*, 6 Beav. 283; 12 L. J., Ch. 221; 7 Jur. 143.

Proceedings for Restitution of Trust Deed.]—Where there is no imputation of breach of trust in a trustee's suffering the deed to get out of his possession, he need not be a party to a bill for its restitution. *Knye* v. *Moore*, 1 Sim. & S. 61. *S. C.*, nom. —— v. *Moseley*, 1 L. J. (o.s.) Ch. 18.

Trustee of Share of Property for his Assignee.]—The plaintiff, and his wife, who was one of the children of A., agreed with the other children to divide equally A.'s property at his death. The plaintiff's wife died before A., and the plaintiff was her administrator. He made an assignment, by which his share passed, and afterwards filed a bill for specific performance:—Held, that the agreement was valid; and that the plaintiff being a trustee of his share for the assignees, the suit was properly instituted by him. *Hyde* v. *White*, 5 Sim. 524.

Bill to set aside Conveyance to Solicitor.]—The plaintiff was entitled under her father's will, and an appointment by her mother, who was his executrix; and being in embarrassed circumstances and without professional advice and ignorant of the amount of her claims, G., her solicitor, induced her in 1833 to convey to him all her rights, which he represented to be only one-half that they amounted to, for a rent charge on the lands so conveyed to him, the payment to be personally secured by him. The deed was drawn by G., and contained no clause of re-entry or covenant by him to pay, but a non-alienation clause was fraudulently, as alleged, inserted. G. ceased to pay in 1836, and the bill was filed in 1845, to set aside the deed and carry the trusts of the will into execution, and for an account of the testator's property, so far as to ascertain the plaintiff's rights, and, if necessary, of the personal estate of her mother. B., the executor of the mother and the administrator de bonis non of the father, was made a party, but the trustee of the father's will was not:—Held, that there was no misjoinder or multifariousness; that if multifarious as to B., G. could not raise the objection; and that the surviving trustee was not a necessary party. *O'Kelly* v. *Glenny*, 9 Ir. Eq. R. 25.

Creditors' Suit—Bill of Revivor against Representatives of Deceased Trustee.]—In a suit by some of many creditors, on behalf of themselves and the others, for an account of property which had been vested in the defendants, the trustees, for the benefit of such creditors, and one of the trustees died after answer, the other trustees are not necessary parties to the bill of revivor, or revivor and supplement, against the representatives of the deceased trustee. *Bateman* v. *Margerison*, 6 Hare, 496.

—— **Trustees for Tenants in Tail.**]—Certain estates were devised to A. for life, then to B. for life, then to the sons of B. in tail male. During the tenancy of A., a bill was filed by a creditor of the testator for a sale of part of the estates. No inquiry into the incumbrances affecting the estates was directed; and the trustees for the tenants in tail were not made parties to the suit. The lands were sold, and a conveyance executed by the officer of the court and by A., and subsequently (though not till after a compromise had been effected), by B.; and the residue of the purchase money was ordered to be invested for the benefit of A. :—Held, that the bill was defective for want of proper parties; and the whole transaction was properly set aside after the death of the two tenants for life, and at the suit of the first surviving tenant in tail: and that the accounts were properly directed to be taken from the period of the death of the second tenant for life. *Mullins* v. *Townsend*, 2 Dow & Cl. 430; 5 Bligh (N.S.) 567—H. L. (Ir.)

Action by Vendor for Specific Performance.]—A party having purchased land, and signified at the time that he made the purchase on behalf of the trustee of his marriage settlement, who had money vested in him to be laid out in land, and a bill being filed against him for specific performance, the court would not allow the case to proceed until the trustee was made a party, and the cause stood over for that purpose. *Wynniat* v. *Lindo*, Tam. 512.

Bill by Solicitor-Trustee to foreclose Mortgage.]—T., a trustee, lent trust money on mortgage to M. By an arrangement on the marriage of M.'s daughter a valuable leasehold interest was granted by M. out of the mortgaged premises and put in settlement, T. being the person who managed it and the solicitor who prepared the lease and settlement, the daughter or her husband not being informed of the mortgage. T. afterwards, with his co-trustee and their cestuis que trust, filed a bill to foreclose the mortgage and sell discharged of the lease, if necessary :—Held, that the parties deriving under the settlement could not object to T.'s being a co-plaintiff. *Tuycross* v. *Moore*, 13 Ir. Eq. R. 250.

Plaintiff Cestui que Trust and also Representative of Deceased Trustee.]—Where several plaintiffs beneficially interested in a trust fund sue the trustees in respect of a breach of trust, and one of such plaintiffs has, in addition to his character as a cestui que trust, become the personal representative of a deceased trustee, who was primarily, or with the other trustees jointly, liable, the suit is improperly framed, and cannot be sustained, notwithstanding it be averred by the bill that the plaintiff has received no assets of the estate of the deceased trustee, and that the trustee died insolvent. *Griffith* v. *Vanheythuysen*, 9 Hare, 85; 20 L. J., Ch. 337: 15 Jur. 421.

Whether, if the plaintiff, who in such a case had become the representative of the accounting party, were the sole plaintiff in the suit, the objection to the suit could be maintained, quære. *Ib.*

Plaintiff Personal Representative of Deceased Trustee and Next Friend of Infant Plaintiff's.]—M. J., the personal representative of a deceased trustee, together with infants, beneficially interested in a fund, by M. J. their next friend, were co-plaintiffs in a suit, the object of which was to make the tenant for life and his interest in the trust funds answerable for part of the trust funds, which the tenant for life had applied to his own use: there were other parties interested in the restitution of the fund, who were made defendants. The court, being of opinion that the trustees' assets might, in the progress of the suit, have to be resorted to for the purpose of making good the breach of trust, and that the interests of the infants and of M. J. would thereby ultimately become conflicting, dismissed the bill, with costs, on the ground of the misjoinder of plaintiffs, but without prejudice to any new bill. *Jacob* v. *Lucas*, 1 Beav. 436; 8 L. J., Ch. 271.

Suit by Mortgagee against Improvement Commissioners and their Trustees.]—A mortgagee, for obtaining payment of the money due to him from the Westminster improvement commissioners, instituted a suit against them and two trustees, to whom the commissioners had conveyed the lands and hereditaments specified in the deed, which contained power to the trustees, in their discretion, to reconvey. The bill recited the conveyance by the commissioners to the trustees; that a suit had been instituted by bondholders against the commissioners and the trustees, in which no decree had been made, but which had been registered as a lis pendens; and that a deed had been executed by which the trustees, in exercise of the power, had reconveyed the lands and hereditaments to the commissioners. The bill alleged that the plaintiff was advised, that if the reconveyance was effectual for any purpose, it was a breach of trust on the part of the trustees, and that they were necessary parties. A demurrer by the trustees was allowed with costs, and leave was given to amend by striking out their names. *Tryon* v. *Westminster Improvement Commissioners*, 2 Giff. 434; 6 Jur. (N.S.) 1324; 3 L. T. 262.

Trustees with Power of Sale of Real Estate.]—The trustees under a settlement of real estate, against whom a trust or power given to them to sell the estate is to be enforced, are necessary parties. *Rooke* v. *Kensington* (*Lord*), 25 L. J., Ch. 567; 4 W. R. 582.

Suit against Trustees of Rates under Local Act.]—J. F., a trustee under a local act of parliament, and treasurer of the trust, took from his co-trustees a security on the rates, called an assignment, to secure moneys advanced to the trust by him after the security was given. A suit was brought against him (to which the treasurer, his successors, and the body of trustees for the time being were parties, as well as the attorney-general representing the ratepayers) to set aside his security on four distinct grounds. The lord chancellor on appeal, in 1852, overruled all these objections to the security and dismissed the bill, but refused expressly to declare J. F.'s security unimpeachable. J. F. died, and his executors, on the refusal of the trustees to pay interest on the assignment, or to take the proper steps to pay it off, filed a bill against three of them to compel payment, and for accounts. No new objections to the security

being brought forward by the defendant :—Held, that the court must work out the decision of the lord chancellor in the former suit, and that the relation of trustee and cestui que trust was created between the trustees and the assignment holders so as to entitle the plaintiffs to an account. Under the circumstances, neither the ratepayers nor the rest of the trustees were considered necessary parties. *Fletcher* v. *Gibbon*, 23 Beav. 212.

Statutory Power for one Trustee to Sue.]—Lands of a moor were vested in trustees by act of parliament, which provided that "all actions and suits by or on behalf of the trustees against any persons or bodies might be prosecuted in the name of one as nominal plaintiff, on behalf of the inhabitants of the parish." A railway company took lands and paid money into court, and gave a bond under the Lands Clauses Act and took possession. They ultimately agreed in writing to pay a certain sum, but failing to complete, a bill was filed by one of the trustees on behalf of the inhabitants for specific performance, setting out the clause of the act giving power to sue. Demurrer for want of equity to this bill overruled. *Cranstone* v. *Hemel Hempstead and L. & N. W. Ry.*, 17 L. T. 596.

Suit by Allottee of Land from Building Society.]—Every allottee of land from a building society entered into restrictive covenants with the trustees of the society for the benefit of the persons for the time being claiming under conveyances made by the trustees :—Held, that the trustees were necessary parties to a suit by an allottee against a purchaser from another allottee, for an injunction to restrain breaches of the covenants, and for damages. Semble, the plaintiff ought to have sued on behalf of himself and all the other persons entitled to the benefit of the covenants. *Eastwood* v. *Lever* or *Levers*, 3 N. R. 232 ; 33 L. J., Ch. 355 ; 9 L. T. 615 ; 12 W. R. 195.

Non-acting Trustees.]—A trustee in a will, who released and never acted, ought not to be made a party in a suit to set aside the will on the ground of fraud, and therefore need not answer as to the fraud alleged. *Richardson* v. *Hulbert*, 1 Anst. 65.

In a suit against trustees of a charity, all the trustees must be parties though they do not act. *Chertsey Market, In re*, 6 Price, 261 ; 20 R. R. 638.

A trustee named in a will, who has refused the trust, is not a necessary party. *Creed* v. *Creed*, 2 Hog. 215.

Under the circumstances, a party named as a trustee in the articles, but who had not acted or executed any deed of trust, was allowed to sustain a suit to carry the articles into effect. *Cook* v. *Fryer*, 1 Hare, 498 ; 11 L. J., Ch. 284 ; 6 Jur. 479.

—— **No Disclaimer.**] — A., the devisee in trust of certain lands, never accepted or acted in the trusts, but never disclaimed them :—Held, that his devisees were necessary parties to a suit relating to the trust estates. *King* v. *Phillips*, 22 L. J., Ch. 422 ; 16 Jur. 1080 ; 1 W. R. 45.

New Trustees — Bill for Appointment.] — Trustees of a term for raising portions under a marriage settlement :—Held, to be necessary parties to a bill for appointing new trustees, in the room of the trustees for preserving contingent remainders, with a power of sale and exchange. *Ellison* v. *Cookson*, 2 Coll. C. C. 52.

Decree for the appointment of new trustees, and conveyance of the trust estate, in a suit by some cestuis que trust against the devisees of the last survivor of the former trustees, and a direction to serve the other cestuis que trust with notice of the decree. *Jones* v. *James*, 9 Hare (App.) lxxx.

—— **Bill for Removal.**]—A trustee who retired and allowed a new trustee to be appointed, without communication with cestui que trust, is not a necessary party to a suit complaining of such new appointment and seeking to displace the new trustee and others, all relief against the retired trustee being waived. *Marshall* v. *Sladden*, 7 Hare, 428 ; 19 L. J., Ch. 57 ; 14 Jur. 106.

A tenant for life, with power to appoint new trustees, parted with the whole of his interest in the settled property. He afterwards appointed two improper persons to be trustees. Upon a bill to remove such trustees, and also to administer the trusts, and to make the tenant for life pay the costs :—Held, on demurrer by the tenant for life, that he had properly been made a party. *Raikes* v. *Raikes*, 32 Beav. 403.

—— **Suit to compel Payment.**] — In 1830 A. and B. were appointed trustees of a part of a sum vested in other trustees. The deed contained a power for the settlors to appoint new trustees, in case any trustee should wish to be discharged from, or should decline to act in, the trusts. B. did not execute. In 1848 B., alleging he had never acted, disclaimed, and A. retired, and thereupon two new trustees were appointed, and the fund assigned to them by A. only :—Held, that whether B. had acted or not, the new trustees had been duly appointed, and that the cestuis que trust were not necessary parties to a suit by such new trustees against the persons who held the fund, to compel payment to the new trustees. *Noble* v. *Meymott*, 14 Beav. 471 ; 20 L. J., Ch. 612.

—— **Administration of Fund in Court.**]—New trustees of a fund in court, to whom no actual assignment of the property has been made, are necessary parties to a suit for the administration of the fund. *Nelson* v. *Seaman*, 1 De G. F. & J. 368 ; 6 Jur. (N.S.) 258 ; 1 L. T. 393 ; 8 W. R. 167.

Co-trustee or his Representative—Joint Breach of Trust.]—Right of a cestui que trust to proceed separately against one trustee implicated in a joint breach of trust. *Walker* v. *Symonds*, 3 Swanst. 75 ; 19 R. R. 155.

—— **Two Classes of Trustees.**]—Two classes of trustees had committed a breach of trust :—Held, that the cestuis que trust might proceed against the one class without making the other class parties. *M'Gachen* v. *Dew*, 15 Beav. 84.

—— **Death of one Trustee pending Suit.**]—Where one of several trustees dies pending a suit which does not seek to charge them personally in that character, his representatives are not necessary parties, for the trusteeship survives. *London Gas Light Co.* v. *Spottiswoode*, 14 Beav. 264.

—— **Death of one Trustee after Institution of Suit.**]—Where one of two trustees of an estate

which was being administered in court died intestate and insolvent, after a decree for an account against himself and his co-trustee, and after the certificate had been settled by the chief clerk except in some formal particulars :— Held, that the proceedings ought to be carried on in the absence of a representative of his estate, although considerable balances were proved to be due from the trustees, and although one of the parties having the conduct of the cause was entitled to take out representation to the deceased trustee. *Moore* v. *Morris*, 41 L. J., Ch. 161 ; L. R. 13 Eq. 139.

—— **Representatives of Deceased Trustee—Account Claimed.**]—To an action in respect of a breach of trust against a surviving trustee, where a general account is claimed, the plaintiff is no longer required to make the representatives of deceased trustees defendants, as they can, when necessary, be added as parties under Ord. XVI. r. 11. *Harrison, In re, Smith* v. *Allen*, 60 L. J., Ch. 287 ; [1891] 2 Ch. 349 ; 64 L. T. 442.

Where one of several trustees has died the cestui que trust may generally sue the surviving trustees for an account without making the representatives of the deceased trustee a party, it being the duty of the surviving trustees to place the fund in a proper position, and recover from the estate of the deceased any portion of the trust money that may have remained in his hands, semble. *Beattie* v. *Johnstone*, 8 Hare, 169.

Lord Hardwicke and Lord Eldon's doctrine, that surviving trustees may be proceeded against without the representatives of others implicated in the same breach of trust. *Att.-Gen.* v. *Newbury Corporation*, C. P. Cooper, 72.

Relief may be had for a breach of trust committed by two trustees, against one, in the absence of the representatives of the other. *Strong* v. *Strong*, 18 Beav. 408. And see *Wilson* v. *Rhodes*, 8 Ch. D. 777.

The representative of a trustee of a settlement, who died six weeks after making of the settlement :—Held, not a necessary party to a suit to recover the trust fund, such trustee not having possessed any part of the trust funds, and not being chargeable with the default. *Simes* v. *Eyre*, 6 Hare, 137.

—— **Order of May, 1841.**]—By an antenuptial settlement, the trustees of it were empowered to sell out the trust fund and invest the proceeds upon (among others) real securities. By a contemporaneous memorandum indorsed on the settlement, the settlors requested the trustees to advance the trust moneys to the owners of a copyhold estate, called Vauxhall Gardens, upon mortgage, as first, second, or third mortgagees : — Held, that the word "owners" meant owners of the date of the settlement and memorandum, and that an advance to them without security, and the subsequent acceptance of a mortgage, with a joint and several covenant, from two of the three owners, after the retirement of the third, was a breach of trust :—Held, also, that in a suit by cestuis que trust, seeking to make one of the trustees liable in respect of the breach of trust, Ord. XXXII. of May, 1841, did not dispense with the necessity of making the co-trustees parties. *Fowler* v. *Reyna'*, 2 De G. & Sm. 749 ; 13 Jur. 649, 650, n. And see *S. C.* on appeal, 3 Mac. & G. 500 ; 21 L. J., Ch. 121 ; 15 Jur. 1019.

Where a trust fund has been wasted, the cestui que trust cannot proceed against the surviving trustees alone, without bringing before the court the representatives of deceased parties, who were trustees at the time of the transaction which occasioned the wasting of the fund. *Munch* v. *Cockerell*, 8 Sim. 219 ; 6 L. J., Ch. 9.

Where a party, who was entitled to a moiety of a trust fund, assigned that moiety to trustees on her marriage, and the fund was afterwards wasted by default on the part of the original trustees :—Held, that the representatives of the first dying trustees of the second settlement were not necessary parties to a suit against the original trustees, in which the cestui que trust, who was absolutely entitled under the provisions of the settlement, was plaintiff. *Ib.*

—— **General Order of August, 1841.**]—In a suit to make trustees liable for a breach of trust :—Held, that the assignees of two bankrupt trustees were not indispensable parties, as the case fell within Gen. Ord. XXXII. of August, 1841. *Norris* v. *Wright*, 14 Beav. 310.

Two deceased trustees having committed a breach of trust by mortgaging, instead of selling, the testator's real estate, and accounts of the estate being necessary :—Held, that, notwithstanding Gen. Ord. XXXII. of August, 1841, a suit could not be maintained to charge the estate of one trustee, and take the accounts, in the absence of the representative of the other. *Devaynes* v. *Robinson*, 24 Beav. 86 ; 27 L. J., Ch. 157.

Suit against trustees, alleging breaches of trust by omitting to make repairs and to provide a fund for the renewal of leases, as directed by the will. The widow of the testator, (who was tenant for life under the will) and two others, were the trustees. The widow married again, and afterwards died, leaving her husband surviving, and leaving assets of her separate estate : —Held, that as there were assets of the widow, which, under the circumstances of this case, were or might be liable to the trust, it was not a case in which the plaintiff could, under Ord. XXXII. of August, 1841, proceed against the other trustees and the husband of the testator's widow, without making a personal representative of the widow a party ; and that the defect was not removed by the waiver of any relief against the assets of the widow, or against all the trustees, in respect of breaches of trust before the marriage of the widow. *Shipton* v. *Rawlins*, 4 Hare, 619.

Ord. XXXII. of August, 1841, applies to the case of a breach of trust committed by several executors ; and a cestui que trust in such a case may proceed against one in the absence of the others, and that although before the above order was made the suit had been ordered to stand over, upon the same objection, for want of parties, but the order, though drawn up, had not passed. But it is proper that the person who has actually benefited by the breach of trust, or his representatives, should be before the court. *Perry* v. *Knott*, 5 Beav. 293. S. P., *Kellaway* v. *Johnson*, 5 Beav. 319.

Where a bill by a cestui que trust is not confined to seeking relief in respect of a particular breach of trust, but a general account of the trust estate is also sought, the Gen. Ord., Consolidated Ord. VII. r. 2, does not dispense with the necessity of all the trustees being represented in the suit. *Coppard* v. *Allen*, 2

De G. J. & S. 173; 4 N. R. 202; 33 L. J., Ch. 475; 10 Jur. (N.S.) 622; 10 L. T. 515; 12 W. R. 943.

Where, therefore, a bill was filed against a surviving trustee, seeking a general account of the trust estate on the footing of wilful neglect and default:—Held, that the legal personal representatives of a co-trustee, who had died shortly before the filing of the bill, after having acted and received assets jointly with the surviving trustee, were necessary parties to the suit. *Ib.*

Under the Judicature Act — Beneficiaries — Action by Trustees.]—By the Judicature Act, Ord. XVI. r. 7, trustees may sue on behalf of their cestuis que trust, and therefore beneficiaries should not be made parties to an action. *Cooper, In re, Cooper* v. *Vesey*, 51 L. J., Ch. 862; 20 Ch. D. 611; 47 L. T. 89; 30 W. R. 648.

—— **Co-Trustee—Realisation of Security.**]—Two trustees advanced to a builder money on mortgage of land and houses thereon. The land had belonged to the defendant, one of the trustees, and part of the money advanced was applied by the builder in payment of the price of the land and of other money due by him to the defendant. The other trustee filed a bill against the defendant, alleging that the security was insufficient, and asking that the security should be realised, and that he should make good any deficiency:—Held, that under such circumstances one trustee had no equity to make the other trustee primarily liable. *Butler* v. *Butler*, 46 L. J., Ch. 548; 5 Ch. D. 554; 37 L. T. 33. Affirmed 37 L. T. 518; 26 W. R. 85—C. A.

Held, also, that the court would not direct a sale in the absence of the cestuis que trust, and merely to ascertain the deficiency, if any. *Ib.*

See also supra, col. 873.

—— **Action against Trustees.**]—Where a claimant against the estate of a deceased person seeks to follow the assets into the hands of a trustee, it is not necessary to make the beneficiaries parties. Dictum in *Clegg* v. *Rowland*, (L. R. 3 Eq. 368) dissented from. *Bowden, In re, Andrew* v. *Cooper*, 59 L. J., Ch. 815; 45 Ch. D. 444; 39 W. R. 219. And see *How* v. *Winterton (Earl)*, 65 L. J., Ch. 832; [1896] 2 Ch. 626; 75 L. T. 40; 45 W. R. 103.—C. A.

—— **Foreclosure Action.**]—Foreclosure action by a first mortgagee against the mortgagor, and a second mortgagee, who had become bankrupt. The second mortgagee was a trustee of the money secured by his mortgage, for various persons:—Held, that notwithstanding Ord. XVI. r. 8, the persons beneficially interested under the second mortgage were necessary parties to the action. *Francis* v. *Harrison*, 59 L. J., Ch. 248; 43 Ch. D. 183; 61 L. T. 667; 38 W. R. 329.

—— **Redemption Action.**]—Under Judicature Act, Ord. XVI., r. 7, trustees of an equity of redemption sufficiently represent their cestuis que trust in a redemption suit, no direction to the contrary having been given by the court. *Jennings* v. *Jordan*, 51 L. J., Ch. 129; 6 App Cas., 698; 45 L. T. 593; 30 W. R. 369—H. L. (E.)

—— **Creditor's Action.**]—A cestui que trust, who with knowledge that his trustee has committed a breach of trust, obtains from him a part only of that to which he is entitled, does not thereby waive his right to such further relief as he may be able to obtain unless an intention so to do can be clearly inferred from the surrounding circumstances. In November, 1860, an order was made in a suit for administering the trusts of the will of J. C., to which H. C., a former trustee, was defendant, directing her to pay into court a sum of money in respect of breaches of trust committed in 1843 and 1845, the amount of which had been ascertained by the chief clerk in the suit. H. C. went abroad, and substituted service of the order was made upon her. By the order on further consideration, in 1863, H. C. appearing by counsel, certain sums of money to which she was entitled, and her life interest under the testator's will, were ordered to be impounded and paid over "to the account of H. C. funds applicable for the repayment of trust funds misappropriated," and an inquiry was directed as to what steps should be taken to obtain restitution of the funds. Certain other orders were made in the suit, but no personal order was made on H. C. for payment of the amount of her defalcation, nor any steps taken against her, although she returned to England in 1870, where she remained till her death in 1880, and her residence was known to the then trustees of the will and some of the cestuis que trust. On her death the surviving trustee of the will of J. C. brought this action against her executors, claiming the adminstration of her real and personal estate on behalf of himself and all other the creditors, alleging himself a creditor in respect of the unpaid balance of the sum representing the breach of trust. At the date of the institution of the action several beneficiaries under J. C.'s will were infants:—Held, that the action was not an attempt to enforce a stale demand, and that the cestuis que trust must not be taken to have elected to abandon their claim against her, and to rest content with impounding her life interest: that, there being a debt due from H. C. at her death to the estate of J. C., and the trusts of his will not being completed, the surviving trustee was the proper person to bring the action, and that the cestuis que trust need not be parties; although as between the cestui que trust and a stranger the claim of the cestui que trust is barred by lapse of time operating against his trustee, lapse of time is no bar as between cestui que trust and trustee. *Cross, In re, Harston* v. *Tenison*, 51 L. J., Ch. 645; 20 Ch. D. 109; 45 L. T. 777; 30 W. R. 376.

—— **Partition Action.**]—The Judicature Act, Ord. XVI., r. 7 of the Rules of Court, 1875, enabling trustees to represent their beneficiaries in an action, applies to an action under the Partition Acts, 1868 and 1876. *Simpson* v. *Denny*, 10 Ch. D. 28; 27 W. R. 280.

In an action for sale and partition, the plaintiffs were trustees for sale of two-thirds of certain leasehold property, and the defendants were trustees for sale of the remaining third part after the death of a tenant for life. The cestuis que trust not being parties:—Held, that the trustees for sale sufficiently represented their cestuis que trust, and a sale and partition were directed without notice to the parties beneficially interested. *Stace* v. *Gage*, 47 L. J., Ch. 608; 8 Ch. D. 451; 38 L. T. 843; 26 W. R. 605.

Representation of Beneficiaries—Under 15 & 16 Vict. c. 86, s. 42—Administration Suit.]—On a bill for the execution of the trusts of a will, directing the sale and distribution of the proceeds of real estate, framed according to the old practice, and bringing all the residuary devisees and legatees before the court:—Held, that the trustees of a settlement of the share of one of the residuary legatees, made on her marriage, ought to be parties; but that the children of the marriage would be sufficiently represented by such trustees. *Densem* v. *Elworthy*, 9 Hare (App.) xlii.

Section 42 of the stat. 15 & 16 Vict. c. 86, observed upon. *Meleod* v. *Annesley*, 22 L. J., Ch. 633; 17 Jur. 608; 1 W. R. 250.

Rule 9 of s. 42 of the stat. 15 & 16 Vict. c. 86, applies not only to administration suits, but to all suits where the interest of the cestui que trust is represented by, and his powers are vested in, the trustee. *Fowler* v. *Bayldon*, 9 Hare (App.) lxxviii.

Under the s. 42 of the 15 & 16 Vict. c. 86, a suit may proceed without making personal representatives of parties dead abroad at the institution of the suit, parties, although, in ignorance of that fact, they had been so named. *Bateman* v. *Cooke*, 17 Jur. 170; 1 W. R. 242.

Where there is a devise to trustees, subject to payment of debts, with a general residuary gift to W., and W. is made a defendant (having made a claim) and answers separately, on the objection taken that he was sufficiently represented by the trustees:—Held, that he was an unnecessary party, that he must be dismissed, and that the plaintiff must pay his costs. *Smith* v. *Andrews*, 4 W. R. 353.

A mortgagor devised his real estate to a trustee on trust for sale, the proceeds to be divided amongst certain persons named in the will. The original mortgagee having died, and her heir not being found, a petition was presented by the trustee and one of the cestuis que trust for a vesting order under s. 19 of the Trustee Act, 1850:—Held, that the trustee sufficiently represented the other cestuis que trust whose appearance was, therefore, dispensed with. *Blanchard's Estate, In re*, 2 N. R. 386; 8 L. T. 603.

Where a testator directed his real estates to be sold for certain purposes, and the residue of the moneys to be held on the trusts of the unsold estates, which he directed his trustees to convey to uses in strict settlement:—Held, that the first tenant for life under the settlement to be made, and unless there was special circumstances, all persons entitled, down to, and including the first vested estate of inheritance, must be before the court, on an order for sale, in a suit to administer the real estate. *Pigott* v. *Pigott*, 2 N. R. 14; 8 L. T. 268.

Trustees will not be deemed to represent the interests of absent cestuis que trust, on any contention among the cestuis que trust, inter se, but only where the contention is between a stranger and all the cestuis que trust, on the other hand. *Hamond* v. *Walker*, 3 Jur. (N.S.) 686.

—— **Bill to Set Aside Settlement as Fraudulent.**]—Bill to set aside a settlement as having been obtained from the plaintiff fraudulently, and by means of misrepresentation and undue influence acquired over her by the trustees. One of the trustees was entitled to one-twelfth of the trust fund, subject to the life interest of the plaintiff. The trustees were the only defendants to this bill:—Held, on an objection for want of parties, first, that notwithstanding stat. 15 & 16 Vict. c. 86, s. 42, r. 9, and s. 51, the question at issue in the cause could not be tried in the presence of the trustees only without any of the absent persons beneficially interested under the settlement. Secondly, that it was not necessary that all such persons should be made parties, although some of them not being next of kin of the settlor must be so, and cause ordered to stand over, that one of the infants not being next of kin might appear by counsel at the hearing. *Read* v. *Prest*, 1 K. & J. 183; 3 W. R. 30.

—— **Executrix directed to Pay Debts.**]—An executrix directed to pay debts cannot be considered to represent third parties within the meaning of the 15 & 16 Vict. c. 86, s. 42. *Bolton* v. *Stannard*, 27 L. J., Ch. 845; 4 Jur. (N.S.) 576; 6 W. R. 570.

—— **Executors with Power of Sale.**]—Executors having a power of sale held to be within r. 9, of the 15 & 16 Vict. c. 86, s. 42. *Shaw* v. *Hardingham*, 2 W. R. 657.

—— **Foreclosure Suit.**]—When an equity of redemption is vested in trustees, the cestuis que trust are necessary parties to a foreclosure suit, notwithstanding 15 & 16 Vict. c. 86, s. 42, r. 9. *Goldsmid* v. *Stonehewer*, 9 Hare (App.) xxxviii.; 22 L. J., Ch. 109; 17 Jur. 199; 1 W. R. 91.

Representation of cestuis que trust of real estate by the trustees, under r. 9, s. 42, stat. 15 & 16 Vict. c. 86, in suits against them for foreclosure or sale, extended to the case of infant cestuis que trust, and to trustees of subordinate interests under settlements of shares of children in remainder, but not otherwise to adult cestuis que trust. *Ib.*

In a foreclosure suit against the devisee in trust of the mortgagor:—Held, that the devisee in trust sufficiently represented the persons beneficially interested. *Wilkins* v. *Reeves*, 3 Eq. R. 494; 3 W. R. 305.

Decree for foreclosure, under the stat. 15 & 16 Vict. c. 86, s. 42, r. 9, against the devisees in trust and executors of the mortgagor, being all the persons who had control over the property out of which the mortgage was to be satisfied, in the absence of the cestuis que trust under the will of the mortgagor. *Sale* v. *Kitson*, 10 Hare (App.) i.; 3 De G. M. & G. 119; 22 L. J., Ch. 344; 17 Jur. 170.

The court refused to act on the 15 & 16 Vict. c. 86, s. 42, r. 9, dispensing with the parties beneficially interested, in a suit for foreclosure against the infant heir at law of the mortgagor, where the devisees in trust under his will had disclaimed, and no adult parties who would be in possession of funds to redeem were before the court as defendants. *Young* v. *Ward*, 10 Hare (App.) lviii.

Since the 15 & 16 Vict. c. 86, the trustees of a mortgage represent the cestuis que trust sufficiently to protect the mortgagor; but where the surviving trustees, or the representatives of the trustees alone are parties, the court requires the cestuis que trust to be also represented, in order to secure the due application of the trust property. *Stansfield* v. *Hobson*, 16 Beav. 189.

Representation under Orders of 1841—Trustees with present Power to Sell.]—Ord. XXX.

of August, 1841, applies to those cases only in which trustees have a present absolute power to sell real estate. *Lloyd* v. *Smith*, 13 Sim. 457; 12 L. J., Ch. 457: 7 Jur. 460.

Under Ord. XXX. of August, 1841, the trustees of real estate by devise, having the powers mentioned in the order, represent the persons beneficially interested in such real estate (so as to make it unnecessary that persons having charges thereon should be parties), not only in suits by persons claiming adversely against the estate, but also in suits by some of the persons beneficially interested, and where the conduct of the trustees is in question. *Osborne* v. *Foreman*, 2 Hare, 656; 13 L. J., Ch. 123; 8 Jur. 55.

When there is a devise of a fee simple, and an absolute power to raise, by sale or mortgage, sums of money for certain purposes, and in the same devise are contained provisions enabling the trustee to give receipts to the purchasers, such trustee sufficiently represents the estate in a suit for a sale, though the person who was, subject to that power, entitled to the first estate of inheritance in the lands, was not a party to the suit. *Keon* v. *Magawly*, 1 Dr. & War. 401.

A testator directed three trustees named in his will, out of the residue of his real and freehold estates, in aid of his personal estate, by sale, mortgage, or perception of the rents and profits, to levy certain legacies for his children A., B., and C. One of the trustees renounced. A bill was filed for an administration of the real and personal estates of the testator, and to make them liable for a breach of trust, to which the two acting trustees were parties, and which charged that A., B., and C. were out of the jurisdiction but did not pray process against them. On a demurrer for want of parties:—Held, that, the legal estate being in the two acting trustees, the case was within Gen. Ord. XXIV. (Irish orders), and A., B., and C. were not necessary parties to the suit. *Bayly* v. *Cumming*, 10 Ir. Eq. R. 405.

—— **Trustees of Equitable Interest with Power to Sell.**]—Ord. XXIV. of August, 1841, does not apply to a case in which the equitable interest only is vested by devise in A. and B., in trust to sell, although they are empowered to give discharges for the proceeds. *Turner* v. *Hind* or *Hyde*, 12 Sim. 414; 5 Jur. 1129.

—— **No Trustees Competent to Sell.**]—A testator, by his will, bequeathed certain legacies, charging them generally on his real estate, but he did not appoint any trustees competent to sell and give discharges. To a bill filed by two of the legatees, it was objected at the hearing, that the other legatees were not before the court:—Held, that notwithstanding Ords. XXX. and XL. of August, 1841, they were necessary parties. *Strickland* v. *Strickland*, 6 Jur. 550.

—— **Creditor's Bill for Accounts.**]—A testator devised an estate to trustees, upon trust for his widow for her life, with power to sell the estate, if they should see fit, or in case such sale should be necessary for the payment of his debts, during the life of his widow. On a creditor filing his bill for the usual accounts in a creditor's suit, without making the testator's widow a party:—Held, that the case came within the words at the conclusion of Ord. XXX. of August 26, 1841, respecting the discretion of the court; and that, under the particular circumstances, it was proper for it to act under those words, by directing that the widow should be made a party to the suit. *Hill* v. *Ledbrook*, 6 Jur. 1078.

On a conveyance of mines, &c., to trustees, upon trust, for the settlor for life, and, after his deccase, upon trust for sale, and thereout, first, to pay his debts, so as to discharge his real and personal estate therefrom; secondly, to apply a certain sum to the purposes of his will; and, lastly, to divide the surplus amongst parties named; the latter are proper parties to a creditors' suit, seeking to follow the real as well as personal estate of the settlor, although the court, in its discretion, may make a decree for administration in their absence. *Savage* v. *Lane*, 6 Hare, 32; 17 L. J., Ch. 89.

In a suit since Ord. XXX. of August, 1841, to establish the claims of creditors of a testator against his real estate devised, legatees, whose legacies are charged on such real estate, are not necessary parties where there are devisees in trust having the power specified in the order. *Ward* v. *Bassett*, 5 Hare, 179.

J. C., by his will, devised all his estates, real and personal, to trustees, first to pay all his debts, &c.; next, to the use of his son G. C., for life, with remainder to his issue; and if G. C. should die without issue, to M. W. for life with remainder to such of her children as should be living at her death, in equal shares. G. C. having died without issue, and M. W. having several children living:—Held, that in a suit by the creditors of J. C. to have the trusts of his will for payment of his debts executed, and praying a sale of the real estate, all the children of M. W. are necessary parties. *Oldham* v. *Wilkins*, 1 Ir. Eq. R. 59.

—— **Bill for Sale of the whole Real Estate.**]—Where the bill prayed for the sale of the whole real estate, and to be applied, with the personal estate, in payment of debts, legacies, and annuities:—Held, not a case within Ord. XXX., and that all were to be made parties. *Miller* v. *Huddlestone*, 13 Sim. 467; 7 Jur. 504.

—— **Bill of Foreclosure.**]—Quære, whether Ord. XXX. of August, 1841, applies to the case of a bill of foreclosure of freeholds devised in trust. *Wilton* v. *Jones*, 2 Y. & C. C. C. 244.

—— **Executors also Devisees in Trust of Real Estate charged with Debts.**]—Executors, who are also devisees in trust of real estate charged by will with debts, generally represent the persons beneficially interested in such real estate, within the meaning of Ord. XXX. of August, 1841, although the trustees are not otherwise empowered to give discharges for the proceeds. *Savory* v. *Barber*, 4 Hare, 125.

—— **Trustees with Power to Sell after Decease of Certain Persons.**]—In a suit to execute the trusts of a will devising real estates to trustees for certain persons for life, and after their decease for sale: with power to give discharges for the proceeds and the rents and profits, and with a direction to stand possessed of the moneys to arise thereby, upon trust for the children of the tenants for life, the trustees and the tenants for life being defendants—but there being no power of sale until after the death of the tenants for life, the court, notwithstanding Ord. XXX. of August, 1841,

directed that the children of the tenants for life should be made parties. *Coæ* v. *Barnard*, 5 Hare, 253.

—— **Distribution of Residue — Devisees in Trust.**]—Where the suit involves the administration of the estate and distribution of the residue, the devisees in trust do not, under Ord. XXX. of August, 1841, sufficiently represent the persons beneficially interested in the estate. *Jones* v. *How*, 7 Hare, 270 ; 19 L. J., Ch. 324 ; 14 Jur. 145.

—— **Suit by Person entitled to Share of Sale Moneys.**]—In a suit by a person entitled to a share of the sale moneys where the trustees had power to give good receipts:—Held, that the parties entitled to the other shares were not necessary parties. *Reeve* v. *Richer*, 1 De G. & Sm. 624 ; 17 L. J., Ch. 86 ; 11 Jur. 960.

—— **Absent Shareholders—Trustee having no Beneficial Interest.**]—The rule that a few of the shareholders of a company may sue on behalf of themselves and the other shareholders, will not enable a mere trustee, having no beneficial interest, to represent the absent shareholders. *Doyle* v. *Muntz*, 5 Hare, 509 ; 16 L. J., Ch. 51 ; 10 Jur. 914.

d. Third Parties.

Persons claiming Title adverse to Trust.]—Persons claiming a title purely adverse to a trust cannot be made parties to a suit for the execution of the trust. *Att.-Gen.* v. *Avon*, otherwise *Aberavon Corporation*, 3 De G. J. & S. 637 ; 2 N. R. 564 ; 33 L. J., Ch. 172 ; 11 W. R. 1050.

Incumbrancer pendente lite held not an indispensable party to a suit to recover the fund. *M'Leod* v. *Annesley*, 16 Beav. 600 ; 22 L. J., Ch. 633 ; 17 Jur. 608 ; 1 W. R. 250.

In a suit for the administration of trust property, part of which had been properly, and part improperly, included in a mortgage security:—Held, that no relief could be given against the mortgagee unless the plaintiff offered to redeem him. *Eaton* v. *Hazel*, 1 W. R. 87.

Upon a bill filed by trustees, for the directions of the court in execution of the trusts of a will, if the trustees have notice of any doubt as to the title of the testator to a part of the estate devised, the person who may be benefited by that doubt is properly made a defendant to the suit, and the court will not proceed to the execution of the trusts of the will, until that doubt is removed, either by a proceeding at law, or by such other course of inquiry as the court may think proper to direct. *Talbot* v. *Radnor* (*Earl*), 3 Myl. & K. 252.

Action by Trustees against Stranger.]—One of several trustees cannot bring an action against a stranger in respect of the trust property. Where there are questions between the different trustees and beneficiaries as to suing strangers, such questions must be tried in a preliminary action to which the stranger is not party. *Luke* v. *South Kensington Hotel Co.*, 47 L. J., Ch. 240.

Three trustees invested trust funds in a second mortgage of an hotel belonging to a company. Two of the trustees executed a deed which purported to reduce the amount charged on the property and to give the security of the covenant of a new company for payment of the reduced amount. The third trustee refused to execute the deed, and filed a bill to have the deed declared void and to realise the security. The other trustees refused to join, and were made defendants. The bill was dismissed. *Ib.*

Action in Name of Trustee.]—The assignee of an insolvent debtor could not bring an action for rent against the tenant of premises in which the insolvent had a life interest in the names of the trustees of those premises without their consent or the offer to them of a sufficient indemnity against costs. *Spicer* v. *Todd*, 1 D. P. C. 306 ; 2 C. & J. 165 ; 2 Tyrw. 172 ; 1 L. J., Ex. 59.

Bill against Trustee and his Solicitor—In respect of Costs.]—To a bill against a trustee and his solicitor, alleging that trust moneys had been improperly paid to the solicitor for costs, a demurrer of the solicitor was allowed, he being a mere agent, and the matter complained of being one merely of account as between the trustee and cestui que trust. *Maw* v. *Pearson*, 28 Beav. 196.

—— **Where Solicitor has Received Trust Moneys.**]—Though the solicitor or agent of a trustee is not generally a proper party to a suit to recover the trust funds, yet the case is different where he has received the trust moneys, and has intermeddled with the performance of the trust. *Hardy* v. *Caley*, 33 Beav. 365.

Persons not Trustees Parties to Breach of Trust.]—In 1840, a father left a legacy to his daughter to be paid ten years after his death. In 1847, the executor assigned to her husband certain leaseholds, which formed part of her father's estate, in consideration of the amount of the legacy, the assignee having notice of the trusts of the will. In 1870, the persons entitled to the residuary estate filed a bill against the executor and the assignee of the leaseholds, alleging that the leaseholds had been sold at an undervalue, and that the assignee was a party to the breach of trust thus committed, and praying for administration of the trusts of the will, and that the assignment might be set aside:—Held, that the bill was not multifarious. *Pyrah* v. *Woodcock*, 24 L. T. 407 ; 19 W. R. 463.

Held, also, that the assignee was not an express trustee so as to bring the case within s. 25 of the 3 & 4 Will. 4, c. 27, the Statute of Limitations. *Ib.*

Bill against a trustee who has assigned his trust. The assignee ought to be made a party, as the decree should be first against him, and the trustee to stand as a security. *Burt* v. *Dennet*, 2 Bro. C. C. 225.

It is not necessary to make all persons who concurred in a resolution for the misapplication of trust money, parties to the suit for replacing it, only those who actually take and misapply the money. *Holmes* v. *Henty*, 4 Cl. & F. 142 ; 10 Bligh (N.S.) 255—H. L. (E.)

A person, not a trustee, who is a party to a breach of trust committed by a trustee, may or may not (at the option of the plaintiff, a cestui que trust) be made a defendant to a suit against the trustee in respect of such breach. *Bateman* v. *Margerison*, 6 Hare, 499.

Cases in which the liability of the trustee and a stranger to the trust may be indivisible ; and the stranger is a proper party, with the trustee to the suit of the cestui que trust. *Lund* v. *Blanshard*, 4 Hare, 29.

Different forms of suit by a cestui que trust in respect of claims against the trustees and strangers as debtors, or liable to the trust. *Ib.* 28.

—— **Proceedings by Corporation against some of its Members.**] — Certain members of the governing body of the Corporation of Leeds, immediately after the passing of the Municipal Corporation Act, procured funds belonging to the corporation to be applied, by the trustees in whom they were vested, to purposes not warranted by the act. An information and bill, in which the corporation were the relators and plaintiffs, was filed for the purpose of making five individuals out of the several members concerned in the transaction, and the trustees, personally liable to make good the funds :—Held, that the suit was properly framed for that purpose; and a decree was made accordingly; and held that the other members concerned in the transaction were not necessary parties. *Att.-Gen.* v. *Wilson*, Cr. & Ph. 1; 10 L. J., Ch. 53; 4 Jur. 1174.

In a suit to remedy a breach of trust, it is not, since the Orders of August, 1841, necessary to make every party participating in the breach of trust party to the suit. *Att.-Gen.* v. *Leicester Corporation*, 7 Beav. 176. S. P., *Kellaway* v. *Johnson*, 5 Beav. 319; 6 Jur. 751.

—— **Person to whom Part of Trust Fund Improperly Paid.**]—A party to whom part of a trust fund had been improperly paid was made a co-defendant with the trustees, in a suit for its recovery. *Att.-Gen.* v. *Compton*, 1 Y. & C. C. C. 417.

In a cause petition by cestui que trust against the personal representative of a trustee for a breach of trust committed by the trustee in paying the trust moneys to a third party, such third party is a necessary party to the suit. *Copeland* v. *Wilkes*, 15 W. R. 855.

Assignees of Bankrupt Trustees.]—In a suit against a surviving trustee, and the representatives of a deceased trustee by a residuary legatee for administration of the estate :—Held, that the assignees of the surviving trustee, who had misapplied the funds and become bankrupt since the bill was filed, were necessary parties. *Lewin* v. *Allen*, 8 W. R. 603.

In a suit to make trustees liable for a breach of trust :—Held, that the assignees of two bankrupt trustees were not indispensable parties, as the case fell within Gen. Ord. XXXII. of August, 1841. *Norris* v. *Wright*, 14 Beav. 310.

3. The Statute of Limitations.

Declaration of Trust—What is.]—A. bequeathed her residuary personalty to her nephew J., and appointed her sister B. executrix. B. (apparently thinking there was an intestacy as to the residue) passed the residuary account showing a sum in hand as being the "said residue and moneys to which I am entitled, and intend to retain to my own use and for the use of J., being a sister and a descendant of a brother of the deceased" :—Held, that B. had not thereby declared a trust of the residue for J. so as to prevent the statute of limitations from running against J. *Rowe, In re, Jacobs* v. *Hind*, 58 L. J., Ch. 703; 61 L. T. 581—C. A.

Money paid by Woman to Man with whom she Cohabited.]—A woman who cohabited with a man as her husband handed to him sums of money without any specific directions as to their application, and he invested them in the purchase of leasehold and other property :—Held, that the transactions ought to be regarded, not as loans, to which the statute of limitations would be applicable, but in the nature of a trust, and that she was entitled to the investments. *James* v. *Holmes*, 4 De G. F. & J. 470; 31 L. J., Ch. 567; 8 Jur. (N.S.) 732; 6 L. T. 589; 10 W. R. 634.

Mortgage—Agreement to assign a Term—Express Trust.]—Where a term is created on an express trust to secure principal and interest, s. 22 of 3 & 4 Will. 4, c. 27, does not operate as a bar, and the mortgagee's right is not confined to six years. *Shaw* v. *Johnson*, 4 L. T. 460; 9 W. R. 629.

Where there is an agreement to assign a term on an express trust to secure principal and interest, which can be enforced in equity, although the deed is not executed, the court will consider such assignment as if it had been executed, and make a decree for a general account not limited to the six years. *Ib.*

Where a term is clothed with an active trust by an express agreement to assign it to recover principal and interest, it is not within the terms of 8 & 9 Vict. c. 112. *Ib.*

Resulting Trust—Possession by Trustees under void Deed.]—Although trustees have in the first instance entered into possession of land conveyed to them in trust for a charity under a deed void under the law of mortmain, yet they may acquire a title by possession. *Churcher* v. *Martin*, 58 L. J., Ch. 586; 42 Ch. D. 312; 61 L. T. 113; 37 W. R. 682.

Breach of Trust—Payment of Interest—Investment on Mortgage—Insufficient Security.]—A breach of trust had been committed by trustees in 1878 by investing trust money on mortgage upon property of insufficient value, at which date the cause of action in respect thereof arose :—Held, that payment of interest to the tenant for life by the trustees from 1878 to 1890, was was not an acknowledgment by the trustees of a liability to repay the principal, and that the action against the trustees by the tenant for life for breach of trust was barred by s. 8 of the Trustee Act, 1888. *Somerset, In re, Somerset* v. *Poulett (Earl)*, 63 L. J., Ch. 41; [1894] 1 Ch. 231; 7 R. 34; 69 L. T. 744; 42 W. R. 145—C. A.

—— **"Party or privy to"—Property "still retained."**]—A person cannot be said to be "party or privy to" a breach of trust within the meaning of s. 8 of the Trustee Act, 1888, who derives no benefit from it, has no knowledge of it, and is not concerned in it in any way; and he cannot be deprived of the benefit of that section on the ground that trust property is "still retained" by him unless it is shown that he has had actual control of the property. *Thorne* v. *Heard*, 64 L. J., Ch. 652: [1895] A. C. 495; 11 R. 254; 73 L. T. 291; 44 W. R. 155—H. L. (E.)

—— **Trustee Act, 1888, s. 8, sub-s. 1 (*a*) (*b*).**]—In an action commenced after the 1st January, 1890, to render trustees liable for a loss arising from an improvident investment of the trust funds, where the breach of trust is committed

more than six years before the commencement of the action :—Semble clause (*a*) of sub-s. 1 of s. 8 of the Trustee Act, 1888, does not apply; but, held, that clause (*b*) applies. *Bowden, In re, Andrew* v. *Cooper*, 59 L. J., Ch. 815 ; 45 Ch. D. 444 ; 39 W. R. 219. See also *Moore* v. *Knight*, 60 L. J., Ch. 271 ; [1891] 1 Ch. 547 ; 63 L. T. 831 ; 39 W. R. 312.

—— **Legacy.**]—In an action by residuary legatees against an executor and trustee for a legacy, in respect of which a breach of trust had been committed, the defendant pleaded the statute of limitations as more than six years had elapsed since the action might have been brought :—Held, that as the action was against a trustee for breach of trust, and was therefore one to which no existing statute of limitations applied within the meaning of the Trustee Act, 1888, s. 8, sub-s. 1 (*b*), the statute of limitations could now be pleaded, and was a bar to the action. *Swain, In re, Swain* v. *Bringeman*, 61 L. J., Ch. 20 ; [1891] 3 Ch. 233 ; 65 L. T. 296.

—— **Account.**]—A testatrix gave all her residuary estate to two trustees in trust for an infant, to be paid to him at twenty-one. He attained twenty-one in 1880. In 1892 he took out a summons against the two trustees for administration of testatrix's estate. One of the defendants, who had been acting trustee alone appeared. There was no allegation of fraud, or any evidence that the defendant still retained any part of the trust funds, or had converted them to his own use. The defendant admitted that he had rendered no account to the plaintiff, but deposed that he had spent all the trust funds in maintaining the plaintiff during his infancy :—Held, that s. 8 of the Trustee Act, 1888, applied, and that the summons must be dismissed. *Page, In re, Jones* v. *Morgan*, 62 L. J., Ch. 592 ; [1893] 1 Ch. 304 ; 3 R. 171 ; 41 W. R. 357.

—— **Payment away of Moneys Applicable to Annuity.**]—A claim by an annuitant against a trustee for an account of moneys which ought to have been appropriated as a security for the payment of the annuity, but which were otherwise disposed of by the trustee in breach of trust more than six years before action brought, is barred by s. 8 of the Trustee Act, 1888. *Bowden, In re, Andrew* v. *Cooper*, supra, explained. *How* v. *Winterton* (*Earl*), 65 L. J., Ch. 832 ; [1896] 2 Ch. 626 ; 75 L. T. 40 ; 45 W. R. 103—C. A.

—— **Conversion.**]—Where trust moneys are advanced on mortgage and are handed over by the mortgagor's directions to a bank of which one of the trustees is a partner in payment of a prior charge of the bank on the property mortgaged, this is not in the absence of fraud "trust property received by the trustee and converted to his use," within s. 8, sub-s. 1 of the Trustee Act, 1888, and consequently the trustee may rely on the statute of limitations as a defence to an action to recover the trust property. *Gurney, In re, Mason* v. *Mercer*, [1893] 1 Ch. 590 ; 3 R. 148 ; 68 L. T. 289 ; 41 W. R. 443.

—— **Directors of Company.**]—As directors are trustees of the assets of their company which come to their hands or which are under their control, the statute of limitations may, by virtue of s. 8 of the Trustee Act, 1888, be pleaded by them where it is sought to make them liable for breach of trust for the improper application of such assets. *Lands Allotment Co., In re*, 63 L. J., Ch. 291 ; [1894] 1 Ch. 616 ; 7 R. 115 ; 70 L. T. 286 ; 42 W. R. 404 ; 1 Manson, 107—C. A.

—— **Trustee in Liquidation.**]—The provisions of s. 8 of the Trustee Act, 1888, have no application to a trustee under a liquidation. *Cornish, In re, Board of Trade, Ex parte*, 65 L. J., Q. B. 106 ; [1896] 1 Q. B. 99 ; 73 L. T. 602 ; 44 W. R. 161 ; 3 Manson, 48—C. A.

—— **Money of Married Woman seized by Husband.**]—In 1876 a husband took from his wife by force a legacy bequeathed to her separate use, which she had to his knowledge just received on her separate receipt. The wife repeatedly demanded the money from her husband until his death in 1894, but did not obtain it. In 1895 she brought an action against her husband's executors for the amount :—Held, that the husband knew or was affected with notice that the legacy was his wife's separate property, and had, by taking possession of it, made himself a trustee for her ; that as he had retained the money and not accounted for it, his executors could not, under the Trustee Act of 1888, s. 8, claim the benefit of the statute of limitations, and that his estate was liable to refund the amount. *Wassell* v. *Leggatt*, 65 L. J., Ch. 240 ; [1896] 1 Ch. 554 ; 74 L. T. 99 ; 44 W. R. 298.

—— **Improper Investment—Action by Cestui que Trust—Interest on Money lodged in Court to satisfy Breach of Trust during Lifetime of Tenant for Life who has acquiesced in Breach of Trust.**]—By a settlement executed on July 7, 1873, on the marriage of J. G. C. and E. M. C. (the plaintiff) of which E. F. W. and C. M. H. were trustees, the following property was put in settlement :—(1) a policy for 1,000*l.* on the life of J. G. C. ; (2) two policies for 200*l.* each on the life of J. L. ; (3) six shares of 20*l.* 10*s.* in the Great Western Railway of Canada ; and (4) 400*l.* on deposit receipt in the Munster bank. The property was settled upon trust for the plaintiff for life, with remainder to the children of the marriage, and the settlement contained a power to advance 400*l.* out of the trust funds to the husband, J. G. C. There were six children of the marriage. J. L. having died, a sum of 516*l.*, representing the two policies on his life, was paid to E. F. W. in April, 1877, and was lent by E. F. W. and C. M. H., to J. G. C. without security and was lost. The 400*l.* invested on deposit receipt in the Munster bank was advanced to J. G. C. under the power. In 1879, E. F. W. retired from the trusteeship, and S. J. S. was appointed in his stead. The trustees neglected to obtain a transfer of the Canadian Railway shares which remained in the plaintiff's name until 1884, when she transferred them to C. M. H. On March 1, 1884, C. M. H. sold these shares for 79*l.* 8*s.* and appropriated the proceeds. J. G. C. died in 1895. In an action by E. M. C. and the minor children, against E. F. W., C. M. H., and S. J. S., to replace the trust fund and for an account, E. F. W. lodged 516*l.* in court, and pleaded the statute of limitations :—Held, that by virtue of the Trustee Act, 1888, s. 8, on E. F. W. lodging the 516*l.* as he had done, and upon his paying the proceeds of sale of the Canadian Railway shares, in case of the default of C. M. H. so to do, no interest was payable to the plaintiff E. M. C. during her life, but that such interest was payable to the trustee

E. F. W. *Collings* v. *Wade*, [1896] 1 Ir. R. 340 —C. A.

—— **Persons "Claiming through a Trustee."**] —*See Leahy* v. *De Moleyns*, [1896] 1 Ir. R. 206 —C.A.

And see B. 5, supra.

See also, LIMITATIONS (STATUTE OF).

F. FOLLOWING TRUST PROPERTY.

1. *Investments in the Name of or under the Control of Trustee.*
   a. In General, 895.
   b. Shuffling the Funds of Two different Settlements, 898.
   c. Trust Money Invested in Land, 899.
2. *Trust Money in Hands of Bankers or other Agents*, 902.
3. *Relief against Purchasers*, 914.

1. INVESTMENTS IN NAME OF OR UNDER THE CONTROL OF TRUSTEE.

a. In General.

General Rule—Mixed Fund.]—If a trustee mixes a trust fund with his own moneys, as long as the mixed fund remains under his control, either in its original shape or in such a substituted form that it can be traced, it is primarily liable to answer the trust. *Frith* v. *Cartland*, 2 H. & M. 417; 34 L. J., Ch. 301; 11 Jur. (N.S.) 238; 12 L. T. 175; 13 W. R. 493.

The rules as to following trust funds in the hands of a defaulting trustee apply against the assignees of the defaulting trustee as fully as against the trustee himself; and the evidence that the trust fund was acquired on the eve of the bankruptcy, and when the bankrupt was about to abscond with that and his other moneys:—Held, not to raise any equity in favour of assignees or general creditors, as against the owners of the trust fund. *Ib.*

If executor, for benefit of the testator's estate, should invest part of it in the funds, or transfer money from one stock to another, this is not a conversion, but it may still be followed as much as if it had continued in the same condition at the testator's death. *Waite* v. *Whorwood*, 2 Atk. 159.

When trust funds are invested on an improper security, the parties interested have a lien on the securities into which it is traced. *Mant* v. *Leith*, 15 Beav. 524; 21 L. J., Ch. 719; 16 Jur. 302.

Under circumstances of great peculiarity, and notwithstanding a great deal of intermixture backwards and forwards of cheques relating to trust funds:—Held, that the trust funds were traced into certain securities, and decree for redemption accordingly. *Harford* v. *Lloyd*, 20 Beav. 310.

Order for Payment into Court—Non-waiver of Right to follow Trust Money.]—Held, that by instituting an administration suit, and obtaining the order against the trustee personally for payment of the trust moneys into court (which order had not been obeyed), the cestuis que trust had not waived their right to pursue the trust money into the unauthorised investment. *Francis* v. *Francis*, 5 De G. M. & G. 108.

Shares in Banking Company held by Trustee and Mixed up with his Own.]—Trust funds were invested in the purchase of transferable shares of a banking company, in the name of one of the trustees, who executed a declaration of the trusts thereof (the rules of the company not allowing shares to stand in the name of joint owners or cestuis que trust). The trustee was also a proprietor of shares in his own right in the same company, and made various sales and purchases of shares therein. There was nothing to distinguish which were the individual shares held by the different proprietors, the same being in the nature of capital expressed by quantity. The trustee contracted to assign a certain number of shares to the banking company as a security for advances which they made to him; he afterwards became bankrupt:—Held, that the trustee must be presumed to have transferred or pledged such shares as belonged to himself, and, so far as he had shares of his own, not to have transferred or pledged the shares of his cestuis que trust; and that, therefore, the cestuis que trust were entitled to so many of the shares standing in the name of the trustee at the time of his bankruptcy as could be presumed to be identical with the shares in which the trust funds were invested, from the fact that such a number of shares had always thenceforward stood in the name of the trustee. *Pinkett* v. *Wright*, 2 Hare, 120; 12 L. J., Ch. 119; 6 Jur. 1102. Affirmed nom. *Murray* v. *Pinkett*, 12 Cl. & F. 764—H. L. (E.)

Informal Document signed by Trustee Debtor to Trust.]—An informal document, signed by a trustee who was indebted to the trust, construed to amount to an equitable mortgage in favour of the trust, notwithstanding a denial by the answer. *Baynard* v. *Woolley*, 20 Beav. 583.

Sole Trustee appropriating Part of Trust Money—Deposit of Policies with Memorandum in Box where Trust Deed kept.]—A sole trustee, who had appropriated 4,000*l.*, part of the trust property, deposited in the box in which he kept the trust deed and the securities for other portions of the trust funds two policies of assurance, one on his own life for 2,000*l.*, the other on the life of his father for 3,000*l.*, inclosing them in an envelope with a memorandum, that "in the event of his" (the trustee's) "death," the amount of the inclosed policies was to be applied to the repayment of 4,000*l.* borrowed by him of the cestui que trust. Six years afterwards the trustee became bankrupt. The policy for 2,000*l.* was found by the officer of the court of bankruptcy inclosed with the memorandum in the box, the other policy having been paid to the bankrupt upon his father's death:—Held, as between the cestui que trust and the assignees in bankruptcy, first, that notwithstanding the words importing contingency, the memorandum was a valid declaration that the policy was, in any event, subject to the trusts of the settlement. *Bankhead's Settlement, In re*, 2 K. & J. 560; 4 W. R. 589.

Held, secondly, that there being a valid declaration of trust by the sole trustee, he was the proper person to be in possession of the policy; in other words, "the true owner" within the meaning of the 12 & 13 Vict. c. 106; and he being also in the reputed possession of the property when the bankruptcy took place, there was no separation of interests, the true owner and the reputed owner were the same person, and s. 125 did not apply. And an order was made, under s. 130, for an assignment of the policy to the new trustees of the settlement. *Ib.*

Debentures in Banking Company acquired with Policy Money.]—E. effected a policy of assurance on his life in the name of two trustees, B. and M., for the benefit of his two daughters, and died largely indebted to M. M. received the policy money, and invested the greater part of it in debentures of a joint-stock banking company. These debentures he placed in a separate envelope, inscribed with the names of E.'s daughters, and paid them the interest until the bank stopped payment. The bank was subsequently wound up under the Joint Stock Company Winding-up Act, when M. was found to be largely indebted to the bank. M. survived his co-trustee, and became bankrupt (having previously handed over the debentures to a third party), and the official manager of the company was appointed official assignee of his bankruptcy. E.'s daughter claimed the debentures as being held in trust for them :—Held, first, that there was a valid trust of the policy money in the hands of M., notwithstanding the fact of E. being indebted to him ; secondly, that the debentures were well appropriated to the trust, and were not subject to M.'s liabilities to the bank. *Boyd, Ex parte, Royal Bank of Australia, In re*, 5 W. R. 634.

Policy effected by Defaulting Trustee as Security for Restoration of Trust Fund.]—A defaulting trustee effected a policy of assurance on his own account (but in the name of the next friend of the cestui que trust, who was a married woman) with the approbation of the master, as being the best security which it was in the trustee's power to give for the restoration of the trust fund. The amount secured by the policy became payable at the death of the trustee, which occurred before the master had made his report :—Held, that the money was not general assets of the trustee, but was applicable in the first place to compensate the loss occasioned by the breach of trust. *Ward* v. *Ward*, 2 Sm. & G. 125 ; 18 Jur. 529.

Purchase of Consols partly with Trust Money and partly with Trustees own Money.]—A testator, having moneys in his hands belonging to other parties, invested a portion, by their direction, together with his own moneys, in consols, and informed the parties of such investment, and duly accounted to them for the dividends. He afterwards sold out nearly the whole of the stock, and then replaced a portion of it, and, on his death, having directed his confidential clerk to buy stock to replace the rest, he expressed his wish that the stock to be purchased by the clerk should be appropriated to replace the trust stock. The clerk purchased a sum of stock in the testator's name ; but the whole stock standing in the testator's name at his death was not sufficient to replace the trust moneys :—Held, that, under the circumstances, the stock standing in the testator's name at his death was impressed with a trust, and did not form part of his general assets. *Robertson* v. *Morrice*, 9 Jur. 122.

Failure of Security taken for Trust Fund and also Trustee's own Money.]—Where a trustee mixes his own money with the trust fund, and takes security for the whole fund, if the security fail, the trust fund is entitled to priority of payment. But if the cestuis que trust have elected to adopt the loan, they cannot compel the trustee to make good the deficiency. *Lamb* v. *Orton*, 2 N. R. 435 ; 11 W. R. 1043.

Trustee becoming Insolvent having given Bond.]—Part of a sum of money which had been raised by a husband upon the security of property comprised in his marriage settlement, by means of a suppression of the settlement, was lent by him to the trustee of the settlement upon his bond, the trustee being ignorant of the means by which the money had been raised. After the death of the husband, the wife, who was entitled to a life interest in the settled property, with remainder to her children, took out administration to her husband, and filed a bill in her own name, and in the names of her children, by herself, as their next friend, against the trustee, who had, in the meantime, taken the benefit of the Insolvent Debtors Act, praying that the sum due upon the bond (which the widow, as administratrix, offered to deliver up) might be replaced with interest upon the trusts of the settlement : —Held, that the widow and children had a clear equity to follow the money in the hands of the trustee, and that they would have had the same equity if, instead of being a trustee, he had been a stranger ; and, semble, that such a claim would not have been barred by the trustee's discharge under the Insolvent Debtors Act, even if it had been proved (which it was not) that the bond debt had been included in his schedule. *Buckeridge* v. *Glasse*, Cr. & Ph. 126 ; 10 L. J., Ch. 134 ; 5 Jur. 163.

Farming Stock Ear-marked as Property.]—W. A., who at the time of his death in 1867 was carrying on the business of a farmer, gave his residuary personal estate to his widow and a co-trustee, upon trust to permit his widow to have the use and enjoyment of the household furniture, and the dividends, interest, and annual income and produce of his other residuary estate for life, and then upon trusts in favour of the testator's two sons. The testator's residuary estate consisted almost entirely of the household furniture and farm stock, and the widow, with the consent of her co-trustee, carried on the business of the farm. She took a new lease of the farm in her own name, and painted her name upon the carts ; but the financial part of the business was carried on through a joint banking account opened in the names of "the executors of the late W. A." In 1879 the widow presented her petition for liquidation. All the property in her possession consisted of the furniture and farm stock bequeathed by the testator, or of stock which had replaced the original stock in the ordinary course of business. Upon being sold, it realised a sum of 2,063*l.* 15*s.* 6*d.*, with produce estimated at 250*l.* still to be realised. The testator's residuary account had been passed at 1,917*l.* 7*s.* 6*d.* :—Held, that the farming stock in the hands of the widow was well ear-marked as trust property, and that only the life interest of the widow in the proceeds of the realisation passed to the trustees in the liquidation. *Barber, Ex parte, Anslow, In re*, 42 L. T. 411 ; 28 W. R. 522.

b. Shuffling the Funds of Two different Settlements.

Trustee of two Funds—Appropriation—Solicitor—Fraud.]—If a solicitor who is a trustee of two funds for different cestuis que trust, shuffles

one for the other for the purpose of concealing a fraud he has committed, a co-trustee, who has unwillingly been led to do an act which enabled the solicitor to deal with the fund, cannot claim a restoration of the fund dealt with, though it remained in the name of the fraudulent trustee. *Case* v. *James*, 30 L. J., Ch. 749; 7 Jur. (N.S.) 869; 4 L. T. 664; 9 W. R. 771—L.JJ. Affirming 29 Beav. 512.

A trustee of a settlement, unknown to his cestuis que trust, sold the trust fund and applied the proceeds to his own use. He represented that the money had been lent on mortgage, and they pressed for its reinvestment. He afterwards induced his co-trustee of a second fund to join him in transferring it into his name, and take as security a transfer of a mortgage, which in the result proved to be a forgery. He afterwards made a small addition to the fund out of his own moneys, and gave notice to the cestuis que trust of the first fund that it had been replaced, and they immediately put a distringas upon the stock. He afterwards died insolvent, leaving the stock standing in his name. Upon a bill by the surviving trustee of the second fund, against the cestuis que trust of the first fund, asking that the stock might be restored to him:—Held, that the plaintiff had no remedy against the cestuis que trust of the first fund; that the cestuis que trust of the second fund, had they known the facts, might have stopped and reclaimed it prior to the notice; that the notice of reinvestment to the cestuis que trust of the first fund amounted to a valid transfer, which made them as against the plaintiff purchasers for value without notice of the fraud; and that the bill must be dismissed with costs. *Ib.*

—— **Right to Follow Fund Paid into Court—Bonâ fide Purchaser.**]—A trustee of two different settlements, having applied to his own use funds subject to one of the settlements, replaced it by funds which, under a power of attorney from his co-trustee under the other, he transferred into the names of himself and his co-trustee in the former. In a suit in respect of breaches of trust of the former settlement, the trustees of it transferred the fund thus replaced into court on motion:—Held, that the transfer was equivalent to an alienation for value without notice, and that cestuis que trust under the other settlement could not follow the trust fund. *Thorndike* v. *Hunt*, 3 De G. & J. 563; 28 L. J., Ch. 417; 5 Jur. (N.S.) 879; 7 W. R. 246.

c. Trust Money Invested in Land.

General Principles.]—The court is cautious in following money into land, but will do it if proved that the money was laid out in land; the doubt is on the proof: always done when admitted on the answer of person laying it out. *Lane* v. *Dighton*, Amb. 413.

Where money is sought to be followed into land, the admission by the personal representative of the party laying it out will not bind the heir, but it will be ground for inquiry. *Ib.*

Money settled to the separate use of the wife, and in the event of no children to her absolutely, surviving the husband; with power to the trustees, with her consent, to invest it in land:—Held, that no lien existed on estates purchased by the husband, having obtained the money from the trustee: the circumstances not raising the presumption, as if he had even under an engagement to purchase, that his purchases were in pursuance of that engagement; and upon the evidence the fact of the application of the trust fund, or the inability of the husband by other means, not being made out. *Lench* v. *Lench*, 10 Ves. 511.

Remedy for a breach of trust is personal, and money produced thereby, laid out on an estate in Ireland, cannot be specifically followed; the party's assets were, however, marshalled in favour of the claim. *Cox* v. *Bateman*, 2 Ves. sen. 19.

Presumption as to Lands Purchased.]—L. M. bequeathed 50,000*l.* to two trustees upon trust to invest in the purchase of lands in Wales, and to settle and convey the same to C. M. for life, with remainder to C. M.'s eldest son for life, with remainder to his first son in tail, with remainders over. C. M., who was also residuary legatee of the testator's estate, took out letters of administration, and subsequently he, with moneys amounting to 49,000*l.*, which were part of the testator's personal estate, purchased the Lamphey and other estates, of which he took conveyances to himself in fee. The Lamphey estate C. M., by his will, devised to his eldest son absolutely, subject, however, to the payments, charges, liabilities and demands of his uncle L. M.'s will, and in exoneration of his, C. M.'s, other estates, which he devised to his younger children. The Lamphey estate, subsequently to the purchase, became much improved in value. A bill was filed by the younger sons of C. M., praying for a declaration that the Lamphey estate ought to be taken in satisfaction of the 50,000*l.* directed by the will of L. M. to be laid out in land. By his report the master found that the Lamphey and other estates were purchased by C. M. by or with part of the personal estate of L. M., in execution or discharge of the trust for investment of the 50,000*l.* On exceptions to the report by the devisees of C. M.'s will:—Held, that the purchases having been made by the trustee C. M. with the trust moneys in his hands, a presumption arose that the purchases were made with a view to execute an obligation. *Mathias* v. *Mathias*, 3 Sm. & G. 552; 3 Jur. (N.S.) 429.

Held, also, that the moneys invested being trust moneys (and the circumstances attending the purchases of the estates were enough to attribute them to the performance of the trust), the trustee could have no right to deal with the estates so as to alter or prejudice the rights of the remaindermen. *Ib.*

Trustee for the purchase of land died without personal assets, but, having purchased land, the estates purchased were held not liable to the trust, the circumstances affording no presumption that they were purchased in execution of the trust. *Perry* v. *Phelips*, 17 Ves. 173.

A., by marriage articles, covenanted that all lands he should afterwards purchase in the parish of K. should be to the uses of the articles. He purchased lands in K., and took a conveyance in fee in the name of his youngest son, without a declaration of trust:—Held, that youngest son was a trustee as to the lands for the parties entitled under the settlement. *Blake* v. *Blake*, 7 Bro. P. C. 241.

An executor by the very will empowered to purchase lands for the heir; yet the purchase being in his own name, and he dead insolvent,

as to the other assets the heir could not follow the land to make a trust for him, though the executor had told the mother of the purchase he was about to make, and had her consent; and so the executor's heirs went away with the land for want of express proof of the application of the trust money. *Halcott* v. *Markant*, Pre. Ch. 168.

A trustee purchases lands out of profits received out of the trust estate, and takes the conveyance in his own name; though possibly, if he be unable to make other satisfaction for the profits so misapplied, those lands may be sequestrated, yet they cannot be decreed to be a trust for the cestui que trust. *Kirk* v. *Webb*, Pre. Ch. 84. See also *Heron* v. *Heron*, id. 163.

A. dies intestate leaving a wife and two daughters; after his death 200*l.* is found hid in a wall, and 200*l.* in a box. The widow lays out this money in land, and settles it to the use of herself for life, remainder to her daughters in tail, remainder to her own right heirs. After the death of the mother and two daughters, plaintiff as administrator to the daughters, brings a bill against the heir-at-law, to have two-thirds of the 400*l.* out of the land as personal estate, and the master of the rolls decreed for him; but the decree was reversed by the lord keeper, money having no earmark. *Kendar* v. *Milward*, 2 Vern. 440. *S. C.*, nom. *Kinder* v. *Miller*, Pre. Ch. 172.

Bank stock to the amount of 13,000*l* was transferred to a trustee to sell and invest the produce in lands, which were to be settled on certain uses and trusts. S., the administrator of the trustee, laid out 38,650*l.* in the purchase of lands, which were conveyed to him absolutely. The price of the stock at the time of the purchase was 23,630*l.* By a subsequent deed reciting the purchase of the lands thereby conveyed, and of other lands also therein mentioned, and that a portion of the purchase money of the several estates, lands and premises, consisted of the 13,000*l.* bank stock, and that the lands were conveyed to S., in pursuance and part performance of the trusts declared of the stock, and that he was desirous of fully performing the trusts by conveying the several lands on the trusts, he conveyed part of the purchased lands accordingly. The entire value of the stock was not represented by the lands so conveyed:—Held, that there was no dedication to the trusts of any other lands than those actually conveyed by the trust deed. *Sealy* v. *Stawell*, Ir. R. 2 Eq. 326.

Held, also, that there was no lien in favour of the persons entitled to the trust estate, on the other purchased lands, and that their claim was simply that of creditors on foot of a breach of trust. *Ib.*

The customer, having received a fund out of court, upon an undertaking to purchase and convey a house, &c., upon the trusts of his marriage settlement, and having deposited it with his bankers, drew on it from time to time, and amongst other things for the purchase of the house, which he procured to be conveyed to himself in fee, the deeds of which he deposited as a security for further advances; the court, in deciding between the bankers and the trustees of the settlement, would presume that the purchase-money of the house was drawn from the fund applicable for that purpose. *Manningford* v. *Toleman*, 1 Coll. C. C. 670; 14 L. J., Ch. 160; 9 Jur. 438.

Right of Legatees to Follow Money laid out in Land by Executor.]—Legatees allowed to follow money of testator laid out in land, &c., by executor. *Ryall* v. *Ryall*, 1 Atk. 59; cited in Amb. 411.

Right of Cestui que Trust where Trustee states that Part of Trust Moneys laid out in Certain Property.]—Where a trustee states in writing to his cestui que trust that part of the trust moneys are laid out in a certain property, although not an investment warranted by the terms of the trust, and although the cestui que trust goes on receiving interest, and not the rents:—Held, that the cestui que trust might at his option take the property in which the trust funds had been laid out as representing the whole trust fund, or might have it sold, and prove, if necessary, against the trustee's estate for the deficiency (if any). But the cestui que trust was not allowed to take the property as representing the actual portion of the trust fund laid out by the trustee, and prove for the balance. *Thornton* v. *Stokill*, 1 Jur. (N.S.) 751.

Payment off of Mortgage by Stranger.]—The plaintiffs, at the request of trustees of a marriage settlement, and of the tenant for life under the settlement, paid off 600*l.*, part of a mortgage debt of 1,000*l.* on a leasehold house comprised in the settlement. There was no transfer of the 600*l.* of the mortgage debt to the plaintiffs, but interest was paid to them. On the death of the tenant for life the appointees of the leasehold house obtained a transfer to themselves from the mortgagee of the remaining mortgage debt of 400*l.*, and of the premises, but subject to the equity of redemption, and they also obtained the title deeds. The plaintiffs advanced 600*l.* out of the trust money:—Held, that as the money was to the knowledge of all concerned trust money, the plaintiffs had a right to follow it. *Patten* v. *Boyd* or *Bond*, 60 L. T. 583; 37 W. R. 373.

Trust Fund Invested in Erection of Houses.]—A trust fund, with the concurrence of the trustees and in breach of the trust, was invested in erecting three houses on ground held under a lease to S., the tenant for life of the fund. One of the trustees brought an action against S. and the other trustee for a restoration of the fund by sale of the houses. The court ordered S. to bring the trust fund into court, or, in default, a sale of the houses, holding that a trustee may follow property in which a trust fund has been wrongly invested, though he has actively concurred in the breach of trust. The costs of an action for that purpose were decreed to the plaintiff trustee on the facts of the case. *Carson* v. *Sloane*, 13 L. R., Ir. 139.

2. Trust Moneys in Hands of Bankers or other Agents.

Bankers—Rule in Clayton's Case as applied to Trust Money.]—If money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands. *West of England and South Wales District Bank, In re, Dale*

& Co., Ex parte, dissented from. *Hallett's Estate, In re, Knatchbull* v. *Hallett*, 49 L. J., Ch. 415; 13 Ch. D. 696; 42 L. T. 421; 28 W. R. 732—C. A. And see *Hallett & Co., In re, Blane, Ex parte*, post, col. 907; *Stenning, In re, Wood* v. *Stenning*, post, col. 908; and *Murray, In re, Dickson* v. *Murray*, post, col. 909.

If a person who holds money as a trustee or in a fiduciary capacity pays it to his account at his bankers, and mixes it with his own money, and afterwards draws out sums by cheques in the ordinary manner:—Held, by the C. A. (dissent. Thesiger, L.J.), that the rule in *Clayton's case* (1 Mer. 572), attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money. *Pennell* v. *Deffell*, infra, on this point not followed. *Ib.*

Held, by Fry, J., that, as between two cestuis que trust whose money the trustee has paid into his own account at his bankers, the rule in *Clayton's case* applies, so that the first sum paid in will be held to have been first drawn out. *Ib.*

When a trustee pays trust money into a bank to his credit to a simple account with himself, not distinguished in any other manner, the debt thus constituted from the bank to him is one which belongs as specifically to the trust as the money would have done had it specifically been placed by the trustee in a particular repository, and so remained; and the case would not be varied by the circumstance of the bank holding also for the trustee, or owing also to him money, in every sense his own. But cheques drawn by the trustee in a general manner upon the bank would, for every purpose be ascribed and affect the account in the mode explained and laid down in *Clayton's case* (1 Mer. 572). *Pennell* v. *Deffell*, 4 De G. M. & G. 372; 1 Eq. R. 579; 23 L. J., Ch. 115; 18 Jur. 273; 1 W. R. 499.

—— **Priority.**]—A banking company were employed as agents to collect money and to remit it to their employers. The bank received the money in cash, placed it with the other cash of the bank, and informed their employers that the money had been remitted; but before the money was actually remitted the bank went into liquidation:—Held, that the money was part of the general assets of the bank, and that the employers of the bank were not entitled to be paid in priority to the other creditors. *Pennell* v. *Deffell*, supra, considered. *West of England and South Wales District Bank, In re, Dale & Co., Ex parte*, 48 L. J., Ch. 600; 11 Ch. D. 772; 40 L. T. 712; 27 W. R. 815.

—— **Appropriation by Beneficial Owner.**]—H., having a balance of 3,961*l.* 10*s.* 3*d.* at his bank, paid in 5,000*l.* trust money. Between the time of doing so and his death he paid in various sums, together amounting to 12,533*l.* 11*s.* 6*d.*, and in the same interval drew out 18,847*l.* 4*s.* 4*d.* No part of this sum was devoted to the purposes of the trust, and he was still liable for the 5,000*l.* at the date of his death:—Held, that the balance remaining at his bank formed part of his general estate, and could not be appropriated by the beneficial owner of the 5,000*l.* *Brown* v. *Adams*, 39 L. J., Ch. 67; L. R., 4 Ch. 764; 21 L. T. 71; 17 W. R. 999.

—— **Mere Allegation that Money Impressed with Trust.**]—Where money has been paid in to the ordinary banking account of a company, not being in any way ear-marked, the company will not, on an allegation that the money is impressed with a trust, such allegation not being admitted by the company, be restrained, on motion, from dealing with the money. *Bank of Turkey* v. *Ottoman Co.*, 14 L. T. 884; 14 W. R. 819.

—— **Bequest of Shares on Trust—Transfer by Trustees—Registration of Transfer—Notice of Trust.**] — Where a testator bequeaths his residuary estate to trustees upon trust to administer it for a period of ten years from his decease, and thereafter "to account for and give the said residue" to the residuary legatees named in the will, the legatees acquire their legal title from the trustees, and do not take directly under the will. *Simpson* v. *Molson's Bank*, 64 L. J., P. C. 51; [1895] A. C. 270; 11 R. 427—P. C.

Where a statute incorporating a bank provides that "the bank shall not be bound to see to the execution of any trust, whether express, implied or constructive, to which any of the shares of the bank may be subject," such provision must relate to, and free the bank from, liability for trusts of which the bank had knowledge or notice, as the bank could not, apart from the statute, incur liability by not seeing to the execution of a trust of which they had no knowledge. But assuming that the bank would be liable if it were shown that they were possessed of actual notice of the trust, the facts (i.) that a copy of the testator's will was in the possession of the bank; (ii.) that in the case of three of the testator's children, notice of the substitution of grandchildren was contained in the transfers registered by the executors in the bank's books on a previous occasion; (iii.) that one of the executors was president of the bank, and that the law agent of the executors was also law agent of the bank, are not sufficient to prove that the bank have received notice of the trust. *Ib.*

In 1843, trust moneys were standing to the credit of the trustees with certain bankers, who had clear and distinct notice that the money was trust money. The bankers transferred the money to themselves, without the knowledge or sanction of the trustees, in discharge of a debt due to them from the tenant for life of the fund, who afterwards became bankrupt. Decree for payment by the bankers of the trust fund, with interest, in a suit instituted against them by the trustees. *Bridgham* v. *Gill*, 24 Beav. 302.

—— **Money Paid in for Specific Purpose, with Instructions in Writing.**]—Where money is paid into a banker's by a customer for a purpose specified, and instructions are given in writing, and those instructions are acted upon, although such sum is carried to the general account of the party paying it in, and although the money is not eventually applied, but comes again into the banker's hands after business has ceased to be carried on:—Held, that it is sufficiently ear-marked to prevent its belonging to the general creditors. *Farley* v. *Turner*, 3 Jur. (N.S.) 532; 5 W. R. 666.

—— **Liquidation of Joint Stock Company—Preferential Payment.**] — By a mortgage,

dated 12th February, 1883, D. mortgaged to the Ulster Land and Building Co. some house property to secure an advance of 600*l.* By two other mortgages, dated respectively the 9th March, 1883, and the 8th January, 1884, D. mortgaged the same property to F. to secure 250*l.* and further advances. The company entered into possession, and on the 20th July, 1885, sold. The company having gone into liquidation, F. required from the liquidator an account of the moneys received on account of the rents and the proceeds of the sale; and the account was furnished, showing that the company had received 135*l.* over and above all sums due. The proceeds of the sale, amounting to 746*l.* 19*s.* 11*d.*, were paid by the company on the 20th July, 1885, into a bank, along with other moneys of the company, making a total payment in of 902*l.* 11*s.* 10*d.* At the time this payment in was made, the company had money to its credit in the bank. At the same time the company had 1,000*l.* on deposit with the B. railway company, and they drew out the sum of 1,000*l.* from the bank, and lodged it with the railway company, making a total deposit with the railway company of 2,000*l.* After drawing out the sum of 1,000*l.*, there was a balance of 32*l.* 2*s.* 5*d.* due to the bank, and from that date down to the 17th August, 1885, the company's account was always overdrawn in a small varying amount. On the 17th August, 1885, the company cashed both the deposit receipts of the railway company, and paid into the bank the 2,000*l.*, with accrued interest. The moneys so lodged were applied by the company in payment of the interest due to the depositors, and in paying off some depositors who had required repayment. On the 31st August, 1885, by reason of these payments the bank account was overdrawn to the extent of 92*l.* 11*s.* 5*d.* From the 20th July, 1885, down to the 31st August, the company did not make any investments of any kind, except the lodgment of the said sum of 1,000*l.* with the B. railway company. The moneys so paid in were used in discharge of debts and liabilities of the company. Between the 31st August, 1885, and the 1st February, 1886, there was sometimes money to the company's credit in the bank, and sometimes the account was overdrawn; but no investments were made by the company during the period. From the 1st February, 1886, down to the date of the winding-up resolutions, the company's account was continuously overdrawn, and at the date of the company's winding-up resolutions the overdraft amounted to over 8,000*l.* In the month of April, 1886, the company's bankers required that the company's overdraft should be secured, when the company lodged with the bank, as security, a number of mortgages payable to the company. The property comprised in these mortgages was sold, and out of the proceeds the bank's claim was discharged:—Held, that F. was not entitled to follow the sum of 135*l.* in the hands of the liquidator, or to have his debt paid as a preferential claim. *Ulster Building Co., In re*, 25 L. R. Ir. 24.

—— **Lease deposited with Bankers—Subsequent Notice of Trust.**]—A., in whom a lease was vested, deposited it with his bankers by way of equitable mortgage. The bankers afterwards received notice, as the fact was, that he was a mere trustee of the leasehold, but they subsequently obtained from him a formal mortgage of the legal estate:—Held, that the cestuis que trust had priority over the bankers. *Baillie* v. *M'Kewan*, 35 Beav. 177.

—— **Railway Stock—Constructive Notice.**]—Bankers advanced to customers 300*l.* to redeem some railway stock which had been transferred to another firm as a security for that sum. The stock was thereupon transferred in blank to the bankers. Subsequently, the customers, in a letter to the bankers, stated that they had been requested by their principal to extend the term of the loan on the stock. The stock actually belonged to a third party, A.:—Held, that, after the receipt of this letter, the bankers had constructive notice of A.'s right to the stock, and that no subsequent advances made by the bankers to the customers could affect the stock. *Locke* v. *Prescott*, 32 Beav. 261.

—— **Deeds deposited with Banker—Negligence of Co-trustees.**]—Trust money was so placed to a banking account that any of the trustees could draw out separately. One of them drew out money and bought a house as a residence for some of the cestuis que trust, but took a conveyance to himself alone. He then deposited the deeds with another bank to secure his private balance, and afterwards became bankrupt. The co-trustees neglected to examine the banker's book for a long time after the purchase:—Held, that by reason of their negligence they were not entitled to priority over the security by deposit. *Allan* v. *Scott*, 12 L. T. 449.

—— **Transfer to Trustee's Private Account—Liability of Bank.**]—Where a sum of money was standing in the books of a banking company to the credit of "the account of the trustees of the late W. H.," and the bank, knowing that the trustees (each of whom had an overdrawn account at the bank) were not beneficially entitled, allowed them to transfer sums at different times from the trust account to their respective private accounts:—Held, that the cestuis que trust were entitled to recover from the bank the sums so allowed to be transferred, and that it was immaterial whether or not the bank knew what were the circumstances of the trust, and also whether or not the bank profited by the transfer from the one account to the other, so long as they were aware that the money dealt with was trust money. *Foxton* v. *Manchester and Liverpool District Banking Co.*, 44 L. T. 406.

—— **Mixing Trust Fund with Private Fund—Breach of Trust.**]—The bankers of a sole trustee received a sum of over 1,400*l.* on his account, with notice that it was trust money. The trustee had not at the time a trust account, but a private account already overdrawn to a greater amount than the trust fund, by arrangement with the bankers, who had security. The bankers advised the trustee that the amount had been placed to his credit, and it was left on his private account, on which he continued to draw. Some years afterwards the trustee became bankrupt, his account being then overdrawn by several thousand pounds:—Held, that the bankers, not having designed or stipulated for any benefit to themselves on receiving the trust money, and not having at that time any suspicion that the trustee was insolvent, or intended to commit a breach of trust, were not bound to restore it to the trust estate. *Foxton*

v. *Manchester and Liverpool District Banking Co.*, supra, distinguished. *Coleman* v. *Bucks and Oxon Union Bank*, 66 L. J., Ch. 564 ; [1897] 2 Ch. 243 ; 76 L. T. 684 ; 45 W. R. 616.

—— **Customer's Money lodged in Bank—Bank's Lien — Appropriation — Marshalling.**] — Money identified as belonging to a customer of the deceased, a stockbroker, was lodged by him to the credit of his current account with his bank. After his death, which occurred on the day after the lodgment, the bank transferred the balance due to the deceased on his current account to a loan account, on which he was indebted to the bank, and sold so much of certain stocks and shares (which they held as security for any balance which might be due to them on the loan account) as was sufficient to pay off the entire amount remaining due to them, and thereupon transferred the remaining securities to the credit of the matter to administer deceased's estate :—Held, that the deceased's customer was entitled to follow the money identified as his, and to stand in the place of the bank, and to have the benefit of their lien on the securities lodged in court. *M'Mahon* v. *Fetherstonhaugh*, [1895] 1 Ir. R. 83.

—— **Separate Trusts Accounts—Set-off of Private Account.**]—When a customer has opened with his bankers separate accounts specially headed with the names of the trusts to which the moneys paid into those accounts belong, the bankers are not at liberty upon the bankruptcy of the customer to apply those moneys in payment of the balance due to them upon the customer's overdrawn private account. *Kingston, Ex parte, Gross, In re*, 40 L. J., Bk. 91 ; L. R. 6 Ch. 632 ; 25 L. T. 250 ; 19 W. R. 910.

A county treasurer used to pay the county moneys into Bacon's Bank, but kept his private account at the National and Provincial Bank, and carried over the police rates to this account by cheques drawn on Bacon's Bank. In 1869 he opened a separate account with the National and Provincial Bank, headed "Police Account." Some of the items to his credit in this account could be traced as having come from county funds, but most of them could not. The cheques which he drew upon it were all headed "Police Account," and appeared to have been drawn only for county purposes. For the purposes of interest the National and Provincial Bank treated the accounts as one account, and the interest on the balance in his favour was carried to the credit of his private account. At the time when the police account was opened the manager of the bank knew that he was county treasurer, and understood that he had been in the habit of paying county moneys into the bank. In April 1870 he absconded, his private account being overdrawn, and the police account being in credit :—Held, that the bank was not entitled to set-off the one account against the other, but that the county magistrates were entitled to recover the balance standing to his credit on the police account. *Ib.*

—— **Settlement of Accounts — Money not received in Specie — Bankruptcy.**] — Trustees gave authority to a bank to receive the proceeds of certain debentures in the H. company which were being paid off, the bank being aware that the money formed part of a trust fund. The bank having cross transactions with the H. company, the proceeds of the above debentures were not actually paid over by the company to the bank, but a balance of account was arrived at, and the trustees' account with the bank was credited with the amount of the debentures. The custom of the bank was to make a daily transfer of their receipts to their London bankers. The bank suspended payment, having a sum to their credit with their London bankers :—Held, that there was nothing in the above transactions to show a receipt, either by the bank or by their London agents, of the sum received for the debentures so as to enable it to be identified and followed as trust money. *Hallett & Co., In re, Blane, Ex parte*, 63 L. J., Q. B. 573 ; [1894] 2 Q. B. 237 ; 9 R. 278 ; 70 L. T. 361 ; 42 W. R. 305 ; 1 Manson, 25—C. A.

—— **Deposit—Forfeiture for Non-completion—Payment by Bankrupt in Fraud of Creditors.**] —A bankrupt, having disposed of his goods in fraud of his creditors, opened an account in a bank with the proceeds, and having entered into a contract for the purchase of land in an assumed name, paid a deposit to the defendant, the auctioneer, by a cheque drawn upon the bank. The vendor and the defendant acted bonâ fide and without notice of the bankruptcy or of the fraudulent conduct of the bankrupt :—Held, that the bankrupt's trustee was not entitled to recover the deposit from the defendant so as to prevent it from being forfeited to the vendor on the non-completion of the contract. *Collins* v. *Stimson*, 52 L. J., Q. B. 440 ; 11 Q. B. D. 142 ; 48 L. T. 828 ; 31 W. R. 920 ; 47 J. P. 439.

—— **Shares in Banking Company held by Trustee partly his Own and partly in Trust—Agreement to Assign Shares to Bank to secure Personal Advances.**]—Trust funds were invested in the purchase of transferable shares in a banking company in the name of one of the trustees, who was also a holder of shares in his own right in the same company, and afterwards made various sales and purchases of shares therein. There was no distinguishing mark by which the shares could be traced, the same being in the nature of capital, expressed by quantity. The trustee agreed to assign some of the shares standing in his name to the banking company, as security for repayment of advances which had been made to him, but no transfer was made. He afterwards became bankrupt, without having shares sufficient to satisfy the trusts and his agreement to assign :—Held, first, that the banking company had no lien on any of the shares which had been held in trust ; secondly, that although the shares held in trust might have been changed by sale and re-purchase, the trustee must still be considered as holding for the purposes of the trust the same number of shares out of a larger number that were standing in his name at the time of his bankruptcy ; thirdly, that as no shares were transferred in pursuance of the agreement, no question as to whether the bank directors were purchasers with or without notice could arise ; and of the two equities, for the cestui que trust and for the bank, the former must be preferred. *Murray* v. *Pinkett*, 12 Cl. & F. 764—H. L. (E.). Affirming *Pinkett* v. *Wright*, 2 Hare, 120 ; 12 L. J., Ch. 119 ; 6 Jur. 1102.

—— **Solicitor paying Client's Money into his Own Banking Account—Appropriation of Payments—Rule in Clayton's Case.**]—Where a solicitor paid

sums of money, received for clients, into his own banking account in which he had money of his own standing to his credit, and at the date of the last payment in there was only a sum equal to about a third of his client's money standing to his credit, and the client who claimed the first sum paid in failed to earmark such sum, the court, applying the rule in Clayton's Case (1 Mer. 572), held that the first sum paid in was the first sum drawn out, and consequently that the claim failed, and the client could only prove against the solicitor's general estate. *Hancock* v. *Smith* (58 L. J., Ch. 725; 41 Ch. D. 456; 61 L. T. 341—C. A.) distinguished. *Stenning, In re, Wood* v. *Stenning*, [1895] 2 Ch. 433; 13 R. 807; 73 L. T. 207.

Money handed to Solicitor—Right of Defrauded Person.]—A solicitor took money of his clients, and pretended to have invested it on mortgage; after the death of the solicitor there was money in the hands of his representative which could be identified as part of the money received by him from his client:—Held, that the client could follow this money, and require it to be applied in payment of the money of which he had been defrauded. *Hallett's Estate, In re, Knatchbull* v. *Hallett*, supra, col. 902, followed. *Murray, In re, Dickson* v. *Murray*, 57 L. T. 223.

—— **Representation by Solicitor that Money Invested on Mortgage.**]—Money was advanced to a solicitor by A. for the purpose of being invested on mortgage security. The solicitor wrote that he had invested the money on mortgage to M. on leaseholds in Camden Town, and that A. was receiving interest at the rate of 5 per cent. The solicitor in fact, subsequently to this, advanced large sums on mortgage to M., but no specific mortgage was made in favour of A. The draft, however, of a mortgage for the sum advanced in favour of A. was found unexecuted after the solicitor's death. The solicitor had died insolvent. A. applied that a sum equal to the sum advanced by him should be paid to him out of a large sum in court representing the moneys advanced by the solicitor to M.:—Held, that the solicitor was bound by his representation; that the money was trust money, and that A. ought to be paid in priority to the general creditors. *Middleton* v. *Pollock, Wetherall, Ex parte*, 46 L. J., Ch. 39; 4 Ch. D. 49; 35 L. T. 608; 25 W. R. 94.

—— **Share Certificates — Appropriation to Trust Estates.**]—A debtor, before his bankruptcy, deposited in a box in his office several parcels of share certificates, with a memorandum attached to each stating that the particular parcel was part of the trust estate mentioned therein:—Held, that this was a good appropriation of the share certificates to the several trust estates. *Middleton* v. *Pollock, Elliott, Ex parte* (45 L. J., Ch. 293; 2 Ch. D. 104), approved and followed. *New's Trustee* v. *Hunting*, 66 L. J., Q. B. 554; [1897] 2 Q. B. 19; 76 L. T. 742; 45 W. R. 577; 4 Manson, 103—C. A.

—— **Equitable and Legal Mortgages—Negligence—Notice.**]—R., a solicitor, in 1883, received money from a client for the purpose of investment, and represented to him that he had invested it upon the security of a particular mortgage. The mortgage, however, was one which R. had previously taken in his own name, and it was never transferred to the client. He afterwards deposited the title-deeds of the mortgaged property with his bankers to secure his overdrawn account, and paid interest on the mortgage to the client down to the death of the latter in 1885, and subsequently to his executors. R. died in 1888, his account being overdrawn to an extent exceeding the value of the mortgaged property, and the bank immediately gave notice of their claim to the mortgagors. The bank had no notice of the client's claim at the date of the deposit, and their notice to the mortgagors was prior to any notice given by the client's executors:—Held (1) that R. was a trustee of the mortgage for his client, and that neither the client nor his executors had been guilty of negligence so as to deprive them of their priority, and (2) that the principle of *Dearle* v. *Hall* (3 Russ. 1) did not apply, and therefore the bank were not entitled to priority by virtue of having given notice to the mortgagors before the executors. *Richards, In re, Humber* v. *Richards*, 59 L. J., Ch. 728; 45 Ch. D. 589; 63 L. T. 451; 39 W. R. 186.

—— **Identification.**]—Trust moneys cannot be followed unless clearly identified. Where, therefore, a solicitor, having trust moneys in his hands, paid certain sums, part of such moneys, into his banking account without distinguishing them as trust moneys, and subsequently filed a liquidation petition:—Held, that the trustee in the liquidation was entitled to the balance of the moneys in the hands of the bank as against the persons claiming to be entitled as trustees of the alleged trust funds under the marriage settlement of the bankrupt. *Hardcastle, Ex parte, Mawson, In re*, 44 L. T. 523; 29 W. R. 615.

A solicitor was employed by the trustees for sale of an estate, his duty being to receive the purchase moneys and pay them into the trustees' banking account. He received large sums, paid them in to his private account, and died insolvent. His banking account at his death showed a large credit, principally made up of specific sums which corresponded with receipts by him on account of sales of the trust estate:—Held, that these specific sums could be followed by the trustees, and that there could not be a set-off allowed in respect of sums alleged to have been paid by the solicitor on account of the trust estate. *Birt* v. *Burt*, 36 L. T. 943.

Payment into Bank by Broker of Proceeds of Consols held on Trust.]—A trustee employed a broker, who had notice of the trust, to sell out consols and invest the proceeds in railway stock. The broker sold the consols for cash, bought railway stock to the same amount for the settling day, and received the price of the consols in a cheque, which he paid into his account at his bankers'. He stopped payment before the settling day, and went into liquidation. The trustee claimed so much of the broker's balance at his bankers' as was attributable to the price of the consols:—Held, that as the price of the consols was known by the broker to be trust money, it could be followed, and that the claim must therefore be allowed. *Cooke, Ex parte, Strachan, In re*, 46 L. J., Bk. 52; 4 Ch. D. 123; 35 L. T. 649; 25 W. R. 171—C. A.

Payment by Auctioneer into Bank.] — An auctioneer received moneys from a sale of live stock, and paid them into his private account at the defendant's bank. His account was overdrawn to an amount not exceeding 2,500*l.*; but

under an arrangement which was then subsisting, he was permitted to overdraw up to 2,500*l*., and he had no suspicion at the time when he paid in such moneys of any intention on the part of the bank to close his account. The bank shortly afterwards closed the account, and applied the proceeds of the sale in reduction of the overdraft. The bank had notice that the moneys so paid in were substantially the produce of the sale of stock. An action was brought by the plaintiff, on behalf of all the vendors at the sale, against the bank, to recover their respective purchase moneys, less the auctioneer's commission:—Held, that the auctioneer paid the proceeds of the sale to his private account in the ordinary course of business, and was not guilty of a breach of trust in so doing, and that therefore the plaintiff had no remedy against the bank. *Marten* v. *Roche*, 53 L. T. 946; 34 W. R. 253.

Sale of Goods Wrongfully Obtained—Proceeds.]—Where a person wrongfully obtained goods and sold them, and the proceeds of sale were paid into a colonial bank for the purpose of transmission to its London branch, he receiving bills of exchange to the amount of the proceeds drawn by the colonial bank on its London branch:—Held, that the owners of the goods were entitled to follow the proceeds in the hands of the bank, and to be paid the amount of the bills, as bills, as they became possessed of them. *Comité des Assureurs Maritimes* v. *Standard Bank of South Africa*, 1 Cab. & E. 87.

Money advanced to Purchase a Business—Non-application by Borrower—Right of Lender.]—Money had been advanced by the plaintiff to the defendant for the purpose of purchasing a certain business, and on an undertaking of the defendant so to apply it. The defendant did not apply it to that purpose, but spent some of it in paying debts of his own. He then became bankrupt. The plaintiff was able to trace the remainder of the money advanced by him:—Held, that a duty had been imposed on the defendant of applying the money in a particular way, and a fiduciary relation created, so that, the money not having been applied in the specified way, the plaintiff could recover in full so much as remained of it, notwithstanding the bankruptcy of the defendant. *Gibert* v. *Gonard*, 54 L. J., Ch. 439; 52 L. T. 54; 33 W. R. 302.

Principal and Agent—Goods Bought by Agent—Moneys held in a Fiduciary Character—Advances for Particular Purpose Misappropriated.]—The defendants were brewers, and employed F. as their "malting agent." The regular course of business between the defendants and F. was as follows. F. occupied the malting premises, and took out the necessary licences. It was his duty to buy barley in his own name as principal for cash, to send to the defendants certain periodical accounts of the barley so bought from time to time, and the prices of the same; to submit samples to the defendants, and if the barley was approved of by them to malt it, and deliver the malt to the defendants, receiving a commission upon the quantity of barley steeped. The quantity of malt required by large brewers being very great, the brewers, and not the malting agents, provide the capital for the purchase of the barley. In the present case the defendants kept accounts at certain provincial banks, upon which F. was empowered to draw, and from time to time the defendants paid in lump sums to the credit of those accounts, in accordance with current requirements, as shown by the accounts sent in by F. of barley purchased; but these sums were not intended to, nor did they, represent any payments for any specific barley. F.'s business was to act as malting agent for the defendants exclusively. The defendants paid the duty as the same became payable upon the malt in F.'s premises. F. had fraudulently departed from the regular course of business. Instead of buying barley for cash and applying the balances at the provincial banks in payment for the same, he had been in the habit of sending in to the defendants fictitious accounts of barley purchased, misapplying the sums paid in for his own purposes, and providing the malt needed for the defendants' purposes by purchasing barley or ready-made malt upon credit. He likewise from time to time sold barley which had been brought on to the maltings to raise money for his own purposes. The defendants believed, in consequence of the fictitious accounts and other false representations of F., that barley was from time to time purchased for cash in accordance with the regular course of business, and on the faith thereof continued to pay sums of money into the banks for the purpose of paying for such barley, which they believed were so applied. F. subsequently absconded, leaving upon his premises barley to the value of about 22,000*l*., and malt to the value of about 35,000*l*., upon part of which duty had been paid by the defendants. The value of such malt and barley was less than the amount drawn from the banks and misappropriated by F. He absconded and thereby committed an act of bankruptcy. Between the time of F.'s absconding and the time when he was adjudged a bankrupt, the defendants seized the barley and the malt left on his premises. The plaintiff, trustee in F.'s bankruptcy, sued the defendants for the value of the same:—Held, that the plaintiff could not recover, on the ground that the relation between the defendants and F. was that of principals and agent, and that the property in the barley and the malt had vested in the defendants, and that the barley and the malt were not in the order and disposition of F. as the reputed owner thereof, it being notorious that "malting agents" are in many instances not the owners of the barley and malt on their malting premises; and also, on the further ground that the moneys advanced by the defendants to provide for the purchase of the barley were impressed with a trust; that even if the barley and the malt left on the premises of F. were not bought in accordance with the authority given to him, and the legal property in the same was not vested in the defendants but in F., nevertheless F. was a trustee for the defendants, to the extent of the sums advanced by them, of such barley and malt, the same being either the product of the trust moneys, or in substitution for the barley in payment for which F. ought to have applied such trust moneys; that F. could not have set up his own breach of trust, or have been heard to allege that the barley was bought otherwise than according to the authority given to him by the defendants; and that the plaintiff, as F.'s trustee in bankruptcy, could not in this respect stand in a better position than F. himself. *Harris* v. *Truman*, 51 L. J., Q. B. 338; 9 Q. B. D. 264; 46 L. T. 844; 30 W. R. 533—C. A.

—— **Undisclosed Principal—Principal cannot Recover Money or Goods from Third Persons without a general Set-off between Latter and Agent.**] —The plaintiffs, who were landowners in New Zealand, were in the habit of shipping wheat from New Zealand to England for sale on the London market, taking bills of lading which made the wheat deliverable to themselves in London, and indorsing these bills to M. and T., merchants and factors at Glasgow, with instructions to sell the wheat in London. M. and T. having no house or agency in London were themselves in the habit of indorsing these bills of lading to the defendants, who were corn-factors and brokers in London, for the purpose of their selling there the wheat. When any sales were effected, M. and T. delivered account sales to the plaintiffs in the usual form, deducting a del credere commission of 3*l.* per cent., whilst the terms upon which the defendants were employed by M. and T. were different, being a factorage of 2*l.* per cent. and not a del credere commission. The indorsement of the bills of lading by the plaintiffs to M. and T. and by M. and T. to the defendants, was in each case only for the purpose of selling the wheat and without the intention of passing any property in it. The plaintiffs knew that the sales effected for them by M. and T. in London were made by brokers employed by M. and T., but the plaintiffs were in no way parties to the particular contracts of sale nor were their names disclosed upon them. The defendants effected sales of certain cargoes of wheat which had been so consigned for sale by the plaintiffs in the above mode, and paid the proceeds into their own account at their bankers', and from time to time made remittances to M. and T. on account of them; but upon reference to the defendants' books of account the proceeds of the particular cargoes could be separated and identified. M. and T. carried on a business at Leith as well as at Glasgow, and they employed the defendants in respect of both, and when they stopped payment, which they did, they were indebted to the defendants on the Leith account but not on the Glasgow account. The plaintiffs having brought an action against the defendants for the net balance of the proceeds of the said cargoes of wheat after deducting the remittances made to M. and T. in respect thereof, but without giving credit due to them from M. and T. on other transactions, the jury found at the trial, first, that the plaintiffs did not, through their agents, employ the defendants to sell and account for the proceeds of the wheat; secondly, that the defendants knew, or had reason to believe, that M. and T. were acting in the sales as agents for a third person:—Held, that the plaintiffs were not entitled to recover, as there was no privity of contract between them and the defendants, and the defendants did not stand in any fiduciary character towards the plaintiffs so as to entitle the latter to follow the proceeds of their property in the defendants' hands, and as whatever right the plaintiffs might have had as owners to claim the wheat before it had been sold, they had no right, after such sale, to the proceeds, without giving credit for the sum due to the defendants from M. and T. on their general account. *New Zealand and Australian Land Co.* v. *Watson*, 50 L. J., Q. B. 433; 7 Q. B. D. 374; 44 L. T. 675; 29 W. R. 694—C. A.

And see ante, C. 12. c.

3. Relief Against Purchasers.

In General—With Notice.] —All persons coming into possession of property bound by a trust, with notice of the trust, are chargeable in equity as trustees. *Adair* v. *Shaw*, 1 Sch. & Lef. 262.

If the persons claiming under the breach of trust have notice of it, then they are subject to the same trust; so if the conveyance be voluntary, or without a valuable consideration; but if for a valuable consideration and without notice, the purchaser will hold the land discharged, and the trustees must buy and settle other land to the same uses. *Mansell* v. *Mansell*, 2 P. Wms. 681; Cas. t. Talb. 252; 2 Eq. Cas. Abr. 747, pl. 6; 748 pl. 2.

A purchaser or mortgagee shall not protect himself by taking a conveyance from a trustee after notice of the trust; for by taking such conveyance he becomes the trustee himself. *Saunders* v. *Dehew*, 2 Vern. 271.

Both the trustee and the assignee are responsible to the cestui que trust for profits subsequent to an assignment in breach of trust. *Vandebende* v. *Lewingston*, 3 Swanst. 625.

Relief for cestui que trust of lease against assignment or sale by trustee. *Rook* v. *Staples*, Cary, 76.

A purchaser, with notice implied or constructive, from a trustee, will be bound by the trust, although there has been a fine levied to him and five years' non-claim. *Thompson* v. *Simpson*, 2 Dr. & War. 459.

Length of possession will not prevail against charitable trusts, where the land was purchased with notice of the trusts. *Att.-Gen.* v. *Christ's Hospital*, 3 Myl. & K. 344.

Trustees to Preserve Contingent Remainders.]—Trustees in will to support contingent remainders, joining with tenant for life in destroying such remainders, are guilty of breach of trust, and purchaser with notice of trust is liable to make good the estate. *Gorges* v. *Pye*, 7 Bro. P. C. 221; Pre. Ch. 308; 1 P. Wms. 128.

If trustees to preserve contingent remainders join in sale to one without notice, the purchaser will be safe; contrà if he have notice. *Willoughby* v. *Willoughby*, Amb. 284.

Trustee De Facto.]—A trustee de facto held liable to account as a trustee de jure. *Hennessey* v. *Bray*, 33 Beav. 96.

The estate of a tenant for life was liable to forfeiture on his mortgaging it. He mortgaged it to A. unknown to the parties taking under the forfeiture:—Held, that A. was liable to account to them for the rents, at all events from the filing of the bill, and beyond that, from the time he had notice of the trusts creating the forfeiture. *Ib.*

—— **Merchants Borrowing Money Settled to Separate Use of Married Woman.**]—A., the trustee of a fund settled on B., a married woman, to her separate use, with a restraint against anticipation, lent the same to C., D. & Co., who were merchants, but not ordinary bankers, and who had actual notice of the nature of the trusts to which the fund was liable. C., D. & Co. entered the transaction in their ledger and balance book, as an account opened with B., and down to the time of their bankruptcy regularly paid the interest of the fund to her,

during A.'s lifetime, through him, but, after his death, directly to her. C., D. & Co. became bankrupts:—Held, that they had made themselves in fact direct trustees of, and were jointly and severally liable to restore, the trust fund. *Watson, Ex parte, Acraman, In re*, 7 Jur. 1001.

——**Trust Money Lent on Security of Judgment—Subsequent Notice of Trust.**]—A trustee, in violation of his duty, lent the trust money to F., upon the security of a judgment; F. at the time not being aware that it was trust money. Subsequently F. was informed that it was trust money, and recognised and acknowledged the title of the trustee thereto:—Held, that from the time he had notice of the trusts, F. was a trustee of the money, and as such liable for the safety of it. *Sheridan* v. *Joyce*, 1 Jo. & Lat. 401; 7 Ir. Eq. R. 115.

Legal Title.]—A cestui que trust of an annuity, secured by a term in an estate, filed a bill against the trustee of the term and the purchaser for value of the estate, praying that the trusts of the term might be administered. The purchaser, who was in possession of the estate, had no notice of the term, or of any interest of the cestui que trust in the estate, and denied the existence of any term in the trustee:—Held, that until the trustee had established his right to the term at law, the cestui que trust could have no such relief as prayed in equity. *Clemow* v. *Geach*, 40 L. J., Ch. 44; L. R. 6 Ch. 147; 19 W. R. 53.

The tendency of modern legislation being to prevent unnecessary litigation, and to enable the tribunal which has been first applied to for redress to dispose of the case when possible, courts of equity may now determine legal rights where equitable relief is consequent upon, or ancillary to, their establishment: and in such instances (unless the balance of convenience be otherwise) a plaintiff having a reasonably clear legal title need not first establish his right by an action at law. *Mulville* v. *Fallon*, Ir. R. 6 Eq. 458.

Fraud of One Trustee—Transferee of Stock—Purchaser for Value without Notice.] — C., trustee with the plaintiff of a will, and also trustee with the defendant of a settlement, having misappropriated a portion of the settlement fund, applied an equal portion of the will fund in the purchase of stock, which he transferred into the names of himself and the defendant. The plaintiff and defendant were both innocent of C.'s fraud, and the defendant and the cestuis que trust under the settlement had no notice that the stock was purchased with part of the will fund. C. died insolvent. In an action by the plaintiff to compel the defendant to transfer the stock to him:—Held, that the defendant having by accepting the transfer of the stock given up his right to sue C. for his debt to the trust, was entitled to be treated as a purchaser for value without notice, and consequently to retain the stock as part of the settlement fund. *Taylor* v. *Blakelock*, 56 L. J., Ch. 390; 32 Ch. D. 560; 55 L. T. 8—C. A. Affirming 34 W. R. 175.

——**Leaseholds—Right of Innocent Trustee to recover Property.**]—The right of an innocent trustee guilty of no negligence to recover from an innocent defendant possession of a leasehold house fraudulently conveyed away to him by the partner of the co-trustee, is not taken away by the fact that the co-trustee connived at his partner's fraud. The prior equitable rights of the cestuis que trust prevail over the later equitable rights of the defendant. *Isaac* v. *Worstencroft*, 67 L. T. 351; 56 J. P. 393.

Fraudulent Abstraction by Trustee of Trust Funds and Fraudulent Receipt.]—A fraudulent abstraction of trust property by the trustee, and a fraudulent receipt and appropriation of it by another person for his own personal benefit, place the receiver in the same situation as the trustee from whom he received, and he becomes subject in a court of equity to the same rights and remedies as may be enforced by the parties beneficially entitled against the fraudulent trustee himself; and when it is said that the person who receives under such circumstances is converted by the court into a trustee, the expression is used for the purpose of describing the nature and extent of the remedy against him, and denotes that the parties entitled beneficially have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of trust. *Rolfe* v. *Gregory*, 4 De G. J. & S. 576; 5 N. R. 257; 34 L. J., Ch. 274; 11 Jur. (N.S.) 98; 12 L. T. 162; 13 W. R. 355.

But the relief against the receiver in such cases is founded on fraud and not constructive trust, and therefore the right of the party defrauded is not affected by lapse of time, or, generally speaking, by anything done or omitted to be done so long as he remains without any fault of his own in ignorance of the fraud that has been committed. *Ib.*

Improper Mortgage by Trustee—Rights of Cestui que Trust.]—The plaintiff, being purchaser of an equity of redemption in leaseholds, had the equity assigned for his own convenience to C., as trustee, by a deed, which in no way disclosed the fact that C. was anything but absolute owner. C. executed a declaration of trust in favour of the plaintiff. Subsequently C. fraudulently borrowed money of the defendants, representing himself to be the absolute owner, executed a mortgage by demise of the equity of redemption to the defendants, and deposited with them the deed of assignment. The defendants had no notice of any trust. C. subsequently absconded. C. was a confidential clerk, and had control of the plaintiff's safe in which the deed of assignment was supposed to be kept. In an action by the plaintiff for a declaration that the defendants had no interest in the mortgaged property, and for delivery up of the deed of assignment:—Held, that the fact that the plaintiff had, under the circumstances, allowed C. to have the custody of the deed of assignment, was not negligence sufficient to deprive him of the benefit of his prior equitable title, which could not be affected by the fraudulent act of C., the trustee. *Carritt* v. *Real and Personal Advance Co.*, 58 L. J., Ch. 688; 42 Ch. D. 263; 61 L. T. 163; 37 W. R. 677.

Forms of Conveyancing—Omissions in Recitals—Priorities.]—The ordinary recitals and forms commonly used in conveyances and assignments to trustees, with a view of keeping all notice of the trust off the title, are not misrepresentations on the face of the document which will displace the equitable title of a cestui que trust, even though they may have

been fraudulently made use of by a dishonest trustee to show that he was in fact the absolute owner. *Ib.*

—— **Trustee lending Trust Money.**]—A person knowingly inducing trustees to lend trust money to his debtor, on a security not warranted by the trusts, in order that when advanced, such person may obtain thereon payment of his debt, is accountable to the cestuis que trust. *Flyer* v. *Flyer*, 3 Beav. 550; 5 Jur. 187.

Where a trustee lends trust money in breach of the trust, and the borrower, with notice of the trust, applies the money to his own use, he cannot be permitted to separate the loan from the trust, and insist that, the loan being barred by the statute, the trust is barred also. *Ernest* v. *Croysdill*, 29 L. J., Ch. 580; 6 Jur. (N.S.) 740; 8 W. R. 736.

—— **Right of Cestui que Trust to Proceeds of Sale by Mortgagee with Notice of Trust.**]—Where a mortgagee advances his money on a mortgage of trust property, of which trusts he has notice when the money is advanced, the cestui que trust has a right to adopt any sale by the mortgagee under his power of sale and to recover the purchase money received by him instead of following the land in the purchaser's hands. *Champion, In re, Dudley* v. *Champion*, 62 L. J., Ch. 372; [1893] 1 Ch. 101; 2 R. 162; 68 L. T. 694—C. A.

Demise of Trust Premises—Lease Void.]—A. made a voluntary surrender of copyholds to a trustee upon trust for F. during her life; and if at her death she left children who attained twenty-one, upon trust to sell and divide the money among them; but if that event did not take place, upon trust for A. in fee. Afterwards, by a deed reciting that the trustee was seised of the premises upon trust for F. and her husband and A., the trustee and F. and her husband and A. concurred in demising the premises for a valuable consideration to G., for a long term of years:—Held, that the lessee was to be considered as having notice of the trust for the benefit of the children of F., and that the lease was void as against them. *Malpas* v. *Ackland*, 3 Russ. 273.

M. devised estates to trustees, for his daughter, an infant, with power to the trustees to demise and lease the same for any term not exceeding twenty-one years at the best yearly rent that could be gotten for the same, without taking any fine or premium; with power to appoint new trustees. In pursuance of this power the trustees, some time afterwards, appointed R. sole trustee, and conveyed to him the devised estate upon the trusts and subject to the powers expressed and declared by the will of M., and for "no other trust, intent, or purpose whatsoever." By an indenture of lease between R. and B., certain part of the premises said to be described in and devised by the will of M., was demised by R. to B. for twenty-one years, in consideration of the yearly rent of 1,100*l.*, the first five years of which rent was to be paid in advance, in manner therein provided, and the remainder, after the expiration of such five years, by equal quarterly payments:—Held, first, that enough appeared from the evidence to fix B., the lessee, with notice of the trustees' title. *Booth* v. *A'Beckett*, 1 Moore, P. C. (N.S.) 201.

Held, secondly, that as the granting of such a lease was a breach of the trusts of the will of M., the same ought to be declared void and set aside, and the premises assigned to the persons to be appointed trustees of the will of M. *Ib.*

Purchaser of Leases from Husband of Cestui que Trust entitled for Separate Use.]—Testator gave leasehold premises to his daughter for life, if his term or terms and interest therein should so long subsist, for her sole and separate use, notwithstanding her present or future coverture; and after her decease to her children equally, their executors, &c., during all the remainder of the estate, term or terms, and interest therein, which should be then to come and unexpired. No trustees being interposed, the husband, having possession, was held accountable according to the uses of the will, both as to the original leases and also as to reversionary leases, granted to him, as the person entitled under the will of the former tenant, upon favourable terms; and the equity was established against a purchaser from him with notice. *Parker* v. *Brooke*, 9 Ves. 583; 7 R. R. 299.

Renewable Leases—Registered Settlement—Subsequent Unregistered Deed—Indemnity of Purchaser.]—In 1830, a settlement of certain property held under renewable leases was made in favour of A. In 1831, A., being about to marry, made a settlement of this property for the uses of the marriage. The deed of 1830 was not registered. The deed of 1831 was registered. In 1840, A., being in actual possession, sold to B., and B., who had no actual notice of the settlement of 1831, entered into possession, and made alterations in the premises. After the death of A., his son, who was entitled under the settlement of 1831, filed a bill against B. to set aside the sale, for an account, and for waste:—Held, that it was not necessary to register the deed of 1830; that the registered settlement of 1831 prevailed against the bonâ fide purchase of B., and that the court below had properly declared him to stand possessed of the leases as a trustee for the parties beneficially interested under that settlement. But held also, that he was entitled to indemnity against the covenants in the leases which he was thus declared to hold as trustee; that an inquiry ought to be made as to alleged improvements and as to alleged waste; and that he was entitled to be allowed the benefits of those improvements; and that, being a bonâ fide purchaser, without misconduct, he ought not to be charged with costs. *Mill* v. *Mill*, 3 H. L. Cas. 828.

Assignment of Life Interest to Person with Notice of Fraud.]—Where, by one deed of settlement, a sum of stock and estates of the wife were settled to her for life, with remainder in trust for the children of the marriage, and, by another deed, the husband settled a rent charge on his estates in trust for the wife for life; she, after her husband's death, fraudulently obtained a transfer of the stock, and sold it out; and afterwards assigned her life interest in her estates and the rent charge to a party with notice of the fraud:—Held, that the rents of her estates and the rent charge were liable to be applied in replacing the stock; and a receiver was appointed. *Woodyatt* v. *Gresley*, 8 Sim. 180.

Fraud of Trustee—Mortgaging and then Selling.]—The trustee of stock, being beneficially entitled to one moiety undivided, assigned his interest to a mortgagee, who placed a distringas on the moiety. The trustee afterwards sold out a moiety and absconded. On a bill by the cestui que trust

of a moiety :—Held, that he was entitled to the remaining moiety, but the court gave the mortgagee his costs. *Wilkins* v. *Sibley*, 4 Giff. 442 ; 9 Jur. (N.S.) 888 ; 8 L. T. 760 ; 11 W. R. 897.

Specific Legacy Misapplied by Administrator traced into Post Obit Securities.] — The produce of a specific legacy misapplied by A., an administrator, being traced into post obit securities given by B. to C.:—Held, that the cestui que trust was entitled to a charge on the securities. *Harford* v. *Lloyd*, 20 Beav. 310.

A specific legacy of 6,000*l.* consols, bequeathed to the plaintiff, was unnecessarily and improperly sold out by the administrator, A., with the aid of B., and the produce carried partly to the banking account of A., and the remainder to that of B. A series of shifting of cheques and transfer of moneys took place, but the sum of 2,908*l.* was traced to B. About this time, B. laid out moneys in the purchase of a post obit security, and though the trust moneys could not be distinctly traced into the securities, yet the court held, from the suspicious character of the transactions, that such was the just inference, so far as to throw on the other side the onus of disproving it, and this not having been done :—Held, that the plaintiff had a charge on the securities for the 2,908*l.* and interest. *Ib.*

In addition to this, B. had sold and transferred the securities to C., in consideration of a debt then owing. C. had notice that the money by which the securities had been obtained had been derived from A., though C. had no notice of the breach of trust :—Held, that C. could not set up an adverse title against A., and à fortiori, that C. could not do so against the plaintiff's A.'s cestuis que trust. *Ib.*

Enforcing Execution of Trust of Chattels.]—Courts of equity will not lend their assistance to enforce the specific performance of ordinary contracts for the sale and purchase of chattels, unless there is something very special in the nature of the contract. On the other hand, if a trust be created, the circumstance that the subject matter is a personal chattel will not prevent this court from enforcing the due execution of that trust. *Pooley* v. *Budd*, 14 Beav. 34.

Trusts may be constituted not merely by direct declaration of trust, but also by the constructive operation of the consequences flowing from the acts of parties. Thus equity will enforce the execution of a trust, not only against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of it. *Ib.*

A., who sold 500 tons of iron, stacked on his wharf, to B., in consideration of a bill accepted by a third party, gave an acknowledgment engaging to deliver it to the bearer, he (A.) "having been paid for the same." B. mortgaged the iron, and the bill having been dishonoured, A. refused to deliver the iron. The mortgagee proceeded in equity to make A. responsible for the iron :—Held, that A. had no ownership or property in the iron so stacked, and was a trustee, and therefore a demurrer for want of equity was overruled. *Ib.*

Trust Moneys Improperly Advanced to Traders for Purposes of Trade.]—Where trust moneys are improperly advanced to traders for the purposes of their trade, they knowing them to be trust moneys, the court will not follow the moneys into the hands of the traders, so as to affect them with the consequences of a breach of trust ; and where moneys so lent produced a larger rate of interest to the tenant for life than if invested in the funds, the court will not, in favour of the persons entitled in remainder, make the trustees liable for the surplus, or hold that such surplus ought to have been converted into capital. *Stroud* v. *Gwyer*, 28 Beav. 130 ; 6 Jur. (N.S.) 719 ; 2 L. T. 400.

Solicitor—Assignment of Leaseholds—Forged Signatures of Co-Trustees—Constructive Notice.] —A., one of three trustees, executed an assignment of leasehold property held jointly by them, to a purchaser, and forged the signatures of his co-trustees, and also the requisite assent of the cestui que trust to the sale. A. was a solicitor, and acted as such on behalf of the purchaser :—Held, that the circumstances attending the transaction were sufficient to affect the purchaser with notice of some trust, if not the actual nature of it ; and that he had constructive notice of the trust through the knowledge of A., his solicitor. *Boursot* v. *Savage*, 35 L. J., Ch. 627 ; L. R. 2 Eq. 134 ; 14 L. T. 299 ; 14 W. R. 565.

Held, also, that the execution by one of the three joint tenants was a valid assignment of the legal interest in one-third to the purchaser, but that the actual and constructive notice of the trust disentitled him to the beneficial interest, and a reconveyance was ordered. *Ib.*

—— Conduct of the Trustee no Defence to Person with Notice.]—T., a trustee, lent trust money on mortgage to M. By an arrangement on the marriage of M.'s daughter a valuable leasehold interest was granted by M. out of the mortgaged premises and put in settlement, T. being the person who managed it and the solicitor who prepared the lease and settlement, neither the daughter nor her husband being informed of the mortgage. T., afterwards, with his co-trustee and their cestuis que trust, filed a bill to foreclose the mortgage and sell discharged of the lease, if necessary :—Held, that the parties deriving under the settlement must be fixed with notice of the mortgage and trust, and could not rely on T.'s conduct as a defence even against him, and therefore could not object to his being a co-plaintiff. Quære, whether, if notice were not shown, such an equity against a trustee would be a defence. *Twycross* v. *Moore*, 13 Ir. Eq. R. 250.

A trust fund of 1,500*l.* created under a marriage settlement by which certain lands were limited to husband for life, remainder to the first and other sons in tail, with a power to the husband of leasing for forty-one years, or three lives at best rent, was directed by the deed to be conveyed, &c., to the same uses, &c., and in meantime, the trustees, with the consent of husband, were empowered to lend the money on certain security. The husband purchased a leasehold for 8,911*l.*, of which he took the assignment to himself alone, and obtained purchase money out of trust fund to the amount of 11,696*l.*, taking security for 1,400*l.* less than 11,696*l.* The husband granted a lease at a great undervalue for his own term to the attorney who managed the purchase, which purchase proved very beneficial :—Held, that the first son of the marriage was entitled to follow that part of the trust fund which had been misapplied, and to have the benefit of the purchase, and to have the lands sold discharged of the lease to the attorney, whose equity against him (the son) as personal representative of his

father, was barred by notice of the settlement and breach of trust. *Phayre* v. *Peree*, 3 Dow, 116 ; 1 Bligh (N.S.) 129, 594—H. L. (Ir.)

A person who has notice cannot avail himself of an act of trustees in breach of their trust. *Ib.*

In March, 1840, A., and B. a solicitor at Carmarthen, raised 2,500*l.* by sale of a sum of stock of which they were trustees, with the intention of lending it, on mortgage, to C., who resided at Carmarthen, but spent part of the year in London. A. enabled B. to receive the 2,500*l.* for the purpose of the loan, and intrusted him with the conduct of the transaction. Accordingly B. prepared the mortgage deed ; and, on the 29th May, 1840, through his London agents and by arrangement between him and C.'s solicitor, procured C. (who knew that the money was in B.'s hands) to execute it, and to sign a receipt, on the back of it, for the 2,500*l.* The agents took the deed away with them ; and, shortly afterwards, procured A. to execute it, and then sent it to B. It having been arranged, between B. and C., that the mortgage money should be paid into the Carmarthen Bank, to C.'s credit, B., on the 31st May, paid 513*l.*, and, on 31st October, 1,050*l.* accordingly, in part of the 2,500*l.* In November he died insolvent :—Held, that, as between A. and C., A. was to be treated as mortgagee for the whole 2,500*l.* *West* v. *Jones*, 1 Sim. (N.S.) 205 ; 20 L. J., Ch. 362.

Moneys of Building Society improperly Deposited with Finance Society].—The manager of a benefit building society established under 6 & 7 Will. 4, c. 32, deposited, in pursuance of a resolution passed by the directors but contrary to the provisions of the act and the rules of the society, money of the society with a finance company of which he was also manager. The company gave a cheque to the manager for the repayment of the money to the building society, but he did not pay over the money to the society :—Held, that the money was trust money improperly deposited with the finance company, that the giving the cheque to the manager was no discharge to the company, nor repayment to the building society, and that, therefore, the trust money being still in the hands of the finance company, a suit would lie on behalf of the real owners to recover it, and that, without making the directors of the building society parties to it. *Hardy* v. *Metropolitan Land and Finance Co.*, 41 L. J., Ch. 257 ; L. R. 7 Ch. 427 ; 26 L. T. 407 ; 20 W. R. 425.

Forged Transfer of Debentures by One Trustee.]—Trust moneys standing in the names of three trustees were invested in railway debentures under the authority of the trust deed. These debentures were subsequently transferred to a purchaser for value by one of the three trustees, who forged the signatures of his co-trustees to the instrument purporting to effect the transfer, and absconded with the proceeds : —Held, that the purchaser who had taken the transfer with notice of the trust, and without inquiry into the circumstances attending the alleged signatures, could not insist upon his purchase as against the co-trustees, who were entitled to have such forged transfer cancelled. *Cottam* v. *Eastern Counties Ry.*, 1 J. & H. 243 ; 30 L. J., Ch. 217 ; 6 Jur. (N.S.) 1367 ; 3 L. T. 465 ; 9 W. R. 94.

Sureties for Treasurer to Corporation.]—A., one of three sureties, who had become bound to the extent of 2,000*l.* to a corporation for the due accounting of the office of its treasurer by B., received formal notice from the corporation that B. was a defaulter, and on the next day took from B. a deposit note of a bank for 2,300*l.*, which had been placed in the bank by B., one month previously, in the name of his daughter. On a bill filed by the corporation against B., who had absconded, and the three sureties, to make good the amount found due by B., ultra the 2,300*l.* :—Held, establishing the liability of the trustees, that the circumstances under which A. received the 2,300*l.*, were such as ought to have induced him to make inquiry, and that, having neglected to do so, he was bound to restore that amount, with interest after the rate of 5*l.* per cent. *Berwick-on-Tweed Corporation* v. *Murray* or *Dobie*, 7 De G. M. & G. 497 ; 26 L. J., Ch. 201 ; 3 Jur. (N.S.) 847 ; 5 W. R. 208.

Advance by Father to Son—Breach of Trust—Satisfaction.]—A father obtained control over the funds subject to the trusts of a settlement under which his wife and he took successive life interests, with remainder to his two sons. He realised the funds, and treated the proceeds as his own property. He made to his sons certain advances which were held both by North, J., and the court of appeal not to be a satisfaction of his liability to the sons in respect of the trust funds. The advances to one of the sons comprised a sum of 4,000*l.* dock stock which had been purchased with a sum of 2,885*l.*, part of the proceeds of the trust funds. The father, his wife and son were all dead. There was nothing to show that the son was aware that there had been any dealing with the trust funds, or out of what money the dock stock had been purchased ; and the correspondence which passed on the occasion of the advance showed that the intention was that the father should make it out of his own money, and that the son's share under the settlement was not to be dealt with :—Held, that the son was not to be taken as having to the extent of the 2,885*l.* received his share of the trust funds, and the father's estate was accountable for that sum equally with the remainder of the proceeds of the trust funds. *Crichton* v. *Crichton*, 65 L. J., Ch. 491 ; [1896] 1 Ch. 870 ; 74 L. T. 357—C. A. Reversing 13 R. 770 ; 44 W. R. 203 ; 59 J. P. 792.

G. PAYMENT INTO AND OUT OF COURT.

1. *Payment into Court.*
   - *a.* Voluntary Payment into Court, 922.
   - *b.* Order for Payment into Court, 923.
   - *c.* Under the Repealed Trustee Relief Acts, 930.
   - *d.* Effect of Payment into Court on Powers of Trustees, 934.
   - *e.* Costs of Payment into Court, 936.
2. *Administration of Fund and Payment Out.*
   - *a.* Jurisdiction of the Court, 943.
   - *b.* Persons to whom Payment will be Made, 946.
   - *c.* Practice, 951.
   - *d.* Costs of Payment Out, 956.

1. PAYMENT INTO COURT.

a. Voluntary Payment into Court.

Statute.]—*Trustee Act*, 1893, *s.* 42.

When Justifiable—Money Belonging to Wards of Court.]—Money in the funds belonging to

wards of the court cannot be transferred into the name of the accountant-general, to the credit of the cause, until the account is taken by a master and his report made. This does not mean that such a transfer cannot be made, but that it could not operate as an acquittance and discharge of the trustees until they had passed their accounts. *Beneroft* v. *Rich*, 1 Bro. C. C. 56.

Semble, a trustee is always justified in transferring the trust fund into court. *Croyden's Trust, In re*, 19 L. J., Ch. 172; 14 Jur. 54. S. P., *Biggs, In re*, 11 Beav. 27; 11 Jur. 958.

Semble, trustees are always justified in not paying money into court; it may turn out that there was no occasion for them to do so. *Mountain* v. *Young*, 18 Jur. 769.

—— **Nun—Civil Death.**]—E. became a nun, and went into a convent abroad, and assigned all her property to trustees for the benefit of a Roman Catholic congregation:—Held, that she was not civiliter mortua, or in such a position as would justify the trustees of a fund to which she was entitled in paying the fund into court, and that the court on her petition would order payment of the fund to her trustees. *Metcalfe's Will, In re*, 33 L. J., Ch. 308; 10 Jur. (N.S.) 287; 10 L. T. 78; 12 W. R. 538—L.JJ.

—— **Disputes between Trustees and Cestuis que Trust.**]—Trustees, between whom and their several cestuis que trust disputes have arisen as to the amounts actually due to them respectively, are justified in paying into court, to the separate account of each cestui que trust, the sum to which they believe him to be entitled, and may have their costs of making such payment out of the respective funds. *Wright's Trusts, In re*, 3 K. & J. 419.

—— **Stock Standing in Name of Lunatic Trustee.**]—Where stock is standing in the name of a trustee who is of unsound mind, but not so found by inquisition, and it desired to bring such stock into court to the credit of a cause, the proper course is for the cause to be heard by the judge to whose court the cause is attached, and then to present a petition in lunacy to the lords justices. *Dawson, In re, Barber* v. *Dawson*, 6 N. R. 346—L.JJ. S. P., *Jeffreys* v. *Drysdale, Drysdale, In re*, 30 L. J., Ch. 612; 7 Jur. (N.S.) 667; 4 L. T. 454; 9 W. R. 428—L.JJ.

Apprehension of Litigation — Discharge of Trustee.]—A trust fund was paid into court by the trustees, in the apprehension of litigation as to the rights of the several parties to the fund. The affidavit, upon payment into court, did not mention the name of A., one of the persons claiming an interest in the fund. The court refused to declare the rights of A. upon a petition presented by him; but gave him liberty to file a bill to establish his claim. *Jephson, In re*, 1 L. T. 5.

Payment into court of the trust fund discharges the trustee from all claims whatever. *Ib.*

b. Order for Payment into Court.

In General—Application of Person having Contingent Interest.]—A party having a contingent interest in a trust fund may, in a proper case, have it brought into court for his protection, but he must show some sufficient ground for it. *Ross* v. *Ross*, 12 Beav. 89.

Motion to pay trust fund into court refused, on the ground that there was no allegation of danger, and that the fund might, if necessary, be sufficiently protected by a distringas. *Ib.*

A residuary sum of stock, standing in the names of trustees, the dividends of which were paid by them to the parties entitled thereto, ordered to be transferred into court to the credit of the cause, on the application of a party entitled to a mere contingent interest in the fund, and notwithstanding that all the parties entitled to vested interests therein were satisfied with the conduct and custody of the trustees, and opposed the application. *Bartlett* v. *Bartlett*, 4 Hare, 631.

Right of a party, entitled contingently in remainder, to have the trust fund brought into court at the hearing, though there be no imputation against the trustees. *Governesses' Benevolent Institution* v. *Rushbridger*, 18 Beav. 467.

—— **Trust Money in Hands of Person without Primâ Facie Right to hold it.**]—When a court of equity traces out trust money in the hands of a person who has not primâ facie a right to hold it, that money must be paid into court. *Leigh* v. *Macaulay*, 1 Y. & C. 260; 4 L. J., Ex. Eq. 37.

—— **Where Trust Fund Lent.**]—Trust fund which, under a power in marriage settlement, had been lent, decreed to be paid into court, the trustees representing it to be in danger. *Payne* v. *Collier*, 1 Ves. 170.

The testatrix, shortly before her death, expressed a wish that H., one of her trustees, should have the loan of the trust fund for a reasonable period. F., the other trustee, accordingly allowed H. to possess himself of the fund, agreeing that it should remain on his personal security for a year. Long after the expiration of that period, on motion, H. was ordered to pay the sum into court within a month, or find sufficient security. *Foster* v. *Hewitt*, 1 Jur. 839.

By a settlement moneys were directed to be laid out on Government or real securities; the trustees having lent the money to the husband on bond, were ordered, on motion, to pay the money into court. *Collis* v. *Collis*, 2 Sim. 365.

—— **Where Trustee had Transferred Consols into his own Name.**]—Where a trustee of a residue had transferred consols into his own name, and had permitted his cestui que trust to receive the dividends for a series of years under a power of attorney, and had died without further earmarking the fund, and his next of kin refused to meddle in the matter:—Held, that there was sufficient evidence to entitle the cestui que trust to have the money paid into court, and to have an order that she should be paid the dividends till further order. *Thornton's Trusts, In re*, 9 W. R. 475.

—— **Application by Parties Beneficially Interested.**]—In a suit for the administration of trust property, the court, on an application by the parties beneficially interested, and where there was no imputation against the trustees, ordered the trust money to be paid into court. *Robertson* v. *Scott*, 14 L. T. 187.

Party ordered to pay money into court in which he claimed the sole beneficial interest, he being also a trustee of the fund. *Inman* v. *Whitley*, 5 Jur. 287.

A solicitor who had received money for his

client in her capacity of administratrix, and who had notice of the rights and claims of other next of kin, and who claimed to be in some sort a trustee of the fund, was nevertheless, on the petition of his client, ordered to bring the money into court and to pay the costs of the petition. *Becke, In re*, 18 Beav. 462.

—— **Person having Reversionary Interest.**]—Testator, having a debt secured on lands, gives the mortgage money to the mortgagor, and desires that he will give a reversionary interest therein to a third person; the mortgagor, selling the estate, shall bring the mortgage money into court for the use of the devisee, subject to the life estate. *Lewis* v. *King*, 2 Bro. C. C. 600.

—— **Where one Trustee Improperly Invested on Mortgage.**]—Two trustees were authorised to invest trust money in their names on good security. One trustee improperly invested 1,500*l.* on mortgage of leaseholds in his own name; the other had declined to act any longer. The security realised 215*l.* only. The trustee was, on motion, ordered to pay the difference into court. *Bourne* v. *Mole*, 8 Beav. 177.

The trustees of a settlement, having invested the settled funds on a mortgage security, which turned out insufficient, and it not appearing that they took due precautions to ascertain whether the security was sufficient, were ordered to pay into court the whole amount of the trust funds, taking upon themselves the security. By the decree in the court below they were declared liable to pay so much only as the mortgaged premises, when sold, should prove insufficient to answer. *Lockhart* v. *Reilly*, 3 W. R. 227.

—— **Application of Government of Foreign State.**]—The court refused to order dividends received before bill filed, of stock purchased by the old government of Switzerland, to be paid into court by the trustees on the application of the present government, without having the attorney-general a party. *Dolder* v. *Bank of England*, 10 Ves. 352.

—— **Purchase Money on Application of Vendor.**]—Purchaser (a trustee, acting on behalf of himself and others, his co-trustees, and of the cestuis que trust) ordered to pay purchase money into court; the agreement having been entered into in the name of himself alone; upon affidavits, that the plaintiffs (the vendors) had no notice of his acting for others, and of acts of ownership committed since possession given to him under the agreement; in opposition to the answer, alleging notice, and denying any acts of ownership by himself, or by any other person, to his knowledge. *Crutchley* v. *Jerningham*, 2 Mer. 502.

—— **Where Trustees about to exercise Discretionary Power.**]—Although the mere existence of a discretionary power in trustees over a fund affords no reason why the court should not order payment of the fund into court, unless such payment into court would interfere with the exercise by the trustee of such discretion; yet where it appeared that trustees were about, in the due exercise of a discretionary power, to deal with a fund, the court refused to order payment into court, although the trustees had not actually parted with the fund. *Talbot* v. *Marshfield*, 2 Dr. & Sm. 285.

—— **Money Misapplied by Solicitor Trustee.**]—Trustees authorised a firm of solicitors (one of whom, W., was a trustee) to draw the trust fund out of a bank. W. drew it out and misapplied it. The trustees were, on interlocutory application, ordered to pay the amount into court. *Ingle* v. *Partridge*, 32 Beav. 661; 32 L. J., Ch. 813.

Three trustees sold out trust funds, and the produce was paid to one alone. The other two were, on motion, ordered to pay the amount into court. *Ib.*

Admissions by Trustees in Answer — Judicial Discretion.]—In an action against a trustee and the executor of a deceased trustee to obtain repayment of part of the trust funds which were alleged to have been misapplied by the trustees, the court refused on an interlocutory application to order the executor of the deceased trustee to bring the sum claimed into court, although he admitted assets. There is a judicial discretion in such a case as to making an order for payment into court. *Wright, In re, Kirke* v. *North*, 65 L. J., Ch. 37; [1895] 2 Ch. 747; 13 R. 849; 73 L. T. 396; 44 W. R. 125.

Where a defendant admits by the answer that there is trust money in his hands, court will always, on an interlocutory application, order payment into court; so where an executor is a debtor to the testator at the latter's death. *Rothwell* v. *Rothwell*, 2 Sim. & S. 217.

Defendant, who had covenanted to pay a sum of money to the trustees of his marriage settlement, but had omitted so to do, ordered, upon motion in a suit for the performance of the trusts of the settlement, to pay the money into court. *Ib.*

Where one of two trustees admits by his answer that a certain fund is in the hands of himself and his co-trustee, but uses such language as is admitted to import that he dealt with it, although the expression is ambiguous, the court will, on motion on the answer, order payment into court of such fund. *Pince* v. *Beattie*, 5 W. R. 616.

On a motion by the executor of a legatee for the transfer into court by trustees of sums of stock admitted by their answer to be standing in their names, no fraud or misconduct on the part of the trustees being alleged:—Held, following *Bartlett* v. *Bartlett* (4 Hare, 631), that the stock should be transferred. *Marryat* v. *Marryat*, 2 Eq. R. 1138; 23 L. J., Ch. 876; 2 W. R. 576.

The court will not, under the above circumstances, order sums of money in the hands of trustees to be paid into court. *Ib.*

In an administration suit by the executor of a legatee against the testator's trustees and executors, the other legatees are not necessary parties. *Ib.*

Where there is no controversy as to facts, trustees will be ordered to transfer stock into court on motion. *Ib.*

Semble, not necessary to serve the cestui que trust. *Ib.*

—— **Claim of Lien for Costs.**]—Where the residue of a trust fund under a composition deed has been duly invested by the

trustees, and they claim a lien thereon for their costs under the deed, and there is no imputation of misconduct, or of the fund being in danger, the court will not, on motion by a creditor who was a party to the deed, and had accepted a dividend under it, order the fund to be paid into court. The costs of such a motion are costs in the cause. *Chaffers* v. *Headlam*, 22 L. J., Ch. 1038; 17 Jur. 754.

—— **Formal Denial of Fact of Trusteeship.**]—Where the admissions made by the answer show the defendant to be a trustee of money, a mere formal denial of the fact will not prevent him from being ordered upon motion to bring the money into court. *Hagell* v. *Currie*, L. R. 2 Ch. 448; 16 L. T. 309; 15 W. R. 605.

—— **Doubt whether Moneys Trust Moneys.**]—Unless there is a distinct admission, or circumstances proved which raised the presumption, that certain moneys are trust moneys, the court will not interfere by injunction to order such moneys to be paid into court before the hearing of the cause, where there is a doubtful case to be tried at such hearing. *Bank of Turkey* v. *Ottoman Co.*, 14 L. T. 884; 14 W. R. 819.

—— **Defendant setting up Claim to Property.**]—A defendant, who admits in his answer the possession of property upon a trust, will be ordered to pay it into court, although he sets up a claim to it, if, upon the facts disclosed in the answer, the court is satisfied that this claim is not well founded. *Del Pont* v. *De Tastet*, 2 L. J. (o.s.) Ch. 140.

The court refused, upon an interlocutory application by a party claiming as cestui que trust, to order money alleged to be trust money, and admitted to be in the possession of the defendant, to be paid into court, where the defendant, under circumstances stated on the record, claimed a title to the money for his own benefit, and did not, by his answer, admit his liability to pay it. *Knight* v. *Haythorne*, 4 Jur. 360.

—— **Where Plaintiff Claims in Particular Character.**]—When a plaintiff claims to be entitled, in a particular character, to a fund in the hands of a trustee, and the trustee, by his answer, says he does not know whether the plaintiff fills that character or not, the plaintiff cannot have the fund brought into court in the suit. *Dubless* v. *Flint*, 4 Myl. & Cr. 502.

—— **Admission of Primâ Facie Title.**]—In order to justify an order for payment into court of a trust fund, it is sufficient that the trustee's answer contains an admission of such a primâ facie title in the plaintiff as to afford a reasonable expectation of the plaintiff succeeding at the hearing in making out his title. *Whitmore* v. *Turquand*, 1 J. & H. 296.

Therefore where, by the answer of a trustee of a composition deed, it was admitted that the fund had been for five years in his hands, that some creditors had acceded within the time limited by the deed, but that the plaintiff had neither acceded nor refused to accede, an order was made for payment of the fund into court. *Ib.*

—— **Application by One of Several Cestuis que Trust.**]—A trustee admitted the whole of a trust fund, to a considerable amount, to be in his hands. The conduct of the trustee being proper, the court will not, on an application by one of several cestuis que trust, order payment into court of more than the aliquot share of the particular cestui que trust making the application. *Hamond* v. *Walker*, 3 Jur. (N.S.) 686.

Semble, the court has, on such an application, by any single cestui que trust, authority to order the whole fund to be brought into court, if the court shall so think fit. *Ib.*

—— **No Admission or Denial of Title.**]—Motion by infant cestuis que trust that their trustee might bring a fund into court allowed where, although he had not by his answer admitted their title, he had not denied it. *Symonds* v. *Jenkins*, 34 L. T. 277; 24 W. R. 512.

In a suit against a trustee for breach of trust and consequent loss of trust funds, he stated that he did not know, and could not set forth as to his belief or otherwise, whether the plaintiffs were the only children of S., or whether the eldest was seventeen years or the youngest two years of age, as alleged by the bill, or whether it was a fact that there had been no child who had attained twenty-one:—Held, that the title of the plaintiffs was sufficiently admitted to entitle them to have the fund brought into court. *Ib.*

The bill stated that some of the plaintiffs were children of another plaintiff, and that they and certain defendants were the only children of the marriage. The answers did not deny the statement, but merely stated that the defendants did not know whether these were all the children, and did not raise any objection for want of parties on this ground. There was no evidence of the relationship between the plaintiffs:—Held, at the hearing, that a case was made for inquiry as to this, and for payment into court of the trust fund. *Fowler* v. *Reynal*, 2 De G. & Sm. 749; 13 Jur. 649. *And see* 3 Mac. & G. 500; 21 L. J., Ch. 121; 15 Jur. 1019.

—— **Admission of Misapplication of Trust Funds.**]—Trustees, who had a sum of money standing in their names at their bankers', signed an order directing the bankers to honour the cheques of any two of them, or of Messrs. G. & Co., their solicitors. W., who was one of the trustees, and of the firm of G. & Co., drew out the money and applied it to his own use. Upon a bill against the trustees:—Held, on an admission of these facts by the co-trustees, that they must pay the money into court. *Ingle* v. *Partridge*, 32 Beav. 661; 32 L. J., Ch. 813.

A trustee, charged with misapplication of trust moneys, admitted by his answer that he had misapplied three sums, and set forth a debtor and creditor account, in which he credited himself with, amongst others, those three sums, and also with a fourth sum, which was equally inadmissible, but which turned the balance of the account in his favour. On a motion for payment of the three sums into court:—Held, that the plaintiff not having in his motion challenged the fourth sum, the motion could only be granted to the extent to which the answer admitted a balance after striking those three items out of the discharge. *Nokes* v. *Seppings*, 2 Ph. 19; 1 Cooper, 194.

—— **Property Settled to Separate Use of Married Woman Restrained from Anticipation.**]—By a marriage settlement in 1856, property was settled

to the separate use of the wife for life, without power of anticipation, with remainders over. In 1866 the wife left her husband, and he instituted a suit against her in the divorce court for restitution of conjugal rights. Judgment was given against the wife with costs. The wife withdrew from the jurisdiction, and declined to obey the judgment. In 1870 the husband procured from the divorce court a writ of sequestration against the separate property of the wife for the costs of the suit. In October, 1869, dividends and interests on the settled property fell due, and were received by one of the trustees, who retained them in his hands. In December, 1869, a hostile suit was instituted by the wife against the trustee to compel the payment of the dividends and interest, and for the removal of the trustee, but not asking for the general administration of the fund. The trustee admitted that he had in his hands the greater part of the entire fund. A few days after his answer the trustee filed a bill in the rolls court for the administration of the trusts of the settlement. On motion by the wife, in the first of the two suits, that the trustee might be ordered to pay into court the entire sum admitted by him to be in his hands:—Held, that regard being had principally to the restraint on anticipation contained in the settlement, the money ought to be paid into court notwithstanding the writ of sequestration, and notwithstanding that the wife's bill had not prayed the general administration of the trust fund. *Miller* v. *Miller*, 18 W. R. 750.

—— **Funds Admitted by One Trustee to have been Sold.**]—In a suit against trustees for breach of trust, one of them admitted that the funds had been sold out, by means of a power of attorney executed by him for the purpose, as he stated, of investing them on more advantageous securities; but he stated he was not concerned in the receipt of the produce, but he had been informed that it had been received by his co-trustee, or by J. M. by his permission. The settlement contained a power to vary the investments:—Held, that there was not, on the answer, a sufficient admission to justify an interlocutory order on this trustee for payment of the money into court. *Meyer* v. *Montriou*, 4 Beav. 343.

—— **Amount of Trust Money Specified by One Trustee only.**]—An order upon motion for payment of money into court proceeds upon the admissions of the defendant, and evidence cannot be resorted to. Three trustees admitted that trust money was standing in their joint names, but one only specified the amount:—Held, that this was insufficient to found an order for its payment into court. *Boschetti* v. *Power*, 8 Beav. 98; 14 L. J., Ch. 63; 8 Jur. 1085.

—— **Trust Stock Sold stated to be Re-invested.**]—A trustee admitted he had sold out trust stock, but he stated that he had invested the produce in other securities. A motion was made before decree, that he might re-purchase the stock and transfer it into court:—Held, that the court could make no such order. *Futter* v. *Jackson*, 6 Beav. 424.

—— **Indebtedness to Trust Estate Admitted by Trustee and his Partner.**]—Testatrix devised her real and bequeathed her personal estate to A. and B. upon certain trusts, and appointed A., B., and C. executors of her will. B. and C. alone proved. On bill filed by C. alone—alleging that A. had not proved, that B. was mentally incapacitated, and that A. declined to act in the trusts, and also alleging that A. and his partner G., who was no party to the suit, were indebted to the estate of the testatrix, and praying for the administration of trusts of the will, for the usual accounts, and for the appointment of new trustees in the place of A. and B.—A. put in his answer, stating that he declined to act in the trusts, and substantially admitting that he and his partner were indebted to the estate of the testatrix. Thereupon C. moved that A. and his partner might pay into court the amount admitted to be due by A. and his partner to the estate, and although G., the partner of A., was no party to the record.—Ordered accordingly. *White* v. *Barton*, 18 Beav. 192.

—— **Admissions in Letters and Recital in Settlement.**]—Trust funds may be ordered to be brought into court by the trustee, an accounting party, upon admissions contained in letters written before action brought that he has received the money, and a recital to that effect contained in the settlement, his execution of which as trustee has been proved, although there is no formal admission in his pleadings or affidavits that he has received and holds the money. *Hampden* v. *Wallis*, 27 Ch. D. 251; 51 L. T. 357; 32 W. R. 977.

Practice — Service of Notice of Motion for Payment — Beneficiaries.]—The prayer of a bill for the removal of a trustee was, that he might be removed and the trust fund transferred into the names of new trustees, and that the parties beneficially interested for life, and in remainder in the fund, "might, upon being served with a copy of the bill, be bound by all the proceedings in the cause." Upon notice of motion to transfer the fund into court, which had been served upon the trustees only:—Held, that the parties beneficially interested ought to be served with notice of the application before the court could make the order. *Lewellin* v. *Cobbold*, 1 Sm. & G. 572; 17 Jur. 1111.

Disobedience to Order.]—When a trustee is ordered to transfer a fund of consols admitted to be due from him and subsequently default is made, a writ of attachment will issue. *Digby* v. *Turner*, 28 L. T. 296; 21 W. R. 471.

c. Under the Repealed Trustee Relief Acts.

Persons who might Pay in — Purchasers.]—Testatrix, by her will, declared that every person thereby made tenant for life should have such and the like powers of leasing, selling, and exchanging any part of the devised estate as were by her father's will given to the tenants for life and in tail mentioned in his will, or to the trustees thereof. It appeared that the father's will did not give a tenant for life or in tail any power of leasing, selling, or exchanging; but gave the trustees full power to sell and exchange the hereditaments therein comprised, and to give receipts for the purchase money:—Held, that a tenant for life in possession of the estate devised by the testatrix had the same powers of selling and exchanging that estate as were by the father's will given to the trustees, but that such powers did not extend to giving receipts. Semble, that the difficulties which might be met with in exercising such power of sale in the absence of a power to give receipts, might be removed by paying the money into court under

the Trustee Relief Act, stat. 10 & 11 Vict. c. 96; and that, upon such payment, the purchaser might safely complete. *Cox* v. *Cox*, 1 K. & J. 251.

—— **Purchasers of Estate Subject to Charges.**]—Parties claiming the benefit of the trustee relief acts must be within the express words. Purchasers of an estate charged with the payment of two sums of 500*l.* will not be allowed to pay the money into court in exoneration of the estate; and having done so, on their applying to have it invested, the money was ordered to be repaid to them, upon their paying the costs of the petition. *Buckley's Trust, In re*, 17 Beav. 110; 1 Eq. R. 18; 22 L. J., Ch. 934; 17 Jur. 478.

—— **Stakeholder.**]—A stakeholder may pay money into court under the trustee relief act. *United Kingdom Life Assurance Co., In re*, 6 N. R. 59; 34 L. J., Ch. 554; 11 Jur. (N.S.) 424; 12 L. T. 441; 13 W. R. 645.

—— **Bankers.**]—Bonds of a foreign company were deposited by their agent at a bank in London, together with 5,000*l.* to be divided amongst the bondholders on non-payment of interest. The 5,000*l.* having become forfeited by non-payment of interest, one of the bondholders brought an action against the bankers for his share. Injunction granted to restrain this action, the bankers being trustees for an unascertained class, and therefore entitled to protection against a succession of actions, and not bound at their own risk and expense to ascertain the amount of bonds negotiated at the date of the forfeiture. Semble, that the 5,000*l.* might have been paid into court under the trustee relief act. *Hankey* v. *Morley*, 4 Jur. (N.S.) 234.

A banking company having received notice in writing of conflicting claims to moneys placed with them on deposit, paid such moneys into court, under the trustee relief act, after first deducting therefrom their costs of payment in. Upon petition by one of the claimants for payment out:—Held, that the proviso in s. 25, sub-s. 6, of the Judicature Act only applied to debts of which there had been an absolute assignment in writing; and that the banking company, not being trustees within the trustee relief act, were not entitled to pay the deposit moneys in court thereunder. *Sutton's Trusts, In re*, 48 L. J., Ch. 350; 12 Ch. D. 175; 27 W. R. 529.

But held, that the petitioner must be taken to have submitted to the jurisdiction under the trustee relief act, by petitioning the court, and upon the principle of *Haycock's Policy, In re* (1 Ch. D. 611), the bank were entitled to their taxed costs of payment in and of the petition, and such costs were directed to be taxed accordingly.

—— **Surety of Administrator.**]—The surety in the probate court of an administrator who has got money assets of the intestate in his hands may lodge it in court under the trustee relief act. *Monahan's Trusts, In re*, Ir. R. 8 Eq. 353.

See also INSURANCE.

—— **Surviving Trustees.**]—Stock standing in the joint names of surviving and deceased trustees may be transferred by the survivors to the accountant-general, under the Trustee Relief Act (10 & 11 Vict. c. 96). *Parry, In re*, 6 Hare, 306; 12 Jur. 721.

—— **Majority of Trustees.**]—Three trustees were possessed of a fund which it was desirable to pay into court. One of the trustees being invalided, the other two petitioned, under the Trustee Further Relief Act (12 & 13 Vict. c. 74), for leave to pay in the fund. The order was made. *Broadwood's Trusts, In re*, 8 L. T. 632.

What Securities might be Paid in—Foreign Bonds.]—As to transfer into court of foreign bonds under the trustee relief act. See *Lloyd's Trust, In re*, 2 W. R. 371.

—— **Railway Stock.**]—Railway stock may now be transferred into court under the Trustee Relief Act, 1847. *Ross's Trusts, In re*, 28 W. R. 418.

Money paid in without Order of Court.]—Before the general orders of June, 1848, money might be paid in to the name of the accountant-general, under the 10 & 11 Vict. c. 96, without any order of the court. *Biggs, In re*, 11 Beav. 27; 11 Jur. 958.

Affidavit on Payment in.]—In an affidavit made upon payment of money into court under the trustee relief act, the sum to be paid in must be expressed in words, and not in figures. *Watts, In re*, 34 L. T. 647; 24 W. R. 701.

If a trustee about to pay money into court under the trustee relief act becomes aware of the existence of a claim after he has filed his affidavit, he must file a supplemental affidavit stating the claim, and in default of so doing, he will be personally responsible for the costs of any application by the claimant necessitated by his neglect. *Allen's Trusts, In re*, 40 L. T. 466; 27 W. R. 529.

Order made under the circumstances for the accountant-general to receive a fund under the trustee relief act on the affidavit of one only of two trustees. *Anon.*, 1 Jur. (N.S.) 974.

—— **Service of Affidavit.**]—The affidavit to be made on a lodgment of funds in court should be served forthwith on "the persons interested in or entitled to them," i.e., in the same way and upon the same parties as if the Chancery Funds Rules, 1874, remained in force, and had not been repealed by the Supreme Court Funds Rules, 1884. *Stenning's Trusts, In re*, 50 L. T. 586.

Notice to Persons entitled to Fund.]—A trustee who pays a fund into court under the trustee relief act, not being required, since the repeal of the Chancery Funds Consolidated Rules, 1874, to set forth in his affidavit the names of the persons entitled to the fund, is no longer required to give notice to such persons under Ord. V. of the Chancery Funds (Amended) Orders, 1874, that order having been rendered of no effect by such repeal. *Graham's Trusts, In re*, 60 L. J., Ch. 98; [1891] 1 Ch. 151; 63 L. T. 664; 39 W. R. 157.

When a legacy had been paid into court by trustees, and the persons entitled to it were resident in Canada:—Held, that notice sent through post by registered letter was sufficient notice. *Merryweather, In re*, 22 L. T. 603.

Where the person mentioned in an affidavit on payment into court under the trustee relief act as being the person interested in the fund could not be found, an opinion was intimated as to what would probably be held sufficient notice of the payment in, but the court declined

to give any directions. *Hardley's Trusts, In re*, 48 L. J., Ch. 335; 10 Ch. D. 664; 40 L. T. 409; 27 W. R. 587.

—— **When Notice Dispensed With.**]—Where the only person entitled to a trust fund paid into court under the trustee relief act had gone to America, and had not been heard of since 1868, service of the notice of the payment into court required to be given by the trustees was dispensed with. *Walters, In re*, 22 L. T. 120.

Where property was given by will to a person, but should he not return to England within seven years of the testatrix's death then over to other persons, and the executor, the seven years having elapsed, and the legatee having been last heard of four years and a half ago in Australia, paid the money into court under the trustee relief act, the money was allowed to be paid to the persons entitled in default of the legatee's return in seven years, and service upon him of notice of the payment into court was dispensed with. *Whitaker's Trust, In re*, 47 L. T. 507; 31 W. R. 114.

On payment into court by trustees of a reversionary fund, which had fallen into possession since the death of a married woman entitled thereto:—Held, that upon production of a full affidavit as to unsuccessful inquiries for the husband, who had gone to Australia in 1850, and had not since been heard of, the court would dispense with notice to the husband. *Hansford, In re*, 7 W. R. 199, 254.

Title of Account.]—Executors paid money into court under the trustee relief act to an account headed "In the matter of the trusts of the will of S. J." The court held that the account was too general to enable it to act under this statute. *Joseph's Will, In re*, 11 Beav. 625.

Observations as to the effect of and the proper mode of proceeding under this act. *Ib.*

In order to indemnify a trustee or executor, who lodges funds in court under the Trustee Indemnity Act (11 & 12 Vict. c. 68), the funds must be lodged to the credit of a particular trust. The court will not make an order where the funds have been improperly lodged. The practice under the said and corresponding English act stated. *Godfrey's Trust, In re*, 2 Ir. Ch. R. 105.

To enable the court to distribute a fund under the act 10 & 11 Vict. c. 96, it must stand to an account which separates it from the other assets, and disconnects it from all the other trusts of the will. *Everett, In re*, 12 Beav. 485.

A fund bequeathed in aliquot parts, on distinct trusts, ought not to be paid by the trustees to the joint account of the several trusts, but ought to be carried to separate accounts. *Tillstone's Trust, In re*, 9 Hare (App.) lix.

Application to have some money paid out of court which had been paid in to an account intituled "The Trusts of the will of J. Robinson, deceased," the application being by the nine children of the testator, all of whom were adult and sui juris, and claimed as residuary legatees. The court, however, declined to pay out to residuary legatees a sum which had been paid in on so general a trust. After consideration of the will, however, the fund was directed to be carried over to an account intituled "The Account Residue," subject to the particular legacies; and then the residuary legatees claiming would be in their right. *Robinson's Trust, In re*, 1 Jur. (N.S.) 750.

Where a fund is paid into court under the trustee relief act to a general account of a will, the court will order it to be carried to the separate account of the person (an infant) named in the trustee's affidavit, as the only person entitled to such fund, and it is not necessary previously to change the title of the account. *Coulson's Trust, In re*, 4 Jur. (N.S.) 6.

Where under the trustee relief act money is paid into court "upon the trusts of a will," it involves the general administration of the estate, and the court will not order it to be transferred to a particular account, except at the request and on the responsibility of the trustee. *Wright's Trusts, In re*, 15 Beav. 367.

Form of order where cash and stock not admitting of division below 1*l.* are paid and transferred into court to separate accounts. *Perry, In re*, 24 W. R. 433.

The balance of the assets of an intestate, after they have been fully administered, should be lodged to a credit intituled, "In the matter of the 11 & 12 Vict. c. 68, and separate credit of the next of kin" of the intestate. *Monahan's Trusts, In re*, Ir. R. 8 Eq. 353.

A fund paid in under the trustee relief act to an account intituled, "In the matter of the estate of a deceased person," will not be paid out without the presence of his legal personal representative and an admission of assets by him. *Edwards' Estate, In re*, 4 W. R. 801.

d. Effect of Payment into Court on Powers of Trustees.

Appointment of New Trustees by Cestui que Trust.]—There being a question whether a fund should be paid to cestuis que trust, infants being interested, the trustee pays it into court under the trustee relief act, and the cestuis que trust appoint new trustees:—Held, that they could do so, as the payment into court specified a "desire to be discharged," and therefore it was competent for them to appoint other trustees under their power in that case to nominate and appoint any other persons, &c. *Bailey's Trust, In re*, 3 W. R. 31.

No Power to Prevent Money Paid in being Paid out.]—Trustees who have paid a fund into court under the 10 & 11 Vict. c. 96, cannot prevent its being paid out to a cestui que trust absolutely entitled to it, on the ground that he is about to file a bill against them to take accounts of the trust. *Wright's Trusts, In re*, 3 K. & J. 419.

Discretionary Powers of Trustees as to Application of Fund.]—Where under a will the income of a fund was payable for the maintenance of T. G.:—Held, that the trustee by paying the fund into court under the trustee relief act relinquished his discretionary power. *Tegg's Trusts, In re*, 15 L. T. 236; 15 W. R. 52.

A trustee having a discretionary power as to the application of a trust fund, does not necessarily abandon it by paying the trust fund

into court. *Landon's Trusts, In re*, 40 L. J., Ch. 370.

Maintenance and Advancement.]—A testator gave all his property to trustees, upon trust to pay the income to his widow, and after her death "to make a weekly allowance to the testator's son S., or his children, for his and their maintenance and support, such allowance to be in the discretion of my trustees." He then gave his trustees a power of advancement, at their discretion, to S. or his children, and concluded, "it being my intention that S., if living, shall have the whole benefit of such moneys, if he shall conduct himself steadily and to the satisfaction of my executors." S., after the death of the widow, assigned the fund absolutely to A. The trustees, in consequence of doubts raised on the construction of the will as to the nature of S.'s interest, and without any observations favourable or otherwise to the conduct of S., paid the fund into court:—Held, that S. took an absolute interest in the whole fund, which passed to his particular assignee. *Coe's Trusts, In re*, 4 K. & J. 199; 4 Jur. (N.S.) 158.

A testator bequeathed to his executors a sum of 450*l.*, which he directed should be held by them in trust for his brother James's family, and should be by his said executors expended for the benefit of the said family, in such a manner as to them should seem most expedient. The executors having paid the 450*l.* into court under the trustee relief act:—Held, that the payment into court terminated the discretionary power of applying the funds. *Mulqueen Trusts, In re, Mulqueen, Ex parte*, 7 L. R., Ir. 127.

—— **Power of Court to Exercise Discretion to make Advances for Maintenance.**]—Where money vested by a deed-poll in trustees upon trust to apply it in such manner in every respect as they in their uncontrolled discretion should think fit for or towards the maintenance, education, advancement, or benefit in any way of all or any one or more exclusively of the other or others of the children of a certain person, and, as to all or any part of the said sum which should not have been applied as hereinbefore mentioned previously to the youngest attaining the age of twenty-one years, in trust for all the children in equal shares, is paid into court under the trustee relief acts, it is competent for the court to exercise the discretion as to advances for maintenance, education, advancement, or benefit originally given to the trustees, and the residue of the fund, after making such advances, will be divisible among the beneficiaries in equal shares without taking such advances into account. *Ashburnham's Trust, In re*, 54 L. T. 84. But see *Nettlefold's Trusts, In re*, 59 L. T. 315.

Retirement of Trustee.]—A trustee who had paid money into court under the Trustee Relief Act (10 & 11 Vict. c. 96):—Held, to have retired from his trust. *Williams' Settlement, In re*, 4 K. & J. 87; 6 W. R. 218.

—— **Right to File Bill to be Relieved from Trusteeship.**]—The 10 & 11 Vict. c. 96, by enabling a trustee to pay a trust fund into court, does not deprive him of the right to file a bill to be relieved from the trusteeship, and he will, in a proper case, be allowed his costs of such bill as between solicitor and client. *Barker* v. *Peile*, 2 Dr. & Sm. 340; 5 N. R. 425; 34 L. J., Ch. 497; 11 Jur. (N.S.) 436; 12 L. T. 50; 13 W. R. 573.

See also ante, B. 7.

e. Costs of Payment into Court.

Present Practice—Originating Summons.]—Trustees who pay money into court under the provisions of the trustee relief act, when the question arising might be decided upon an originating summons under Ord. LV. of the Rules of Court, 1883, will in future not be allowed the costs occasioned by such payment into court. *Giles, In re*, 55 L. J., Ch. 695; 55 L. T. 51; 34 W. R. 712.

Payment in Justifiable—Bonâ fide Doubt.]—A trustee will be allowed his costs of paying money into court under the trustee relief act where there is a case of bonâ fide responsibility. He is not bound to take upon himself the responsibility of deciding between adverse claimants. *Headington's Trust, In re*, 27 L. J., Ch. 175; 6 W. R. 7.

If a trustee entertains bonâ fide legal doubts as to the parties beneficially entitled to trust funds, he is justified in paying them into court, and he will not be made to pay the costs of payment out of court. *Wylly's Trusts, In re*, 28 Beav. 458; 6 Jur. (N.S.) 906; 8 W. R. 645.

Trustees not entitled as of course to their costs of paying a fund into court under the trustee relief act where such payment has been vexatious, and not justified by the possibility of a question as to the title to the fund. Where, however, the person entitled to the fund, and objecting to its being paid in, claims by representation, trustees will have their costs, as the possibility of a disposition by the deceased person through whom the claim is made is not excluded. *Lane's Trusts, In re*, 3 W. R. 134.

—— **Refusal of Cestui que Trust to admit Account Correct.**]—Trustees have a right to some sort of discharge from their cestuis que trust, not, perhaps, a release, unless the instrument creating the trust was under seal; and trustees, between whom and their several cestuis que trust disputes have arisen as to the amounts actually due to them respectively, are justified in paying into court, to the separate account of each cestui que trust, the sum to which they believe him to be entitled, and may have their costs of making such payment out of the respective funds. *Wright's Trusts, In re*, 3 K. & J. 419.

—— **Married Woman Absolutely Entitled.**]—A sum of money having been left by will to a married woman, it was agreed by the husband and wife that a settlement should be made. Difficulties subsequently arose, and the parties altered their views, and called upon the trustee of the will to hand over the money to the husband. The trustee declined to do so, and paid the fund into court under 10 & 11 Vict. c. 96. Upon a petition by the husband and wife that the money might be paid out to the husband, and that the trustee might pay the costs occasioned by his conduct:—Held, that no binding agreement for a settlement had been shown, but that the trustee was justified in the course he had pursued, and his costs must be paid. *Bendyshe, In re*, 26 L. J., Ch. 814; 3 Jur. (N.S.) 727; 5 W. R. 816.

Where a trustee has paid into court a fund to which a married woman is absolutely entitled, he is entitled as of course to his costs between solicitor and client, unless his conduct has been simply capricious or vexatious. *Swan's Trusts, In re*, 2 H. & M. 34 ; 4 N. R. 53 ; 10 L. T. 334 ; 12 W. R. 738.

Payment into court by an executor of a legacy bequeathed to a married woman, not specifically appropriated, the husband and wife being abroad, and the husband requiring it to be paid under a power of attorney :—Held, that the executor had a right to pay it in ; his costs of paying in to come out of the general estate, his costs of appearing on a petition to be paid out of the legacy. *Jones, In re*, 3 Drew. 679 ; 5 W. R. 336.

—— **On Appointment of New Trustee.**]—A trust fund was paid into court by a trustee upon being informed that a new trustee, to whose proposed appointment he had previously objected on the ground that he was unknown to him, and believed not to be a fit and proper person, had been appointed joint trustee with him over the fund :—Held, that the trustee was entitled to receive his costs upon the petition of the cestui que trust for a transfer of the fund to new trustees. *Williams's Trust, In re*, 4 K. & J. 87 ; 6 W. R. 218.

—— **Assurance Company—Costs as between Solicitor and Client.**]—An assurance company properly paying money into court under the trustee relief act is entitled to costs as between solicitor and client. *Webb's Policy, In re*, 35 L. J., Ch. 850 ; L. R. 2 Eq. 456 ; 12 Jur. (N.S.) 595 ; 14 L. T. 89 ; 14 W. R. 857. S. P., *The United Kingdom Life Assurance Co., In re*, 6 N. R. 59 ; 34 L. J., Ch. 554 ; 11 Jur. (N.S.) 424 ; 12 L. T. 441 ; 13 W. R. 645.

—— **Cost of Copies of Affidavits of Claimants.**]—Trustees who have paid trust funds into court under the 10 & 11 Vict. c. 96, and take copies of affidavits of parties claiming to be beneficially interested in the fund, will not be allowed their costs of the copies of affidavits so taken by them. *Lazarus, In re*, 3 K. & J. 555.

—— **Lunatic Trustee—Costs of Transfer.**]—Where a trustee becomes lunatic, and consequently an application to the court of lunacy becomes necessary for the purpose of obtaining a transfer of the trust funds, no order as to costs will be made. *Garden, In re*, 6 N. R. 347—L.JJ.

Payment in Improper—Executors Informed that Bill about to be Filed against them.]—Executors being informed that a bill was about to be filed against them by a person entitled to a share of residue, charging them with breaches of trust, paid a sum of money into court under the trustee relief acts, as the share of that person. The bill was afterwards filed, and, on an application for payment out of court by the person entitled, the trustees were not allowed their costs. *Waring, In re*, 21 L. J., Ch. 784 ; 16 Jur. 652.

—— **Undisputed Balance.**]—Trustees who had paid into court, under 10 & 11 Vict. c. 96, an alleged balance, the title to which they believed undisputed, the party they believed entitled having previously demanded payment, and offered a discharge pro tanto :—Held, not entitled to costs upon a petition for payment of the fund out of court. *Heming's Trusts, In re*, 3 K. & J. 40 ; 26 L. J., Ch. 106 ; 2 Jur. (N.S.) 1186 ; 5 W. R. 33.

—— **Legacy to which Professed Nun was Entitled.**]—Where a professed nun, while in a French convent, executed a deed, conveying all her real and personal estate to trustees upon trust to sell and pay the proceeds to the superior priest of a certain congregation, for the benefit of the congregation at his discretion, and covenanted to assign all her future property upon the same trusts, and subsequently upon the nun's becoming entitled to a legacy under a will, the trustees of the will paid the same into court under the trustee relief act, and a petition was presented by the nun and the trustees of the deed praying payment to the latter :—Held, by Romilly, M.R., that the fund ought not, without distinct evidence that the petition was her free and unbiassed act, to be paid out of court ; but upon appeal, the court directed the fund to be paid out either to herself or to the trustees she had appointed, and considering that the trustees of the will were not justified in paying the money into court, refused them their costs. *Metcalfe's Will, In re*, 33 L. J., Ch. 308 ; 10 Jur. (N.S.) 287 ; 10 L. T. 78 ; 12 W. R. 538.

—— **No Sufficient Reason.**]—Trustees who, after accepting the trust, had paid the trust fund into court without sufficient reason, refused their costs of an application to pay the income to the tenant for life. *Leake's Trusts, In re*, 32 Beav. 135 ; 1 N. R. 417 ; 9 Jur. (N.S.) 453 ; 7 L. T. 816 ; 11 W. R. 352.

A fund was held in trust for A., an unmarried lady, for life, but to cease if "by any means whatever" it should vest in or become payable to any other person. A. afterwards married, and her life interest was settled to her separate use without power of anticipation, by a settlement to which the trustees purported to be parties, but to which they never assented. The trustees thereupon paid the trust fund into court :—Held, that as the trusts which they had accepted had not been varied either by the marriage or the settlement, they were not justified in paying the money into court, and they were refused their costs of appearing on a petition for payment of the income to the tenant for life. *Ib.*

—— **Unreasonable Doubts as to Trust.**]—Trustees paying money into court, upon doubts as to questions of law and fact which the court thought unreasonable, were disallowed costs of appearing on the petition. *Pearson's Trusts, In re*, 20 L. T. 8 ; 17 W. R. 365.

The trustees of a trust fund to which their cestui que trust has become entitled in default of appointment by a tenant for life, are justified in paying it over to him on being informed in writing by the solicitor to the parties that he has reason to believe that no appointment has been made ; and would be free from liability in doing so. *Cull's Trusts, In re*, 44 L. J., Ch. 664 ; L. R. 20 Eq. 561 ; 32 L. T. 853 ; 23 W. R. 850.

Trustees who under such circumstances pay the trust fund into court under the trustee relief act will not, as a rule, be entitled to their costs. *Wylly's Trusts, In re*, supra, col. 936, explained. *Ib.*

Trustees will not be allowed the costs occasioned by paying money into court under the Trustee Relief Act, 10 & 11 Vict. c. 96, when

they do so for the mere purpose of escaping liability, and when there is no reasonable doubt as to the performance of their trust. *Elliot* or *Eliot's Trusts, In re*, 42 L. J., Ch. 289 ; L. R. 15 Eq. 194 ; 21 W. R. 455.

A., the surviving executor of the last surviving trustee of a will, whereby a fund was settled upon B. for life, with remainder to the children, who survived her, paid the dividends to B. during her life, and then paid the fund into court :— Held, that A. had accepted the trust, and there being no difficulty in ascertaining what children B. left, the payment into court was unnecessary, and he could not be allowed his costs. *Abbot's Trusts, In re*, 38 L. T. 442.

—— **Payment in after Notice of Objection by Cestuis que Trust.**]—Trustees after being warned by their cestuis que trust that if they paid the trust fund into court under the 10 & 11 Vict. c. 96, the cestuis que trust should object to the trustees being allowed the costs of paying the fund into and taking it out of court, nevertheless paid the fund into court, stating by their affidavit, not that they had any doubts as to the title of their cestuis que trust, but that "to the best of their knowledge and belief the cestuis que trust were the only persons interested in or entitled to the trust fund, and that the facts mentioned in that affidavit were stated upon their own knowledge, and they had acquired such knowledge as trustees." The cestuis que trust then presented a petition for the payment of the fund out of court, and praying that the costs of the petition and of paying the fund into court might be paid by the trustees personally :— Held, that the trustees who had been served with and appeared upon the petition were not entitled to the costs of such appearance, but only to their costs of paying the money into court. *Covington's Trusts, In re*, 25 L. J., Ch. 238 ; 1 Jur. (N.S.) 1157.

Trustee ordered to pay Costs—Payment in without Waiting for Production of Evidence.]—The court has jurisdiction to order a trustee to pay the costs of an application for payment out of court of a fund paid in by him under the 10 & 11 Vict. c. 96. *Woodburn's Trusts, In re*, 1 De G. & J. 333 ; 26 L. J., Ch. 522 ; 3 Jur. (N.S.) 799 ; 5 W. R. 423, 642.

A trustee of a small trust fund, which had become divisible, called upon the claimants for proof of their title. They procured evidence which, though not technically complete, was tolerably satisfactory, and he declared himself ready to pay the fund to them. Afterwards, without assigning any reason, he receded from this determination, and the matter, which had been conducted on his behalf by his country solicitors, was placed in the hands of his London agents, who made various objections to the sufficiency of the evidence. The claimants produced additional evidence, and requested to know what more the trustee required, and offered to produce it. The trustee, however, without waiting for its production, paid the money into court. The applicants petitioned for payment of the fund to them, and made out their title to the satisfaction of the court :— Held, that the trustee had been properly ordered to pay the costs of the petition. *Ib.*

The opinion of Wood, V.-C., on this point, expressed in *Heming's Trusts, In re*, supra, col. 937, overruled. *Ib.*

—— **No Inquiry as to Parties Entitled.**]—A trustee paid money into court under the trustee relief act without making inquiries for the parties entitled to the fund :—Held, that he must pay the costs which the cestuis que trust, who were officers in the Austrian service, had been put to in obtaining payment of the money out of court. *Knight's Trusts, In re*, 27 Beav. 45 ; 28 L. J., Ch. 625 ; 5 Jur. (N.S.) 326.

—— **Share of Married Woman.**]—Trustees paid the ascertained share of a residue of a married woman into court, under the trustee relief act. The court refused to make the trustees pay the costs, observing that it was not desirable to act too strictly in such cases. *Brocklesby, In re*, 29 Beav. 652.

Trustees are not justified, as a matter of course, in paying a married woman's legacy into court, but will be liable for costs if such payment appears vexatious and unnecessary. *Swan's Trusts, In re*, supra, col. 937, questioned. *Roberts' Trusts, In re*, 38 L. J., Ch. 708 ; 17 W. R. 639.

—— **Doubt as to Right of Claimant.**]—A trustee is not justified in paying a fund into court under the 10 & 11 Vict. c. 96, s. 1, merely because, acting bonâ fide, he entertains a doubt as to the right of the claimant. There must be a reasonable case of uncertainty, or he may be ordered to pay the costs of the petition for payment out. *Elgar, In re*, 11 L. T. 415.

—— **Refusal of Person entitled to give Release.**]—A. and B., being each entitled to one-fifth of a reversionary fund, mortgaged their shares with a power of sale. B. was a mere surety for A., and A. afterwards assigned his share to B. for his indemnity, with a power to sell and to give receipts for the share and the produce of the sale. The mortgagees sold the reversionary interest, and refused to pay the surplus to B. without the concurrence and release of A., and they paid the fund into court :—Held, that this was improper, and they were ordered to pay the costs of a petition to get the money out of court. *Folingo's Mortgage, In re*, 32 Beav. 131.

A trustee vexatiously paying money into court under the trustee relief act ordered to pay the costs of the petitioner for obtaining payment. *Cater's Trusts, In re*, 25 Beav. 361.

A trustee paid a trust fund into court, under the trustee relief act, merely because other trustees to whom it was payable declined to give a release. He was ordered to pay the costs of getting the money out of court. *Id.* 366.

—— **Request Refused to have Opinion of Counsel at Cost of Claimant.**]—By a marriage settlement, which empowered the husband and wife, or the survivor of them, to appoint new trustees, a sum of money was vested upon certain trusts in trustees, their executors, &c. The last survivor of the trustees appointed Sir R. de B. and Lady de B. executor and executrix of his will, and died. They proved the will ; and afterwards the husband, who had survived his wife, by deed, indorsed on the settlement, appointed three new trustees, and required Sir R. de B. and Lady de B. to transfer the trust fund to them. Sir R. de B. requested to have the opinion of counsel, the costs to be paid out of the dividends. This request was refused, on

the ground that there was not any difficulty or risk. Sir R. de B. and Lady de B. thereupon brought the trust fund into court under the trustee relief act. On a petition by the husband for a transfer of the fund to the new trustees:—Held, that Sir R. de B. should pay the costs. *Wise's Trusts, In re*, 3 Ir. Eq. R. 599.

—— **Appointment by Donee under General Power by Will by which Executor also Appointed.**]—A married woman having, under a settlement, a general power of appointment by will over a fund of personal estate, made a will directing that the fund should be divided among five persons, and appointed executors. The trustees of the settlement paid the fund into court under the trustee relief act, and the cestuis que trust presented a petition for payment out, and established their title by evidence. Malins, V.-C., ordered payment of the fund to the petitioners, but directed the trustees to pay the costs of the petition (except the costs of the evidence of title) on the ground that they ought to have paid the fund to the executor to be distributed:—Held, that the case was governed by *Taylor* v. *Dowlen* (38 L. J., Ch. 680; L. R. 4 Ch. 697; 21 L. T. 70; 17 W. R. 778), and that an appeal would not lie. *Hoskin's Trusts, In re*, 46 L. J., Ch. 817; 6 Ch. D. 281; 35 L. T. 935; 25 W. R. 779.

Semble, that the decision of the V.-C. on the question of law was right, and that the executor of the donee of the power was the proper person to give a discharge. *Ib.*

But see as to trustee's right to appeal in respect of costs, *Turner* v. *Hancock*, 51 L. J., Ch. 517; 20 Ch. D. 303; 46 L. T. 750; 30 W. R. 480.

Bill Filed on Trustees Refusing to Pay into Court.]—Any trustee who entertains a reasonable doubt or difficulty as to the title of the person who claims to be his cestui que trust should pay the funds into court. *Gunnell* v. *Whitear*, 39 L. J., Ch. 869; L. R. 10 Eq. 664; 22 L. T. 645; 18 W. R. 883.

A trustee who, entertaining such doubt, did not pay the funds into court, but by his conduct caused the institution of a suit, was allowed out of the funds only the costs that he would have been entitled to if he had paid the funds into court and the costs of appearing on the petition. *Ib.*

Where trustees of a legacy given for the benefit of a lady, with limitations over, one of which trustees being also the residuary legatee under the will, refused to comply with the request of the tenant for life, that they would pay the legacy into court under the provisions of the Trustee Relief Act, 1847, although she offered to pay the costs of the proceedings for that purpose, and she consequently instituted a suit and obtained an order for payment of the fund into court, the costs of the suit were directed to be paid out of the residue. *Handley* v. *Davis*, 28 L. J., Ch. 873; 5 Jur. (N.S.) 190.

On the sale of real estate part of the purchase money was invested in the names of trustees, who were to hold the fund until sufficient evidence should be produced of the death of a certain person, and on such evidence being produced were to pay the fund to the vendors. The vendors in the following year, thinking that they had sufficient evidence of the death, called upon the trustees either to pay the fund to them or to pay it into court under the trustee relief act. The trustees having refused to do so, a bill was filed to compel them to pay over the fund:—Held, that the trustees, having caused unnecessary expense by their refusal to pay the fund into court, were only entitled to such costs as they would have got if they had paid the fund into court, and the vendors had presented a petition for the payment of the fund to them. *Weller* v. *Fitzhugh*, 22 L. T. 567.

Bill Filed instead of Payment into Court by Trustee.]—The 10 & 11 Vict. c. 96, by enabling a trustee to pay a trust fund into court, does not deprive him of the right to file a bill to be relieved from the trusteeship, and he will, in a proper case, be allowed his costs of such bill as between solicitor and client. *Barker* v. *Peile*, 2 Dr. & Sm. 340; 5 N. R. 425; 34 L. J., Ch. 497; 11 Jur. (N.S.) 436; 12 L. T. 50; 13 W. R. 573.

Where a trustee has an ascertained sum in his hand which is claimed by opposite parties, the proper course is to pay the money into court under the trustee relief act. *Wells* v. *Malbon*, 31 Beav. 48; 31 L. J., Ch. 344; 8 Jur. (N.S.) 249: 6 L. T. 32; 10 W. R. 364.

Where a trustee, instead of so doing, files a bill, he will be allowed only such costs as he would have received if he had paid the money into court under that act. *Ib.*

Deduction of Costs by Trustees before Payment in.]—The trustee relief act provides no special means for making the costs, which trustees may deduct before paying money into court under its provisions, the subject of inquiry. *Bloye's Trust, In re*, 1 Mac. & G. 488; 2 Hall & Tw. 140; 19 L. J., Ch. 89; 14 Jur. 49—L.JJ. And see *Parker's Will, In re*, post, col. 943.

Upon a petition under the trustee relief act, the court has no jurisdiction to order the trustees to refund any sum retained by them for their costs. *Leake's Will, In re*, 32 Beav. 135; 1 N. R. 417; 9 Jur. (N.S.) 453; 7 L. T. 816; 11 W. R. 352.

Where an executor, paying into court a part of a legacy, has deducted his costs of paying it in, the court has no jurisdiction, under the trustee relief act, to order payment by the executor to the legatees of the amount of those costs. *Barber's Will, In re*, 2 N. R. 571; 32 L. J., Ch. 709; 9 Jur. (N.S.) 1098; 8 L. T. 825; 11 W. R. 1056.

Trustees, on paying a fund into court, retained a sum for their costs. On a petition to obtain the fund out of court, the trustees obtained the costs of their appearance, but all their costs were ordered to be taxed. *Hue's Estate, In re*, 27 Beav. 337; 28 L. J., Ch. 893; 5 Jur. (N.S.) 1235; 7 W. R. 562.

Trustees, on paying a fund into court, deducted 44*l.* 14*s.* 6*d.* in respect of their costs. On a petition by the person entitled to the dividends praying that the same might be paid to her, and that the costs of the trustees, who appeared on the petition, might be taxed:—Held, that the costs of their appearance and their costs, charges, and expenses properly incurred in relation to the fund in court, ought to be taxed, and that they ought to be charged with the sum deducted by them on payment into court. *Sweeper's Trusts, In re*, 24 L. T. 413; 19 W. R. 793.

When a trustee's claim for costs, charges, and expenses is contested, he is not entitled to retain

the amount of such claim and pay the balance of the trust fund into court, but should pay the whole fund into court and leave it for the court to award the proper amount to which he is entitled in respect of his claim. *Beaty* v. *Curson*, 38 L. J., Ch. 161 ; L. R. 7 Eq. 194 ; 20 L. T. 61.

The sum of 8*l.* is the proper sum to be deducted by trustees in the first instance for the costs of lodging money in court under the trustee relief act. *Blayney's Trust. In re*, Ir. R. 9 Eq. 413. S. P., *Boyd's Trusts, In re*, Ir. R. 1 Eq. 489.

2. Administration of Fund and Payment out.

a. Jurisdiction of the Court.

Jurisdiction Limited to Fund brought into Court.]—On applications for payment out of a fund which has been paid into court under the Trustee Relief Act (10 & 11 Vict. c. 96), the jurisdiction of the court is limited to the fund which has been actually brought into court ; and repayment by the trustees of costs and expenses deducted by them from the fund before payment in cannot be ordered. If it can be shown that in such a case the costs and expenses have been improperly retained separate proceedings must be taken against the trustees to recover the amount. *Parker's Will, In re*, 58 L. J., Ch. 23 ; 39 Ch. D. 303 ; 60 L. T. 83 ; 37 W. R. 313—C. A.

A trustee paying into court a sum of money under the trustee relief act, although such sum may be less than the amount of the trust fund in his hands, is discharged as to the money so paid in, and after such payment the parties beneficially interested can proceed only under the act to recover the money so paid in, and the ordinary jurisdiction of the court as against the trustee is confined to the balance which may remain due from the trustee in respect of the trust fund after such payment. *Goode* v. *West*, 9 Hare, 378 ; 21 L. J., Ch. 127 ; 15 Jur. 1025.

The trustee relief act takes away the jurisdiction of the court by bill against the trustee in respect of the money which he has paid into court. *Thorp* v. *Thorp*, 1 K. & J. 438.

Question of Election.]—Quære, whether the court has jurisdiction to decide a question of election on a petition under the trustee relief act. *Bernard, Ex parte, Leigh's Trust, In re*, 6 Ir. Ch. R. 133.

Sanity of One of the Parties.]—Where a petition was presented under the trustee relief act, and a question as to the sanity of one of the parties arose :—Held, that the court had jurisdiction to decide the matter as if it were a suit, and if necessary the court could direct an issue. Semble, also, that where there are creditors or unascertained claims a suit is the proper course. *Allen's Will, In re*, Kay (App.) li.

Construction of Marriage Settlement.]—In a case upon the construction of a marriage settlement and the interest of the children of the marriage under it :—Held, that the question raised was a matter which it was competent for the court to deal with on petition, under the trustee relief act. *Dalton's Settlement, In re*, 1 De G. M. & G. 265 ; 21 L. J., Ch. 681 ; 16 Jur. 253.

Discretion to Direct Bill to be Filed.]—Under the trustee relief act it is entirely a matter for the discretion of the court to direct a bill to be filed, if such a mode of proceeding shall appear to be necessary ; but the lord chancellor has the same jurisdiction upon petition as upon a bill. *Lewis* v. *Hillman*, 3 H. L. Cas. 607. Affirming *S. C.* nom. *Bloye's Trust, In re*, 1 Mac. & G. 488 ; 2 Hall & Tw. 140 ; 19 L. J., Ch. 89 ; 14 Jur. 49—L.C.

Validity of Deed.]—On a petition presented under that act praying for the payment out of court of money then in court, and on cross-petition in opposition thereto, the court has full power to declare the validity or invalidity of any deed on which the claim to that money is rested. *Ib.*

Quære, whether this may not properly be done upon petition alone, without any necessity for filing a cross-petition. *Ib.*

Such necessity, if it exists, may be dispensed with by consent. *Ib.*

A. was entitled to a reversionary interest in one-fifth share of certain real and personal estate then held by a devisee for life. A. granted to B. an annuity upon it ; the annuity deed, which was registered, contained a power of sale ; the annuity fell into arrear, and B. determined to exercise the power of sale. The sale was effected for a sum of 900*l.* ; but the purchaser discovered an objection in the memorial registered, which rendered the annuity deed invalid, and he refused to complete the purchase, and obtained a return of his deposit money. The solicitors of B. (acting at the time, as they stated, from motives of kindness to A.) obtained from A., who had not the benefit of any solicitor's advice, an assignment of the reversionary interest to L. for the sum of 900*l.*, and after the reversion fell in by the death of the tenant for life, claimed the property as the purchaser's, alleging that the purchase had been made by L. as their agent and on their behalf. The executors declined to pay them the value of the property, which it was then found amounted to 1,770*l.*, but paid it into court, under the trustee relief act. The solicitors presented a petition to have the money paid out to them as purchasers of the reversionary interest under the deed of assignment to L. A. opposed the payment on affidavits, which set up a case of deception and fraud practised on him. The parties on both sides agreed that the case should be heard on petition and affidavits as if a petition and cross-petition had been filed. The vice-chancellor ordered the money to be paid out of court to the solicitors as purchasers. The lord chancellor, on appeal, reversed this order, declared the assignment to be invalid, and ordered the money to be paid back into court, reserved the costs, and gave either of the parties liberty to make any further application to the court :—Held, that the lord chancellor's order was correct ; that the purchase by the solicitors, who were at the time the solicitors of the vendor, was contrary to the rules of equity, and void ; that without any consent the court had jurisdiction, on petition or cross-petition, under the statute, to declare the deed of assignment invalid, as well as to order repayment of the money ; that the consent here given waived any possible necessity for a cross-petition ; and that the order was not bad for not directing a return to the solicitors of the money they had paid as purchase money ; for that the leave reserved

to either party to make any further application to the court enabled them to obtain a return of this money. *Ib.* But see *Way's Trusts, In re*, 34 L. J., Ch. 49; 10 Jur. (N.S.) 1166; 11 L. T. 495; 13 W. R. 149.

Rectification of Settlement.]—A fund in court, which has, contrary to the intention of the parties, clearly proved, been included in a settlement, will only be paid out to the parties entitled under that settlement until it has been reformed; and the court has no jurisdiction upon petition to reform an instrument. *Malet, In re*, 30 Beav. 407; 8 Jur. (N.S.) 226. But see *Hoare's Trusts, In re*, 4 Giff. 254; 1 N. R. 161; 9 Jur. (N.S.) 167; 7 L. T. 523; 11 W. R. 181; and *De la Touche's Settlement, In re*, L. R. 10 Eq. 603.

Order for Distribution and Investment.]—The testator directed his debts and funeral and testamentary expenses to be paid out of his personal estate. He then devised his freeholds to trustees to be sold, and the proceeds, after deducting costs, to be deemed part of the residue of his personal estate, and to be subject to the dispositions thereinafter made of the same. The testator then gave a legacy of 1,000*l.* upon certain trusts, and finally directed all the rest and residue of his personal estate to go to his wife for life, remainder over. The pure personal estate being insufficient to pay all the debts and legacies:—Held, that the legacy of 1,000*l.* ought to be paid out of the moneys arising from the sale of the real estate. There was only one petition presented in the present case, and the petitioner being held not to be entitled, another petition ought to have been presented by the party whose claim was preferred. But in order to save expense, the court, having under the Trustee Relief Act the same jurisdiction on such a petition as on a bill, made an order for distribution and investment, according to the rights of the parties. *Woollard's Trust, In re*, 18 Jur. 1012.

Legal Estate in Trustees.]—A testator devised a freehold to trustees for the benefit of E. for life and for her separate use, and after her death upon trusts for such of the children of E. as, being sons, should attain twenty-one, or, being daughters, should attain that age or marry. E. died after the testator, leaving an infant daughter who did not marry before attaining twenty-one:—Held, that the legal estate was in the trustees, and the daughter of E. took the property on attaining twenty-one, but the interim rents went to the residuary devisee. *Eddels' Will, In re*, 40 L. J., Ch. 316; L. R. 11 Eq. 559; 24 L. T. 223; 19 W. R. 815.

On a petition for payment out of the interim rents which had been paid in under the Trustee Relief Acts, the court decided that the legal estate was in the trustees. *Ib.*

Question of Title—Petition or Action.]—Application by person claiming to be entitled to some money which had been paid into court under the Trustee Relief Act, 1847, asking for leave to make out his title to it on a bill rather than on a petition, stating that the only point to be decided was, whether a legacy "to the oldest son of my dear sister J." lapsed or not by the decease, in the lifetime of the testator, of the child who was eldest son at the date of the will, refused. *Harris's Trust, In re*, 2 Eq. R. 1110; 18 Jur. 721; 2 W. R. 442.

Where a fund is brought into court under the trustee relief act, and the title of one of the claimants is adverse to that of the trustees who brought in the fund, the court will not decide the case on petition under the act, but will direct a bill to be filed. *Fozard's Trusts, In re*, 1 K. & J. 233; 3 Eq. R. 759; 24 L. J., Ch. 441; 3 W. R. 219. S. P., *Draper's Settlement, In re*, 9 W. R. 805.

Petition to Appoint new Trustees.]—The surviving trustee under two wills, having gone abroad temporarily, pays the trust fund into court, and a petition is presented by the cestuis que trust to appoint new trustees: and upon the question whether the fund should not remain in court:—Held, that such was not the object of the Trustee Relief Act, but the parties interested must be satisfied with the trustees appointed. *Lloyd's Trust, In re*, 2 W. R. 371.

Question by Third Parties as to Amount of Fund.]—Where trustees pay a fund into court under the 10 & 11 Vict. c. 96, as the portion of A., the court will not, upon petition by A. for payment out to him of the fund, entertain any question by third parties as to whether it is the right sum. *Jenkins's Trusts, In re*, 3 N. R. 408; 10 Jur. (N.S.) 332; 10 L. T. 58.

b. Persons to whom Payment will be Made.

Trustees.]—Where an estate has been completely administered, the court will, in general, order the funds to be paid out to the trustees, and will not interfere with their discretion where they are agreed. *Butler* v. *Withers*, 1 J. & H. 333.

A fund in court ordered to be repaid to a trustee, he undertaking to allocate it to legatees residing in America. *Ibberson* v. *Warth*, 1 Jur. (N.S.) 440; 3 W. R. 230.

A trustee who has paid a sum of money into court under the 10 & 11 Vict. c. 96, may afterwards apply by petition, that the fund may be dealt with as in an administration suit. *Trower's Trusts, In re*, 1 L. T. 54.

—— **Sole Trustee.**]—The court will never order payment out of a fund in court to a sole trustee in the absence of any parties interested in the estate, unless such estate is substantially represented. *Roberts, In re*, 7 Jur. (N.S.) 818; 9 W. R. 758.

The residue of the purchase money, after payment of incumbrances upon lands sold to the landed estates court, will not be paid over to a sole trustee of such lands, although the instrument by which they were put in settlement appointed only one such trustee. *Dickinson's Estate, In re*, Ir. R. 3 Eq. 344.

—— **Absence Abroad of One of several Trustees.**]—In the absence abroad of one of several trustees the court may order a sum of money under its control to be paid to the other trustees, without requiring the absent trustee to join in giving the receipt by power of attorney. *Clark* v. *Fenwick*, 42 L. J., Ch. 320.

—— **Infant Trustee.**]—The sole surviving trustee of stock was an infant, and was also absolutely entitled beneficially to the fund. The court ordered the fund to be brought into court under the trustee relief act, and part of the capital

to be sold out and applied for the infant's benefit. *Pitt, In re*, 1 Jur. (N.S.) 1155.

Pauper Tenant for Life.]—A party entitled for life to the dividends of a fund paid into court, under the 10 & 11 Vict. c. 96, allowed to apply for payment in formâ pauperis. *Money, In re*, 13 Beav. 109; 20 L. J., Ch. 274; 15 Jur. 51.

Executor.]—A sum of money was paid into court by an executor, in the belief that it was the clear residue. Debts were afterwards discovered to be due from his estate; and on a petition, consented to by the parties beneficially interested, an order was made for payment out to the executor of money to the requisite amount, he undertaking to apply it according to the trusts of the will. *Tournay, Ex parte*, 3 De G. & Sm. 677; 19 L. J., Ch. 257; 14 Jur. 263.

—— **Supposed Intestacy—Money paid into Court by Administrator—Subsequent Discovery of Will.**]—A woman died on October 27, 1889, as it was supposed, intestate. Administration was taken out to her estate, and the administrator paid into court under the trustee relief act, to the credit of several infants who were among her next of kin, sums of money representing their shares of her estate. A will being afterwards found, the grant of administration was revoked, and the will proved. The executor petitioned for payment out of the money to him. The court made the order asked for on proof that legacies given by the will to the infants were secured. *Hood's Trusts, In re*, 65 L. J., Ch. 372; [1896] 1 Ch. 270; 74 L. T. 77; 44 W. R. 382.

Administrator of Cestui que Trust.]—A trust fund paid into court under the trustee relief act, after the death of the cestui que trust, ordered to be paid to the administrator of the cestui que trust, under a grant of letters of administration by the archdeaconry court, obtained after the fund was in the court of chancery. *Spencer's Trust Estate, In re*, 9 Hare, 410; 1 De G. M. & G. 311; 21 L. J., Ch. 314; 16 Jur. 233.

Payment to Widow after Title found by Master.]—Where stock paid into court under 10 & 11 Vict. c. 96, was settled in default of issue of the marriage on the husband absolutely, and he, by his will, there being no children, bequeathed it to his wife, the court refused to order it, on petition, to be transferred to her until the fact on which her title depended had been found by the master. *Woods' Settlement, In re*, 15 Sim. 469.

Cestui que Trust absolutely entitled.] — Trustees who have paid a fund into court under the 10 & 11 Vict. c. 96, cannot prevent its being paid out to a cestui que trust absolutely entitled to it on the ground that he is about to file a bill against them to take the accounts of the trust. *Wright's Trusts, In re*, 3 K. & J. 419.

Foreign Settlement—Father as Guardian of Infant Child.]—Stock paid into court under the trustee relief act, and forming the subject of a settlement according to the law of Prussia, under which the husband took no interest, ordered, after the death of the wife, to be paid out to him in his capacity of guardian of the infant child of the marriage, who was entitled to the fund upon the death of her mother. *Brown's Trusts, In re*, 12 L. T. 488; 13 W. R. 677.

Wife Deserted by Husband.]—A wife who has been deserted by her husband for more than twenty years, and has heard nothing of him for more than five years, is entitled to receive a sum of money, paid into court, as though a feme sole. *Pope, In re*, 21 W. R. 646.

Minors.]—An annuity was bequeathed to the separate use of an unmarried minor; and some gales of the annuity having been lodged by the trustees under the trustee relief act, the court, on the petition of the minor's father, directed the trustees to hold the future gales of the annuity as they should accrue to the credit of the matter, and that they should be paid to the petitioner's solicitor, on his undertaking to transmit them to the petitioner, who also undertook to account yearly for their due application to the minor's education. *Lloyd's Trusts, In re*, Ir. R. 2 Eq. 507.

—— **Scotch Minors and their Curators.**] — Funds, lodged under the trustee relief act to the separate credit of minors, natives of and domiciled in Scotland, ordered to be transferred to the minors and their curator. *Ferguson's Trusts, In re*, 8 Ir. Eq. R. 563.

Conflicting Claims to Trust Fund standing in Name of one Claimant.]—When there are conflicting claims to a trust fund, and the trustees have paid it into court to the account of one of the claimants, without giving, at the same time, notice to the court of the adverse claims, payment of the fund to the person in whose name it stands ordered by the court, but without prejudice to any question as between the trustees and the adverse claimants. *Jenkins's Trusts, In re*, supra, col. 946.

Person not mentioned in Trustee's Affidavit.] —A person not mentioned in the trustee's affidavit may apply by petition for the payment out of court of moneys paid in under the trustee relief act. *Jephson, In re* (1 L. T. 5), not followed. *Puttrell's Trusts, In re*, 47 L. J., Ch. 11; 7 Ch. D. 647; 37 L. T. 374.

Lunatic.] — Where a person who has been found a lunatic is entitled to a fund which has been paid into court under the trustee relief act, a petition may be presented in chancery under the trustee relief act and in lunacy, and the court has jurisdiction to make an immediate order for the transfer of the fund to the account of the lunatic. *Tate, In re*, 20 Ch. D. 135; 47 L. T. 2.

—— **Not so Found by Inquisition.**] — The court of chancery, in its ordinary jurisdiction, can entertain applications relating to the property under its control of persons of unsound mind not found lunatic by inquisition. *Macfarlane, In re*, 2 J. & H. 673; 31 L. J., Ch. 335; 8 Jur. (N.S.) 208; 6 L. T. 154; 10 W. R. 369.

Stock transferred into court under the trustee relief act, and constituting the entire fortune of a person of unsound mind not found lunatic by inquisition, ordered, with the dividends thereon, to be paid to his father in part discharge of moneys expended for past maintenance, the father undertaking to continue the maintenance in future. *Ib.* S. P., *Berry, In re*, 13 Beav. 455.

The court ordered a fund of 379*l.* stock and 5*l.* cash paid into court under the trustee relief act, and constituting nearly the entire fortune of a lunatic not found such by inquisition, to be paid to his father in part discharge of moneys expended for past maintenance. *Law, In re*, 30 L. J., Ch. 512 ; 7 Jur. (N.S.) 410.

Investment of a fund belonging to a lunatic in an annuity for his life. *Dodsworth's Trust, In re*, 10 Hare, 16.

S., a person alleged to be lunatic, but not so found by inquisition, was entitled absolutely to 720*l.*, which had been paid into court under the trustee relief act. The father of S. presented a petition in his own right, and as next friend, praying that the income of the fund might be paid to him during the life of S., or until further order, he undertaking to apply it towards the maintenance of S. The evidence showed that S. was quite imbecile, and was not entitled to any property other than the 720*l.*, and that the father was not of ability to maintain her. The court made the order, but directed an application to be made once a year in chambers, showing the state of mind of S., and of what her property then consisted. *Sturge's Trusts, In re*, 5 Jur. (N.S.) 423 ; 7 W. R. 395.

—— **Payment to Overseers of the Poor.**]—Certain stock, belonging to a lunatic, though not found so by inquisition, had been paid into court under the trustee relief act. The expenses of the maintenance of the lunatic out of the parish fund had exceeded the value of the fund in court. The stock in court was ordered to be sold, and the produce to be paid to the clerk of the guardians of the poor of the parish. *Parker, In re*, 2 W. R. 139.

Order made, on a petition presented by guardians of the poor under the Trustee Relief Act, 10 & 11 Vict. c. 96, for payment to them, out of a fund paid in by trustees in which a lunatic was interested, of sums expended by the guardians in support of the lunatic, the lord chancellor holding that, by the act, the court was placed in the position of the trustees, and that the trustees might have made the payment under the 7 & 8 Vict. c. 101, s. 27. *Upfull's Trust, In re*, 3 Mac. & G. 281 ; 21 L. J., Ch. 119.

Expenses incurred by the overseers for the maintenance of a lunatic paid to them upon petition out of his share in a sum of stock paid into court under the trustee relief act. *Ward's Estates, In re*, 2 W. R. 406.

When a person of unsound mind, not found lunatic by inquisition, had been maintained in a lunatic asylum by his parish, the whole of the capital of a fund belonging to him, which had been paid into court under the trustee relief act, was ordered to be applied, so far as it would extend, in discharge of the past charges of the parish for maintenance. *Phelps, In re*, 28 L. T. 350.

Where a person of unsound mind had been maintained in a lunatic asylum by his parish, a portion of the capital of a fund belonging to him, which had been paid in under the trustee relief act, ordered to be applied in defraying the past charges of the parish. *Buckley's Trust, In re*, Johns. 700.

The court has a discretion to order such repayment or not, as it may think most for the benefit of the lunatic. *Ib.*

—— **Order for Maintenance—Removal to new Asylum.**]—A pauper lunatic in an asylum at Bethnal Green, but not found lunatic by inquisition, became entitled to a small fund in court. An order was made in 1856 on petition under the trustee relief act by his next friend directing that he should continue at the asylum until further order, and, the guardians of the poor of his parish undertaking to maintain him there, that 31*l.* a year should be raised out of the fund and paid to the guardians in repayment of the sums to be expended in his maintenance. In 1859 he was removed to the new asylum for his county by order of the justices, but without any order of the court of chancery. From this time no payments were applied for by the guardians. He remained in the county asylum till his death in 1875. His legal personal representative petitioned for transfer of the funds in court to him. The guardians appeared and claimed maintenance for the past time :—Held, that the guardians could not claim maintenance under the order, which ceased to be operative on the lunatic's removal to a fresh asylum. *Marman's Trusts, In re*, 8 Ch. D. 256 ; 38 L. T. 797 ; 26 W. R. 621.

—— **Representatives of Deceased Lunatic.**]—Held, also, that any claim for maintenance independently of the order was merely a debt of the lunatic, payable by his personal representative in due course of administration, and that the court had no jurisdiction in the matter to order payment of it, but that the whole fund must go to the personal representative. *Ib.*

A testator bequeathed one-third of the capital in a fund to A., a married woman. In 1835 (long after the death of the testator) A.'s husband took the benefit of the insolvent debtors act, and assigned all his property, present and future, to his assignee. In 1851 A. died, and the husband took out administration to her estate. In 1852 the husband became an inmate of a county lunatic asylum. In 1854 the annuitant died, and the fund became divisible :—Held, as between the assignee in insolvency of the husband and the overseers of the parish to which his maintenance was chargeable (who have, as to lunatics, a preferential claim to all others), that the assignee in insolvency was entitled to the share of the deceased wife jure mariti. *Tyler's Trusts, In re*, 2 Jur. (N.S.) 927 ; 4 W. R. 524.

The fund having been paid into court under the trustee relief act, the assignee in insolvency had presented his petition claiming the fund, which he had served on the overseers ; and the latter appeared and argued their claim :—Held, that they were not entitled to costs. *Ib.*

—— **Payment out to Master in Lunacy in New South Wales.**]—See *Barlow's Will, In re*, *Barton* v. *Spencer*, 56 L. J., Ch. 795 ; 36 Ch. D. 287 ; 57 L. T. 95 ; 35 W. R. 737—C. A.

—— **So Found under Foreign Jurisdiction.**]—When a fund belonging to an Englishman residing abroad and found lunatic there under a foreign inquisition is paid into court under the trustee relief act, the court has a discretion to refuse to transfer the corpus to the foreign provisional committee of the estate of the lunatic, though such committee is duly constituted according to the laws of the country where the inquisition was held, and has power to sue and

give valid receipts for the fund. *Garnier, In re*, 41 L. J., Ch. 419; L. R. 13 Eq. 532; 25 L. T. 928; 20 W. R. 288.

A., being entitled to property under an English settlement, and being resident in Jersey, was found of unsound mind by a formal proceeding there, and his brother E. appointed his curator. The trustee of the settlement having paid the fund into court under the trustee relief act, the curator petitioned to have the dividends paid to him, he undertaking to apply them for the benefit of A. Order made on production of official and verified copy of the proceedings in Jersey. *Albo's Trusts, In re*, 7 L. T. 778; 11 W. R. 80.

And see LUNATIC.

c. Practice.

Petition — Creditor's Action — Further Consideration.]—Upon the further consideration of a creditor's action for inquiries as to incumbrances upon, and for distribution of, funds paid into court under the trustee relief act, an order will be made for payment out of the funds to the persons found entitled thereto, without a petition being presented for that purpose. *Pullen* v. *Isaacs*, 72 L. T. 834.

Semble, that money paid into court under the trustee relief act cannot be included in an order on further directions without a petition. *Otte* v. *Castle*, 1 W. R. 64.

Petition or Motion.]—Applications under the 10 & 11 Vict. c. 96, and the 12 & 13 Vict. c. 74, must be by petition, and not by motion. *Masselin's Trusts, In re*, 21 L. J., Ch. 53; 15 Jur. 1073. See also *Magawley's Trust, In re*, 5 De G. & Sm. 1; 15 Jur. 1005.

The court has not jurisdiction on motion, without a petition, to pay out funds lodged in court under the Trustee Relief Act. *Stock, Ex parte*, 5 Ir. Ch. R. 341.

—— **Foreign Marriage — Decree of Foreign Court.**]—The court will not, upon motion, direct the payment of trust funds out of court to parties declared, by a decree of a foreign court of competent jurisdiction, to be entitled, under a foreign marriage settlement, to receive the same, but will require a plenary suit for the purpose. *Warburton* v. *Cicognara*, Ir. R. 3 Eq. 592; 18 W. R. 396.

Petition or Action.]—Applications for payment out of court of a fund paid in under the trustee relief act must be made by petition, and not by action; and a person not named in the trustees' affidavit may petition for payment out of court. But where an action has been brought the court may make a declaration of right, leaving the payment to be made on petition. *Pelling* v. *Goddard*, 47 L. J., Ch. 646; 9 Ch. D. 185; 38 L. T. 811; 26 W. R. 476.

When a fund has been paid into court under the trustee relief act, a person not mentioned in the trustee's affidavit can apply by petition to the court for the distribution of the fund, and need not bring an action. *Jephson, In re* (1 L. T. 5), not followed. *Puttrell's Trusts, In re*, 47 L. J., Ch. 11; 7 Ch. D. 647; 37 L. T. 374.

As to filing cross-petitions. See *Lewis* v. *Hillman*, 3 H. L. Cas. 607.

Petition or Summons.]—A judge in chambers is not empowered, under s. 26 of the act (15 & 16 Vict. c. 80), to entertain applications with reference to funds paid into court under the acts for the relief of trustees; such applications must originate in and be founded upon a petition presented to the court, and applications cannot be made to a judge in chambers under the act unless subsequently to such petition being presented. *Hodges, In re*, 4 De G. M. & G. 491; 3 Eq. R. 123; 1 Jur. (N.S.) 73; 3 W. R. 151.

—— **Adjournment into Chambers.**]—A trust fund having been paid into court under the trustee relief act by the trustee of a will, a petition was presented by parties interested for an inquiry as to the persons entitled and for payment out to the persons found entitled under that inquiry. Upon the petition coming on for hearing an order was made directing the inquiry, and adjourning the further hearing of the petition in chambers:—Held, that the proceedings having been properly commenced by petition under s. 2 of the Trustee Relief Act, the court had jurisdiction, under s. 27 of the Masters' Abolition Act, 1852 (15 & 16 Vict. c. 80), to adjourn the petition into chambers. *Frodsham* v. *Frodsham* (15 Ch. D. 317; 43 L. T. 558; 29 W. R. 165) distinguished. *Moate's Trusts, In re*, 22 Ch. D. 635; 31 W. R. 497.

—— **Order for Maintenance of Infant.**]—Where money belonging to an infant has been paid into court under the Trustee Relief Act, 10 & 11 Vict. c. 96, a petition must, notwithstanding the act 15 & 16 Vict. c. 80, be presented in order to enable the court to make an order for the infant's maintenance. *Rye's Trust, In re*, 3 Eq. R. 368; 1 Jur. (N.S.) 222; 3 W. R. 198.

—— **Fund Exceeding £500—Title depending only on Proof of Identity and Age of Applicant.**]—Where the title to a fund in court depends only upon proof of the identity, or the birth, marriage, or death of any person, the mere fact that the fund exceeds 500*l.* does not prevent an application, under the trustee relief act, for the payment or transfer of the fund out of court being made by summons in chambers. *Campbell's Trusts, In re*, 31 L. R. Ir. 434.

Form and Contents of Petition.]—Petitions for the payment out of court of money which has been paid in under the trustee relief act must set out enough of the affidavit on which the payment was made to show the difficulty which occasioned the payment into court, and who are the parties that claim or are interested in the fund, but not necessarily all the details contained in that affidavit. *Curtois' Will, In re*, 10 Hare (App.) lxiv.; 22 L. J., Ch. 1045; 17 Jur. 852.

On a petition presented under the trustee relief act for payment of trust funds out of court, the statements in the affidavits made on payment of the trust money into court should be set out in the petition, as these statements form the only declaration of trust under which the court can act. *Levett's Trust, In re*, 5 De G. & S. 619; 16 Jur. 1063. S. P., *Flack's Will, In re*, 10 Hare (App.) xxx.

The prayer of a petition, and notice thereof under the trustee relief act, should specify the exact order which is sought for and the precise portions of the fund which are to be transferred to the several parties entitled to it. *Bernard, Ex parte, Leigh's Trust, In re*, 6 Ir. Ch. R. 133.

Money had been paid into court under the

trustee relief act, and an affidavit of the trustees was intituled, "In the matter of the trusts of the settlement bearing date the 12th July, 1812, and made on the marriage of." A petition was presented for payment out of court of part of the money so paid in, and an affidavit in support was intituled, "In the matter of the trusts of an indenture of settlement bearing date the 12th July, 1812, and made on the marriage of":—Held, that the variation was not material, and that the affidavit might be received. *Harris, In re*, 8 Jur. (N.S.) 166.

Service—On Trustees.]—Where the trustee who has paid the trust fund into court under this act cannot be found, service on him of the petition for payment out of the fund, at the address given by him in his affidavit on the occasion of his paying in the money, will be deemed good service. *Baugham, Ex parte*, 16 Jur. 325.

Where a trustee pays money into court, and, in his affidavit, appoints a place for service on him of any legal proceedings, and he is not there to receive service, the court will not deem such service good unless he cannot be found elsewhere on search made. *Lawrence's Trust, In re*, 13 L. T. 580; 14 W. R. 93.

When the house named by trustees on payment into court as their address for service had been pulled down, and the trustees had not been heard of for ten years, service of the petition for payment out of court dispensed with, and an inquiry directed to ascertain who were entitled to the fund. *Bolton, In re*, 21 L. T. 413; 18 W. R. 56.

An administrator paid into court under the trustee relief act, to the separate account of an infant, a sum representing his share of the intestate's estate, as one of his next of kin. The administrator, in an affidavit, stated, that, to the best of his knowledge and belief, the infant was entitled to the fund. The infant having attained his majority, petitioned for a transfer of the fund:—Held, unnecessary to serve the administrator with the petition. *Beauclerk, In re*, 11 W. R. 203.

Where the court has decided a question under a will upon a fund being paid into court under the 10 & 11 Vict. c. 96, and a petition is presented for payment out of court of such fund, the court will dispense with service upon the trustee. *Thomas's Will, In re*, 11 W. R. 276.

A fund having been paid into court by the trustees under the trustee relief act, one-third was carried to the separate account of one of the cestuis que trust, who was a lunatic. Afterwards a petition was presented in lunacy for a transfer of the one-third belonging to the lunatic:—Held, that the trustees need not be served with notice of the petition. *Young (a Lunatic), In re*, 5 W. R. 400.

Semble: Where the title of the tenant for life is clear, the trustees ought not to appear upon a petition simply affecting the income. *Evans' Trusts, In re*, 41 L. J., Ch. 512; L. R. 7 Ch. 609; 26 L. T. 815; 20 W. R. 695.

—— **On Remaindermen.**]—Upon a petition by a tenant for life of a fund paid into court under the 10 & 11 Vict. c. 96, for payment of the income to him, the costs of the trustees and remainderman were ordered to be paid out of the corpus. *Whitling's Settlement, In re*, 30 L. J., Ch. 862; 7 Jur. (N.S.) 754; 4 L. T. 739; 9 W. R. 830.

In such cases it will, as a general rule, be unnecessary to serve the remainderman with the petition. *Ib.*

—— **On other Parties Interested.**]—A person claiming a particular share of an aggregate fund brought into court under the trustee relief act, presenting a petition to get that share out of court, ought to serve with the petition all the other persons whom the trustees have stated to be in their belief interested in the fund. *Manning's Trusts, In re*, 3 W. R. 379.

Upon an application for payment out of court of a fund paid in under the trustee relief act, one of the persons in consequence of whose claim it was paid into court was found to be out of the jurisdiction, and had not been served:—Held, that no service could be ordered in such a case, and the petition was directed to be proceeded with as if all parties were before the court. *Naylor's Residuary Personal Estate, In re*, 28 L. T. 18.

Where money has been paid into court under the trustee relief act, and the court, in an action brought for the fund, has declared the rights of the person interested, on an application made by the trustee and the person so interested for payment out, it is unnecessary to serve notice of the application on persons who, although stated in the trustee's affidavit as being interested in the fund, have not been declared to be so by the court. *Fosbury's Trusts, In re*, 39 L. T. 422.

Whether the parties beneficially interested in a fund which had been paid into court under the trustee relief act should be served with a petition for the payment of an annuity out of the dividends thereof when the petition prays costs out of the corpus of the fund. *Greenland's Trusts, In re*, 1 W. R. 46.

On a petition under the trustee relief act for payment out of court of a fund to which numerous parties were entitled, most of whom were not before the court, a former order having been made directing class inquiries, and the chief clerk having made his certificate, it was ordered that the petitioner be at liberty to serve a copy of the petition, the former order and the chief clerk's certificate, together with the present order, upon the several persons named in the certificate, and that the petition stand over till such persons had been served. *Battersby's Trusts, In re*, 10 Ch. D. 228.

As to service on some of a class only under the trustee relief act. See *Colson's Trust, In re*, Kay, 133; 2 Eq. R. 257; 23 L. J., Ch. 155; 2 W. R. 111.

Where the trustees had paid the fund into court, under the 10 & 11 Vict. c. 96, it was ordered to be transferred to a purchaser from the cestui que trust on the petition being served only on the trustees, and notice given to the assignees of the husband of cestui que trust. *Stuteley, Ex parte*, 1 De G. & Sm. 703.

Service out of Jurisdiction or Substituted.]—Upon a petition under the trustee relief act the court has jurisdiction to order service on a respondent out of the jurisdiction, and also substituted service. *Bonelli's Electric Telegraph Co., In re, Cook's claim*, 43 L. J., Ch. 720; L. R. 18 Eq. 655; 31 L. T. 83; 22 W. R. 856. S. P., *Haney's Trusts, In re*, 44 L. J., Ch. 272; L. R. 10 Ch. 275; 23 W. R. 602. Affirming 31 L. T. 645. But see *Naylor's Residuary Personal Estate*,

supra; and *Bernard, Ex parte, Leigh's Trust, In re*, 6 Ir. Ch. R. 133.

The court has no jurisdiction to allow service out of the jurisdiction of a petition under the trustee relief act for payment of money out of court. *Gordon's Settlement Trusts, In re* (W. N. (1887), 192), not followed. *Jellard, In re*, 39 Ch. D. 424; 60 L. T. 83.

On appeal from this decision, it appearing that the order sought by the petition was only for carrying into full effect an order which had recently been obtained by the respondents, the court of appeal, without deciding that leave was necessary, gave leave to serve the petition on the solicitors who had presented the former petition, and who were willing to accept service. *Ib.*

Petition standing over for Amendment.]—Where a petition, under the trustee relief act, stands over for amendment by adding a next friend on behalf of the petitioner, it is not necessary to re-answer the petition. *Medow's Trusts, In re*, 10 Jur. (N.S.) 536; 10 L. T. 185; 12 W. R. 595.

Order of Revivor.]—A petitioner under the trustee relief act died pending the results of some inquiries:—Held, that an order of revivor might be made in favour of his executor. *Staggoll, In re*, 15 W. R. 974.

Order for Payment of Dividends.]—Some portion of a trust fund, payable by instalments, was paid by the trustee into court, under the trustee relief act. Upon a petition seeking payment of the fund so paid in, the trustee was ordered to pay the future instalments from time to time as he should receive them to the cestui que trust, whose title was clear. *Wright's Settlement, In re*, 1 Sm. & G. (App.) v.

When a fund which has been paid into court is settled on two successive tenants for life, an order may be made for payment of the dividends to the first tenant for life, and on proof of his death, to the second, without any further petition. *Brent's Trust, In re*, 8 W. R. 270.

Where, under the trustee relief act, a petition is presented for the payment of the share in an undivided fund of one of several children who has become entitled, the court will, if the amount be small, reserve liberty to each of the remaining children to apply at chambers in respect of their several shares as they successively become due. *Tracey's Trusts, In re*, Ir. R. 6 Eq. 271.

Drawing up the Order.]—Upon a written and reasonable application from claimants residing abroad, the court will postpone the drawing up of an order for payment out of court of money paid in under the trustee relief act. *Hodson's Will, In re*, 22 L. J., Ch. 1055; 17 Jur. 826.

Appeal and Review.]—Trustees of a fund to which a lady was entitled for life, with remainder to her children, on her death paid the fund into court under the trustee relief act, and under orders of the court three-fourths were paid out. One child then claimed the fund as the only legitimate child, and presented a petition for leave to file a bill of review:—Held, that orders under the trustee relief act stood, pro hâc, on the same footing as a decree in a suit, and a probable case being put forward, founded on facts discovered since the date of the orders, leave was given. *Smyth and Arnold's Estate, In re*, 2 N. R. 381; 32 L. J., Ch. 779; 8 L. T. 599; 11 W. R. 850.

Notice of appeals from orders made under the trustee relief act must, according to the true construction of the Judicature Act, Ord. LVIII. rr. 9, 15, be given within twenty-one days from the perfecting of the order, or, in the case of the refusal of an application, from the date of such refusal. *Baillie's Trusts, In re*, 46 L. J., Ch. 330; 4 Ch. D. 785; 35 L. T. 917; 25 W. R. 310.

d. Costs of Payment out.

Two Petitions.]—When two petitions are bonâ fide separately prepared for obtaining payment out of court of a sum paid in under the trustee relief acts, and both raise the same issue, the court will in general allow the costs of the preparation of the second petition, but where solicitors had been informed that a petition was presented, and they persisted in presenting another for the same object, the costs of the preparation and presentation of the second petition were disallowed. *Chaplin's Trusts, In re*, 3 N. R. 289; 33 L. J., Ch. 183; 9 L. T. 677.

Claimant who failed.]—A petitioner, claiming a fund under the 10 & 11 Vict. c. 96, allowed his costs although his claim failed. *Birch's Legacy, In re*, 2 K. & J. 369.

The court has jurisdiction to order an unsuccessful claimant on a fund paid into court under the Trustee Relief Act, 10 & 11 Vict. c. 96, to pay the costs of an application for payment of the fund out of court. *Armston's Trusts, In re*, 4 De G. J. & S. 454; 4 N. R. 450; 10 Jur. (N.S.) 715.

Respondents who make an unfounded claim to a fund, and so occasion the payment of it into court under the trustee relief acts, will be ordered to pay the costs of getting the fund out of court. *Benton's Policy Trusts, In re*, 43 L. J., Ch. 715.

Costs of Appearance—Trustees served with Petition.]—A trustee who has paid funds into court under the act 10 & 11 Vict. c. 96, and has been served with a petition, is entitled to his costs. *Erskine's Trust, In re*, 1 K. & J. 302; 24 L. J., Ch. 327; 1 Jur. (N.S.) 156; 3 W. R. 262. S. P., *Burnell's Estate, In re*, 10 Jur. (N.S.) 289; 10 L. T. 127; 12 W. R. 568.

Trustees who have lodged money under the trustee relief act will be allowed their costs of appearing on the hearing of a petition to draw it, if the claimant's title be doubtful. *Blayney's Trusts, In re*, Ir. R. 9 Eq. 413.

A fund paid in under the trustee relief act to an account entitled the estate of a deceased person, will not be paid out without the presence of his legal personal representative and an admission of assets by him. Administration having been taken out to remove the difficulty, the trustees were allowed their costs, and the costs of the administration were given out of the fund. *Edwards' Estate, In re*, 4 W. R. 801.

—— **Insurance Company.**]—Where an insurance company paid insurance money into court under the trustee relief act, and the company was afterwards served with and appeared on the petition to pay it out:—Held, that the company was entitled to costs as between solicitor and client. *Cobbe's Settlement, In re*, 15 L. T. 170; 15 W. R. 29.

—— **Mortgagees of Reversionary Interest of Married Woman.**]—Mortgagees of the reversionary interest of a married woman not allowed their costs of appearance to a petition for payment out of court of a fund representing such interest which had been paid in under the Trustee Relief Act. *Insole, In re*, 14 W. R. 160.

—— **Overseers of the Poor.**]—A testator bequeathed one-third of the capital in a fund to A., a married woman. In 1835 (long after the decease of the testator), A.'s husband took the benefit of the insolvent debtors act, and assigned all his property, present and future, to his assignee. In 1851 A. died, and the husband took out administration to her estate. In 1852 the husband became an inmate of a county lunatic asylum. In 1854 the annuitant died, and the fund became divisible:—Held, as between the assignee in insolvency of the husband and the overseers of the parish to which his maintenance was chargeable (who have, as to lunatics, a preferential claim to all other creditors), that the assignee in insolvency was entitled to the share of the deceased wife jure mariti. *Tyler's Trusts, In re*, 2 Jur. (N.S.) 927; 4 W. R. 524.

The fund having been paid into court under the trustee relief act, the assignee in insolvency had presented his petition claiming the fund, which he had served on the overseers; and the latter appeared and argued their claim:—Held, that they were not entitled to costs. *Ib.*

—— **Other Parties.**]—A party served with a petition under the 10 & 11 Vict. c. 96, does not necessarily get his costs of appearing at the hearing of the petition. *Fisher, Ex parte, Smith, In re*, 3 Jur. (N.S.) 659.

Thus, where assignees in insolvency alleged a claim, but failed to substantiate it, costs of their appearing at the hearing of the petition refused. *Ib.*

Costs of parties served with or appearing on a petition under trustee relief act. See *Wilson's Trust, In re*, 14 W. R. 161.

A petition for payment out of a fund paid in under the trustee relief act was served on a party who did not appear on the petition to have any claim, but had sent notice of a claim. She now disclaimed, and was not allowed her costs. *Parry's Trust, In re*, 12 Jur. 615.

On a petition under the Trustee Relief Act to apply a fund, a wife who was a cestui que trust, with her husband and her mortgagees, having appeared and opposed the distribution, the court properly ordered part of the fund to be applied to the costs of the opposition, and incurred by the husband's proceedings, though under the deed creating the fund it was to be paid to her separate use. *Newton* v. *Ricketts*, 7 Jur. (N.S.) 953; 5 L. T. 62; 10 W. R. 1—H. L. (E.)

—— **Trustees Respondents.**]—Trustees who were respondents to a petition under the trustee relief act, and were tendered 42*s.* for costs under Rules of Court, 1875 (Costs), Ord. VI. r. 17, will not be allowed their costs of appearance unless they appear for the sake of giving the court necessary information. *Sutton, In re*, 21 Ch. D. 855; 46 L. T. 740; 30 W. R. 657.

—— **Executors Respondents.**]—Executors who paid into court under the trustee relief act, a fund representing part only of a share, the title to which was disputed, and retained the remainder in their hands, were made respondents to a petition for payment out of the fund in court, and accepted a tender of 30*s.* for their costs, under Ord. LXV. r. 27, sub-r. 19:—Held, that they were entitled to their costs of appearance out of the remainder of the share. *Vardon's Trusts, In re*, 33 W. R. 297.

Costs of Affidavits of interested Parties.]—Trustees who have paid trust funds into court under the trustee relief act, taking copies of affidavits by parties claiming to be beneficially interested in the fund, will not be allowed the costs of the copies so taken by them. *Lazarus, In re*, 3 K. & J. 555.

Petition by Trustees for Distribution of Funds in Court.]—Although a trustee may, under Ord. IV. of June 10, 1848, present a petition under the Trustee Relief Act, 10 & 11 Vict. c. 96, as to moneys paid in by himself, the court, in making an order on such petition, gave him respondent's costs only, even where his petition was presented at the request of one of the parties beneficially interested in the fund. *Hutchinson's Trusts, In re*, 1 Dr. & Sm. 27; 29 L. J., Ch. 356; 6 Jur. (N.S.) 136; 1 L. T. 428; 8 W. R. 253.

Where trustees, having paid money into court under 10 & 11 Vict. c. 96, afterwards apply by petition under Ord. IV. of June 10, 1848, for a distribution of the fund, the court has jurisdiction to make an order upon the petition, and is bound to exercise that jurisdiction. *Housman's Trust, In re*, or *Cazneau's Legacy, In re*, 2 K. & J. 249; 2 Jur. (N.S.) 157; 4 W. R. 275.

But where such a petition was presented by trustees without consent of the parties claiming beneficial interests in the fund, and no cause was shown by the trustees for taking upon themselves to be movers in the matter, the court, to discourage such applications, allowed them only respondents' costs. *Ib.*

Whether Payable out of Income or Corpus—Petition by Tenant for Life for Payment of Dividends.]—The costs of all parties to a petition presented by a tenant for life and other persons interested in the fund for the payment of the income of a fund, which has been paid into court under the trustee relief act, are payable out of the income. *Evans's Trusts, In re*, 41 L. J., Ch. 512; L. R. 7 Ch. 609; 26 L. T. 815; 20 W. R. 695.

The rule laid down in *Marner's Trusts, In re*, post, adopted as the established practice of the court. *Ib.* S. P., *Munton's Trusts, In re*, 39 L. J., Ch. 764.

A fund was paid into court under the trustee relief act. The tenant for life petitioned for payment of the dividends. There being no general estate applicable:—Held, that the costs of the petition ought to be paid out of the income, and not out of the corpus. *Lorimer, In re*, 12 Beav. 521; 19 L. J., Ch. 524; 14 Jur. 1126.

Costs of petitions by tenants for life for payment of income arising from funds which have been paid into court under the trustee relief act must come out of the income, and not out of the corpus of the estate. *Marner's Trusts, In re*, 36 L. J., Ch. 58; L. R. 3 Eq. 433; 15 W. R. 99. S. P., *Bangley's Trust, In re*, 21 L. J., Ch. 875; 16 Jur. 682; *Fletcher, Ex parte*, 17 L. J., Ch. 169; 12 Jur. 619; *Ingram's Trust, In re*, 18 Jur. 811; 2 W. R. 679; and *Hamersley, In re*, 23 Beav. 267.

Where a fund has been paid into court under

the trustee relief act, the costs of a petition by the tenant for life for the payment to him of the income are payable out of the corpus of the fund. *Turnley, In re*, 35 L. J., Ch. 313; L. R. 1 Ch. 152; 12 Jur. (N.S.) 305; 13 L. T. 662; 14 W. R. 322. S. P., *Tanner's Trusts, In re*, 35 L. J., Ch. 689; *Butler's Trust, In re*, 16 Jur. 325; *Field's Trust, In re*, 16 Beav. 146; 16 Jur. 770; and *Leake's Trusts, In re*, 32 Beav. 135; 1 N. R. 417; 9 Jur. (N.S.) 453; 7 L. T. 816; 11 W. R. 352.

Gift by will to trustees of 3,000*l.*, on trust to pay the interest to the separate use of R., and that the same should remain during her life under the direction of the said trustees, as a provision for her, and the interest of it be given to her, on her personal appearance and receipt, by any banker. After the death of R. the 3,000*l.* was to be rendered back to the testator's estate. R. married. The 3,000*l.* was paid into court by the trustees, under the trustee relief act. The assignee applied for the dividends:—Held, that the costs of all parties, except R., should come out of the corpus. *Ross's Trust, In re*, 1 Sim. (N.S.) 196; 20 L. J., Ch. 293; 15 Jur. 241.

On a petition by a tenant for life of a trust fund in court for the payment of the interest of that fund to him for life:—Held, that his own costs of such an application must be paid by himself, the costs of the trustees out of the corpus of the fund. *Whitling's Settlement, In re*, 30 L. J., Ch. 862; 7 Jur. (N.S.) 754; 4 L. T. 739; 9 W. R. 830. S. P., *Hadland's Settlement, In re*, 23 Beav. 266; 4 W. R. 690; and *Tchitchakoff's Will, In re*, 10 L. T. 860; 12 W. R. 1100.

The costs of a trustee, who was served with and appeared upon a petition by a tenant for life for payment of dividends, were ordered to be paid out of income. *Mason's Trusts, In re, Smithett, Ex parte*, L. R. 12 Eq. 111; 24 L. T. 869; 19 W. R. 1025.

When a fund has been paid into court by a trustee under the trustee relief act, his costs, charges, and expenses properly incurred in, about, and preliminary to the payment into court, are payable out of the capital of the fund; his costs of appearance on a petition for payment of dividends are payable out of income. *Whitton's Trusts, In re*, L. R. 8 Eq. 352. S. P., *Smith's Trusts, In re*, L. R. 9 Eq. 374; 22 L. T. 220; 18 W. R. 513.

Upon a petition by tenant for life of stock which had been paid into court under the trustee relief act for payment out of the dividends, the trustee, who appears on the petition after notice from the petitioner's solicitor not to do so, upon the ground that the petition relates to the income only, will not be allowed his costs of the appearance out of the funds representing income. *Battell's Trusts, In re*, 21 W. R. 138. And see *Leake's Trusts, In re*, supra.

Costs of trustees who were served with and appeared upon petition by a tenant for life for payment of dividends are payable out of corpus. *Gordon's Trusts, In re*, 37 L. J., Ch. 408; L. R. 6 Eq. 335. S. P., *Knight's Trusts, In re*, 37 L. J., Ch. 409.

When a fund had been paid into court on account of the inability of a sole trustee to act, on an application relating solely to the payment of the dividends, the costs of the appearance of the trustee may be properly charged on the corpus. *Wood's Trusts, In re*, 40 L. J., Ch. 179; L. R. 11 Eq. 155; 23 L. T. 586; 19 W. R. 227.

Liability of Testator's General Estate.]—The intention of the legislature by the 10 & 11 Vict. c. 96, was merely to relieve trustees, and not to throw any additional burden on the cestuis que trust or disentitle them to costs, which before the act would have been borne by the testator's general estate. *Sharpe's Trustees, In re*, 15 Sim. 470; 17 L. J., Ch. 395; 12 Jur. 492.

When a particular fund is paid into court by an executor who has the general residue in his hands, the court has jurisdiction to order the costs of a petition relating to the particular fund to be paid out of the general residue. *Trick's Trusts, In re, Willoby, Ex parte*, 39 L. J., Ch. 201; L. R. 5 Ch. 170; 21 L. T. 739; 18 W. R. 123.

Held, that the expenses attending the payment of money into court, under the stat. 10 & 11 Vict. c. 96, must be paid by the executor out of his testator's estate, but those of paying it out by the legatee. *Cawthorne's Trusts, In re*, 12 Beav. 56; 18 L. J., Ch. 116.

Upon a petition for payment out of court of the amount of a particular legacy paid in under the trustee relief act, the court has no jurisdiction to order payment of any of the costs in the matter out of the testator's general residuary estate. Observations upon the operation of the act with regard to costs. *Bartholomew's Will, In re*, 13 Jur. 380.

A question arose as to whether the next of kin (of which there were sixteen) of the testator's wife were entitled to a sum of money bequeathed to them as a class, or whether only such of the class were entitled as were living at the death of the testator. The trustees paid the amount into court under the above acts. The court, having decided that as to five shares such shares lapsed, and went to the residuary legatees, directed the eleven shares to be paid in full, and that the costs of all parties should be paid out of the five lapsed shares. *Ham's Will, In re*, 2 Sim. (N.S.) 106; 21 L. J., Ch. 217; 15 Jur. 1121.

Where the executors of a will pay money into court in consequence of a difficulty created by the testator himself, the executors may retain their costs out of the residue, but the costs of the parties entitled to the fund must come out of the fund itself. *Feltham's Trust, In re*, 1 K. & J. 528, 533.

Trust for Maintenance—Corpus.]—Costs occasioned by the fund being paid into court under the trustee relief act, in the case of a trust for maintenance, must come out of the corpus. *Reid's Trust, In re*, 1 W. R. 13. And see *Robertson's Trust, In re*, 6 W. R. 405.

Successive Beneficial Interests.]—Where a fund in which successive beneficial interests exist is transferred into court under the trustee relief act, the costs incurred by the trustees in proceeding under the statute are payable out of the corpus, not out of the income of the fund. *Staples' Settlement, In re*, 13 Jur. 273.

Distinct Legacies paid into Court.]—Where two distinct legacies have under the trustee relief act been paid in to two distinct accounts, the costs of paying out one of such legacies cannot be obtained out of the other legacy, notwithstanding that in the events that had happened such latter legacy had become residue. Observations on *Tillstone's Trusts, In re* (9 Hare,

App. lix.) and *Everett, In re* (12 Beav. 485). *Hodgson's Trust, In re*, 18 Jur. 786; 2 W. R. 539.

Legacy paid in by Executor of Trustee who was Residuary Legatee.]—A husband and wife resident abroad give a general power of attorney to their solicitor to act for them in this country. The wife is entitled to a legacy, which has been retained for many years by the trustee, who is also residuary legatee. The trustee is dead, and his executor, considering that the solicitor under the power of attorney cannot give him an effectual discharge, pays the legacy into court under the Trustee Relief Act, and, notwithstanding he is requested not to do so, appears by counsel on the petition. On the question whether the costs of the payment into court and of the appearance of the executor are payable out of the legacy:—Held, that the executor is not entitled to the costs of payment in, but is entitled to the costs of appearing on the petition. *Jones, In re*, 3 Drew. 679; 5 W. R. 336.

H. VESTING ORDERS, CONVEYANCES, AND TRANSFERS.

1. *Vesting Orders.*
a. Under the Trustee Act, 1893...961.
b. Under the Trustee Acts, 1850 and 1852.
i. In General, 962.
ii. Copyholds, 967.
iii. Leaseholds, 970.
iv. Mortgages, 972.
v. Stock and Choses in Action, 976.
vi. Sales, 981.
vii. Other Cases, 983.
c. Form of Vesting Order, 985.
d. Practice as to Vesting Order.
i. In General, 987.
ii. Lunacy, 990.
iii. Costs, 994.
2. *Conveyances and Transfers.*
a. Under the Trustee Acts, 1850 and 1852, 997.
b. Under the Trustee Acts prior to 1850.
i. Conveyances under 7 Anne, c. 19, 1001.
ii. Conveyances under 4 Geo. 2, c. 10, 1004.
iii. Conveyances under 6 Geo. 4, c. 74, 1005.
iv. Conveyances under 11 Geo. 4 & 1 Wm. 4, c. 60...1005.
v. Transfer of Stock under 36 Geo. 3, c. 90, and Succeeding Statutes, 1015.

1. VESTING ORDERS.

a. Under the Trustee Act, 1893.

Infant Tenant in Tail in Possession.]—Form of order declaring the infant tenant in tail a trustee, and directing a conveyance to the trustees of the will under the Trustee Act, 1893. *Montagu, In re, Faber* v. *Montagu*, 65 L. J., Ch. 372; [1896] 1 Ch. 549; 74 L. T. 346; 44 W. R. 583.

Appointment of Existing Trustees in Place of Themselves and a Trustee who cannot be found.]—There is jurisdiction under the Trustee Act, 1893, as also under the Lunacy Act, 1890, to make an order vesting trust property in existing trustees in the place of themselves and a trustee entitled jointly with them who cannot be found, without appointing a new trustee in his place. *Lees' Settlement, In re*, 65 L. J., Ch. 770; [1896] 2 Ch. 508; 75 L. T. 178; 44 W. R. 680.

Payment off — Death of Surviving Mortgagee—Disputed Will.]—Where the will of a surviving mortgagee is the subject of a disputed action in the probate division, the court may make a vesting order under s. 29 (e) of the Trustee Act, 1893. *Cook's Mortgage, In re*, 64 L. J., Ch. 624; [1895] 1 Ch. 700; 13 R. 391; 72 L. T. 388; 43 W. R. 461.

Request to Trustee to transfer Stock — Petition for Vesting Order presented within Twenty-eight Days—Liability of Trustees for Costs.]—The court will refuse to make a vesting order under s. 35, sub-s. 1 (ii.) (*d*) of the Trustee Act, 1893, which provides for the making of such an order, where a trustee refuses to transfer stock for twenty-eight days after a request in writing, upon a petition which has been presented before the expiration of such twenty-eight days. The respondent trustee may be required to pay the costs of a petition praying for such an order. *Knox's Trusts, In re*, 64 L. J., Ch. 402; [1895] 1 Ch. 538; 13 R. 392; 72 L. T. 761; 43 W. R. 442. Affirmed 64 L. J., Ch. 860; [1895] 2 Ch. 483; 13 R. 395, n.; 72 L. T. 761—C. A.

Death of Trustees of Railway Stock — No Personal Representative — New Trustees appointed under Power.]—Trustees, in whose name a sum of English railway stock stood, died, and there was no personal representative of the survivor. New trustees were appointed under a power in the settlement:—Held, that in the absence of a personal representative, there was no jurisdiction under the Trustee Act, 1893, to make an order vesting in the trustees so appointed the right to call for a transfer of the stock. *Ellis' Settlement, In re* (24 Beav. 426), considered. *Carre's Trust, In re*, [1895] 1 Ir. R. 172.

Colony — Australia — Appointment of New Trustee by Master.]—Sect. 30 & 32 of 16 Vict. (No. 19) authorise the supreme court to appoint a new trustee where it is expedient to do so, and "either by the same or any subsequent order" to vest the trust property in the trustee so appointed. It is competent for the court under these sections to refer the appointment to the master, and at the same time to make an order vesting the trust property in the trustee whom the master shall appoint. It is not necessary that in case of appointment by the master the court should make a subsequent order. *Plomley* v. *Richardson*, 64 L. J., P. C. 18; [1894] A. C. 632; 11 R. 324; 71 L. T. 377—P. C.

b. Under the Trustee Acts, 1850 and 1852.

i. *In General.*

Land in Ireland.]—Where a trustee of land in Ireland becomes a lunatic, the judges of the court of appeal in England can, on a petition intituled in the chancery division and in lunacy, appoint a new trustee under their jurisdiction in lunacy, and make a vesting order under their

jurisdiction as additional judges of the chancery division. *Smyth, In re*, 55 L. T. 37 ; 34 W. R. 493—C. A.

The Trustee Act, 1850, does not give to the lord chancellor of Great Britain sitting in lunacy jurisdiction in Ireland. *Davies, In re*, 3 Mac. & G. 278.

Where the surviving trustee of property, consisting partly of real estate in Ireland, becomes lunatic, the court has jurisdiction to make an order, upon a petition presented both in lunacy and in the chancery division, appointing new trustees, and vesting the real estate in Ireland in them. *Lamotte, In re*, 4 Ch. D. 325 ; 36 L. T. 231 ; 25 W. R. 149.

Where land held in trust is situated in Ireland, the cestui que trust being in England, and a surviving trustee in Ireland, the court has jurisdiction under s. 54 of the Trustee Act of 1850 (13 & 14 Vict. c. 60) to appoint new trustees and make a vesting order. *Hewitt's Estate, In re*, 6 W. R. 537.

—— **Refusal to Convey Land in Ireland.**]—The court has jurisdiction, under s. 2 of the Trustee Extension Act, 1852, to vest land in the beneficiaries absolutely entitled thereto, where the trustee thereof wilfully refuses to convey to them, although the land and the trustee are both in Ireland, and the trusts were created by an Irish settlement. *Steele, In re, Gold* v. *Brennan*, 53 L. T. 716.

Land in Canada.]—A vesting order vesting the legal estate in the owner of lands in Canada may be made under the 13 & 14 Vict. c. 60, s. 54. *Groom's Trusts, In re*, 11 L. T. 326.

A. purchased an estate in Canada, and his conveyance was duly registered there. A mortgage thereon, made in 1837, had also been registered. The conveyance to A. was confirmed by the personal representative of the mortgagee, the mortgage having been satisfied in his lifetime. It subsequently turned out that the mortgage was a mortgage in fee, and the legal estate was outstanding in a grandchild of the mortgagee, an infant. On proof of these facts the court made an order vesting the estate in A. *Ib.*

Irish Railway Stock.]—One of the trustees of an estate which was being administered by the court having become of unsound mind, an order was made under the Trustee Act, 1850, s. 5, appointing a person to concur with the other trustee in transferring into court certain Irish railway stock standing in the names of the trustees. It being discovered before the order was drawn up that owing to s. 56 of the act such an order could not be made as to Irish stock, an order was made appointing a person new trustee of the Irish stock in the place of the person of unsound mind, and directing him to concur with the other trustee in transferring the stock into court. *Hodgson, In re, Kerdis (Lord)* v. *Hodgson*. 11 Ch. D. 888.

Intestacy—Escheat.]—Where the crown has become entitled to the whole of the trust estate of a testator, and also to a part of the beneficial interest therein, the court cannot, upon an application under the Trustee Acts for the appointment of new trustees of the will and a vesting order, make a vesting order against the crown, but an application must be made to the court under s. 5 of the Intestates' Estates Act, 1884. *Pratt's Trusts, In re*, 55 L. T. 313 ; 34 W. R. 757.

Effect of Vesting Order on Estate Tail.]—A vesting order, under the Trustee Act, 1850, will, if consented to by the protector of the settlement, bar all estates in remainder, and not pass a base fee only under the 3 & 4 Will. 4, c. 74. *Powell* v. *Matthews*, 1 Jur. (N.S.) 973.

When, by order under the Trustee Act, 1850, the estate of a trustee tenant in tail who is of unsound mind is vested in any person the order should only direct the land to be vested in such person for all the estate which the trustee could convey, if sane, and need not refer to the execution of a disentailing deed, or to the Fines and Recoveries Act. *Mason* v. *Mason, Mason, In re*, 7 Ch. D. 707 ; 26 W. R. 565—C. A.

Sect. 3 of the Trustee Act, 1850, will then free the land from the estate tail. *Ib.*

Order Vesting Legal Estate in Purchaser to Uses to bar Dower.]—Upon a petition presented under the Trustee Act, 1850, s. 7, the court declined, without further consideration, to make an order to vest the legal estate in a purchaser to uses in bar of dower. Such an order was subsequently made by V.-Ch. Kindersley. *Howard's Estate, In re*, 5 De G. & Sm. 435 ; 21 L. J., Ch. 437.

As to limitations in an order under the Trustee Act, 1850, vesting the legal estate in a purchaser to uses in bar of dower. See *Lush, In re, Grieve, Ex parte*, 5 De G. & Sm. 436, n.

Upon petition presented under the Trustee Act, 1850, an order made vesting the legal estate in a purchaser to uses to bar dower. *Davey* v. *Miller*, 1 Sm. & G. (App.) xix. ; 1 Eq. R. 236 ; 22 L. J., Ch. 1054 ; 17 Jur. 908 ; 1 W. R. 465.

Death of Sole Trustee—No Personal Representative.]—The sole trustee of land appointed by a will died in the lifetime of the testator. The testator's heiress-at-law died intestate (after the Conveyancing Act, 1881, had come into operation), and there was no representative of her estate :—Held, that, on a petition for the appointment of new trustees of the will, which was served on the testator's heir, an order could be made vesting the property in the new trustees for such estate as was vested in the heiress-at-law at the time of her death. *Williams' Trusts, In re*, 56 L. J., Ch. 1088 ; 36 Ch. D. 231 ; 56 L. T. 884 ; 36 W. R. 100.

The last survivor of three trustees of real estate died, and no legal personal representative of his estate had been appointed. Upon a petition for the appointment of new trustees, and a vesting order of the trust property, an order was made vesting the estate in the new trustees for all the estate and interest which the deceased trustee had in him immediately before his death. *Rackstraw's Trusts, In re*, 52 L. T. 612 ; 33 W. R. 559.

Upon the death of a sole surviving trustee intestate the court made an order for the appointment of new trustees, and ordered certain lands forming part of the estate to vest in the new trustees "for the estate now vested in the heir-at-law of the deceased trustee." After the order had been passed and entered, administration was taken out to the estate of the deceased trustee. Upon motion that the order of the court might be altered by substituting the legal

personal representative for the heir-at-law of the intestate trustee in accordance with s. 30 of the Conveyancing Act, 1881, the court made a new order that, notwithstanding the previous order, the lands should vest in the new trustees "for all the estate therein now vested in the legal personal representative of the deceased trustee." *Pilling's Trusts, In re*, 53 L. J., Ch. 1052; 26 Ch. D. 432; 32 W. R. 853.

New Trustees—Jurisdiction to Re-appoint.]—A new trustee was appointed, under a power, in place of a trustee who had become incapable:—Held, that there was no jurisdiction under the Trustee Acts to re-appoint the new trustee and vest the trust estate in the continuing trustees and the new trustee. *Dalgleish's Settlement, In re*, post, col. 971, overruled. *Dewhirst's Will, In re*, 55 L. J., Ch. 842; 33 Ch. D. 416; 55 L. T. 427; 35 W. R. 147—C. A. See also *Batho, In re*, post, col. 975.

Where there is no doubt that existing trustees of an instrument have been duly constituted, the court will not re-appoint them, with a view to making, under the Trustee Act, 1850, s. 34, a vesting order which will not sever the joint tenancy. *Pearson, In re* (5 Ch. D. 982), not followed. *Vicat, In re*, 55 L. J., Ch. 843, n.; 33 Ch. D. 103; 54 L. T. 891; 34 W. R. 645—C. A.

A., B. and C. were named trustees in a will. A. died, B. became of unsound mind, and C. appointed E. and F. trustees in the place of A. and B. Part of the trust estate consisted of a mortgage of freeholds. The appointment of E. and F. being unquestionably valid, the court refused to re-appoint them and make an order vesting the mortgage estate in C., E. and F., but made an order appointing C. in the place of B. to convey the mortgaged property for the estate of himself and B. to himself, E., and F. upon the trusts of the will. *Ib.*

One of two trustees was convicted of felony and sentenced to penal servitude, and upon an application to the palatine court a new trustee was appointed, jointly with the remaining trustee. The trust property consisted of land partly within and partly without the jurisdiction of the palatine court. On the appointment of the new trustee, the palatine court made an order, vesting such part of the land as lay within that court's jurisdiction in the new trustee and the remaining trustee. A petition was then presented to this court, asking for an order vesting the remaining land in the new trustee and the remaining trustee. The evidence showed that the convict trustee could not be found:—Held, that inasmuch as there was no appointment of new trustees to be made on the present petition, no vesting order could be made under s. 8 of the Trustee Extension Act, 1852, having regard to the decision of *Dewhirst's Will, In re*, supra. But held, that as there was sufficient evidence that the convict trustee could not be found, the court had jurisdiction, under s. 10 of the Trustee Act, 1850, to make a vesting order, and would accordingly make such an order. *Hulme's Trusts, In re*, 57 L. T. 13.

—— **Continuing Trust—Decrease in Number of Trustees.**] — It is the settled practice of the court under the Trustee Acts, when there is a continuing trust, not simply to remove or discharge a trustee, without appointing a new trustee in his place, by appointing the remaining trustees to be sole trustees in place of themselves and him. And though the court will deviate from this rule and make such an appointment if the trustees have no duty to perform but to distribute a fund which is immediately divisible, it will adhere to the ordinary rule if there is a continuing trust as regards even a relatively small part of the trust fund. *Lamb's Trusts, In re*, 54 L. J., Ch. 107; 28 Ch. D. 77; 33 W. R. 163.

Although, where one of the trustees of a trust fund becomes lunatic, the court will not in general vest the right to deal with the trust funds in the trustees of sound mind, but will require a new trustee to be appointed in the place of the lunatic, an order vesting the right to the fund in the trustees of sound mind will be made where the fund is immediately divisible. *Martyn, In re, Toutt's Will, In re*, 54 L. J., Ch. 1016; 26 Ch. D. 745; 50 L. T. 552; 32 W. R. 734—C. A.

Where one of three trustees was an absconding bankrupt, the court refused, notwithstanding evidence of great difficulty in getting a third person to act as trustee, to appoint the solvent trustees in place of themselves and the bankrupt, and to make an order vesting the trust estate in the solvent trustees alone, on the ground that the court will not reduce the number of trustees of a continuing trust; and also that there is no power to appoint existing trustees to be new trustees. *Gardiner's Trusts, In re*, 55 L. J., Ch. 714; 33 Ch. D. 590; 55 L. T. 261; 35 W. R. 28.

—— **Special Circumstances.**]—One of the four trustees of a settlement having been adjudicated a bankrupt and having absconded, an action was brought by one of the cestuis que trust against the other three trustees claiming to have the trusts carried into execution, and to have it declared that the defendants were bound to make good any loss which might accrue on three mortgages on which part of the trust funds had been invested, and which the plaintiff alleged to be insufficient securities. He also alleged that the fourth estate had acted fraudulently. The legal estate in the mortgaged properties was vested in all the four trustees, and the stocks, in which the remainder of the trust funds had been invested, stood in the names of the four trustees. Before issue was joined in the action the defendants, in pursuance of an order of the court, gave notice to call in two of the mortgages, and one of the notices had expired. Owing to the pendency of the action no one could be found willing to accept the trusts in place of the bankrupt:—Held, that under these circumstances, the court could properly appoint the defendants trustees in the place of themselves and the bankrupt. An order was accordingly made appointing the defendants, and vesting in them the mortgaged properties, and the right to sue for and receive the mortgage debts, and to call for a transfer of, and to transfer, the stocks into their own names, and to receive the dividends thereon, the defendants to pay into court the mortgage money when received. *Davies* v. *Hodgson*, 32 Ch. D. 225.

By a settlement made in 1859 four trustees were appointed, one of whom disclaimed. The existing three trustees desired to retire, and in the events that had happened the power to appoint new trustees contained in the settlement was not exercisable. A petition was accordingly

presented for the appointment of three new trustees in place of the three who had acted and now wished to retire. Great difficulty was found in obtaining the consent of other persons to act as trustees, and this was alleged as a ground for the application that three new trustees should be appointed in the room of the original four:—Held, that on an appointment of new trustees by the court, assuming it was necessary to prove special circumstances to enable the court to appoint three new trustees when there had originally been four trustees, the disclaimer by one and the difficulty of obtaining new trustees constituted special circumstances. Whether special circumstances were actually necessary to be shown, quære. *Fowler's Trusts, In re*, 55 L. T. 546.

Absconding Trustee — Refusal to join in Appointment.]—The persons having power to appoint new trustees of a marriage settlement, viz., the husband and wife, appointed a new trustee in the place of one who had absconded abroad, and jointly with the continuing trustee. The trustee who had absconded declined to join in the appointment, and to execute the necessary transfers. The property subject to the trusts of the settlement consisted of policies of insurance and mortgages. It became therefore impracticable, having regard to sub-s. 3 of s. 34 of the Conveyancing Act, 1881, to vest such property in the trustees without the assistance of the court. A petition for a vesting order was accordingly presented, under the Trustee Acts, 1850 and 1852, by the husband and wife and the continuing trustee:—Held, that the order asked for might be made; but that the petition must be amended by adding the name of the proposed new trustee as a co-petitioner. *Keeley's Trusts, In re*, 53 L. T. 487.

Absconding Liquidator — Appointment of New Liquidator.]—After an order had been made for the compulsory winding-up of a company A. B. was appointed official liquidator. A. B. afterwards absconded, and he was removed from the post of official liquidator, and in his place C. D. was appointed official liquidator. It was found that a sum of consols, part of the assets of the company, was standing in A. B.'s name as official liquidator. An application, under the Trustee Act, 1850, ss. 22 and 43, was therefore made by motion ex parte for an order to vest such sum of consols in C. D. as official liquidator. A. B. had become bankrupt and could not be found:—Held, that the court had jurisdiction to make the order asked for upon motion; but that, except in simple cases like the present, the application should be made by petition:—Held, also, that the order asked for should be made, but not drawn up, within a week, and that the trustee in bankruptcy of the absconding liquidator should forthwith be served with notice of the order. *Capital Fire Insurance Association, In re*, 55 L. T. 633. See also *Hulme's Trusts, In re*, supra, col. 965.

ii. *Copyholds.*

Consent of Lord of Manor.]—It is not necessary for the lord of a manor to appear in court to consent to a vesting order under the Trustee Act. *Ayles* v. *Cox*, 17 Beav. 584.

After a decree for the sale of an intestate's copyhold estate in lots, but before the sale, the infant heir of the intestate was admitted:—Held, that a petition for a vesting order was properly presented by the purchaser, whose money was in court, and that the costs of the order were to be borne by the vendors, and to be paid out of the purchase-money of the particular lot, and not out of the fund in court generally. *Ib.*

Where the party entitled to the legal estate in copyholds has been admitted, and the legal estate descends on his death to his customary heirs, who disclaim, the consent of the lord will be necessary to a vesting order. *Howard, In re*, 3 Eq. R. 846; 3 W. R. 605.

The court will, on a petition to appoint a new trustee under the Trustee Act, direct copyholds to vest in the trustees appointed by the court, without requiring the parties to get the consent of the lord. *Fliteroft, In re*, 1 Jur. (N.S.) 418. And see *Boyce, In re*, 4 De G. J. & S. 210; 3 N. R. 396; 33 L. J., Ch. 390; 10 Jur. (N.S.) 138; 9 L. T. 670; 12 W. R. 359.

Where copyholds of inheritance had been sold by order of the court in a suit by an equitable mortgagee against the infant customary heir, who had not been admitted, and the personal representative of the deceased mortgagor, the consent of the lord of the manor evidenced either by his appearing and consenting, or by a verified certificate of his consent, was held to be a necessary preliminary to the drawing up of a vesting order under the 13 & 14 Vict. c. 60, made upon the petition of the purchaser, the infant heir, and the personal representative of the mortgagor. *Cooper* v. *Jones*, 25 L. J., Ch. 240; 2 Jur. (N.S.) 59.

Where a person to whom a trust estate in copyholds is devised disclaims, a vesting order, vesting in a new trustee the estate and interest in the copyholds, which would have vested in the disclaiming trustee if he had accepted the devise, is regular. *Paterson* v. *Paterson*, 35 L. J., Ch. 518; L. R. 2 Eq. 31; 14 L. T. 320; 14 W. R. 601. And see *S. C.*, nom. *Bristow* v. *Booth*, 35 Beav. 506; 39 L. J., C. P. 47; L. R. 5 C. P. 80; 21 L. T. 427; 18 W. R. 138.

The consent of the lord is not necessary to a vesting order of copyholds, but his right to his fine is not prejudiced by such an order if made without his consent. *Ib.*

If the order is to be made without the consent of the lord, he ought not to be served with the petition. *Ib.*

A copyhold was vested in a married woman. It was sold under a decree, which ordered all proper parties to join. She stated in writing that she never would surrender:—Held, that the case came within the Trustee Act, and a vesting order was made. *Rowley* v. *Adams*, 14 Beav. 130; 20 L. J., Ch. 436; 15 Jur. 1002.

Whether, where a purchaser has paid his purchase-money into court, the petition under the Trustee Act should be presented by the plaintiff or the purchaser, quære. But held, that the objection might be removed by making them co-petitioners. *Ib.*

The tender of a notice requiring a trustee to surrender a copyhold is not sufficient, within s. 17 of the Trustee Act, 1850, but the tender of a deed appointing an attorney to surrender may possibly be sufficient. *Ib.*

Where an estate is sold in lots under a decree, one petition under the Trustee Act, as to the several lots, is not multifarious. *Ib.*

Form of order appointing a new trustee of a copyhold estate, and appointing a person

to complete the assurance of the estate to such new trustee. *Hey's Will, In re*, 9 Hare, 221.

Covenant to Surrender Copyholds.]—Covenant by A. to surrender copyholds to the use of B., and in the meantime, and until such surrender should be made, that A. would stand seised of the copyholds "upon trust for, and to surrender the same unto B." A. went out of the jurisdiction without making any surrender. Order made, under the Trustee Act, 1850, for the appointment of a person to surrender the copyholds to B. *Collingwood's Trusts, In re*, 6 W. R. 536.

A vendor covenanted in the usual way to surrender copyholds to the purchaser, and the purchase-money was paid. The vendor died before surrender. His customary heir was of unsound mind. The covenant contained no declaration that the vendor and his heirs would until surrender hold the premises in trust for the purchaser:—Held, that a person might be appointed under the Trustee Act, 1850, to convey to the purchaser, without a suit being instituted to have the heir declared a trustee. *Cuming, In re*, L. R. 5 Ch. 72; 21 L. T. 739; 18 W. R. 157.

By their marriage settlement, husband and wife covenanted with the trustee to surrender copyholds of the wife to the uses of the settlement. The marriage was solemnised, but the wife died without ever having surrendered the copyholds, and upon her death they became vested in the youngest child of the marriage as her customary heir. Upon a petition presented by the trustee of the settlement, the eldest child, who was of age, and the other children of the marriage, infants, by their father and next friend, it was ordered by the court that the copyholds, without any surrender or admittance, should vest in the trustee of the settlement upon the trusts of the settlement for all the estate of the customary heir. *Bradley's Settled Estate, In re*, 54 L. T. 43; 34 W. R. 148.

Copyhold lands were devised to an infant for life, with remainder to his first and other sons in tail. By a decree made in a cause these copyholds were directed to be sold for the payment of the testator's debts, and an order was made under the Act 1 Will. 4, c. 47, directing the guardian of the infant to surrender the lands to the purchaser. The purchaser objected to the surrender of the copyholds in question without a petition presented under the Trustee Act, 1850, on the ground that there were contingent rights and interests subsequent to the infant's life estate, which the surrender as proposed would not defeat:—Held, that the purchaser was entitled to an order under s. 29 of the Trustee Act, 1850, discharging the contingent rights of the unborn issue of the tenant for life, but that such an order might be made in the suit without a petition entitled in the Trustee Act. *Wood* v. *Beetlestone*, 1 K. & J. 213; 3 Eq. R. 238.

A mortgagor of copyholds having refused for twenty-eight days to make a surrender in accordance with his covenant, an order was made vesting the legal estate in the mortgagee, subject to the proviso for redemption. *Crowe's Mortgage, In re*, 41 L. J., Ch. 32; L. R. 13 Eq. 26.

Copyhold premises were surrendered in 1829, by a debtor to the use of his creditor, his heirs and assigns, upon trust that he, his heirs, executors, administrators, or assigns, should sell the same, and, out of the proceeds, should pay to himself, his executors or administrators, 200*l.* then due, and interest. The creditor died in 1831. In 1851 his personal representative contracted to sell the copyhold premises for 100*l.* The customary heir of the creditor was an infant. On the petition of the personal representative of the creditor, it appeared that the debtor had died intestate, that there was no personal representative, and that proof of the title of the customary heir would be very expensive. The court made an order vesting the legal estate in the copyhold premises in the purchaser, without any service either on the customary heir or on the personal representative of the debtor. *Wise, In re*, 5 De G. & Sm. 415.

"Seised Jointly"—Coparceners.]—The words "seised jointly" in s. 10 of the Trustee Act, 1850, are not limited strictly to a legal joint tenancy, but are used in the widest sense, and they include the case of land vested in coparceners, one of whom is out of the jurisdiction of the court. *Templer's Trusts, In re*, post, col. 975, and *M'Murray* v. *Spicer*, post, col. 981, considered. *Greenwood's Trusts, In re*, 54 L. J., Ch. 623; 27 Ch. D. 359; 51 L. T. 283; 33 W. R. 342.

"Wilful" Refusal to Convey.]—Sect. 2 of the Trustee Extension Act, 1852, only applies to cases where the title to the lands of the person requiring a conveyance thereof is free from doubt. Where there is a bonâ fide doubt as to such title, the refusal of a trustee to convey the lands is not "wilful" within that section, and there is therefore no jurisdiction under it in such a case to grant a vesting order. *Mills' Trusts, In re*, 40 Ch. D. 14; 60 L. T. 442; 37 W. R. 81—C. A.

iii. *Leaseholds.*

Lessee Covenanting to Stand Possessed of Reversion of Term for Mortgagee.]—A lessee who mortgages his term with the reservation of a day, and covenants to stand possessed of the reversion for the mortgagee and his assigns, is not a trustee within the 13 & 14 Vict. c. 60. *Roberts's Estate, In re*, 1 W. R. 237.

Lunatic Trustee.]—A trustee of property held in trust for A. B. absolutely, having become lunatic, A. B. presented a petition asking that the property might be vested in himself:—Held, that such an order ought not to be made, but that a new trustee ought to be appointed, and the property vested in him. *Holland, In re, Howarth's Trusts, In re*, 50 L. J., Ch. 271; 16 Ch. D. 672; 44 L. T. 561; 29 W. R. 449.

Order vesting leaseholds in continuing and new trustees as joint tenants. *Fisher's Will, In re*, 1 W. R. 505.

Death of Trustee Intestate—Appointment by Court of New Trustee.]—The surviving trustee of leaseholds died intestate, and no administration had been taken out. The court appointed a new trustee, and made a vesting order in the absence of the owner of the fee. *Matthew's Settlement, In re*, 2 W. R. 85.

Semble, the court has no jurisdiction to make a vesting order, as to leaseholds, where the surviving trustee, who had died intestate, had not proved the will, or acted in the trusts, and no administration had been taken out to his

estate. *Robinson's Will, In re*, 2 N. R. 504 ; 9 Jur. (N.S.) 885 ; 9 L. T. 12 ; 11 W. R. 1035.

—— **Re-appointment of Trustees previously Appointed.**]—When a sole trustee of leaseholds had died intestate, and had no legal personal representative, and new trustees had been duly appointed under the settlement, the court re-appointed the same two persons trustees, and made an order vesting the leaseholds in them. *Dalgleish's Settlement, In re*, 4 Ch. D. 143 ; 35 L. T. 829; 25 W. R. 122—C. A. Reversing 45 L. J., Ch. 68. But see *Dewhurst's Trusts, In re*, supra, col. 965.

New trustees had been appointed, under a power, of trust property, comprising freehold, copyhold, and leasehold estates, but the property remained vested in the representatives of a former trustee, who had died abroad. A petition was presented for a vesting order under s. 15 of the 13 & 14 Vict. c. 60 ; but the court made an order under s. 32, re-appointing the trustee who had been already appointed under the power, and ordered that the trust estates should vest in such trustees under s. 34. *Mundel's Trusts, In re*, 6 Jur. (N.S.) 880; 2 L. T. 653 ; 8 W. R. 688.

Upon an appointment of A. as a trustee under a settlement jointly with B., certain leaseholds were assigned to a provisional trustee, upon trust to re-assign the same to A. and B. No re-assignment was executed. The provisional trustee died intestate, and no legal representative could be found. Under s. 32 of the Trustee Act, 1850, A. was re-appointed a trustee of the settlement ; and, under s. 34, the leaseholds were vested in A. and B. jointly. *Morris's Settlement, In re*, 4 N. R. 480.

When a trustee of leaseholds has died intestate and has no legal personal representative, and a new trustee has been duly appointed in his place, the court will not re-appoint him trustee under the Trustee Act, 1850, s. 32, merely for the sake of making a vesting order under s. 34. *Driver's Settlement, In re*, L. R. 19 Eq. 352 ; 23 W. R. 587.

The court will, however, appoint an additional trustee under s. 32, and will thereupon make a vesting order under s. 34. *Ib.*

Agreement to grant Building Leases—Covenant for Quiet Enjoyment.]—The defendant agreed to grant to the plaintiff leases of houses built by the plaintiff on the defendant's land. Before leases were granted the defendant became of unsound mind, though he had not been so found by inquisition, nor had any committee of his estate been appointed. In an action for specific performance, the defendant offered to submit to a decree, and to have himself declared a trustee for the plaintiff under the Trustee Act, 1850, and to have a person appointed to execute the leases on his behalf, or to have the houses vested in the plaintiff on the terms of the agreement :—Held that the proposed order would vest a legal term in the plaintiff pursuant to the contract, but would not give him the benefit of the express covenant for quiet enjoyment. *Cowper* v. *Harmer*, 57 L. J., Ch., 460 ; 57 L. T. 714.

Leaseholds for Lives—Form of Vesting Order.]—In 1883 a lease for three lives of a certain manor was granted to A., B. and C., subject to the trusts declared by the will of a testator. C. survived his co-trustees A. and B., but afterwards died intestate as to the trust property. C. left a brother, D., who died intestate, leaving co-heiresses. A petition was presented for the appointment of new trustees of the lease and a vesting order. A question then arose as to the persons in whom the lease would be legally vested and the proper wording of the vesting order. It was sought to amend the petition by varying the proposed vesting order so as to vest the manor in the new trustees "for the same estate as C. would have had if he had been alive," and reference was made to the form in Seton (vol. 1, p. 539) :—Held, that no form ought to be adopted in which the heir was not named, except in cases where it was in fact inconvenient or impossible to identify the heir ; and that the court, on a broad view, ought to regard the fact that the estate might have been dealt with, since the death of the last surviving trustee, in such a way that the parties not before the court might be prejudiced by a vesting order in the form proposed. But held, that under the circumstances of the case and the court being satisfied that no parties could be prejudiced, the vesting order might be made in the form proposed. *Sarum (Bishop), In re*, 55 L. T. 313.

iv. *Mortgages.*

Mortgagor out of Jurisdiction.] — After a decree for foreclosure, the absconding mortgagor was declared a trustee and an order was made, under 13 & 14 Vict. c. 60, ss. 9, 43, vesting the mortgaged premises in the plaintiff, on non-payment of the principal, interest, and costs. *Lechmere* v. *Clamp*, 31 Beav. 578 ; 30 L. J., Ch. 651 ; 2 W. R. 860.

On making an order of foreclosure absolute, the court refused to add a declaration under the Trustee Act 1850, that the mortgagor, being out of the jurisdiction, is a trustee, in order to found upon it a subsequent application for a vesting order. Such a declaration can be obtained only on a separate application. *Smith* v. *Boucher*, 1 Sm. & G. 72 ; 16 Jur. 1154 ; 1 W. R. 51.

Leases were granted to A. B. for certain terms of years. He sub-demised to C. D. for the terms, less ten days. C. D. mortgaged to E. F. & Co., for securing money, and sub-demised for the last-mentioned terms, less one day, with a power of sale, and covenanted to assign the last day of each term to a purchaser. The mortgagees (E. F. & Co.) sold to G. H., and assigned the mortgage terms. G. H. then bought of A. B. the improved ground rents, and took an assignment of the leases granted to him. C. D., the mortgagor, being abroad, G. H. petitioned under the Trustee Act (13 & 14 Vict. c. 60), that the court would declare the last day of each of the terms, created by the underlease to him, vested in the petitioner : but the court, concurring in the opinion of one of the vice-chancellors, dismissed the petition. *Propert's Purchase, In re*, 22 L. J., Ch. 948 ; 1 W. R. 237.

Death of Mortgagor Intestate — Infant Heir — Equitable Mortgage.] — An equitable mortgage was created in 1886 by a deposit of title deeds accompanied by a memorandum, whereby it was agreed that the mortgagor would, when required, execute a legal mortgage to the mortgagees. The mortgagor died intestate and

his heir-at-law was an infant:—Held, that a vesting order might be made under the Trustee Act, 1850, s. 7, vesting the legal estate in the mortgaged premises in the mortgagees subject to the heir-at-law's right to redeem. *Jones and Co.'s Mortgage, In re*, 59 L. T. 859.

Infant Devisee of Mortgagor.]—On a claim for foreclosure against the devisees of the mortgagor, one of whom was an infant, the infant did not appear, and the plaintiff obtained an order appointing the solicitor to the Fee Fund his guardian:—Held, on the hearing, that the plaintiff had a right to have the common decree of foreclosure, with a day for the infant to show cause, there being nothing in the Trustee Act to alter the rights of the infant. *Newbury* v. *Marten*, 15 Jur. 166.

In this case, and under the circumstances, the costs of the solicitor to the Fee Fund were ordered to be taxed and paid by the plaintiff, and added to the debt, as the solicitor only appeared for the convenience of the plaintiff. *Ib.*

Vesting order under s. 7 of the Trustee Act 1850, as to the equity of redemption in an infant, against whom, in a foreclosure suit, a decree for sale had been made, refused on the ground that a mortgagee had the legal estate, and that all equities were bound by the order for sale. *Williams' Estate, In re*, 5 De G. & Sm. 515; 21 L. J., Ch. 437.

In a foreclosure action, where the estate of the mortgagor was devised in trust for sale, and had become vested in an infant, who was one of the persons beneficially interested:—Held, that the decree should contain a direction that, in case the mortgagees were not redeemed within six months, the infant should be a trustee for them within the meaning of the Trustee Act, and the executrix of the mortgagor be ordered to convey the estate to the mortgagees on his behalf. *Foster* v. *Parker*, 8 Ch. D. 147.

Mortgagee—Heir Unknown.]—Under s. 19 of the Trustee Relief Act 1850, the court has jurisdiction, upon the petition of the personal representative of a mortgagee in fee, who has died intestate as to the mortgaged premises, and whose heir cannot be found or is unknown, to vest the mortgaged estate in such representative, subject to the equity of redemption, the mortgage debt remaining unpaid. *Boden's Estate, In re*, 1 De G. M. & G. 57; 9 Hare, 820; 21 L. J., Ch. 316; 16 Jur. 279. But see *Meyrick's Estate, In re*, 9 Hare, 116; 20 L. J., Ch. 336; 15 Jur. 505.

Where a mortgagee, with power of sale, and a trust to pay the residue to the mortgagor, took possession and so remained until his death, giving his estate generally to trustees, but left no heir-at-law, the court would not make a vesting order under ss. 9 or 10 of the 13 & 14 Vict. c. 60, but under s. 15. *Keeler's Mortgage Trust, in re*, 1 N. R. 44; 32 L. J., Ch. 101; 9 Jur. (N.S.) 95; 11 W. R. 62.

In consideration of money lent, real estate was conveyed to the lender, his heirs and assigns, upon trust, in case the principal money and interest should be re-paid by a given day, for the borrower, his heirs or assigns; but in case default should be made, then upon trust for sale, and the trusts of the purchase-money were declared to be for payment of the principal money, interest, and costs, and subject thereto for the borrower, "his executors, administrators, or assigns." Default having been made:—Held, that the trust of the surplus, being for the borrower, "his executors, administrators, or assigns," and not for him, "his heirs, or assigns," the deed operated to convert the property as between his real and personal representatives. It was therefore more than merely a security for money; more, that is, than a "mortgage," as defined by s. 2 of 13 & 14 Vict. c. 60; it was a deed of "trust" within the meaning of s. 15; and the lender having died intestate, and it being impossible to find the heir, the court had power to make a vesting order under that section. *Underwood, In re*, 3 K. & J. 745; 5 W. R. 866.

M., a mortgagee in fee, after directing payment of debts, &c., devised all her real and personal estate to B. upon certain trusts. M. was illegitimate, and had died without issue. The court made an order vesting the legal estate in the mortgaged premises in a purchaser, the money having been paid off. *Minchin's Estate, In re*, 2 W. R. 179.

—— **Heir out of Jurisdiction.**]—Vesting order made in the executors of a deceased mortgagee in fee, whose heir-at-law was residing out of the jurisdiction. *Lea's Trust, In re*, 6 W. R. 482.

When the personal representative of a mortgagee assigns the mortgage, the heir of the mortgagee being out of the jurisdiction, the assignee may, under s. 19 of 14 & 15 Vict. c. 60, obtain an order vesting the legal estate. The relief given by that section is not confined to the case of re-conveyance to the mortgagor. *Quinlan, In re*, 9 Ir. Ch. R. 306.

The court may, under s. 9 of the Trustee Act, make an order vesting in the executors of a deceased mortgagee in fee, who has died intestate as to trust estate, the legal estate outstanding in the heir-at-law out of the jurisdiction of the court, though the mortgagee had before her death been in the receipt of the rents and profits of the mortgaged property. *Skitter's Mortgage Trusts, In re*, 4 W. R. 791.

—— **Infant Heir.**]—A mortgagee in fee of lands of gavelkind tenure gave and devised all the residue of his estate, personal and real property, moneys, and securities, and all other effects, which should remain after paying his just debts, funeral and testamentary expenses, to his wife, for her own use and benefit:—Held, that in consequence of the devise by the will, no estate in the mortgage premises remained vested in the infant co-heirs in gavelkind of the mortgagee; and an order was therefore refused, upon a petition presented under the Trustee Act, 1850, praying an order vesting the infants' estate in the petitioner. *Field's Mortgage, In re*, 9 Hare, 414; 21 L. J., Ch. 175; 15 Jur. 1004.

Where the legal estate was outstanding in the infant heir of a deceased mortgagee, and the equity of redemption had been devised by the mortgagor to his three daughters charged with a pecuniary legacy, it was ordered, upon petition under the Trustee Act, 1850, that the legal estate should be vested in the daughters subject to the legacy. *Elerthorpe, In re*, 2 Eq. R. 1146; 18 Jur. 669.

One of the executors of a deceased mortgagee was a married woman, and the legal estate, as to which there was an intestacy, had descended to the infant heir-at-law of the mortgagee. To save

the necessity of an acknowledgment under the Fines and Recoveries Act by the executrix upon a reconveyance to the mortgagor, order made upon petition under the Trustee Act 1850, vesting the legal estate in the executors, their heirs and assigns, to such uses, &c., as they should appoint; and in default of and until appointment, to the use of the executors in fee, subject to the equity of redemption therein. *Powell, In re*, 4 K. & J. 338; 6 W. R. 136.

Joint Mortgages—Two Coparceners One out of Jurisdiction.]—A legal estate vested in a mortgagee having descended on two coparceners, one of whom was out of the jurisdiction, an order was made vesting it in the other alone. *Templer's Trusts, In re*, 4 N. R. 494. But see *Greenwood's Trusts, In re*, supra, col. 970.

—— **One Joint Mortgagee out of Jurisdiction.**]—The court has no jurisdiction under the Trustee Act, 1850, to appoint a person to convey lands in mortgage for the estate therein of a joint mortgagee out of the jurisdiction of the court. *Osborn's Mortgage Trusts, In re*, 40 L. J., Ch. 706; L. R. 12 Eq. 392; 25 L. T. 151.

One of three joint mortgagees, who were trustees, went abroad, and in his absence the mortgage was paid off, and by a deed, to which he, with the other trustees, was named a party, but which he never executed, the debt and security, except the legal estate outstanding in him, were vested in the transferee of the mortgage. Afterwards a new trustee was by deed appointed a trustee in his place:—Held, that the neglect or refusal of the old trustee to convey the outstanding legal estate brought the case within the Trustee Acts, and that the court had jurisdiction under those acts to vest in the transferee the outstanding legal estate. *Osborn's Mortgage Trusts, In re*, supra, distinguished. *Walker's Mortgage Trusts, In re*, 3 Ch. D. 209.

Transfer of Mortgage Debt Ordered—Doubt as to Power of Trustees of Debt to Convey.]—The court has jurisdiction to make a vesting order of the legal estate in mortgaged lands, where a transfer of the mortgage debt had been ordered by the court, and it is doubtful whether the trustees of the debt have power to convey the legal estate. *Hughes, In re*, 2 H. & M. 695.

Trustee out of Jurisdiction—Mortgage Debt and Stock.]—The property comprised in a settlement consisted of money lent upon a mortgage of freeholds vested in the two surviving trustees, and of a sum of consols standing in their names. One of these two surviving trustees was a lunatic, and the other was resident out of the jurisdiction; and under a power in the settlement two persons were appointed new trustees in their places. Upon a petition by these two new trustees and by all the beneficiaries praying for an order reappointing the new trustees as trustees of the settlement, and vesting in them the trust property:—The court declined to reappoint the new trustees, but under s. 3 of the Trustee Act, 1850, vested the lands subject to the mortgage in the new trustees, and under s. 5 of the same act vested the mortgage debt and the right to call for a transfer of the consols in the trustee of sound mind resident out of the jurisdiction, and it appearing that he was out of the jurisdiction, vested the mortgage debt and the right to call for a transfer of the consols in the new trustees. *Batho, In re*, 58 L. J., Ch. 32; 39 Ch. D. 189; 59 L. T. 882—C. A. *And see* ante, col. 965.

—— **Trustee of Mortgage Money.**]—On the 1st July, 1881, a house was mortgaged to B. for 350*l*. On the 15th July, 1887, this mortgage was transferred to D. in consideration of 385*l*. This money was in fact found by S. and T., and the transfer was taken to D. as trustee for them, but there was no declaration of trust. Soon after the transfer D. was adjudicated bankrupt, and absconded. At the date of the petition he was out of the jurisdiction, and could not be found. The mortgagor and S. and T. presented a petition under the Trustee Act, 1850, for an order vesting D.'s estate in S. and T. D.'s trustee in bankruptcy admitted that he took no beneficial interest:—Held, that the court had jurisdiction to make the vesting order. *Barber's Mortgage Trusts, In re*, 58 L. T. 303.

—— **New Trustee Appointed out of Court.**]—Where one of two trustees resides permanently out of the jurisdiction, and a new trustee has been appointed out of court in his stead, by virtue of a power contained in the instrument creating the trust, the court has power, under s. 10 of the Trustee Act, 1850, to make an order vesting the trust property, consisting of money on mortgage, in trustees appointed out of court. *O'Gorman's Trust, In re*, 25 L. R., Ir. 93.

v. *Stock and Choses in Action.*

Refusal by Trustees to Transfer.]—The court has jurisdiction, under s. 23 of the Trustee Act, 1850, and having reference to the interpretation clause (s. 2) of the act, to make an order vesting trust property in new trustees, where two or more present trustees improperly refuse to transfer it. *Hyatt's Trusts, In re*, 51 L. J., Ch. 742; 21 Ch. D. 846.

—— **Stock.**]—The surviving trustee of a sum of stock neglected, for twenty-eight days after a request in writing had been made to him by persons who had been duly appointed new trustees, to transfer the stock to them. The court held, that they were persons absolutely entitled to the stock, within the meaning of the Trustee Act, 1850, and ordered the stock to be transferred to them. *Russell's Trust, In re*, 1 Sim. (N.S.) 404; 20 L. J., Ch. 196; 15 Jur. 100.

Stock was standing in the names of A. and B. upon trust for C. for life, with remainders over. By an order made in a cause instituted by C. against A. and B., with respect to the stock, it was ordered that A. and B. should transfer the stock to the credit of the cause. A. refused to make the transfer. A petition was presented by C. under the Trustee Act, 1850, and in that cause, praying that the right to transfer the stock might be vested in B. alone:—Held, that the court had not jurisdiction to make the order. *Mackenzie* v. *Mackenzie*, 5 De G. & Sm. 338; 21 L. J., Ch. 385; 16 Jur. 723.

The 13 & 14 Vict. c. 60, gives power to the court to make a vesting order in cases where a sole trustee, or one or two or more trustees of stock, shall refuse to transfer the same according to the direction of the person absolutely entitled. Where there were two trustees, and both refused to transfer:—Held, that the Act did not apply. *Spawforth's Settlement, In re*, 10 L. T. 641; 12 W. R. 978.

On the neglect of old trustees to transfer stock to new trustees appointed by the court, the court will upon motion, vest the right to transfer stock in the new trustees, and that whether the order upon the old trustees was made in a cause or upon petition. *Holbrook's Will, In re*, 29 L. J., Ch. 200 ; 1 L. T. 18 ; 8 W. R. 39.

On the refusal of a trustee to comply with an order directing the assignment of trust property, the court, after a lapse of twenty-eight days, and on an ex parte application, made an order vesting the property in the person entitled to it. *Knight* v. *Knight*, 14 L. T. 161.

—— **Disobedience to Order—Attachment.**]—The case of a trustee refusing to obey the order of the court is not a case provided for by the Trustee Act, 1850, but it is a case within the 1 Will. 4, c. 36, s. 15, the 15th sub-division ; and any proceeding to obtain the transfer should be taken under that act. *Mackenzie* v. *Mackenzie*, supra.

By an order expressed to be made in a cause and in the matter of the Trustee Act, 1850, a defendant was directed to transfer stock. Upon an affidavit of service of this order, which was intituled in the cause only, a writ of attachment for disobedience was issued, on which the defendant was in custody. The writ was discharged for irregularity on account of a variance, but the court declined to give the defendant costs. *Ib.*

When a trustee is ordered to transfer a fund of consols admitted to be due from him and subsequently default is made, a writ of attachment will issue. *Digby* v. *Turner*, 28 L. T. 296 ; 21 W. R. 471.

—— **Dividends.**]—The person entitled for life to the dividends of stock held in trust requested, in writing, two executors of a sole deceased trustee, in whose name the stock was standing in the bank-book, to receive the dividends, and they made default for twenty-eight days in doing so. Upon the petition of the person entitled for life to the dividends, the court declared that the right to receive the dividends which accrued due prior to such request was vested in the petitioner ; but held, that it had no authority to make any order as to any dividends accrued, or to accrue, subsequent to the date of the request. *Hartnall's Trusts, In re, Hodges, Ex parte*, 5 De G. & Sm. 111 ; 21 L. J., Ch. 384 ; 16 Jur. 33.

—— **Shares.**]—One of the three executors of a surviving trustee of canal shares was of unsound mind, and the other two, when applied to by the persons absolutely entitled to the shares, declined to do anything :—Held, that an order could be made vesting the right to transfer the shares in the persons beneficially entitled. *White, In re*, L. R. 5 Ch. 698.

One of the executors of the surviving trustee of a settlement was a lunatic. The other two executors refused to transfer some shares included in the settlement to the person absolutely entitled to them :—Held, that a vesting order could not be made under the Trustee Act, 1850, s. 24, but that a petition in lunacy must be presented. *Nicholl, In re*, 22 L. T. 323 ; 18 W. R. 443.

A trustee having refused to convey certain shares to new trustees duly appointed, a notice was served upon him under s. 24 of the Trustee Act, 1850, and on a petition being afterwards presented which was not served on the recusant trustee, the court made a vesting order. *Baxter's Will, In re*, 2 Sm. & G. (App.) v.

Trustee out of Jurisdiction or Uncertain—Stock.]—Husband of executrix out of the jurisdiction held to be a trustee within the Trustee Act, 1850, s. 22. *Bradshaw, Ex parte, Dennison's Trust, In re*, 2 De G. M. & G. 900 ; 22 L. J., Ch. 180.

Where a trustee is out of the jurisdiction, and it is uncertain whether he is living or dead, no order can be made under the latter part of s. 22, of the Trustee Act, 1850, in the absence of evidence proving him to be a sole trustee. *Randall's Trust or Will, In re*, 1 Drew. 401 ; 1 W. R. 207.

Stock was standing in the names of G. and H., trustees for a lunatic. G. died in 1864, and E. was his executor, H. having died long previously, but no such proof of his death as the bank would act upon could be furnished. An order was made under s. 22 of the Trustee Act, 1850, appointing the officer of the bank to concur with E. in transferring the stock into court :—Held, that such order could not be made on the petition of the committee alone. *Bourne, In re*, 2 De G. J. & S. 426.

—— **Shares and Dividends.**]—A., the owner of shares in a certain bank, wrote a letter from Calcutta to the manager in England, requesting him to deliver over the shares to the manager of another bank to which A. was indebted, and to pay all dividends on the shares to, and to sell them at, the order of this last-mentioned bank. A. being still in India, the shares were sold under the authority of this letter, and the purchaser applied for an order under the Trustee Act, 1850, to vest the shares and dividends in B., for the purpose of enabling the purchaser to obtain a transfer of the said shares and dividends from B. under the authority of the act. On proof of the signature of A. to the letter, of the sale, and that the debt had ever since existed and was still due, the order was made. *Angelo, In re*, 5 De G. & Sm. 278 ; 16 Jur. 831.

—— **Future Dividends.**]—The 13 & 14 Vict. c. 60, s. 22, authorises an order vesting the right to receive future dividends. *Peyton's Settlement, In re*, 2 De G. & J. 290 ; 4 Jur. (N.S.) 469 ; 1 L. T. 127 ; 6 W. R. 453.

One of four trustees of stock being out of the jurisdiction, an order was made under the 13 & 14 Vict. c. 60, s. 22, vesting the right to receive the dividends in the other three (25 Beav. 317 ; 27 L. J., Ch. 476); but was, on appeal by the bank, varied by restricting it to the dividends to accrue due during the joint lives of the three. *Ib.*

No Legal Personal Representative of Surviving Trustee.]—Stock was vested in the names of three trustees, in trust for the benefit of a lunatic for life, and, after her decease, for her children ; the last surviving trustee having died, his widow and executrix refused to prove his will. The court, upon petition, appointed new trustees, and directed that they should obtain a limited administration to the last surviving trustee for the purpose of procuring a transfer of the stock to themselves. *Needham, In re*, 1 Jo. & Lat. 34 ; 6 Ir. Eq. R. 557.

The 13 & 14 Vict. c. 60, held to apply to a case in which the executor of a surviving trustee

had not proved the will, and had neglected to transfer stock on the requisitions of new trustees appointed out of court. *Ellis' Settlement, In re*, 24 Beav. 426.

The court directed the circumstances, bringing the case within the Trustee Act, to be inserted in an order vesting the right to transfer stock. *Ib.*

When the surviving trustee of a fund, standing in the names of trustees in the books of the Bank of England, died leaving no personal representative, the court, upon a petition by the person beneficially entitled, appointed him trustee of the fund, and ordered it to be transferred into his name. *Dickson* or *Dixon, In re*, 27 L. T. 671; 21 W. R. 220.

When the legal personal representative of the last surviving trustee of a settlement was dead, the court made an order vesting stock standing in the name of the last surviving trustee in the persons entitled thereto. *Hilliard's Settlement Trust, In re*, 42 L. T. 79.

The survivor of two trustees of stock under a will having died leaving no legal personal representative, the cestuis que trust and two new trustees, who had been appointed under a power in the will, presented a petition asking that the right to transfer the stock—which was then standing in the names of the deceased trustees—might vest in the new trustees, under s. 25 of the Trustee Act, 1850. The court made the order—considering itself bound by *Dalgleish's Settlement, In re*, supra, col. 971—but without re-appointing the new trustees. *Crowe's Trusts, In re*, 14 Ch. D. 304. Order corrected, *Id.* 610; 42 L. T. 822; 28 W. R. 885.

Where all the trustees of the stock had died, and there was no personal representative of the survivor, and new trustees had been appointed under a power in the settlement, the court, under s. 32 of the Trustee Act, 1850, re-appointed the same persons trustees, and under s. 35 made an order vesting in them the right to call for the transfer of the stock the subject of the trusts. *M'Carthy, In re*, 1 L. R., Ir. 16.

Personal Representative of Sole Trustee out of Jurisdiction.]—Under s. 25 of the Trustee Act, 1850, the court has power to make a vesting order in relation to stock standing in the sole name of a domiciled Scotchman whose executor has proved his will in Scotland, but has not proved it in England, and who is resident in Scotland. *Trubee's Trusts, In re*, 61 L. J., Ch. 715; [1892] 3 Ch. 55; 67 L. T. 161; 40 W. R. 552.

Infant Trustee — Stock — Maintenance — Appointment of Guardian.] — Under the will of her father (a domiciled Scotchman, who made his will in the Scotch form), an infant was entitled to a legacy. The will contained no express trust for maintenance. The court of session in Scotland appointed a curator bonis to the infant, who received the legacy, and invested it in the purchase of some New Zealand stock, in the sole name of the infant. This stock was transferable at the Bank of England. It was the only property of the infant, and the income derived from it was not sufficient to provide for her maintenance and education. The court of session authorised the curator bonis to advance from time to time sums out of capital, not exceeding in all 100*l.*, for the purpose of supplementing the income of the infant, and enabling her to be placed at a suitable school. The curator bonis, as next friend, presented a petition, asking that the right to transfer 100*l.* of the New Zealand stock might vest in him, and that he might be at liberty to sell and transfer the same, and to apply the proceeds in or towards the maintenance or education of the infant; that the dividends which had accrued, and which might, during the minority of the infant, accrue on the stock, or on the residue thereof after the transfer, might be paid to him, he undertaking to apply them in or towards the maintenance or education of the infant; and that he might be appointed guardian:—Held, that the infant was a "trustee" of the stock, within the meaning of the Trustee Acts, and an order was made vesting the right to transfer 100*l.* of the stock in the next friend (who was appointed guardian to the infant), and liberty was given to him to sell and transfer the same, and to apply the proceeds in or towards the maintenance or education of the infant; and that the dividends, accrued and to accrue during the minority of the infant, should be paid to the guardian, he undertaking to apply them in or towards her maintenance or education. *Gardner v. Cowles*, infra, followed. *Findlay, In re*, 55 L. J., Ch. 395; 32 Ch. D. 221, 641.

—— Infants entitled to Stock—Stock standing in Names of Infants and Others.]—Infants were entitled under a will to certain legacies, which had been invested in consols in the names of the executor and executrix, and of the infant in each case entitled thereto:—Held, that the court would, under s. 3 of the Trustee Extension Act, 1852, made an order vesting in the executor and executrix the right to transfer the stock and receive the dividends accrued prior to the transfer. *Barnett, In re. Foster v. Barnett*, 61 L. T. 676.

The sole trustee of money for A. and B. invested it in stock in the joint names of himself and B. (an infant); after the death of the trustee and A., the infant was held to be a trustee within the 13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55, s. 3, and a vesting order was made. *Sanders v. Homer*, 25 Beav. 467; 6 W. R. 476.

Where an investment in consols has been made by executors, by mistake, in the names of infants, for the purposes of re-investment, the infants must be considered as trustees for the executors, and a declaration will be made by the court to that effect. *Rives v. Rives*, 14 L. T. 351.

Money payable under a will to an infant at twenty one, with maintenance and education, out of the income in the meantime, was invested in stock in the joint names of the executors and the infant. The executors having died:—Held, that the infant was a trustee of the stock within the meaning of the trustee acts. *Gardner v. Cowles*, 3 Ch. D. 304; 24 W. R. 920.

An infant declared a trustee of stock standing in his own name, and to which he was absolutely entitled, in order to obtain payment of the dividends to his guardians. *Westwood, In re*, 6 N. R. 61.

Where stock to which an infant was beneficially entitled had been invested in the joint names of himself and another person:—Held, that the court had jurisdiction under s. 3 of the Trustee Extension Act, 1852, to make an order vesting in such other person the right to transfer such stock. *Harwood, In re*, 51 L. J., Ch. 578; 20 Ch. D. 536; 30 W. R. 595.

—— **Infant Out of the Jurisdiction.**] — Before the passing of the Trustee Extension Act (15 & 16 Vict. c. 55) the court had no authority to make a vesting order with regard to stock held by an infant sole trustee who was out of the jurisdiction of the court. *Cramer* v. *Cramer*, 5 De G. & Sm. 312 ; 16 Jur. 831.

An infant trustee of stock in the jurisdiction not being, within the Trustee Act, 1850, s. 22, an infant and sole trustee out of the jurisdiction, is not a sole trustee of stock out of the jurisdiction within the meaning of s. 22. *Ib.*

Vesting Right to Stock or Choses in Action in Beneficiaries.] — A surviving trustee of stock died leaving no personal representative. The person beneficially entitled was appointed trustee of the fund, which was ordered to be transferred into his name. *Dickson* or *Dixon*, *In re*, 27 L. T. 671 ; 21 W. R. 220.

Where a chose in action is vested in two trustees within the jurisdiction, the court will not make an order vesting it in the cestuis que trust only. Semble, the same rule applies to the case of an order directing the transfer of shares in a bank. *Brass's Trusts*, *In re*, 4 W. R. 764.

A sum of 500*l.* stood settled on the trusts of a marriage settlement. The trustees were dead ; there were no children ; the wife was fifty-eight years old, and had assigned all her interest to her husband, who was one of the cestuis que trust. On the petition of husband and wife, the court ordered that the right to transfer might vest in the husband, and that he might transfer to himself. *Ryan*, *In re*, 9 W. R. 137.

vi. *Sales.*

Trustee out of Jurisdiction.]—There being a direction in a will to sell real estate without naming the person to sell, and no devise of the real estate, and it not being clear that there was a sufficient legal power of sale (implied) in the executor, or a sufficient charge of debts to enable him to convey the legal estate to a purchaser, the court, at the hearing, directed a sale, declaring the heir-at-law, who was out of the jurisdiction, a trustee within the meaning of the 13 & 14 Vict. c. 60, and made a vesting order under s. 9. *Hooper* v. *Strutton*, 12 W. R. 367.

When two persons, of whom both were legally entitled as coparceners to copyholds, but one only had any beneficial interest therein, were admitted as tenants in common, and the lord afterwards enfranchised to both, their heirs and assigns, the other was held to be "solely seised upon trust" within the meaning of s. 9 of the Trustee Act, 1850. *M'Murray* v. *Spicer*, 37 L. J., Ch. 505 ; L. R. 5 Eq. 527 ; 18 L. T. 116 ; 16 W. R. 332. But see *Greenwood's Trusts*, *In re*, supra, col. 970.

After a bankruptcy, and the appointment of assignees, the proceedings were suspended under the Bankruptcy Act, 1861, s. 110, reserving the rights and jurisdiction of the assignees ; and the court held, that one of the assignees who had gone abroad was a trustee within the meaning of the Trustee Act, 1850. *Joyce's Estate*, *In re*, L. R. 2 Eq. 576.

Upon the sale of an estate which stood limited to the ordinary uses to bar dower, but over which the tenant for life was not entitled to a power, the objection was taken by the purchaser that the dower trustee, who was then in Australia, was a necessary party to the conveyance :—Held, on a bill for specific performance, filed by the vendor, that the purchaser was entitled to such estate as was then vested in the dower trustee. Specific performance was decreed, and a vesting order made under the Trustee Act, 1850. *Collard* v. *Roe*, 4 De G. & J. 525 ; 27 L. J., Ch. 295 ; 1 L. T. 148 ; 4 Jur. (N.S.) 431 ; 6 W. R. 348.

Absent Trustee (Trustee Act, 1850, s. 49).]—The court directed a cause to be certified as fit for hearing, although one of the defendants, a trustee, who could not be found, had not entered an appearance. *Westhead* v. *Sale*, 3 Jur. (N.S.) 1209 ; 6 W. R. 52.

The court ordered a cause to be set down for hearing, notwithstanding one of the defendants, who was a trustee, had not entered an appearance. *Burrell* v. *Maxwell*, 25 L. T. 655.

Vendor—Heir or Devisee.]—Two partners in a brewery, part of the property of which consisted of freehold and copyhold estates, covenanted that the survivor should have the option of purchasing the share of the deceased partner in the property of the partnership at a valuation ; and the survivor accordingly exercised such option, and paid to the executors of the said partner the amount at which his share was valued. The share of the deceased partner and his legal estate, in part of the freehold and copyhold estates of the partnership descended or became vested in his infant heir ; but the court refused, upon petition or motion under the Trustee Act, 1850, without suit, to declare the infant heir a trustee for the surviving partner. *Burt*, *In re*, 9 Hare, 289 ; 22 L. J., Ch. 153.

The infant heir of an intestate who had died after contracting to sell his real estate is not a trustee within the meaning of the Trustee Act, 1850, s. 29 (Trustee Act Extension, s. 1) until the constructive trust shall have been declared by a decree of the court. *Carpenter*, *In re*, Kay, 418.

Where a testator had, in his lifetime, agreed to give an option to his lessee to purchase the fee, and the lessee did not declare for the option until after the testator's decease, an infant tenant in tail of the legal estate under the will is not a trustee for the lessee desirous of purchasing within the meaning of the Trustee Act, 1850 ; but a claim for specific performance was directed to be filed. *Weeding*, *In re*, 4 Jur. (N.S.) 707.

Where a vendor, after conveying the equitable estate, became seised of the legal estate, and died intestate, and without an heir :—Held, that he was a trustee within the 13 & 14 Vict. c. 60. *Wilkinson's Trust*, *In re*, 10 Jur. (N.S.) 716 ; 10 L. T. 89 ; 12 W. R. 522.

Where a person seised in fee of land, which a railway company was empowered to take compulsorily, entered into a voluntary agreement for sale with the company, and after the purchase-money had been paid, and the company had taken possession, and had accepted the title, the vendor died intestate, leaving an infant heir-at-law :—Held, that the heir-at-law was a trustee within the Trustee Act, 1850, and that an order might be made for a conveyance of the legal estate without a bill filed. *Russell's Estate*, *In re*, 35 L. J., Ch. 461 ; 12 Jur. (N.S.) 224.

When the owner of lands agrees to sell to a railway company land which it has power to take for the purposes of its undertaking, and

afterwards dies, having devised his real estate to an infant, the infant devisee is a trustee within the meaning of the Trustee Act, 1850, and a vesting order may be made on a petition under that act. *Lowry's Trusts, In re*, 42 L. J., Ch. 509 ; L. R. 15 Eq. 78 ; 21 W. R. 428.

In such a case service of the petition on the infant is necessary. *Ib.*

A., without devising lands to his executors, L. & G., directs them to sell the lands and to apply the money. A., after the date of his will, contracts to sell the land to X., who objects to the title of the executors, and requires the heirs of A. to join in the conveyance. The court made an order vesting the estate which was in A.'s heirs in the executors of his will. *Badcock's Trusts, In re*, 2 W. R. 386.

Semble, where two executors are appointed and only one proves, the court will not make a vesting order in favour of the one who proves, unless the other disclaims. *Ib.*

—— **Contract for Sale of Realty—Death of Vendor before Completion.**]—By an order under the Lunacy Regulation Act, 1862, the guardians of the poor of N. were authorised to sell a freehold belonging to A. C., a person of unsound mind, and to receive the purchase-money and execute a conveyance. The property was sold in May, 1885, the sale to be completed in November. An abstract of title was delivered, and no objection was taken to the title. On the 28th of June A. C. died. The guardians now presented a petition, asking that A. C. might be declared a trustee within the meaning of the Trustee Act, 1850, and that their clerk might be appointed a trustee of the property and the estate vested in him in trust to complete the sale:—Held, that A. C. could not be held a trustee within the meaning of the Trustee Act, 1850, and that the order could not be made. *Carpenter, In re*, supra, approved. *Colling, In re*, 55 L. J., Ch. 486 ; 32 Ch. D. 333 ; 54 L. T. 809 ; 34 W. R. 464—C. A.

In Case of Copyholds.]—*See* supra, col. 967.

vii. *Other Cases.*

On Appointment of New Trustees where Legal Estate already in them.]—A vesting order made on the appointment of new trustees, two of whom were possessed of the legal estate in the trust property under a previous attempted appointment of them as new trustees, the will creating the trust containing no power to appoint new trustees. *Manning's Trusts, In re*, Kay (App.) xxviii. ; 2 Eq. R. 221 ; 2 W. R. 289.

Devise to Two Trustees, One being an Infant.]—A testator having devised to two trustees upon trust to sell, and one of the trustees named being an infant, the court declined to make an order vesting the whole estate in the other trustee, being adult, but appointed a person to be trustee in the room of the infant, and vested the whole estate in such new trustee with the original adult trustee jointly. *Porter's Trusts, In re*, 25 L. J., Ch. 482 ; 2 Jur. (N.S.) 349 ; 4 W. R. 217.

Husband and Wife.]—A married woman who was the legal representative of a testator, in exercise of a power reserved to her by her marriage settlement, made her will and appointed her husband executor. The husband proved the will, and also obtained letters of administration to all other his wife's personal estate. He also applied for supplemental letters of administration, to enable him to continue the chain of representation to the testator ; but they were refused by the court of probate. The court made an order, appointing the husband trustee of the trust funds which were standing in the testator's name, and vesting in him the right to transfer them. *Herbert's Will, In re*, 8 W. R. 272.

Disputed Question of Title.]—The court has no jurisdiction on a petition presented under the Trustee Acts to decide on a disputed question of title. *Draper's Settlement, In re*, 9 W. R. 805.

—— **Land Bought by Father in Name of Son.**]—Lands bought by a father in the name of his son held, under the circumstances of the case, not to amount to an advancement ; but the lord chancellor declined to make an order to that effect on the petition of the father, though the petition was founded on the certificate of the master under s. 38 of the Trustee Act, 1850. *Collinson* v. *Collinson*, 3 De G. M. & G. 409.

Order to Defeat Extortion on the part of Trustee.]—The court will make a vesting order under 15 & 16 Vict. c. 55, s. 2, to defeat an attempt at extortion on the part of a trustee. *O'Donnell, In re*, 19 W. R. 522.

Investment by Married Woman in Names of Son and Daughter.]—A married woman living separate from her husband invested, in the names of her son and daughter, moneys arising from savings of her separate estate. The mother appointed her daughter her executrix. The son having become lunatic, a transfer to the daughter as executrix was ordered on petition without bill. *De Visme, In re*, 2 De G. J. & S. 17 ; 33 L. J., Ch. 332 ; 9 L. T. 668 ; 12 W. R. 140.

Trustee and Executor Proving Will only.]—When a trustee and executor has proved the will only, and done no other act, and taken no notice of applications, nor appeared on a petition served upon him, the court will appoint another trustee in his room, and make a vesting order under the Trustee Act, 1850. *Byrne, In re*, 18 L. T. 631.

Where Trustees have a mere Power and no Legal Estate.]—The court of chancery has not authority, under the Trustee Acts of 1850 and 1852, to make a vesting order of real estate in proposed trustees, where the testator by his will directed his "executors" to sell the estate after the death of one of them, who was also tenant for life ; the surviving executor being also a person of unsound mind, not found so by inquisition. *Porter's Will, In re, Franklin, Ex parte*, 3 Eq. R. 719 ; 3 W. R. 583. And see *Badcock's Trusts, In re*, supra.

The power of appointing new trustees conferred by the 13 & 14 Vict. c. 60, s. 32, applies to the simple office of trustee, and it is not necessary to the exercise thereof that any estate or property should be vested in the trustee. *Boyce, In re*, 4 De G. & Sm. 205 ; 3 N. R. 396 ; 33 L. J., Ch. 390 ; 10 Jur. (N.S.) 138 ; 9 L. T. 670 ; 12 W. R. 359.

c. Form of Vesting Order.

Stock—Transfer into Names of Trustees.]—An order under s. 35 of the Trustee Act, 1893, vesting stock in trustees, should direct the trustees to transfer the stock into their own names. Order in *Gregson, In re*, infra, followed. *Price, In re*, 8 R. 621.

—— **Appointment of New Trustees**—In an order made under s. 35 of the Trustee Act, 1850, and s. 6 of the Trustee Extension Act. 1852, vesting the "right to call for a transfer of and to transfer" stock in new trustees, it is not obligatory to insert the name of any transferee in the order, nor is there any general rule that the words "to any purchaser or purchasers" should be added; the insertion or omission of these words is a matter of discretion for the judge who makes the order. *Peacock, In re*, infra, explained. The word "stock," as defined in s. 2 of the Trustee Act, 1850, comprises shares in a limited company not fully paid up. *New Zealand Trust and Loan Co., In re*, 62 L. J., Ch. 262; [1893] 1 Ch. 403; 2 R. 151; 68 L. T. 593; 41 W. R. 457—C. A.

—— **Appointment of Trustee of Unsound Mind.**]—Upon the appointment of new trustees by the court the common form of vesting order in the case of government stock is to be adhered to, which vests in the trustees the right to call for the transfer of the same, and to receive the dividends due and to accrue due thereon, and which further directs the trustees to transfer the same "into their own names," but if in any particular case a judge thinks it proper to depart from the usual form, and to make a special order, it is perfectly competent for him to do so. *New Zealand Trust and Loan Co., In re*, supra, explained. *Gregson, In re*, 62 L. J., Ch. 764; [1893] 3 Ch. 233; 2 R. 513; 69 L. T. 73; 41 W. R. 641—C. A.

Form of order on appointment of new trustees where the trust funds are invested on unauthorised securities and it is desired not to transfer them into the names of new trustees, but to sell them and re-invest the funds in accordance with the trusts of the settlement. *Peacock, In re*, 49 L. J., Ch. 228; 14 Ch. D. 212; 43 L. T. 99; 28 W. R. 801.

Consols.]—On the appointment of new trustees of a fund of consols, the proper order is to direct the new trustees to transfer the consols into their own names. *Joliffe's Trusts, In re*, 3 R. 718; 68 L. T. 747.

Contents of Order.]—Vesting order prefaced with a statement that A. B. was a trustee within the meaning of the Trustee Act, 1850, and died without an heir. *Hughes* v. *Wells*, 2 W. R. 575.

A vesting order should contain some description of the property intended to be comprised in it. *Ord's Trust, In re*, 3 W. R. 386.

Where an order is made under the Trustee Acts, subject to the production of evidence to the registrar, the order will bear date on or after the day of the production of such evidence. *Havelock, In re*, 11 Jur. (N.S.) 906; 14 W. R. 174.

The court directed the circumstances bringing a case within the Trustee Act, 1850, to be inserted in an order vesting the right to transfer stock. *Ellis, In re*, 24 Beav. 426.

If the Bank of England is required to act upon an order made in pursuance of the 13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55, the circumstances bringing the case within the acts must appear upon the order of the court. *Mainwaring, In re*, 26 Beav. 172; 28 L. J., Ch. 97; 5 Jur. (N.S.) 52.

Bank of England—In Chambers—Right to Transfer Stock.]—On a petition for the appointment of new trustees and a vesting order, an order was made in court on the 28th of June, 1884, that two or more proper persons should be appointed trustees, and that an inquiry should be made of what the trust funds consisted; and the parties were to be at liberty to apply in chambers for an order to vest the trust property in the new trustees when appointed. On the 22nd of July, before any certificate as to the trust funds had been made, an order was made in chambers appointing new trustees, and directing that the right to call for a transfer of, and to transfer into their own names, certain sums of stock specified in the order "may" vest in the new trustees. This order mentioned, but did not recite, the order of the 28th of June. The Bank of England refused to act on it, and Bacon, V.-C., on the 28th of November, made an order directing them to do so. The bank appealed:—Held, that the matter having been properly brought before the court on petition, the judge had power, under the provisions of the Masters Abolition Act, 1852 (15 & 16 Vict. c. 80), to dispose in chambers of such parts of the matters brought before him on the petition as he thought could be more conveniently disposed of in chambers than in court, and that there was therefore jurisdiction to make the order of the 22nd of July. *Frodsham* v. *Frodsham*, infra, distinguished. *Tweedy, In re*, 54 L. J., Ch. 331; 28 Ch. D. 529; 52 L. T. 65; 33 W. R. 313—C. A.

But held, that the order was so irregular in form that the bank were justified in declining to act upon it, they being entitled to require a vesting order to be in such form as to show that the statutory requirements have been satisfied. Statement of the recitals which ought to be contained in a vesting order made in chambers under the Trustee Act. *Ib.*

In an action commenced by writ for the administration of a testator's estate, an order for accounts was made in chambers under Ord. XV. (Judicature Act). Subsequently an order was made in chambers directing the plaintiff and defendant to transfer a sum of stock into court. The defendant could not be found, and an order was made in chambers vesting the right to transfer the stock in the plaintiff, and directing him to transfer it into court. The bank objecting to act on this order, on the ground of its having been made in chambers, a motion was made by arrangement for an order directing the bank to act upon it:—Held, by Jessel, M.R., that the judge had jurisdiction to make the order on summons in chambers, and that the bank ought to be ordered to act upon it. *Frodsham* v. *Frodsham*, 50 L. J., Ch. 233; 15 Ch. D. 317; 43 L. T. 558; 29 W. R. 165.

Held, by the court of appeal, that, having regard to the 18 & 19 Vict. c. 134, s. 16, Cons. Ord. XXXV. r. 1, and the course of practice, there was so much doubt as to the jurisdiction as to render it unsafe to make such a vesting order in chambers, and that the order directing the bank to act upon it ought to be discharged. *Ib.*

An order discharged, on the objection of the

bank as being unauthorised by the Trustee Act, 1850; and another order substituted under the 1 Will. 4, c. 65, s. 32. It is the duty of the Bank of England to bring an erroneous order, under which it is asked to act, under the notice of the court. *Westwood, In re*, 6 N. R. 316.

It is of great importance to have the books of the Bank of England clear; and upon the construction of an act directing a transfer of stock, if there is room for argument, the strict interpretation of the act must be followed. Therefore, under the Trustee Act, 1850, which authorises the court to vest in new trustees the right to call for a transfer of stock, forming part of the trust estate:—Held, before the Trustee Extension Act, s. 6, passed, that the order ought to be in that form, and should not purport to vest in the new trustees the right to the stock; and that the bank was not bound to permit the new trustees to make a transfer into their names. *Smyth's Settlement, In re*, 4 De G. & Sm. 499; 20 L. J., Ch. 255; 15 Jur. 644.

Stock was standing in the name of a person of unsound mind, part of the stock being his own beneficially, and part of it being vested in him as trustee. The court had made an order appointing new trustees, and vesting in them the right to call for a transfer of the trust stock, and to receive the arrears of dividends. It was found that an order in this form could not be acted on as to the arrears of dividend, since the bank could not pay arrears on part of a sum. The court therefore varied the order, so as to enable the new trustees to receive the past dividends on the whole stock, and to retain, for the purposes of the trust, that portion which had accrued due in respect of the trust stock. *Stewart, In re*, 2 De G. F. & J. 1; 8 W. R. 425.

d. Practice as to Vesting Order.

i. *In general.*

Form and Contents of Petition.]—A petition presented under the Trustee Act should mention the sections under which it is proposed that the order asked for should be made. *Hall's Settlement Trusts, In re*, 58 L. T. 76.

Petitions under the trustee acts should contain a statement indicating the particular sections of the acts under which the court is asked to make an order. *Moss's Trusts, In re*, 57 L. J., Ch. 423; 37 Ch. D. 513; 58 L. T. 468; 36 W. R. 316.

When a purchaser presented a petition for a vesting order intituled in the cause only, the petition was ordered to be amended by intituling it under the Trustee Act 1850 (13 & 14 Vict. c. 60, s. 43). *Gough* v. *Bage*, 25 L. T. 738.

Originating Summons—Jurisdiction.]—An originating summons having been issued under Ord. LV. r. 13a, for the appointment of a new trustee and vesting order:—Held, that this was a "matter" within s. 43 of the Trustee Act, 1850; and that the court had power to make an order vesting the trust property in the new trustee, with the right to call for a transfer of stock in the Bank of England. *Jones, In re*, 59 L. J., Ch. 157; 61 L. T. 554; 38 W. R. 203.

The court has no jurisdiction, upon an originating summons in chambers, to make an order appointing new trustees, and vesting in them the trust estate. *Gill, In re, Smith* v. *Gill*, 53 L. T. 623; 34 W. R. 134.

As to making vesting order on summons in chambers; see *Tweedy, In re*, and *Frodsham* v. *Frodsham*, supra, col. 985.

Slip—Second Petition—Further Vesting Order.]—An order was made, upon a petition, appointing new trustees of the will of a testator, and vesting in them the property mentioned in the petition, subject to the trusts of the will. After the order had been drawn up, passed, and entered, it was discovered that one part of the trust property had been inadvertently omitted in the order, and another part, by an accident, had not been mentioned in the petition. The new trustees were not able, therefore, to obtain a transfer of such property into their own names. A second petition was accordingly presented by the same persons, who were the petitioners in the first petition. Sections 22 and 35 of the Trustee Relief Act were referred to as giving jurisdiction to the court to make a further order. The court made an order vesting in the new trustees all the property which had been omitted, and directing the costs of the application to be paid out of the trust estate. *Hopper's Trusts, In re*, 54 L. T. 267; 34 W. R. 392.

—— **Re-hearing.**]—By an order made under the 13 & 14 Vict. c. 60, real estate was inadvertently vested in an alien. The court declined varying the order, by inserting the name of a natural-born subject, without the consent of the crown; but the order was made upon a re-hearing. *Giraud, In re*, 2 N. R. 9; 32 Beav. 385; 9 Jur. (N.S.) 862; 11 W. R. 607.

Supplemental Order.]—An order was made on a petition under the Trustee Act, 1850, appointing three new trustees, and vesting property in them jointly with a fourth surviving trustee, but subject to the production of certain evidence. Before this evidence could be obtained the fourth trustee died. Upon motion that the order might be dated on the day it was pronounced:—Held, that the proper course was to make a supplemental order on the petition. *Havelock, In re*, 11 Jur. (N.S.) 906; 13 L. T. 272; 14 W. R. 174.

Jurisdiction without Petition.]—An order under the Trustee Act, 1850, may be made in a cause without a petition presented in the act. *Wood* v. *Beetlestone*, 1 K. & J. 213; 3 Eq. R. 238.

Upon a petition for the reconveyance of mortgaged premises, the equity of redemption of which was in trustees, upon the question whether some of several cestuis que trust sufficiently represented the parties beneficially interested under the Trustee Act, 1850:—Held, that irrespective of that act, the court has power to adjudicate upon such a petition, under the 15 & 16 Vict. c. 86. *Sharpley's Trust, In re*, 1 Eq. R. 40; 1 W. R. 271.

The court will make an order under s. 4 of the 15 & 16 Vict. c. 55, upon motion made in a matter as well as in a cause. *Holbrook's Will, In re*, 29 L. J., Ch. 200; 5 Jur. (N.S.) 1333; 1 L. T. 18; 8 W. R. 3.

Order made vesting property in a mortgagee in a foreclosure suit without requiring a petition to be presented under the Trustee Act, 1850. *Harrison* v. *Smith*, 17 W. R. 646.

A debtor resident in India pledged shares, held by him in a joint stock banking company in England, with a creditor in England, with an

authority by letter to sell, which was communicated to and recognised by the banking company. The creditor, in exercise of the authority, sold the shares to a purchaser. Upon the petition of the purchaser:—Held, that the shares were "stock," and that the debtor in India, being constructively a trustee, was a trustee for the purchaser within the Trustee Act, 1850; and the court made an order directing a specified person to transfer the shares to the petitioner. *Angelo, In re*, 5 De G. & Sm. 278; 16 Jur. 831.

Under the 1 Will. 4, c. 60, the court was prohibited from making any order upon such a petition until the rights of the petitioner had been ascertained by suit; but the Trustee Act, 1850, contains no such prohibition. *Ib.*

Parties.]—A mortgagor devised his real estate to a trustee on trust for sale, the proceeds to be divided amongst certain persons named in the will. The original mortgagee having died, and her heir not being found, a petition was presented by the trustee and one of the cestuis que trust for a vesting order under s. 19 of the Trustee Act 1850:—Held, that the trustee sufficiently represented the other cestuis que trust, whose appearance was, therefore, dispensed with. *Blanchard's Trusts, In re*, 2 N. R. 386; 8 L. T. 603.

Real estate was devised by C. D. to trustees upon trust, after paying debts and legacies, and, subject to a certain annuity charged thereon, to convey the same to use of A. A. in fee:—Held, upon petition by the devisee of A. B. for a conveyance by the trustee of C. D.'s will, all the debts and legacies having been satisfied, that the concurrence of the annuitant to this petition was not necessary. *Winteringham's Trusts, In re*, 3 W. R. 578.

Service of Petition.]—Shares in an assurance office were vested in trustees, one of whom refused to assign them to new trustees who had been duly appointed. A notice having been served on the old trustee under s. 24 of the Trustee Act 1850, and a petition having been presented but not served on the old trustee, order made vesting the shares in the new trustees. *Baxter, In re*, 2 Sm. & G. (App.) v.

Where a person seised in fee of land, which a railway company was empowered to take compulsorily, entered into a voluntary agreement for sale with the company, and after the purchase-money had been paid, and the company had taken possession, and had accepted the title, the vendor died intestate, leaving an infant heir-at-law:—Held, that the heir-at-law was a trustee within the Trustee Act, 1850. *Russell's Estate, In re*, 35 L. J., Ch. 461; 12 Jur. (N.S.) 224.

In such a case service of the petition on the infant is necessary. *Ib.*

It is not necessary to serve a petition for a preliminary order, under the Trustee Extension Act, 1852, s. 4, upon the trustee. *Mount, In re*, 24 L. T. 290.

The court has authority to order service upon minors residing out of the jurisdiction of a petition under the Trustee Acts 1850 and 1852 (13 & 14 Vict. c. 59, and 15 & 16 Vict. c. 55); and also a petition under the Trustee Relief Act (11 & 12 Vict. c. 68). *Wycherley, In re, Dunne, In re*, 1 L. R., Ir., 12.

A petition under the 13 & 14 Vict. c. 60, for the appointment of a person to convey, in the place of an infant heir of a deceased mortgagee, need not to be served upon the infant. *Willan, In re*, 2 W. R. 689.

A petition for vesting a legal estate outstanding in the infant heir of a deceased mortgagee must be served upon the infant. *Jones, In re*, 22 W. R. 837.

A petition for vesting in beneficiaries lands of which the legal estate had descended to the infant heir of the last surviving trustee, ordered to be served on the infant. *Adams' Trusts, In re*, 57 L. T. 337; 35 W. R. 770.

The trustees of a will conveyed all their beneficial interest in a certain property to a purchaser. The legal estate in the property was in the heir of a deceased sole trustee to whom the legal estate had been conveyed to prevent merger. On petition for a vesting order:—Held, that service of the petition on the heir, who resided abroad, might be dispensed with. *Stanley's Trusts, In re*, 62 L. J., Ch. 469; 3 R. 368; 68 L. T. 197; 41 W. R. 343.

A petition for an order vesting the trust estate in continuing trustees, and a new trustee having been presented:—Held, that service on the trustee of unsound mind was not necessary. The power was well exercised. *East, In re, Bellwood's Trusts, In re*, 42 L. J., Ch. 480; L. R. 8 Ch. 735.

Appeal.]—Notice of appeals from orders made under the Trustee Relief Act must, according to the true construction of Ord. LVIII. rr. 9, 15 (Judicature Act), be given within twenty-one days from the perfecting of the order, or, in the case of the refusal of an application, from the date of such refusal. *Baillie's Trusts, In re*, 46 L. J., Ch. 330; 4 Ch. D. 785; 35 L. T. 917; 25 W. R. 310.

ii. *Lunacy.*

Jurisdiction — Chancery or Lunacy — Where Vesting Order only.]—Whether the lords justices acting in lunacy under the royal sign-manual, have jurisdiction to make an order vesting a trust estate, of which a person of unsound mind, who was heir-at-law of a deceased trustee, was seised, the words of the Trustee Act, 1850 (13 & 14 Vict. c. 60), being "the Lord Chancellor intrusted by virtue of the Queen's sign-manual," quære. *Pattinson, In re*, 21 L. J., Ch. 280.

Semble, that the lords justices intrusted by warrant under the sign-manual to make orders in lunacy, have jurisdiction to make a vesting order under the Trustee Act, where the heir of the survivor's trustee is of unsound mind; but for the greater certainty, the lord chancellor made the order. *Waugh's Trust, In re*, 2 De G. M. & G. 279.

Where a trustee is an infant as well as lunatic, the court of chancery has jurisdiction to make an order for conveying his estate under the Trustee Act; and recourse need not be had to the jurisdiction in lunacy. *Arrowsmith's Trusts, In re, Thompson, In re*, 27 L. J., Ch. 704; 4 Jur. (N.S.) 1123; 6 W. R. 642.

The case of an imbecile trustee is not within the jurisdiction of this court, and an application to the lords justices or lord chancellor is necessary. *Good Intent Benefit Building Society, In re*, 2 W. R. 671.

When a decree in a partition suit had declared a lunatic a trustee of an allotted portion of land for the plaintiff:—Held, that the court of chancery could make a vesting order under the Trustee Act, 1850. *Bloomar, In re* (2 De G. & J.

88; 27 L. J., Ch. 173; 4 Jur. (N.S.) 546; 6 W. R. 178), discussed. *Molyneux, In re, Spencer, Ex parte*, 4 De G. F. & J. 365: 10 W. R. 512.

One of the two trustees of a will became lunatic, and a new trustee was appointed under a power in the will. A petition was then presented entitled in lunacy only, asking for a vesting order:—Held, that the petition must be entitled in chancery as well as in lunacy, and must ask for the re-appointment of the new trustee by the court, as, if the order were made in lunacy only, it would have the effect of severing the joint tenancy. *Chell, In re*, 49 L. T. 196; 31 W. R. 898.

The meaning of s. 28 of the Charitable Trusts Act, 1853, is to confer on the master of the rolls and vice-chancellors at chambers the same jurisdiction as before the passing of the act they could have exercised in a suit regularly instituted, or upon petition. Consequently, where a vice-chancellor had in chambers, appointed new trustees of a charity, and the surviving trustee was a lunatic:—Held, that he might also in chambers make an order under the trustee acts vesting the charity property in the new trustees. *Davenport's Charity, In re*, 4 De G. M. & G. 839.

When the legal estate in land sold under the order of the court is vested in a person of unsound mind, but not found lunatic, an order may be made by the lord chancellor on a petition in chancery, under the Trustee Acts, appointing a person to convey the legal estate so vested. *Herring* v. *Clark*, L. R. 4 Ch. 167.

—— **Where Appointment of New Trustees with or without Vesting Order.**]—The court made an order, upon one petition, for the appointment of new trustees in the place of retiring trustees and a lunatic trustee, and that the trust estates should vest in the new trustees; but directed that the order should be intituled both in lunacy and in chancery, and be entered in the registrar's book. *Davidson, In re*, 20 L. J., Ch. 644.

An appointment under the Trustee Act, 1850, of a new trustee in the place of one of unsound mind not so found by inquisition, belongs to the jurisdiction in lunacy, and not to that of the court of chancery. It cannot therefore be exercised by the court of chancery of Lancaster. *Ormerod, In re*, 3 De G. & J. 249; 28 L. J., Ch. 55; 4 Jur. (N.S.) 1289; 7 W. R. 71.

A summary petition under the Acts of 1850 and 1852, for the appointment of a new trustee in the place of one who has become imbecile, though not so found by inquisition, can only be disposed of by the lord chancellor sitting in lunacy. *Burton, In re*, L. R. 7 Eq. 270.

When a petition is presented under the Trustee Acts, 1850 and 1852, for the appointment of new trustees in the place of trustees some of whom are dead and the survivor a person of unsound mind, not so found by inquisition, the petition may be presented in lunacy only, and not in chancery. *Owen, In re*, L. R. 4 Ch. 782; 17 W. R. 1035.

When a trustee of a trust deed registered under the Bankruptcy Act, 1861, had become of unsound mind, and there was no power in the deed to appoint new trustees, the court of chancery appointed a new trustee under the Trustee Acts. *Donisthorpe, In re, Thompson's Trusts, In re*, 44 L. J., Ch. 536; L. R. 10 Ch. 55; 31 L. T. 369; 23 W. R. 100.

A testator devised real estate to trustees, their heirs and assigns, upon certain trusts. The surviving trustee devised all estates vested in him as a trustee to three persons, one of whom, after proving his testator's will, became of unsound mind. A petition was presented for the appointment of new trustees, and for the appointment of a person to convey on behalf of the devisees of the surviving trustee:—Held, that the petition was properly presented in lunacy as well as in chancery. *Mason, In re*, 44 L. J., Ch. 678; L. R. 10 Ch. 273; 23 W. R. 737.

A petition under the Trustee Acts of 1850 and 1852, for the appointment of new trustees in the place of trustees two of whom were dead, and one of the surviving two was a person of unsound mind, but not so found by inquisition (not asking for a vesting order), may be presented in chancery and not in lunacy. *Vickers' Trusts, In re*, 46 L. J., Ch. 16; 3 Ch. D. 112; 24 W. R. 755.

A petition for the appointment of new trustees and for a vesting order, where the existing sole trustee is of unsound mind and out of the jurisdiction, need not be presented in lunacy as well as in chancery. *Gardner's Trust, In re*, L. R. 10 Ch. 29; 40 L. T. 52; 27 W. R. 164.

The surviving trustee of property, consisting partly of land in Ireland, having become lunatic, an order was made, upon a petition instituted both in lunacy and in the chancery division, appointing new trustees and vesting the Irish land in them. *Lamotte, In re*, 4 Ch. D. 325; 36 L. T. 231; 25 W. R. 149.

Where a new trustee of a settlement had been appointed in the place of a trustee who had become of unsound mind, a petition for an order appointing the new trustee by the court and vesting the real estate, and the right to call for a transfer of the personal property in the new trustee, together with the continuing trustee, was directed by the court to be entitled in chancery as well as in lunacy, otherwise the vesting order will sever the joint tenancy. *Pearson, In re*, 46 L. J., Ch. 670; 5 Ch. D. 982; 37 L. T. 299; 25 W. R. 853. And see *Chell, In re*, supra.

—— **Where Trustees have a Mere Power and no Legal Estate.**]—A testator gave all his real and personal estate to his wife, and after her death he desired the same to be sold by his executors, the proceeds to be divided amongst legatees as directed by his will. He appointed his wife and S. F., his daughter, executors. After the death of the wife S. F. became lunatic, but was not found so by inquisition. Upon a petition being presented by the legatees praying for the appointment of new trustees under the Trustee Acts:—Held, that S. F., as surviving executor, had no power to convey or assign, the interest having descended to the heir subject to her power; and therefore the court could not make a vesting order under s. 3 of the Trustee Act, 1850. *Porter's Will, In re, Franklin, Ex parte*, 3 Eq. R. 719; 3 W. R. 583.

A husband appointed his wife executrix, and A. executor and trustee of his will. He devised his real estate to his wife during her life or widowhood, but in case she should marry again he gave her, by way of legal limitation, an annuity out of his realty, with powers of entry, distress, and sale; and directed his trustee to invest and accumulate the surplus of the rents and profits of his real estate, and on the death of his wife to sell the real estate, with power to execute such instruments and assurances as might be requisite for effecting the sale. The will contained a power to appoint new trustees

in the place of any trustee dying, or becoming unwilling or unable to act. The donee of this power having died, and the original trustee having become of unsound mind, although not so found by inquisition :—Held, that the order for the appointment of the new trustees and the vesting order should be drawn up in chancery, as well as in lunacy. *Boyce, In re*, 4 De G. J. & S. 205 ; 3 N. R. 396 ; 33 L. J., Ch. 390 ; 10 Jur. (N.S.) 138 ; 9 L. T. 670 ; 12 W. R. 359.

Semble, there is no power under the Trustee Act, 1850, to appoint, in lunacy, a new trustee in the room of a lunatic trustee, except where some property is vested in him. *Ib.*

—— **Stock Vested in Lunatic—Transfer of and Vesting in New Trustees.**]—The wife of a lunatic was sole surviving trustee of stock. An order was made appointing new trustees in the place of the married woman and the deceased trustees, and vesting in the new trustees the right to transfer the stock. *Wood, In re*, 3 De G. F. & J. 125 ; 30 L. J., Ch. 453 ; 7 Jur. (N.S.) 323 ; 4 L. T. 104.

Stock was standing in the name of a person of unsound mind, part of the stock being his own beneficially, and part of it being vested in him as trustee. The court had made an order appointing new trustees, and vesting in them the right to call for a transfer of the trust stock, and to receive the arrears of dividends. It was found that an order in this form could not be acted on as to the arrears of dividend, since the bank could not pay arrears on part of a sum. The court, therefore, varied the order, so as to enable the new trustees to receive the past dividends on the whole stock, and to retain, for the purposes of the trust, that portion which had accrued due in respect of the trust stock. *Stewart, In re*, 2 De G. F. & J. 1 ; 8 W. R. 425. S. P., *Skynner* v. *Pelichet*, 9 W. R. 191.

Out of the four trustees of a settlement, one was a lunatic, so found by inquisition, and another was, through ill health, unfit to act. The court appointed two new trustees in their room, and made an order that the real estates, subject to the settlement, should vest in the new trustees jointly with the two continuing old ones, and that the right to call for a transfer of some stock, also subject to the settlement, should vest in the same persons. *Chauncey, In re*, 14 W. R. 849.

The sole surviving trustee of a sum of stock under a settlement having become of unsound mind, the persons beneficially entitled presented a petition in lunacy for an order vesting in them the right to transfer the stock and receive the dividends :—Held, that such an order ought not to be made, as it would be administering the trust in lunacy ; but, on the petition being amended and intituled in the chancery division as well as in lunacy, an order was made appointing the petitioners trustees of the settlement, and vesting in them, as such, the right to transfer the stock and receive the dividends. *Currie, In re*, 10 Ch. D. 93 ; 40 L. T. 110 ; 27 W. R. 369.

Where one of three trustees was dead, one an absconding bankrupt, and one a lunatic, on a petition being presented intituled both in lunacy and in the chancery division, the court under the Trustee Act, 1850, ss. 5, 32, and 35, appointed three new trustees, and vested the right to transfer stock in them. *Druce's Trusts, In re*, 46 L. T. 669 ; 30 W. R. 759.

Where one of three executors of the surviving executor of a testator was of unsound mind, an order was made under section 5 of the Trustee Act, 1850, giving the right to transfer a sum of stock belonging to the estate of the original testator, although the stock still remained standing in the name of the original testator. *Wacher, In re*, 22 Ch. D. 535 ; 48 L. T. 552.

One of the executors of the surviving trustee of a settlement was a lunatic. The other two executors refused to transfer some shares included in the settlement to the person absolutely entitled to them :—Held, that a vesting order could not be made under the Trustee Act, 1850, s. 25, but that a petition in lunacy must be presented. *Nicholl, In re*, 22 L. T. 323 ; 18 W. R. 443.

When one of several trustees of stock becomes lunatic or of unsound mind, the court, although it may have jurisdiction under s. 5 of the Trustee Act, 1850, to make an order vesting the right to transfer the stock solely in the co-trustees, will not do so, but a new trustee in the place of the lunatic must be appointed before a vesting order will be made. *Nash, In re*, 16 Ch. D. 503 ; 44 L. T. 40 ; 29 W. R. 294.

One of three trustees of a sum of stock had been found lunatic. The fund having become divisible, a petition, intituled both in lunacy and in chancery, was presented for the appointment of a new trustee and a vesting order :—Held, that the appointment of a new trustee was unnecessary, and that the petition ought to be intituled in lunacy only. Order made vesting the right to call for a transfer of and to transfer the stock in the two trustees who were not under disability. *Nash, In re*, supra, not followed. *Watson, In re*, 19 Ch. D. 384 ; 45 L. T. 513 ; 30 W. R. 554.

Where one of four trustees of stock became lunatic, and there was no difficulty in finding a new trustee to be appointed in his place, the court, though having discretion under s. 5 of the Trustee Act, 1850, to do so, refused to make an order vesting the right to transfer the stock in the three remaining trustees, and ordered a new trustee to be appointed in the place of the lunatic trustee. *Nash, In re*, supra, and *Watson, In re*, supra, considered. *Ray, In re*, 47 L. T. 500.

—— **Transfer into Court.**]—Where stock is standing in the name of a trustee, who is of unsound mind, but not found so by inquisition, and it is desired to bring such stock into court to the credit of a cause, the proper course is for the cause to be heard by the judge to whose court the cause is attached, and then to present a petition in lunacy, to be heard before the lords justices. *Dawson, In re, Barber* v. *Dawson*, 6 N. R. 346.

Where stock is standing in the names of two trustees, in whom alone a power of appointing new ones is vested, and one of the existing trustees is found lunatic by inquisition, the proper course, in order to obtain a transfer of the fund into court, is by petition in lunacy. *Jeffreys* v. *Drysdale, Drysdale, In re*, 30 L. J., Ch. 612 ; 7 Jur. (N.S.) 667 ; 4 L. T. 454 ; 9 W. R. 428.

iii. *Costs.*

Lunatic Mortgagee—Liability of Mortgagee.]—Where, through the unsoundness of mind of a mortgagee (not found lunatic by inquisition),

proceedings under the Trustee Act (13 & 14 Vict. c. 60) are rendered necessary to obtain the re-conveyance of the estate, the costs must be borne by the mortgagee. *Sargeant, Ex parte*, 25 L. J., Ch. 656.

A mortgage debt having been paid off, the committees of the estate of the mortgagee, who had become lunatic, presented a petition, which they served upon the mortgagor, for an order enabling them to re-convey the mortgaged property. The costs of the mortgagor's appearance were directed to be paid by the petitioners, and allowed to them out of the estate, with an intimation that for the future petitions of the kind ought not to be served upon mortgagors. *Rowley, In re*, 1 De G. J. & Sm. 417 ; 32 L. J., Ch. 158 ; 7 L. T. 702 ; 11 W. R. 297.

The costs of the proceedings for obtaining from the committee of a lunatic a re-conveyance of premises mortgaged to the lunatic, will be ordered to be paid out of the lunatic's estate where the lunatic is beneficially interested in the mortgage money, and the petition is presented by the committee. *Wheeler, In re*, 1 De G. M. & G. 434 ; 21 L. J., Ch. 759.

This rule will not, however, be acted on if the mortgagor presents the petition, unless in cases where the committee has declined to take that step. *Ib.*

Upon the petition of the committee of a lunatic mortgagee, an order was made vesting the estate in the mortgagor, the costs of the order to be paid out of the lunatic's estate, with the exception of the stamp, which was to be paid by the mortgagor. *Thomas, In re*, 22 L. J., Ch. 858 ; 1 W. R. 155.

Where through the lunacy of a mortgagee not found lunatic by inquisition, a petition under the Trustee Act (13 & 14 Vict. c. 60) is rendered necessary, in order to enable the mortgagor to pay off the mortgage debt, the costs must be paid out of the mortgage debt. There being no committee, but only a receiver of the mortgagee's estate, under the 8 & 9 Vict. c 100, the costs of the appearance of the heir-at-law and next of kin were allowed. *Biddle, In re*, 2 Eq. R. 71 ; 23 L. J., Ch. 23 ; 2 W. R. 50.

A plaintiff in a suit for the administration of a mortgagor's estate, and the purchasers under a decree in the suit, presented a petition under the Trustee Act, seeking an order to vest in the purchasers the legal estate in the purchased property, which was vested in a lunatic mortgagee not found so by inquisition :—Held, that a portion of the costs ought to be paid out of the mortgage money. *Hawkins* v. *Perry, Viall, In re*, 8 De G. M. & G. 439 ; 4 W. R. 686.

When the committee of a lunatic mortgagee presents a petition under the Trustee Act for a re-conveyance of the mortgaged estate to the mortgagor, the mortgagor is not entitled to his costs out of the lunatic's estate, even though served with the petition. *Phillips, In re*, L. R. 4 Ch. 629 ; 17 W. R. 904.

When a mortgagee becomes of unsound mind, not so found, and the mortgagor applies for a vesting order on payment into court of the mortgage debt, making the mortgagee a respondent to the petition, the court has no jurisdiction to make an order for the costs to be paid out of the mortgage debt, but each party must bear his own costs. *Sparks, In re*, L. R. 6 Ch. 361 ; 25 W. R. 869.

A trustee having advanced money on mortgage became lunatic. Upon redemption of the estate and a petition to appoint a person to re-convey, it appearing that the mortgagor had no knowledge that the money was trust money, the costs of the application were ordered to be paid out of the trust estate. *Jones, In re*, 45 L. J., Ch. 688 ; 1 Ch. D. 70 ; 34 L. T. 470 ; 24 W. R. 377.

—— **Liability of Mortgagor.**]—Where a mortgage in fee had been paid off to the mortgagee's executor, and a petition was presented under the Trustee Act, 1850, by the mortgagor for a re-conveyance from the mortgagee's heir, who was a lunatic, or for a vesting order :—Held, that the mortgagor must pay the costs of the proceeding. *Stuart, In re, Marshall, Ex parte*, 4 De G. & J. 317 ; 3 L. T. 495.

A mortgagee died intestate as to estates whereof he was a mortgagee, leaving an heir-at-law, who was a lunatic. The costs of obtaining a vesting order, and of all proceedings necessary to effect a re-conveyance, were directed to be borne by the mortgagor. *Jones, In re*, 2 De G. F. & J. 554 ; 30 L. J., Ch. 112 ; 7 Jur. (N.S.) 115 ; 9 W. R. 175.

Vendor and Purchaser.]—A vendor agreed to surrender, or procure some person to surrender, and the costs of the surrender were to be paid by the purchaser. It was necessary to procure a surrender under the Trustee Act, 1850 :—Held, that the costs of the proceedings ought to be paid by the vendor. *Bradley* v. *Munton*, 16 Beav. 294.

After a decree for the sale of an intestate's copyhold estate, in lots, but before the sale, the infant heir of the intestate was admitted :—Held, that a petition for a vesting order was properly presented by the purchaser, whose money was in court, and that the costs of the order were to be borne by the vendors, and to be paid out of the purchase money of the particular lot, and not out of the fund in court generally. *Ayles* v. *Cox*, 17 Beav. 584.

Where a vendor dies intestate, leaving an infant heir, and a bill is filed to make him a trustee to convey under the Trustee Act, 1850, each party must pay his own costs. *Scott* v. *Scott*, 8 L. T. 450 ; 11 W. R. 766.

Where, by the lunacy of a vendor, a decree in a suit for specific performance is necessary as ground for a vesting order, no costs will be given on either side. *Cresswell* v. *Haines*, 31 L. J., Ch. 237 ; 8 Jur. (N.S.) 208 ; 10 W. R. 121.

See, as to vesting order and costs, *Fulham, In re*, 15 Jur. 69.

Lunatic Husband of Sole Surviving Trustee.]—Where a widow, a sole surviving trustee of a will, married, and her husband was afterwards duly found lunatic, such husband was held a trustee within the 13 & 14 Vict. c. 60, and the costs of his committee, who appeared, were allowed out of the corpus of the trust fund. *Wood, In re*, 3 De G. F. & J. 125 ; 30 L. J., Ch. 453 ; 7 Jur. (N.S.) 323 ; 4 L. T. 104.

Bare Trustee Lunatic.]—The costs of applications to the court, in respect of trust property, necessitated by the lunacy of a bare trustee, will not be ordered to be paid either by or to the lunatic's estate. *Garden, In re*, 6 N. R. 347 ; 34 L. J., Ch. 466—L.JJ.

Refusal of Assignee of Bankrupt Trustee to sign Disclaimer.]—Under the Trustee Acts the

court has not jurisdiction to give the costs to a cestui que trust, compelled, in consequence of the assignees of a bankrupt trustee refusing to sign a disclaimer, to apply to the court to procure a transfer of the trust funds. *Primrose, Ex parte*, 26 L. J., Ch. 666; 3 Jur. (N.S.) 899; 5 W. R. 508. But see *Woodburn's Trusts, In re*, 26 L. J., Ch. 522; 3 Jur. (N.S.) 799; 5 W. R. 642.

Infant Heir of Mortgagor.]—An equitable mortgagee filed a bill against an infant heir of the mortgagor (upon whom a vesting order had been made under the Trustee Act, 1850), for a sale of the property. The proceeds being insufficient to satisfy the mortgage debt and costs:—Held, that the infant heir was not entitled to his costs of the suit, but he was allowed the costs of the vesting order. *Wade* v. *Ward*, 4 Drew. 482; 29 L. J., Ch. 42; 7 W. R. 542.

2. CONVEYANCES AND TRANSFERS.

a. Under the Trustee Acts, 1850 & 1852.

Appointment of Person to Convey — Order for Sale — Vendor found Lunatic.] — An order was made in a partition action for sale of the leasehold estate in respect of which the action was brought. After a sale had been made it was discovered that one of the beneficiaries was a lunatic so found, but that no committee had been appointed. The court then made an order declaring the other beneficiaries seised of the property upon a trust within the meaning of the Trustee Act, 1850, and the Trustee Extension Act, 1852, and appointing another party to the action to convey the property to the purchaser for the estates of the beneficiaries therein other than the lunatic. A petition was then presented to the Lord Chancellor, intituled in lunacy and in the chancery division, asking for a declaration that the lunatic was to be deemed seised of his share upon a trust within the meaning of the Trustee Act, 1850, and that the same person might be appointed to convey such property to the purchaser for all the estate and interest of the lunatic:—Held, that, as the order for sale had been made, the lunatic was, under s. 1 of the Trustee Act, 1852, to be deemed to be possessed upon a trust within the meaning of the act of 1850, and that, although the rest of that section only gave jurisdiction to the chancery division, the court sitting in lunacy could, under ss. 3 and 20 of the Trustee Act, 1850, appoint a person to convey the lunatic's interest. *Watson, In re*, 58 L. T. 509—C. A.

—— **Committee.**]—A devisee of real estate, subject to payment of debts, became of unsound mind, and was so found by inquisition. A committee was appointed, and an action for the administration of the testator's real and personal estate was commenced, with the sanction of the master in lunacy, in the chancery division, by the lunatic and his committee, and, the testator's personal estate proving to be insufficient for payment of his debts, an order was made for sale of all the testator's real estate upon payment of the purchase money into court. Under this order the real estate was sold, and the purchaser paid the purchase money into court. He, however, raised an objection to the title of the vendors, on the ground that they could not convey without an order in lunacy:—Held, that, the administration action in which the order for sale was made having been properly commenced with the sanction of the master in lunacy, the lunatic plaintiff was entitled to carry on the action, and was, therefore, also bound by the order for sale made in it; that the lunatic was, therefore, a trustee within the Trustee Extension Act, 1852, s. 1, of the real estate, and that his committee should be appointed to convey. *Stamper, In re, Stamper* v. *Stamper*, 46 L. T. 372.

—— **Tenant in Tail — Person of Unsound Mind not so Found, confined in a Foreign Asylum—Chief Clerk Appointed.**] — The chief clerk's certificate made in a partition action found that a person of unsound mind not so found was entitled as tenant in tail to a share of land in England in respect of which an order for sale had been obtained. The lunatic was confined in an asylum in Virginia, U.S.A., under an order of the court of that state, and a committee of his property had been appointed by that court, but the committee, who was resident in Virginia, declined to act in conveying the lunatic's property in this country, although he was willing to abide by any order of the English court. The lunatic was one of the defendants in the partition action by his guardian ad litem. Upon a summons taken out in the action by the guardian ad litem asking that the lunatic might be declared a trustee of his one-third share in the land within the meaning of the Trustee Acts, and that the applicant might be appointed to convey the fee of the lunatic's share to a purchaser of the land:—Held, that the lunatic might be declared a trustee of his share, and the chief clerk was appointed to convey the fee of the lunatic's share of the land to a purchaser, but the proceeds of the sale of the lunatic's share were ordered to be paid into court, and remain subject to the same uses to which the lunatic's share was subject before the sale of the land. *Caswell* v. *Sheen*, 69 L. T. 854.

—— **Plaintiff's Solicitor.**]—Real estates devised to married women and infants having been sold under a decree in a creditor's suit, in several lots, upon petition under the Trustee Acts, the court appointed the plaintiff's solicitor to convey their shares to the several purchasers; form of the order. *Hancox* v. *Spittle*, 3 Sm. & G. 478.

—— **On Disclaimer by Trustees.**]—A testator devised real estates to trustees, upon trust to sell and pay debts, and apply the surplus as in his will mentioned. The trustees disclaimed the trusts by deed; the heir-at-law of the testator could not be found:—Held, in a suit for the sale of the estates and administration, that the case fell within the meaning of s. 9 of the 13 & 14 Vict. c. 60; and that an order appointing a party to convey to a purchaser was correct. *Wilks* v. *Groom*, 6 De G. M. & G. 205; 2 Jur. (N.S.) 1077; 4 W. R. 828.

—— **Infants — Constructive Trustees.**] — A testator devised his freehold estates to his granddaughter for life, with remainder to all her children as tenants in common in fee, on their attaining twenty-one. In a suit for the administration of the testator's real and personal estate, certain parts of the real estate had been contracted to be sold by order of the court, to provide a fund for payment of costs. The only two infant children of the granddaughter were parties to the suit. On their petition in the cause, and under the Trustee

Act, 1850, praying a declaration that the petitioners and the unborn children of the granddaughter would, on attaining twenty-one, be trustees of the estate devised to children of the granddaughter for the purpose of the decree, and that their respective rights might be vested in the respective purchasers, or that some person might be ordered to convey for them :—Held, that ss. 29 and 30 of the Trustee Act, 1850, did not apply, and that the infants were not constructive trustees; and the court refused to make any order. *Weston* v. *Filer*, 5 De G. & Sm. 608; 16 Jur. 1010.

—— **Discharge of Contingent Rights of Unborn Children.**]—The court will, upon petition under the Trustee Acts, discharge the contingent rights of unborn children in favour of purchasers under a decree, and make an order vesting in such purchasers the estates of infants and the contingent estates of unborn infants. *Wake* v. *Wake*, 17 Jur. 545; 1 W. R. 283.

Where copyholds devised to an infant for life, remainder to his first and other sons in tail, were decreed to be paid to pay the debts of the testator, and an order was made in the cause, and pursuant to the 1 Will. 4, c. 47, that the guardian of the infant should surrender them to the purchaser :—Held, that the purchaser was entitled to require that an order should be made discharging the contingent rights of the unborn issue of the infant, under s. 29 of the Trustee Act, 1850. *Wood* v. *Beetlestone*, 1 K. & J. 213; 3 Eq. R. 238.

After a sale under a decree for partition in a suit under the Partition Act, 1868, it appeared that one-sixth of the estate was vested in B. (one of the parties to the suit), a bachelor, for life, with remainders to his issue in tail, with ultimate remainders to the right heirs of the plaintiff :—Held, that the power (to make declarations as to the interest of unborn persons, and that such persons on coming into existence would be trustees) given by the Trustee Act, 1850, s. 30, which is incorporated in the Partition Act, 1868, enabled the court to make an order to appoint a person to convey the legal estate in the one-sixth limited to the right heirs of the plaintiff. *Basnett* v. *Moxon*, 44 L. J., Ch. 557; L. R. 20 Eq. 20; 23 W. R. 945. And see *Lees* v. *Coulton*, 44 L. J., Ch. 556; L. R. 20 Eq. 182; 23 W. R. 544.

Contracts for sale of different parts of an estate held under the same title had been entered into with different purchasers by a father and son, who had a joint power of appointment under a settlement. The son died before the conveyances were executed. The legal estate under the settlement thereupon became vested in the father for life, with remainder in tail to an infant. A bill was filed by one of the purchasers, on behalf of himself and all other purchasers, &c., for the purpose of having the several contracts carried into effect. The cause coming on to be heard before Turner, V.-C., he declined to make a decree against the infants in a suit of that form, but suggested his willingness to do so if the bill were amended by making the several purchasers parties as co-plaintiffs, and the defendants undertook not to raise the objection of multifariousness. The bill having been amended accordingly, the decree was now made, and directions given for the completion of the several purchases against the infants and unborn persons claiming under the settlement. *Hargreaves* v. *Wright*, 1 W. R. 408.

Shares Minute and Complicated—Estate Vested in Single New Trustee.]—Upon a partition, the shares of the parties were very minute and complicated. The court, to save expense, and instead of directing a conveyance of the several shares, declared each of the parties trustees as to the shares allotted to them, and then vested the whole trust estate in a single new trustee, under the Trustee Acts, with directions to convey to the several parties their allotted shares. *Shepherd* v. *Churchill*, 25 Beav. 21.

—— **New Trustees Appointed—Conveyance by Deed.**]—In cases where new trustees are appointed under the Trustee Act, 1850, the real estates subject to the trust ought to be conveyed to them by deed, and the vesting order ought only to be resorted to when it is inconvenient to obtain a conveyance. *Langhorn* v. *Langhorn*, 21 L. J., Ch. 860.

Specific Performance—Refusal to obey Order.]—A decree was made for specific performance of an agreement to grant a new lease of certain premises, and the defendant was ordered to execute such new lease to the plaintiff. The defendant having refused to obey the order, the plaintiff moved for leave to issue a writ of attachment against her :—Held, that there having been a decree for specific performance, the court had jurisdiction, under s. 30 of the Trustee Act, 1850, to appoint a person to execute the lease in place of the defendant, and the motion was directed to be amended accordingly. The motion having been amended, an order was made declaring the defendant a trustee of the premises within the meaning of the Trustee Act, and a person was appointed in place of the defendant to execute the lease to the plaintiff. *Hall* v. *Hale*, 51 L. T. 226. *See now* 47 & 48 Vict. c. 61, s. 14.

A donee of a power of jointuring under a settlement was ordered, in a specific performance suit instituted by his wife, to execute the power by a deed to be approved of by the master, whereby 1,000*l.* per annum was to be appointed as the plaintiff's jointure. On his refusal to obey the decree :—Held, that under the Trustee Acts 1850 and 1852 he might be declared a trustee of all the rights, interests, estates, and property acquired by him under the settlement; and the court appointed a person to execute the requisite deed in his place, under the Trustee Act, 1850. *Mornington (Countess), Ex parte, Mornington* v. *Mornington*, 4 De G. M. & G. 537; 1 Eq. R. 368; 1 W. R. 248. *S. C.*, nom. *Wellesley* v. *Wellesley*, 22 L. J., Ch. 966.

—— **Attachment.**]—When a person has been directed to execute a lease, but refuses to do so, the court can only enforce such execution by attachment, the Trustee Act, 1850, having omitted to provide for such a case. *Grace* v. *Baynton*, 25 W. R. 506.

—— **Mortgagee a Lunatic—Direction to Transfer.**]—Section 3 of the Trustee Act, 1850, is not confined to a case where the lunatic or person of unsound mind is a sole trustee or mortgagee, but extends to the case where he is one of several trustees or mortgagees. One of two trustees being of unsound mind, a new trustee was appointed in his place under a power :—Held,

that the court has jurisdiction to appoint a person to convey the interest of the trustee of unsound mind in a mortgage, forming part of the trust estate, for the purpose of vesting the mortgaged estate in the continuing trustee and the new trustee. *Jones, In re*, 56 L. J., Ch. 272; 33 Ch. D. 414; 55 L. T. 498; 35 W. R. 172—C. A.

Where a person of unsound mind is possessed of an estate by way of mortgage, the court can, under the Trustee Act, 1850, s. 3, appoint a person to convey the estate for the purpose of effectuating a transfer of the mortgage. *Nicholson, In re*, 56 L. J., Ch. 1036; 34 Ch. D. 663; 56 L. T. 770; 35 W. R. 569—C. A.

The court has jurisdiction under s. 3 of the Trustee Act, 1850, where a mortgagee is a lunatic, to direct the committee to transfer the mortgage. *Peel, In re*, 55 L. T. 554; 35 W. R. 81—C. A.

The master in lunacy having reported that it was desirable that property of which the lunatic was mortgagee should be sold under a power of sale in the mortgage, the court declined to make an order authorising the committee to sell and to convey the estate to the purchaser, but only directed him to sell, leaving the transfer of the legal estate to be dealt with on a subsequent application under the Trustee Act, 1850. *Harwood, In re*, 56 L. J., Ch. 974; 35 Ch. D. 470; 56 L. T. 502; 36 W. R. 27—C. A.

A. gave all his real and personal estate and effects, of what nature or kind soever, to B., upon trust to pay to his wife for life the rents of this real estate, and the interest on all sums due to him on mortgages, bond, note, or other security, and after her death to get in all debts owing to him on any security, and pay the same over to other persons. B. died intestate, leaving C., his eldest son and heir-at-law, a person of unsound mind and an infant:—Held, that the legal estate in the mortgaged property passed to B., and that he was a trustee; and persons were appointed to convey the property comprised in the mortgages to the purchasers thereof, under ss. 3 and 20 of the Trustee Act, 1850. *Arrowsmith's Trusts, In re, Thompson, In re*, 27 L. J., Ch. 704; 4 Jur. (N.S.) 1123; 6 W. R. 642.

b. Under the Trustee Acts prior to 1850.

i. *Conveyances under 7 Ann. c. 19.*

Infant Trustee.]—The stat. 7 Ann. c. 19, enabling infant trustees to convey, extends only to plain and express trusts, not to such as are implied, or constructive only. *Goodwyn* v. *Lister*, 3 P. Wms. 387.

Infant devisee of land, charged with payment of money, is a trustee in equity, but not within the stat. 7 Ann. c. 19. *Anon.*, 2 Eq. Cas. Abr. 521, pl. 6.

An infant, the surviving life in a bishop's lease, not beneficially interested, held to be an infant trustee within the statute of 7 Ann. *Hodges, Ex parte*, Dick. 737.

Where a trust to be executed vests in an infant, he is not a trustee within 7 Ann. c. 19, but he must be decreed to convey on suit for that purpose. *Riggs* v. *Sykes*, Dick. 400.

Infant trustee for sale is not within the stat. 7 Ann. c. 19, though the persons entitled to the produce of the sale are adult and join in the petition, semble. *Chasteney, Ex parte*, Jacob, 56.

Infant trustee within the stat. 7 Ann. c. 19, notwithstanding an interest as co-executor and co-residuary legatee, entitled to the mortgage money; the receipt and discharge of the other executor leaving the infant a mere trustee. —— v. *Handcock*, 17 Ves. 383.

Infant trustee within the stat. 7 Ann. c. 19, must be a dry trustee. *Id.* 384.

An infant directed to convey charity estates to new trustees, under the act of 7 Ann. c. 19, he having nothing to do but to make such conveyance; but where infant has any duty to perform as such trustee, beyond the mere conveyance, the case is not within the statute. *Att.-Gen.* v. *Pomfret*, 2 Cox, 221.

—— **Property Abroad.**] — Infant trustee directed to convey under the stat. 7 Ann c. 19, though the trust estate abroad. *Prosser, Ex parte*, 2 Bro. C. C. 325.

An infant trustee ordered to convey an estate in Calcutta under the stat. 7 Ann. c. 19. *Anderson, Ex parte*, 5 Ves. 240.

—— **Order to Convey.**]—Infant trustee within 7 Ann. c. 19; purchaser to enjoy, and infant to convey at full age. *Chandler* v. *Beard*, Dick. 392. S. P., *Benton, Ex parte*, Dick. 394.

Infant trustee refusing, ordered to convey by a given day, and if he still refused, plaintiff to move that he stand committed, unless cause, &c. *Beech, In re*, 4 Madd. 128.

Order upon petition, under the stat. 7 Ann. c. 19, for an infant trustee to convey to the persons absolutely entitled, or as they shall appoint, but not to convey to a new trustee, upon trusts to be executed without a bill. *Anderson, Ex parte*, 5 Ves. 240.

Infant Heir.]—The infant heir of a messenger, to whom in bankruptcy a provisional assignment had been made, and who died before the choice of assignees:—Held, to be a trustee within the 7 Ann. c. 19. *Carter, Ex parte, Portsmouth Bank, In re*, 5 Madd. 81.

A decree having been made for sale of an estate, and that a trustee should join in the conveyance; that trustee dying, his infant heir bound to execute a conveyance under the stat. 7 Ann. c. 19. Such a decree against the ancestor would obviate any doubt as to whether his infant heir were or were not a trustee within the act. *Hawkins* v. *Obeen*, 2 Ves. Sen. 559.

Tenant in tail, with remainder over, by bargain and sale conveyed to B. for the purpose of making him tenant to the præcipe in a recovery. By mistake recovery was suffered before bargain and sale was executed. Tenant in tail died:—Held, infant heir of B. was not a trustee within 7 Ann, c. 19. *Boehm, Ex parte*, 5 Madd. 124.

Court refused to direct an infant customary heir to surrender copyhold premises to a purchaser, which had been sold and conveyed to him by deceased ancestor of infant for valuable consideration, and for which ancestor had received purchase money in his lifetime, on a motion made to confirm report which found those facts, and that the infant was a trustee within 7 Ann. on the ground that it was an ex parte proceeding; and non constat, that ancestor was competent to sell; and therefore court would not declare infant a trustee within the statute. *Janaway, In re*, 7 Price, 679.

Infant heir of nominal vendee in trust, being reported to be within the statute, may be

ordered to convey to the devisee of the real vendee, as being the cestui que trust. *Vernon, Ex parte*, 7 Price, 685, n.; 2 P. Wms. 549.

The court will not, on motion or petition, order an infant trustee to convey, unless the trust appear in writing; but in such case will leave the cestui que trust to get a decree by bill. *Ib.*

—— **To Convey at full Age.**] — Bill to execute articles for the sale of lands against the devisee for life and the infant heir of the vendor:—Decreed to be executed, and that plaintiff should be let into possession and hold against the infant, who should convey when of age, unless cause shown within six months after. *Sikes* v. *Lister*, 5 Vin. Abr. 541, pl. 28.

The vendor dying intestate, and leaving an infant heir, the purchase money being paid into court in a suit for specific performance instituted after his death, will be retained till the heir attains twenty-one, and conveys. *Bullock* v. *Bullock*, 1 J. & W. 603.

Form and Contents of Conveyance.]—Assuree dies before assurance, heir unknown. Assurer, on bill of interpleader, ordered to assure to two six clerks, they to re-assure heir, when discovered. *Anon.*, Cary, 29.

The manner in which infant trustees are to convey the estates devolved on them, pursuant to the Act of Parliament. *Anon.*, Pre. Ch. 284.

In a marriage settlement, husband made tenant for ninety-nine years if he so long lived, remainder to trustees during the life of the husband, etc., remainder to the first, etc., son by the marriage in tail male, remainder to the first, etc., son of any other wife, remainder over. A son is born, and of age, the wife dead, and there are no other sons by the second marriage; the trust for preserving contingent remainders descends to an infant; if for the benefit of the family, equity will decree the infant trustee to join in a recovery. *Winnington* v. *Foley*, 1 P. Wms. 536.

An infant trustee may levy a fine; but Lord Hardwicke doubted whether he could suffer a recovery without a privy seal. *Bowes, Ex parte*, 3 Atk. 164. And see *Johnson, Ex parte*, 3 Atk. 559; *Smith, Ex parte*, Amb. 624.

Court will, if necessary, order an infant feme covert, being heir or trustee, to levy a fine. *Anon.*, 2 Comyn, 615.

An infant mortgagee or trustee, who is a feme covert, may convey by fine under 7 Ann. c. 19. *Maire, Ex parte*, 3 Atk. 479.

Conveyance by infant trustee voidable, as not within the statute; if he would be bound to convey when adult, he would in equity be restrained from setting it aside. —— v. *Handcock*, 17 Ves. 383.

Costs.]—An infant trustee, ordered to convey under the statute of Ann. is entitled to his necessary costs. The Lord Chancellor said, that in taxing them, the master would not allow anything that was not necessary; as, for instance, a brief to counsel to consent for an infant, to which no attention could be paid. *Cant, Ex parte*, 10 Ves. 554.

Infant Mortgagee.]—The Lord Chancellor and the Master of the Rolls inclined to think the legal estate in mortgaged premises passed by a general residuary devise by the mortgagee to A., who was also executor, his heirs, executors, administrators, and assigns for ever, on the side of his mother. A. being nineteen, the Lord Chancellor would not order him to join in conveyance, under the statute 7 Ann. c. 19, but ordered the money to be put into the bank, ex parte the infant, and said, when he should come of age, it would be very reasonable that he should join. *Sergison, Ex parte*, 4 Ves. 147.

An infant mortgagee is within the statute notwithstanding he may be beneficially interested in the mortgage money. *Bellamy, Ex parte*, 2 Cox, 422.

A mortgage in fee, devised to A., B., and C., and the "survivor, and the heirs of such survivor." The infant heir of the testator was directed to join in reconveying to the mortgagor, as having the fee in him during the joint lives of the devisees. *Harrison, In re*, 3 Anstr. 836.

Mortgagee within the statutes 7 Ann. c. 19, as to infants, and 4 Geo. 2, c. 10, as to lunatics, though entitled as co-executor and residuary legatee to the mortgage money, the discharge of the other executor leaving a naked trust. *Tutin, Ex parte*, 3 V. & B. 151.

Estate in Ireland ordered to be conveyed by an infant mortgagee, under the stat. 7 Ann. The order under the statute for the reference to the master as well as that for the infant to convey, must be on petition, not on motion. *Evelyn* v. *Forster*, 8 Ves. 96.

ii. *Conveyances under* 4 *Geo.* 2, *c.* 10.

Lunatic Trustee.]—A trustee found a lunatic, by the master's report, could not be ordered to convey under the stat. 4 Geo. 2, c. 10, unless a commission of lunacy had issued. *Gillam, Ex parte*, 2 Ves. 586.

Lunatic trustee within 4 Geo. 2, c. 10, must be without interest or duty; therefore, having an interest as creditor, trust being to sell for payment of debts, he is not within the act. *Tutin, Ex parte*, 3 V. & B. 149.

The heir of one who had covenanted to surrender copyholds to the uses of a settlement on his daughter's marriage being a lunatic, a surrender cannot be made under the stat. 4 Geo. 2, c. 10. *Currie, Ex parte*, 1 J. & W. 642.

Lunatic Mortgagee.]—One found non compos before the senate of Hamburg a mortgagee within stat. 4 Geo. 2, c. 10, and will be directed to convey. *Otto Lewis, Ex parte*, 1 Ves. Sen. 298.

Mortgagee is within the statutes 7 Ann. c. 19, as to infants, and 4 Geo. 2, c. 10, as to lunatics, though entitled as co-executor and residuary legatee to the mortgage money, the discharge of the other executor leaving a naked trust. *Tutin, Ex parte*, 3 V. & B. 151.

Costs.]—The costs of a committee of a lunatic mortgagee requisite to enable him to re-convey to the mortgagor under the stat. 4 Geo. 2, c. 10, including the costs of the reference, are to be paid out of the lunatic's estate, whether the application be made by the mortgagor, or by the committee, which is the usual course. *Richards, Ex parte*, 1 J. & W. 264; 21 R. R. 166.

If the mortgagor be ready to pay the committee of a lunatic, mortgagee should apply for a reference under the statute, and it seems he would not be allowed to bring an action. *Ib.*

Costs of the committee of a lunatic trustee conveying within the statute must be paid out

of the lunatic's estate. *Brydges, Ex parte*, G. Cooper, 290.

The costs of the committee of a lunatic trustee, conveying under the statute, must be paid by the cestuis que trust. The estates being vested in the lunatic upon trusts for securing an annuity, and subject thereto upon trust for the grantor of the annuity, were ordered to defray equally the committee's costs of an application by them for a re-conveyance of the estate. *Pearse, Ex parte*, Turn. & R. 325.

iii. *Conveyance under* 6 *Geo.* 4, *c.* 74.

Infant Heir or Trustee.]—A copyholder covenants to surrender to trustees in trust to sell, and dies before surrender, leaving an infant heir; the covenantees agree to sell the estate, and afterwards file a bill for a specific performance:—Held, that the heir is not an infant trustee within 6 Geo. 4, c. 74, and therefore cannot be ordered to surrender immediately; and the bill was dismissed with costs. *King* v. *Turner*, 2 Sim. 549. *But see* 1 Myl. & K. 456; Coop. t. Brough. 64.

A. contracted to sell a freehold estate to B., and by will gave the purchase money to trustees for certain purposes; and if the contract should not be completed, he devised the estate to the trustees for the same purpose. A. died, leaving a son, who died, leaving an only daughter, an infant:—Held, that she was not a trustee within the stat. 6 Geo. 4, c. 74. *Moody, In re*, Tam. 4.

Court has no jurisdiction in bankruptcy to declare an infant heir of assignee a trustee of bankrupt's estate; the petition must be entitled under 6 Geo. 4, c. 74. *Kirk, Ex parte*, Buck, 478. S. P., *Beddam, Ex parte*, 1 Rose, 310.

iv. *Conveyances under* 11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 60.

General Principles.]—The 11 Geo. 4 & 1 Will. 4, c. 60, s. 8, applies to cases where conveyances are to be made, and not where sales are to be effected. *Down, In re*, 2 Jur. 886.

Section 8 of the stat. 11 Geo. 4 & 1 Will. 4, c. 60, relates to trusts only, and not to mortgages, and to positive or naked trustees, and not to constructive trustees, or trustees by operation of law. *Dearden, In re*, 3 Myl. & K. 508; 4 L. J., Ch. 186.

The stat. 11 Geo. 4 & 1 Will. 4, c. 60, intituled "an act for amending the laws respecting conveyances, and transfers of estates, and funds vested in trustees and mortgagees," applies only to cestuis que trust who are named in the instruments upon which their title depends, or to persons who claim directly under such cestuis que trust, as real or personal representatives, or as assignees. *Merry, In re*, 1 Myl. & K. 677.

The act, 11 Geo. 4 & 1 Will. 4, c. 60, does not apply to lands out of the Queen's dominions; nor is a party having the legal interest in a debt (which he has been decreed to assign) a trustee of such debt within the act. *Price* v. *Dewhurst*, 8 Sim. 617; 8 L. J., Ch. 267.

An exchange of lands, or an exchange of lands where a sum of money forms part of the consideration by way of equality of exchange, is not within the stat. 11 Geo. 4 & 1 Will. 4, c. 60. *Turner* v. *Edgell*, 1 Keen, 502; 6 L. J., Ch. 201.

The stat. 1 Will. 4, c. 60, does not apply to cases of partition. *Nearhell, In re*, 14 L. J., Ch. 121.

The proper reference under the Escheat Act is, "whether the party is within the meaning of the Escheat Act, and also within the meaning of 1 Will. 4, c. 60." *Anon.*, 4 L. J., Ch. 73.

Vendor dying before Completion.]—A vendor who dies before the completion of the contract is a trustee within the meaning of the 4 & 5 Will. 4, c. 23, though expressly excepted out of the 1 Will. 4, c. 60. *Lowe's Estate, In re*, 2 Ph. 690; 17 L. J., Ch. 430; 12 Jur. 638.

Executor of Surviving Trustee declining to prove Will.]—The executor of the survivor of three trustees declined to prove his will:—Held, that the case was within the 11 Geo. 4 & 1 Will. 4, c. 60. *Hagger, Ex parte*, 1 Beav. 98.

Heir of Testator.]—Real estate having been applied for a century and a-half upon the trusts specified by a will, the court assumed that the will created a trust, and that the heir of the testator became a trustee, and, the present heir not being known, the case was held to be within 11 Geo. 4 & 1 Will. 4, c. 60, s. 23. *Gore's Charities, In re*, 2 Con. & L. 411; 4 Dr. & War. 270.

Devise in 1677 to the use of the poor of the parish of A. The master was unable to ascertain in whom the estate was vested:—Held, that the case was not within the Trustee Acts. So also where charity money had in 1745 been laid out by a parish in the purchase of an estate for the poor of the parish, and it could not be ascertained in whom it was vested. *Att.-Gen.* v. *Randles*, 8 Beav. 185.

Estates decreed to be Sold—Tenant for Life.]—Tenant for life of estates decreed in a creditors' suit to be sold for payment of debt, is a trustee for the purchaser within the meaning of 1 Will. 4, c. 60, s. 18. *Milfield, In re*, 2 Ph. 254. *And see* 5 Hare, 538.

—— **Devisee subject to Charge.**]—An estate was devised to A., subject to a charge of 5,000*l.*, payable to the executors in a suit to which A. was a party; the estate was sold, and all proper parties were ordered to join in the conveyance. A., refusing to execute the deed, was declared a trustee for the purchaser under the stat. 11 Geo. 4 & 1 Will. 4, c. 60, and another person was directed to convey in his stead. The petition for the above purposes was presented by a defendant in his character of purchaser: the court refused to give costs. *Robinson* v. *Wood*, 5 Beav. 246.

Feme Covert.]—A woman who was sole trustee for sale of real property married a man who absconded, and had not been heard of up to the hearing of the cause. The court decreed a sale, and that the husband should be declared a trustee within the 11 Geo. 4 & 1 Will. 4, c. 60, s. 19, but declined to appoint a person to convey in his room under s. 8, on the ground that he was not the trustee "last known to have been seised," there being a joint seisin in him and his wife. *Moore* v. *Vinten*, 12 Sim. 161; 10 L. J., Ch. 345.

A feme sole, trustee, marrying, and her husband refusing to join her in a proper conveyance to the cestui que trust, is a refusal within 1 Will. 4, c. 60, s. 8. *Phillips* v. *Cornish*, 4 L. J., Ch. 27.

—— **Heiress-at-Law.**]—Where the heiress-at-law, a feme covert, declined acknowledging the conveyance upon the sale of an intestate's estate

under a decree, semble, that the heir was a trustee within 11 Geo. 4 & 1 Will. 4, c. 60. *Billing* v. *Webb*, 1 De G. J. & S. 717; 12 W. R. 427.

Heir of Trustee.]—The heir of a trustee of the lessee's interest in a lease of lives renewable for ever, having been applied to to accept a renewal to him, refused to execute the conveyance:—Held, that s. 8 of the Trustees Act, 11 Geo. 4 & 1 Will. 4, c. 60, did not extend to such a case. *Fitzgibbon* v. *Lewis*, 6 Ir. Eq. R. 560.

Infant Heir.]—Estates were conveyed to A. and B. and the heirs of A. A. died, having devised the estates to C. in tail. C. alone, in B.'s lifetime, conveyed the estates to D., to make him tenant to the præcipe, and a recovery was suffered to the use of C. in fee. D. died, leaving an infant heir:—Held, that the heir was not a trustee, for though the recovery did not bar the estate tail, it drew out from D. the whole estate that was vested in him, under the recovery deed. *Debary, In re*, 5 Sim. 283.

Four co-partners purchased an estate out of the partnership assets, and took a conveyance to themselves as tenants in common in fee. One of them died intestate as to his real estate, leaving an infant heir. The survivors settled with his executors for the value of one-fourth of the estate, and then petitioned under the 11 Geo. 4 & 1 Will. 4, c. 60, that the infant might be declared a trustee of one-fourth of the estate, and might join in conveying the estate to a purchaser. The court refused to make the order, and said that a bill must be filed. *Williams, Ex parte*, 11 Sim. 54.

A trader, who had freehold, copyhold, and personal estate, died in September, 1832, leaving an infant heir. His estate was insufficient to pay his debts and charges. His partners, however, by deed took upon themselves to pay all the debts, and secured the principal part of his property for his family. A suit was instituted for carrying the deed into execution, and the master found that it would be for the benefit of the infant heir that the real estate should be sold and applied in the manner mentioned in the deed. A decree was made for sale, and the infant was declared a trustee within the 11 Geo. 4 & 1 Will. 4, c. 60:—Held, that a sale under the decree could not be enforced; that the court had no jurisdiction to order the sale; that the infant was not a trustee within the act; that the purchaser was not bound to wait until the error was corrected; and the court, therefore, discharged him with his costs, charges, and expenses. *Calvert* v. *Godfrey*, 6 Beav. 97; 12 L. J., Ch. 305.

After decree in a suit for specific performance, against the infant heir of the vendor, a petition must be presented under 11 Geo. 4 & 1 Will. 4, c. 60, for an order that the infant may convey to the purchaser. The costs of the suit were ordered to be paid out of the purchase money. *Prytharch* v. *Havard*, 6 Sim. 9.

—— **Beneficiaries.**] — A testatrix directed funds to be transferred in the bank books, into the names of A. B. and wife, and their children, who were infants, for the benefit of A. B. and wife for life, with remainder to their children. This was done, and a suit being instituted for the performance of the trusts:—Held, that the court had no jurisdiction, under the 11 Geo. 4 & 1 Will. 4, c. 60, to order the infants to transfer the fund into court. *Watts* v. *Scrivens*, 1 Beav. 223.

Where the widow and administratrix of an intestate transferred money into the names of herself and infant child, it was ordered, under the 11 Geo. 4 & 1 Will. 4, c. 60, that the child should join in transferring the third to which the widow was entitled. *Kidd* v. *Kidd*, 1 Beav. 225, n.

—— **Minor not Party to Cause.**]—Where an order was obtained on petition against a minor, not a party to the cause, to execute the conveyance, and the minor refused to obey the order, it is necessary, to present a further petition to obtain an order that an attachment should issue against the minor, that a person appointed by the court should execute in his name. Semble, the 4 & 5 Will. 4, c. 78 (Irish Statutes), does not apply to minors. *Moore* v. *Grogan*, 9 Ir. Eq. R. 472.

—— **Tenant in Tail.**]—The infant tenant in tail of lands decreed to be sold for an equitable charge is a trustee under ss. 8 and 18 of the 11 Geo. 4 & 1 Will. 4, c. 60; and if he refuse to execute, the master will be directed to do so in his name, under 11 Geo. 4 & 1 Will. 4, c. 60. Semble, the 4 & 5 Will. 4, c. 78, s. 8, does not apply to infants. *Peyton* v. *M'Dermott*, 6 Ir. Eq. R. 220.

—— **Devisees.**] — Where the master finds that in a certain construction of a devise the infant therein named is a trustee within the act 11 Geo. 4 & 1 Will. 4, c. 60, but that on a different construction another person would be such trustee, the court may declare the infant to be the trustee, and make the order for conveyance, without sending the case back to the master. *Langford* v. *Auger*, 4 Hare, 313.

A testator agreed to let land on a building lease, but died before the execution of the lease, having devised the land:—Held, on a bill for specific performance by the intended lessee, that the devisees, including an infant, were trustees for the plaintiff, under the statute 11 Geo. 4 & 1 Will. 4, c. 60, for the purpose of executing the lease. *Cullum* v. *Upton*, 19 L. J., Ch. 276; 14 Jur. 187.

An infant devisee had been ordered to convey real estate sold for payment of testator's debts; and having made default, and not being within reach of process, a person was appointed by the court, under 1 & 2 Will. 4, c. 60, s. 8, to convey. *Thomas* v. *Gwynne*, 9 Beav. 275.

Upon a direction for the sale of testator's real estate to pay debts, infant devisees refusing to convey, were declared by the court to be trustees within 11 Geo. 4 & 1 Will. 4, c. 60. *Warburton* v. *Vaughan*, 4 Y. & C. 247.

—— **Heir of Devisee.**]—In a decree for raising legacies against an infant heir of a devisee, whose estate was charged with the legacies, a sale may be directed, but the infant will not then be declared a trustee, so as to enable the court to order a conveyance under ss. 6 and 18 of the 11 Geo. 4 & 1 Will. 4, c. 60. *Walters* v. *Jackson*, 12 Sim. 278; 10 L. J., Ch. 383.

—— **Trustee.**]—Bill filed to have a sale of lands, the legal and beneficial estate in which was vested in the plaintiff, an infant. Order for sale made:—Held, that this order was tantamount to declaring that the infant was a trustee for the purchaser within the act 11 Geo. 4 & 1 Will. 4, c. 60, s. 18; and upon the petition of

the purchaser, the court ordered an immediate conveyance by the infant, without a previous reference to the master to inquire whether he was a trustee within the meaning of the act. *Blackwell, In re*, 7 Jur. 9.

Where a freehold estate was vested in an infant trustee on a plain trust, an order for a conveyance was made on a petition presented under the 11 Geo. 4 & 1 Will. 4, c. 60, without a reference to the master. *Trapp, In re*, 13 L. J., Ch. 168; 8 Jur. 437.

A petition under the 11 Geo. 4 & 1 Will. 4, c. 60, stated, that in 1823 the testator devised real estate to a trustee to pay debts, and after payment thereof in trust for the petitioner; that he died in 1824, and thereupon the petitioner entered; that many years ago petitioner and the trustee sold part of the estate, and paid all the debts; that the trustee had died, and that his heir was a minor; and it prayed a conveyance of the real estate. The court directed inquiries whether the minor was a trustee for the petitioner alone, discharged of debts and the trusts of the will. *Barry, In re*, 2 Jo. & Lat. 1.

——**Partition.**]—The stat. 11 Geo. 4 & 1 Will. 4, c. 60, does not apply to cases of partition, and an infant will not be directed under the provisions of that act to execute a conveyance upon a partition, unless the rights of the parties have been previously established by a decree. *Neachell, In re*, 14 L. J., Ch. 121.

Mortgages—In General.]—The devisee of a mortgage is not a trustee for the executors of the testator, within 11 Geo. 4 & 1 Will. 4, c. 60. *Payne, Ex parte*, 6 Sim. 645; 5 L. J., Ch. 259.

Section 8 of the 11 Geo. 4 & 1 Will. 4, c. 60, relates to trusts only, and not to mortgages, and to positive or naked trustees, and not to constructive trustees, or trustees by operation of law. *Dearden, In re*, 3 Myl. & K. 508; 4 L. J., Ch. 186.

Appointment of person to convey for the heir of a mortgagee under the 11 Geo. 4 & 1 Will. 4, c. 60, s. 8, 4 & 5 Will. 4, c. 23, and 1 & 2 Vict. c. 69. *Wilson, In re*, 2 Jur. 987.

Mortgagees and the heirs of mortgagees are within s. 8 of the 11 Geo. 4 & 1 Will. 4, c. 60, explained by the 4 & 5 Will. 4, c. 23, s. 2. *Whitton, Ex parte*, 1 Keen, 278.

An order of reference to inquire whether the heir of the mortgagee was a trustee within the acts 11 Geo. 4 & 1 Will. 4, c. 60, and 1 & 2 Vict. c. 69, was made upon the petition of the executors of the mortgagee; and the mortgage debt being paid off pending the reference, the master found that the heir was not a trustee for the petitioners, but for the mortgagee, whereupon the court allowed the petition to be amended and made the petition of the mortgagor, and then directed the reconveyance. *Manifold, In re*, 4 Hare, 308.

—— **Assignment of Mortgage Debt.**]—The 11 Geo. 4 & 1 Will. 4, c. 60, being intended only to provide means for conveying the legal interest:—Held, that an assignment of a mortgage debt was not within the act; nor was the act intended to apply to land out of the queen's dominions. *Price* v. *Dewhurst*, 8 Sim. 617; 8 L. J., Ch. 267.

——**Heir of Mortgagee out of Jurisdiction or not to be Found.**]—A mortgagee in fee died intestate as to his real estate, and his heir was not known. The court had no authority, under the 11 Geo. 4 & 1 Will. 4, c. 60, s. 8, to appoint a person to reconvey the estate to the party entitled to the equity of redemption on his payment of the mortgage money to the executor of the mortgagee. *Goddard, In re*, 1 Myl. & K. 25; 2 L. J., Ch. 16.

A mortgagee in fee died intestate as to the mortgaged premises, but having bequeathed her personal estate to B. The mortgage money remaining unpaid, B. presented a petition, under 11 Geo. 4 & 1 Will. 4, c. 60, praying that some person might be appointed, in the place of the mortgagee's heir (who could not be found), to convey the premises to him; but the court refused to make any order. *Stanley, In re*, 5 Sim. 320; 3 L. J., Ch. 240.

On a further application to the court:—Held, that his heir was to be regarded as a trustee within the meaning of the 11 Geo. 4 & 1 Will. 4, c. 60, s. 8, as explained by 4 & 5 Will. 4, c. 23, s. 2, and the court made the order. *S. C.*, 7 Sim. 170; 6 L. J., Ch. 361.

A mortgagee was resident out of the jurisdiction:—Held, that the case was not within the 11 Geo. 4 & 1 Will. 4, c. 60, the 4 & 5 Will. 4, c. 23, or the 1 & 2 Vict. c. 69. *Green* v. *Holden*, 1 Beav. 207.

The act 1 & 2 Vict. c. 69, does not repeal any part of 11 Geo. 4 & 1 Will. 4, c. 60, nor of the 4 & 5 Will. 4, c. 23, and therefore, since the passing of the 1 & 2 Vict., according to previous decisions upon the meaning of the 4 & 5 Will. 4, an order will be made for the reconveyance of the legal estate when the heir of a mortgagee is either an infant or cannot be found. *Wilson's Estate, In re, Gathorne, In re*, 8 Sim. 392; 8 L. J., Ch. 45; and *id.* 46.

The case of a mortgagee leaving an heir, though such heir be unknown, is within the stat. 11 Geo. 4 & 1 Will. 4, c. 60, s. 8, as expounded by the stat. 4 & 5 Will. 4, s. 23. *Williams, In re, Bird, Ex parte*, 9 Sim. 642. Reversing *id.* 426; 9 L. J., Ch. 353; 4 Jur. 912.

Section 8 of 11 Geo. 4 & 1 Will. 4, as expounded by s. 2 of 4 & 5 Will. 4, c. 23, applies to the case of the heir of a mortgagee being out of jurisdiction of the court. *Thomson, In re*, 12 Sim. 392.

The heir-at-law of a mortgagee who had never been in possession, was out of the jurisdiction, and the produce of the sale of the mortgaged lands under a decree was insufficient to pay off the mortgage by reason of prior incumbrances:—Held, that the court had no jurisdiction to make an order for the conveyance of the legal estate to the purchaser either under the 11 Geo. 4 & 1 Will. 4, c. 60, s. 8, or 1 Vict. c. 69, s. 1. The decision under these statutes reviewed. *Thompson, In re*, supra, disapproved of. *Spunner* v. *Walsh*, 10 Ir. Eq. R. 214.

Copyholds which were mortgaged in fee, descended to the customary heir of the devisee of the mortgagee, who was also beneficially interested therein under the mortgagor; the mortgage money was afterwards paid off to the personal representatives of the mortgagee:—Held, that such customary heir, who was residing out of the jurisdiction, was not, under the circumstances, within 1 Will. 4, c. 60; and the court refused to appoint a person in his stead, to be admitted, and to surrender the copyholds in his absence. *Newman, In re*, 4 L. J., Ch. 124.

—— **Infant Heir of Mortgagee.**]—The infant heir of a mortgagee, who had obtained a decree for a sale, being out of the jurisdiction:—Held, a trustee within ss. 8 and 18 of 11 Geo. 4 & 1 Will. 4, c. 60. *Prendergast* v. *Eyre*, Ll. & G. t. Sugd. 11.

The executors of a mortgagee in fee who had died intestate, leaving an infant heir, having in exercise of a power in the mortgage deed agreed to sell the estate, the heir was ordered, on a petition presented by the executors under the 11 Geo. 4 & 1 Will. 4, c. 60, s. 6, to convey the estate to the purchaser. *Kent, In re*, 9 Sim. 501; 8 L. J., Ch. 169.

Form of order upon an application for an infant mortgagee to convey, under the stat. 11 Geo. 4 & 1 Will. 4, c. 60, s. 6. *Halliday, In re*, Dr. 3.

And see *Wilson's Estate, In re*, *Gathorne, In re*, supra.

—— **Mortgagor out of Jurisdiction.**]—In a suit by an equitable mortgagee of leaseholds to enforce his security, a decree was made for sale in default of payment, and the premises were sold under the decree; the mortgagor, then out of the jurisdiction, was held not to be a trustee, within the act 11 Geo. 4 & 1 Will. 4, c. 60, for the purchaser, but he was held to be a trustee within that act for the plaintiff, and a person was appointed to execute the assignment in the place of such trustee. *King* v. *Leach*, 2 Hare, 57.

—— **Devisees of Equity of Redemption.**]—In a creditors' suit for the administration of a testator's estate, a decree was made that the devisees of real estates subject to a mortgage, two of whom were married women, should execute a conveyance of the equity of redemption to the mortgagee, if the latter were willing to release the testator's estate from the mortgage debt. The devisees refused to execute a deed of conveyance, prepared in pursuance of the decree by the mortgagee, and approved of by the master:—Held, upon petition by the mortgagee, that he was entitled, under stat. 11 Geo. 4 & 1 Will. 4, c. 60, to an order for the appointment of a person to execute the conveyance in the place of the devisees. *Hood* v. *Hall*, 19 L. J., Ch. 312; 14 Jur. 127.

—— **Infant Heir of Mortgagor.**]—In a suit by an equitable mortgagee against the infant heir of the mortgagor, the estate having been directed to be sold as most beneficial to the infant, the latter was, under s. 11 of the stat. 11 Geo. 4 & 1 Will. 4, c. 60, directed to convey to the purchaser. *Scholefield* v. *Heafield*, 8 Sim. 470; 7 L. J., Ch. 4.

Where lands are decreed to be sold in a mortgage suit, the infant heir-at-law of the mortgagor is not a trustee within ss. 8 or 18 of the 11 Geo. 4 & 1 Will. 4, c. 60. *Goddard* v. *Macaulay*, 6 Ir. Eq. R. 221.

Semble, the court has jurisdiction, under 11 Geo. 4 & 1 Will. 4, c. 47, s. 11, to make an order directing such infant heir to execute the conveyance. *Ib.*

He is not within the provisions of the 28 Geo. 3, c. 25. Nor is he a necessary party to the conveyance to the purchaser. *Ib.*

Lunatic Trustee.]—The stat. 11 Geo. 4 & 1 Will. 4, c. 60, applies only to the case of a trustee who, by reason of mental incapacity, is incompetent to the execution of a trust. *Jones, In re*, 6 Jur. 545.

The summary jurisdiction given to the lord chancellor by the 11 Geo. 4 & 1 Will. 4, c. 60, s. 5, for the conveyance of property vested in trustees or mortgagees who are lunatic, but not found so by inquisition, does not apply to cases in which the fact of lunacy is contested. *Walker, In re*, Cr. & Ph. 147; 10 L. J., Ch. 355; 5 Jur. 571.

Where the evidence adduced of unsoundness of mind of a lunatic trustee, but not found such by inquisition, is very strong, the court will make the order for a conveyance of the trust property in the first instance, without directing a reference to the master. *Daniel, In re*, 11 L. J., Ch. 123.

Lands having been sold under a decree for payment of charges which were prior to the estate of one of the defendants, who was a lunatic, the court referred it to the master to appoint a person in his place to convey them to the purchaser. When the sale is under a decree of the court, the granting parties do not fill the character of vendors within the exception in the 11 Geo. 4 & 1 Will. 4, c. 60, s. 18. *Blake, In re*, 3 Jo. & Lat. 265.

Where a lunatic, who had no issue, was seised of an estate tail in possession, with the immediate reversion to himself in fee, and the land had been sold under the 1 Will. 4, c. 65, for payment of his debts, an order was made on the committee to suffer a recovery on behalf of the lunatic, in order to complete the title to a purchaser. *Brand, In re*, 1 Myl. & K. 150; 2 L. J., Ch. 12.

R. B. was entitled to a rent-charge for life, and legal estate for life in remainder in lands decreed to be sold for paramount incumbrances. After decree he became lunatic, but no commission issued. A conveyance by him to a purchase was ordered under s. 5 of the Trustee Act, 11 Geo. 4 & 1 Will. 4. *Blake* v. *Blake*, 9 Ir. Eq. R. 592.

A petition, praying that the committee of a lunatic may be ordered to transfer property vested in a lunatic as a trustee, ought to be entitled in the lunacy, and need not be entitled in the matter of the act which authorises the lord chancellor to make the order. *Fowler, In re*, 2 Russ. 449.

Ad interim committee incapable of conveying under the act 1 Will. 4, c. 60, s. 3. *Poulton, In re*, 1 Mac. & G. 100; 1 Hall & Tw. 476.

—— **Mortgagee.**] — Property, of which a lunatic (not so found) was mortgagee in fee for 1,300*l.*, was sold for 900*l.* His beneficial interest in the mortgage money having been by means of an equitable charge reduced below 700*l.*:—Held, that this case fell within s. 5 of the act 11 Geo. 4 & 1 Will. 4, c. 60. *Sandford, In re*, 1 Mac. & G. 538; 2 Hall & Tw. 137.

—— **Mortgagor.**] — A., after making an equitable mortgage of freeholds, became lunatic. The mortgaged estate was sold under a decree in a foreclosure suit. The lunatic was held to be a trustee within the 11 Geo. 4 & 1 Will. 4, c. 60, and a conveyance was ordered to be made by the plaintiff's solicitors in the name of the lunatic, without a reference. *Rogers, In re*, 13 L. J., Ch. 262; 8 Jur. 229.

—— **Devisees.**] — After a decree in a creditors' suit for the sale of the real estate of the testator, and the application of the proceeds in

payment of the debt, and after a sale under that decree, the devisees of the estate, being lunatic or out of the jurisdiction, are trustees of the estate, within the stat. 11 Geo. 4 & 1 Will. 4, c. 60, for the plaintiff in the cause, semble. *Jackson* v. *Milfield*, 5 Hare, 538.

Practice—Order to Convey.]—An application, under the 11 Geo. 4 & 1 Will. 4, c. 60, to appoint a person to convey in the place of an absent trustee, who has been discharged by a decree of the court, ought to be by motion in the cause in which the decree was pronounced, a petition for that purpose being unnecessary. *Callaghan* v. *Egan*, 1 Dr. & Wal. 187.

Where an order that the master or any other person appointed by the court should convey in the name of a defendant, under the 11 Geo. 4 & 1 Will. 4, c. 60, s. 8, cannot be made contemporaneously with the decree at the hearing of the cause, in consequence of the party to whom the conveyance is to be made not being then ascertained (e.g., where lands are by the decree directed to be sold), an application, under the 11 Geo. 4 & 1 Will. 4, c. 60, that the master should execute a conveyance in the name of such defendant, must be made by petition. *Newman* v. *Fitzgerald*, 13 Ir. Eq. R. 65.

Under the 11 Geo. 4 & 1 Will. 4, c. 60, the master has no power to appoint a person to convey. It is for the master to "approve," and for the court to "appoint." *Fowler* v. *Ward*, 8 Beav. 488; 14 L. J., Ch. 321.

One of two executors appearing, from the proceedings in the cause, to be a trustee within the meaning of the 11 Geo. 4 & 1 Will. 4, c. 60, of a fund standing in the testator's name, and it being proved by affidavit that he was living out of the jurisdiction, the court, without a reference to the master, made an order, under this act, for the transfer of the fund by his co-executor. *Parker* v. *Burney*, 1 Beav. 492; 8 L. J., Ch. 107.

Where the court, in any proceeding in a cause, declares a party to be a trustee, within 11 Geo. 4 & 1 Will. 4, c. 60, it may, by the same order, direct a conveyance to be made. *Walton* v. *Merry*, 6 Sim. 328.

Where the court, by its decree, declares that an infant heir is a trustee, and the right of party entitled to a conveyance is established by that decree, the court will at the same time direct a conveyance from the infant heir, a petition for that purpose being unnecessary. *Broom* v. *Broom*, 3 Myl. & K. 443. S. P., *Meller* v. *Knight*, 1 Keen, 129; 5 L. J., Ch. 168.

—— **Execution of Conveyance.**]—Where a person has been ordered, under the 11 Geo. 4 & 1 Will. 4, c. 60, to execute a deed in place of a refusing trustee, it is sufficient that he should execute the same deed that has been tendered to the refusing trustee, it being expressed, in the attestation clause, that he has executed it in place of the trustee, and in pursuance of the order. *Foley, Ex parte*, 8 Sim. 395; 8 L. J., Ch. 56; 2 Jur. 1012.

—— **Reference.**]—For the proper form of the reference under the stat. 11 Geo. 4 & 1 Will. 4, c. 60. See *Pigott, In re*, 2 Russ. & M. 683.

Where one of two executors, defendants in an administration suit, was stated by affidavit to be out of the jurisdiction, an order was made for the transfer of a fund, under the 11 Geo. 4 & 1 Will. 4, c. 60, without a reference, it appearing from the proceedings in the cause, as was stated in the order, that he was a trustee within the meaning of the act. *Parker* v. *Burney*, supra.

Reference directed under 11 Geo. 4 & 1 Will. 4, c. 60, in a case where the cestui que trust, making the application, claimed in respect of interests devised in remainder after the determination of prior estates tail which had failed. *De Clifford Estates, In re*, 2 Myl. & K. 624.

—— **Supplemental Affidavit.**]—In proceedings under the 11 Geo. 4 & 1 Will. 4, c. 60, all the circumstances giving the court jurisdiction should be stated in the petition, as a supplemental affidavit cannot be read. *Hartford, In re*, 1 Con. & L. 394; 2 Dr. & War. 292.

—— **Proof of Search.**]—Proof of search for a trustee under the 11 Geo. 4 & 1 Will. 4, c. 60, s. 24, may be given at the hearing of the cause, by affidavit. *Moore* v. *Vinten*, 12 Sim. 161; 10 L. J., Ch. 345.

—— **Title of Petition.**]—The title of a petition presented, under an act of parliament, as the Trustee Act (11 Geo. 4 & 1 Will. 4, c. 60), should contain a reference to that act, as well as to the matter of the petition. *Law, In re*, 4 Beav. 509; 11 L. J., Ch. 118; 6 Jur. 615.

Costs—Infant Heir of Mortgagee.] — The infant heir of a mortgagee is entitled to the costs incurred on the reference, under 11 Geo. 4 & 1 Will. 4, c. 60. *Miltown (Earl)* v. *Trimleston (Lord)*, Fl. & K. 338.

The infant heir of a mortgagee in fee having been found by the master to be a trustee of the mortgaged estate for the executor of the mortgagee, the executor petitioned that the infant might be ordered to reconvey the estate to the mortgagor on payment of the principal and interest due on the mortgage and costs:—Held, that the costs of the proceeding before the master must be paid by the mortgagor. *Ommaney, Ex parte*, 10 Sim. 228; 10 L. J., Ch. 315; 5 Jur. 647.

—— **Devisees of Mortgagee.**]—The costs of the petition and order, under the stat. 11 Geo. 4 & 1 Will. 4, c. 60, for the reconveyance of a mortgaged estate to the mortgagor or his representatives, upon payment of the mortgage money, are to be borne by the mortgagor or his estate, although such proceedings were rendered necessary by the circumstance that the mortgagee had devised the legal estate in the mortgaged premises to three trustees, one of whom could not be found. *King* v. *Smith*, 6 Hare, 473; 18 L. J., Ch. 43; 12 Jur. 1083.

—— **Lunatic Mortgagee or Trustee.**]—Costs of the committee of a lunatic trustee, conveying within the statute, must be paid out of the lunatic's estate. *Brydges, Ex parte*, G. Cooper, 290.

Semble, the expenses of proceedings, under the 11 Geo. 4 & 1 Will. 4, c. 60, s. 5, for the purpose of obtaining a reconveyance of a mortgaged estate from a mortgagee of unsound mind, but not found such by inquisition, are to be borne by the mortgagor. *Marrow, In re*, Cr. & Ph. 142; 10 L. J., Ch. 340.

Where it clearly appeared that the lunatic was a trustee of mortgaged premises, and the mortgage deed contained a declaration to that effect:—

Held, that the costs of proceedings under the act 11 Geo. 4 & 1 Will. 4, c. 60, to obtain a reconveyance, must be borne by the mortgagor. *Lewes, In re*, 1 Mac. & G. 23 ; 1 Hall & Tw. 123 ; 18 L. J., Ch. 153 ; 13 Jur. 548.

The costs of proceedings for a reconveyance by the committee of a lunatic of premises mortgaged to the lunatic will be ordered to be paid out of the lunatic's estate, where the lunatic is beneficially interested in the mortgage money, and the petition is presented by the committee. *Wheeler, In re*, 1 De G. M. & G. 434.

This rule, however, will not be acted on if the mortgagor presents the petition, unless in cases where the committee has declined to take that step. *Ib.*

Application of the rule as to the costs of proceedings under 11 Geo. 4 & 1 Will. 4, c. 60, for the purpose of obtaining a reconveyance of mortgaged premises, to the case of a lunatic mortgagee who was a trustee, and where the existence of the trust did not appear on the mortgage deed. *Townsend, In re*, 1 Mac. & G. 686 ; 2 Hall & Tw. 185 ; 2 Ph. 348 ; 16 L. J., Ch. 456.

—— **Resisting Improper Order.**]—If a motion is made to enforce an order under the 11 Geo. 4 & 1 Will. 4, c. 60, and the order appears to be an improper one, the court has jurisdiction to give the party resisting it the costs of the motion. *King, In re*, 10 Sim. 605 ; 9 L. J., Ch. 257.

—— **Recusant Trustee served with Petition Appearing.**]—If a petition is presented under the 10 Geo. 4, c. 56, or under the 11 Geo. 4 & 1 Will. 4, c. 60, to have a person appointed to convey property in the place of a recusant trustee, the latter ought not to be served with the petition ; and if he is served, he will be entitled to costs. *Third Burnt Tree Building Society, In re*, 16 Sim. 296 ; 12 Jur. 595. And see *S. C.*, 1 Mac. & G. 607 ; 2 Hall & Tw. 44.

—— **Infant Heir of Trustee.**]—Upon an order, under the 11 Geo. 4 & 1 Will. 4, c. 60, for the infant heir of a trustee under a settlement to convey to parties who claimed under the will of a party who claimed under the limitation in the settlement to the right heirs of the settlor :—Held, that such heir need not be served with the order of reference to the master, or other orders in the matter of the reference ; and the petition of such infant, that he might be directed to convey upon the trusts of the settlement, instead of the trusts of the subsequent will, and that he might be served with such orders as aforesaid, being wrong, the petitioner could not have his costs of opposing the cestui que trust. *Bradburne, In re*, 12 L. J., Ch. 353.

v. *Transfer of Stock under the* 36 *Geo.* 3, *c.* 90, *and Succeeding Statutes.*

Under the 36 Geo. 3, c. 90 — Trustee of Unsound Mind.]—Stock ordered to be transferred, under the stat. 36 Geo. 3, c. 90, the trustee being of unsound mind, though no commission had issued, and having actually refused to transfer, the refusal proceeding from mere weakness of mind. *Simms* v. *Naylor*, 4 Ves. 360.

A lunatic abroad, under a judicial proceeding in the nature of a commission of lunacy, is not within the stat. 36 Geo. 3, c. 90, s. 3. *Sylva* v. *Da Costa*, 8 Ves. 316.

A trustee, who is in a state of mind which renders him incompetent for the management of business, may refuse to transfer within the meaning of the 36 Geo. 3, c. 90, s. 1. *West* v. *Ayles*, Turn. & R. 330.

Construction of the act 36 Geo. 3, c. 90, s. 3, directing the transfer in certain cases of stock standing in the name of a lunatic or his committee, not to extend to stock standing in the name of another to which the lunatic is entitled as administrator. *Adams, Ex parte*, 2 Mer. 112.

—— **Trustees under Foreign Will—No Representatives Here.**]—Trustees under a foreign will dead, and no personal representation taken out in this country, is a case for relief, by directing a transfer of stock, within the stat. 36 Geo. 3, c. 90. *Lee* v. *Bank of England*, 8 Ves. 44.

Order for a transfer of stock within the stat. 36 Geo. 3, c. 90, as upon a refusal by a party appearing by counsel, and admitting that she had disobeyed an order to transfer. *Rider* v. *Kidder*, 13 Ves. 123.

—— **Trustee out of Jurisdiction.**]—Under 36 Geo. 3, c. 90, on proof that one trustee had become bankrupt, and absconded, and was abroad, and not likely to return, order was made that remaining trustee should transfer stock into name of himself and another as co-trustees. *Williams* v. *Bird*, 1 V. & B. 3.

Where a bill is filed under the 36 Geo. 3, c. 90, merely to obtain a transfer of stock standing in name of a trustee who is out of the jurisdiction of court, the order must be made at the hearing of the cause, and cannot be obtained by petition. *Burr* v. *Mason*, 2 Sim. & S. 11.

—— **Absconding Trustee.**]—Trustee of fund absconding, dividends of fund ordered to be paid to the cestui que vie. *Wharton* v. *Massey*, Dick. 429.

Under the 6 Geo. 4, c. 74—Act only Extends to Express Trusts.]—A. and B., the residuary legatees of a deceased person, obtained administration of and had part of the assets transferred to their names. The letters of administration were afterwards recalled, and administration granted to B., the sole next of kin of the deceased, who was declared to have died intestate. A. was abroad, and B. a prisoner for contempt, for not obeying an order of the court to transfer to the credit of the cause certain stock, which they had admitted, by their answer, to belong to the deceased. A petition was presented, under the 6 Geo. 4, c. 74, to have the stock transferred ; but the court held, that the act extended only to express trusts, and refused to make the order. *Dew* v. *Clarke*, 4 Russ. 511.

——**Refusal by Executors of a Deceased Trustee to take out Probate.**]—The executor of a surviving trustee appointed three executors, who in an adverse litigation procured probate of his will to be decreed to them, but afterwards refused to take out probate. They are legal personal representatives of the surviving trustee, within the meaning of 6 Geo. 4, c. 74, and an order will be made under that act for the transfer of stock standing in the trustee's name. An affidavit that they refuse to take out probate of the testator's will is not sufficient to ground an order

under the act; it should state that they refuse to take the steps necessary for enabling them to transfer. *Winter, Ex parte*, 5 Russ. 284.

Under the 11 Geo. 4 & 1 Will. 4, c. 60—Construction of Act.]—Construction of 11 Geo. 4 & 1 Will. 4, c. 60, s. 10. *Anon.*, 2 Jur. 886.

Construction of 11 Geo. 4 & 1 Will. 4, c. 60, ss. 10, 11. There must be a clear case of trust to justify the court in transferring. *Crouch* v. *Crouch*, 2 Jur. 773.

The request in writing mentioned in the stat. 11 Geo. 4 & 1 Will. 4, c. 60, s. 10, as to the transfer of stock, means a private request by the party requiring the transfer, and service of an order of court directing such transfer is not sufficient. *Madge* v. *Riley*, 3 Y. & C. 425.

A decree declared a defendant, against whom the bill had been taken pro confesso, to be a trustee of stock for the plaintiffs; but the court declined to refer it to the master to appoint a person to transfer the stock, in the place of the defendant, except upon a petition presented under 11 Geo. 4 & 1 Will. 4, c. 60. *Fellowes* v. *Till*, 5 Sim. 319.

But where the widow and administratrix of an intestate, who had also left a child, of her own accord had transferred money in the funds into the names of herself and the infant child, it was ordered, under the 11 Geo. 4 & 1 Will. 4, c. 60, that the child should join in transferring the third to which the widow was entitled. *Kidd* v. *Kidd*, 1 Beav. 225, n.; 2 L. J., Ch. 24.

—— **Infants.**]—A testatrix directed funds to be transferred in the bank books into the names of A. B. and wife, and their children, who were infants, for the benefit of A. B. and wife for life, with remainder to their children. This was done, and a suit being instituted for the performance of the trusts:—Held, that the court had no jurisdiction, under 11 Geo. 4 & 1 Will. 4, c. 60, to order the infants to transfer the fund into court. *Watts* v. *Scrivens*, 1 Beav. 223.

—— **Bengal Government Notes.**] — Bengal government notes are land within the meaning of the act 11 Geo. 4 & 1 Will. 4, c. 60. *Dyce Sombre, In re*, 1 Mac. & G. 101; 13 Jur. 218.

—— **Trustee refusing to Transfer.**]—The executor of a surviving trustee declined stating whether he would or would not prove the will, and neglected for thirty-one days after notice to transfer trust-stock standing in the name of the testator:—Held, that he was a trustee within the 11 Geo. 4 & 1 Will. 4, c. 60, and a transfer was ordered to new trustees. *Cockell* v. *Pugh*, 6 Beav. 293.

Petition, under the 11 Geo. 4 & 1 Will. 4, c. 60, s. 10, for the appointment of a person to transfer stock in the place of a trustee refusing. *Crowther, In re*, 3 Jur. 21.

A. and B. claimed adversely a sum of stock standing in the names of A. and two other persons as trustees. A. filed an amicable bill to have the rights and interests of himself and B. declared; A. was beyond sea, commanding a merchant vessel on a voyage to India. B. presented a petition, under 11 Geo. 4 & 1 Will. 4, c. 60, praying that the stock might be transferred into court in the cause. Petition refused, the case not being within the act. *Hutchinson* v. *Stephens*, 5 Sim. 498; 3 L. J., Ch. 239.

—— **Trustee refusing to Receive Dividends.**]—Stock was vested in trustees in trust to pay the dividends to persons successively entitled for life. One of the trustees had acted, by joining in a power of attorney to receive the dividends, but, a new power of attorney being necessary, he refused to join in giving it, or in receiving the dividends. There was a power to appoint new trustees vested in the acting trustee of the deed. A petition was presented by the person entitled to the first life interest to have a trustee appointed to receive and pay over the dividends:—Held, not a case within s. 10 of 11 Geo. 4 & 1 Will. 4, c. 60. *Byrne, In re*, 1 Jo. & Lat. 535; 6 Ir. Eq. R. 563.

—— **One Trustee out of Jurisdiction.**]—Stock was invested in the names of two persons upon trust, as was alleged, for the petitioners. The only evidence of the trust was the statements in the petition and verifying affidavits of a letter written by the donor for the purposes of the application. One of the alleged trustees being resident in some place unknown, out of the jurisdiction, a petition was presented, praying that the stock might be transferred to the petitioners; but the court refused to make the order in his absence, though it was stated that he declined to act, and the other trustee submitted to act as the court should direct. *Dunbar, In re*, 2 Jo. & Lat. 120; 8 Ir. Eq. R. 71.

—— **Executor out of Jurisdiction.**]—Testator gave an annuity to his widow, and the residue of his estate to his children. The executors paid the testator's debts and legacies, and purchased stock in their names to answer the annuity, and paid the dividends to the widow. One of the executors went to reside abroad, and the other died:—Held, that they were trustees of the stock, within 11 Geo. 4 & 1 Will. 4. *Dover, Ex parte*, 5 Sim. 500.

One of two executors appearing, from the proceedings in the cause, to be a trustee, within the meaning of the 11 Geo. 4 & 1 Will. 4, c. 60, of a fund standing in the testator's name, and it being proved by affidavit that he was living out of the jurisdiction, the court, without a reference to the master, made an order under this act for the transfer of the fund by his co-executor. *Parker* v. *Burney*, 1 Beav. 492; 8 L. J., Ch. 107.

—— **Refusal of Next of Kin of Surviving Trustee to Administer.**]—The survivor of four trustees of a sum of stock died intestate, and his sole next of kin refused to administer to him:—Held, that the case was not within s. 10 of 11 Geo. 4 & 1 Will. 4, c. 60, and therefore the court could not appoint a person to transfer the stock. *Lunn's Charity, In re*, 15 Sim. 464. On appeal, 11 Jur. 256.

—— **Lunatic Trustee.**]—Upon an application, under the 11 Geo. 4 & 1 Will. 4, c. 60, for a transfer of stock standing in the name of a lunatic trustee, the lord chancellor will not adopt the facts as found in the proceedings in a suit in the court of exchequer, but will require them to be ascertained by the usual reference. *Prideaux, In re*, 2 Myl. & Cr. 640; 7 L. J., Ch. 82.

Where stock is standing in the names of trustees, one of whom becomes a lunatic, and new trustees are appointed in his place, the court will not order a transfer of the stock to

be made to the cestui que trust, but it must be transferred to the old and new trustees. *Smith, In re*, 17 L. J., Ch. 415.

I. COSTS, CHARGES, AND EXPENSES.

1. *In General*, 1019.
2. *Rights of Co-trustees inter se*, 1024.
3. *Indemnity for Costs to Trustee by Cestui que Trust*, 1024.
4. *Trustees Acting in a Professional Character*, 1025.
5. *Where Settlement Set Aside*, 1030.
6. *Opinion of Counsel*, 1031.
7. *Unsubstantiated Charges of Breach of Trust or Fraud*, 1032.
8. *Misconduct and Breach of Trust.*
   a. In General, 1033.
   b. Wilful Misconduct, 1040.
   c. Disclaimer or Refusal to Act, 1043.
9. *Trustee Refusing to give Accounts or Information*, 1044.
10. *Trustee Refusing to Convey or Transfer the Trust Fund*, 1045.
11. *Separate Defences*, 1050.
12. *Fund Liable for Payment of Costs*, 1053.
13. *Taxation of Costs.*
   a. As between Party and Party, 1058.
   b. As between Solicitor and Client, 1060.
14. *Practice on Allowance of Costs*, 1062.

1. In General.

General Rules.]—As a general rule, trustees have a right to their costs out of the estate; but the application of the rule depends upon the conduct of the trustees and their strict observance of the duties of their trust. *Beer* v. *Tapp*, 31 L. J., Ch. 513; 6 L. T. 269; 10 W. R. 277.

A trustee seeking the direction and indemnity of court, as to the execution of his trust, is always allowed his costs; unless the act required to be done leads to no responsibility, and the motive of the trustee is obviously vexatious. *Curteis* v. *Chandler*, 6 Madd. & Geld. 123.

Trustees who file a bill for the administration of a testator's estate, are entitled to their costs, however small the estate may be, and however small the risk in administering the estate. *Hodgkinson* v. *Gilbert*, 19 L. J., Ch. 424.

Costs of course out of the fund to agents, receivers, and trustees, who have accounted fairly and paid money into court. Costs cannot be given to a college individually, nor as a corporation, unless proved so. *Att.-Gen.* v. *London (City)*, 1 Ves. 246; 3 Bro. C. C. 171.

A trustee is entitled to be reimbursed out of the trust property all the charges and expenses incurred in the execution of the trust, and in this the court will always deal liberally with a trustee acting bonâ fide. *Courtney* v. *Rumley*, Ir. R. 6 Eq. 99.

A trustee is entitled to his costs, unless he acts from motives of obstinacy and caprice. *Taylor* v. *Glanville*, 3 Madd. 176; 18 R. R. 210.

No costs to any party claiming under a contract not meritorious, even though recovered upon; not even to a trustee. *Colman* v. *Sarrel*, 1 Ves. 55; 1 R. R. 83.

Neglect of Trustees.]—Trustees neglecting their trust not entitled to their costs. *England* v. *Downs*, 6 Beav. 279.

Where trustee by neglect occasions the suit, no costs are given him, but against him, of course. *O'Callaghan* v. *Cooper*, 5 Ves. 117; *Caffrey* v. *Darby*, 6 Ves. 488.

A court of equity will not entertain a suit for enforcing a foreign judgment against a defendant unless he has been duly served with notice of the proceedings in the foreign court, and has had an opportunity for making his defence there. *Griffin* v. *Brady*, 39 L. J., Ch. 136; 18 W. R. 130.

But when, by reason of the neglect or refusal of a trustee to do his duty, a cestui que trust is compelled to resort to a foreign court for enforcing his right against the trustee, though the trustee should not be served with a notice of such proceedings, the court will, on application by the cestui que trust, order the trustee to pay the costs of such proceedings, as being costs necessarily incurred in consequence of the refusal of the trustee to do his duty. *Ib.*

Where, under the trusts of a doubtful will, the tenant for life, who was also a trustee, neglected to make proper investments, she was held chargeable with interest at 4 per cent. only, and the decree was made without costs. *Mousley* v. *Carr*, 4 Beav. 49; 10 L. J., Ch. 260.

Acting unreasonably—Vexatious and Unjustifiable Conduct—Costs thereby Incurred.]—A trustee may be honest, and yet from over-caution or some other cause he may act unreasonably, and if his conduct is so unreasonable as to be vexatious, oppressive, or otherwise wholly unjustifiable, and he thereby causes his cestuis que trust expense which would not otherwise have been incurred, the trustee must bear such expense, and it ought not to be thrown on the trust estate or on his cestuis que trust. *Chapman, In re, Freeman* v. *Parker*, 72 L. T. 66—C. A.

Right to set off Debt due against Costs.]—Where a person at the time of an order being made for payment of his costs by trustees on a petition in the matter of a trust is indebted to the trust estate, although the amount is not then ascertained, he cannot get any of such costs until he has paid the amount due from him to the trust, and the trustees, therefore, can set off the costs payable by them against the amount due from him. *Harrald, In re, Wilde* v. *Walford*, 53 L. J., Ch. 505; 51 L. T. 441—C. A.

Lien for Costs.]—Trustees for sale on the decease of a tenant for life having a prior legal estate:—Held, not to have any lien upon the property in respect of the costs of an abortive sale attempted by them during the tenancy for life, or of proceedings against them at law and in equity in reference thereto, notwithstanding such sale was attempted on the solicitation of the tenant for life, and with the consent and approbation, and by the direction of the cestuis que trust, one of whom was sui juris, the shares of the others, who were married women, being settled to their separate use without power of anticipation. *Leedham* v. *Chawner*, 4 K. & J. 458.

Improper Appointment of Trustee.]—A party accepting the office of trustee, though the form of appointment is legally followed, does so at his peril. If he is a stranger to the cestuis que trust, it is his duty to communicate with them before accepting the office. *Peatfield* v. *Benn*, 17 Beav. 522; 23 L. J., Ch. 497; 2 W. R. 68.

A defaulting trustee, pending a suit for an account and for the appointment of new trustees, appointed another person trustee; he accepted the office without any communication to the

cestui que trust; upon a supplemental bill his costs were refused, but he was not made to pay any. *Ib.*

Mistake.]—Trustees who had acted bonâ fide, though upon an erroneous construction of a will, not ordered to pay costs. *Harper* v. *Munday*, 2 Jur. (N.S.) 1197; 5 W. R. 62—L.C.

Where a trustee committed a breach of trust from a mistake of his powers, he was made to pay costs. *Powlett (Earl)* v. *Herbert*, 1 Ves. sen. 297.

Appeal for Costs—"Charges and Expenses."]—Costs incurred by a trustee in actions relating to the estate are not "costs" in administration proceedings, but only "charges and expenses," and therefore an appeal lies from an order of the judge in such administration proceedings, allowing a trustee his costs of such actions out of the estate. *Charles* v. *Jones* (33 Ch. D. 80) explained; *Chennell, In re* (8 Ch. D. 492), approved. *Beddoe, In re, Downes* v. *Cottam*, 62 L. J., Ch. 233; [1893] 1 Ch. 547; 2 R. 223; 68 L. T. 595; 41 W. R. 177—C. A.

Right of Trustee's Executor to Costs out of Assets.]—The trustee of a marriage settlement invested the trust moneys, with the consent of the husband, who had a life interest under the settlement, in an unauthorised security. On the trustee's death, his widow, as his administratrix, became trustee, and, on ascertaining that the settlement fund was in great danger of being lost, instituted an action for administration of the trusts of the settlement, under which the greater part of the trust fund was recovered. It was contended, on the authority of *Haldenby* v. *Spafforth* (9 Beav. 195), that the plaintiff was entitled to her costs of the action:—Held, that that case must be understood to decide that the representative of a defaulting executor is entitled to costs out of the executor's assets, not out of the assets of the original testator whose estate is being administered. *Gurney* v. *Gurney*, 48 L. T. 529.

Held, accordingly, that the plaintiff could not be allowed to retain her costs of the action as against the cestuis que trust, though she was entitled to her costs, charges, and expenses as trustee other than those of the action. *Ib.*

Originating Summons — Costs.]—An originating summons under Rules of Supreme Court, 1883, Ord. LV. r. 3, for inquiries or directions, without administration, is equivalent to the old chancery practice of commencing an administration suit, raising the particular point by the pleadings, obtaining an inquiry by direction upon that point, and then staying further proceedings. Accordingly, upon such a summons, the court has jurisdiction, provided it has proper parties before it under r. 5, to deal with the question of costs, although no estate or fund is sought to be administered; and if the summons has been taken out by trustees, they are precisely in the same position, as regards their rights to costs under Ord. LXV. r. 8, as if it were an ordinary action for administration. *Medland, In re, Eland* v. *Medland*, 58 L. J., Ch. 572; 41 Ch. D. 476; 60 L. T. 851; 37 W. R. 753—C. A.

An originating summons was taken out under Rules of the Supreme Court, 1883, Ord. LV. r. 3 (g), by one of the three trustees of a will, against his co-trustees, to determine whether the trustees ought to call in certain mortgages on which the testator's residuary estate had been invested. One of the defendants was also tenant for life or widowhood of part of the residue, and the other was beneficially entitled absolutely to a moiety of the residue. The person beneficially entitled to the other moiety, a daughter of the testator, was not a party to the summons, but the plaintiff and one of the defendants were two of the three trustees of her marriage settlement which comprised her moiety:—Held, by North, J., that the court had jurisdiction, notwithstanding the summons did not ask for administration, to direct an inquiry what the trustees ought to do with regard to the calling in of the mortgages, but had no jurisdiction to make any order as to costs, all the persons interested in the trust estate not being before the court:—Held, on appeal, that the summons had been properly taken out under Ord. LV. r. 3 (g), and that under r. 5, a sufficient number of the persons beneficially interested in the estate had been served to give the court the same jurisdiction as to costs as in an ordinary administration action, though the court had power, if it thought fit, to require any other persons to be served before deciding the question of costs; and that the judge below ought to have exercised his discretion as to costs under Ord. LXV. r. 1, by reserving them, as in an administration action, until the inquiry directed had been answered. *Ib.*

Retainer of Costs—Order—"The Judge doth not think fit to make any Order as to Costs."]—Where in an action between a cestui que trust and a trustee the judge, having his attention directed to the question of the payment of the costs of the action, and having the estate sufficiently represented before him, makes an order that he "doth not think fit to make any order as to the costs," the trustee is not entitled to retain the costs out of the trust estate in his hands. *Hodgkinson, In re, Hodgkinson* v. *Hodgkinson*, 64 L. J., Ch. 663; [1895] 2 Ch. 190; 12 R. 297; 72 L. T. 617; 43 W. R. 594—C. A.

—— **Statute-barred Items.**]—Trustees acting honestly are entitled to pay and retain the amount of a bill of costs, although some of the items in it are statute-barred, and the cestuis que trust cannot intervene and prevent the payment. *Budgett* v. *Budgett*, 64 L. J., Ch. 209; [1895] 1 Ch. 202; 13 R. 1; 71 L. T. 632; 43 W. R. 167.

Trustee not Appearing at Hearing.]—A trustee not appearing at the hearing of the cause, a decree was made against him, with liberty to show cause against it. Under this order, he set down the cause again, and prayed his costs, which were given him on paying the costs of the day on the former hearing. *Norris* v. *Norris*, 1 Cox, 183.

Action to Enforce Pre-existing Interests.]—A party becoming a trustee under a deed creating interests adverse to interests already existing may be liable to costs in a suit instituted to enforce such pre-existing interests in the trust property. *Heap* v. *Tonge*, 9 Hare, 105; 20 L. J., Ch. 661.

Action of Covenant—Bill of Interpleader.]—An action of covenant was brought against a trustee, who lodged the amount claimed in court, and filed a bill of interpleader, which was dismissed with costs on demurrer:—Held, he was entitled to have the money returned without deducting the costs. *Doyle* v. *Dumoncel*, 11 Ir. Eq. R. 517.

Claim of Trustee to Trust Property.]—Where a suit was not occasioned by the claim of a trustee to the trust property, and the costs had not been increased by that claim, the costs of the trustee were allowed. *Rittson* v. *Stordy*, 1 Jur. (N.S.) 771; 3 W. R. 627.

Trustees appearing without being Served.]—Where an infant defendant had married without obtaining the consent of the court, funds in court in her name were ordered to be paid to her husband with her consent, no settlement having been made. The trustees of the fund, who appeared without having been served, were not allowed their costs. *Bennett* v. *Biddles*, 10 Jur. 534.

Question as to whether Legal Estate passed.]—It not being clear whether the legal estate in the realty passed by the codicil of the survivor of the two trustees, or descended to his heir, the costs of making such heir a party to a suit, brought by the executors of such surviving trustee against the cestuis que trust, were given to the plaintiffs. *Greenwood* v. *Wakeford*, 1 Beav. 576; 8 L. J., Ch. 333.

Action for Specific Performance.]—Agreement for a lease of a farm, referring to a paper containing the terms: bill for specific performance according to such clauses, as had been read to the plaintiff: parol evidence to prove that was refused, and the bill dismissed. Bill being dismissed without costs, as a hard case, parties made trustees without their knowledge, and as such being necessary parties to the bill, cannot have costs against plaintiff, but left to their remedy against their principal: otherwise perhaps, if plaintiff had prevailed; because then those costs might have been given over against other defendants. *Brodie* v. *St. Paul*, 1 Ves. 326.

Where plaintiff's bill for specific performance of an agreement for sale was dismissed, plaintiff must pay the costs, though he was only a trustee for sale. *Edwards* v. *Harvey*, G. Cooper, 40.

New Trustees liable to pay Costs preliminary to Appointment—Costs of old Trustees—Costs of Donee of Power.]—In a partition action an order was made directing the taxation of the costs of the parties, including in the costs of the defendants, the trustees, "one moiety of any costs, charges, and expenses properly incurred by them as trustees of the will of the testator beyond their costs" of the action. The taxing-master disallowed the costs of former trustees, who were dead, paid to the executor of the survivor in consideration of his transferring the trust property, also costs of examining into the state of the trust property, and the validity of the power, before the appointment, also costs of the donee of the power in appointing. On summons to review taxation:—Held, that the trustees were bound to pay the costs of the old trustees properly incurred; that the burden of proof that the payments were wrong lay on the objectors:—Held, also, that it was not only the right, but the duty, of the new trustees to see what the estate consisted of and that the power was properly exercised; also that they were entitled to the costs of the donee of the power which they had paid. The trustees were therefore on principle entitled to the costs disallowed, subject to the discretion of the taxing-master as to items. *Harvey* v. *Olliver*, 57 L. T. 239.

On Appointment of New Trustees.]—*See* ante, C. 5. ix.

Payments and Advances.]—*See* ante, C. 6. viii.

On Payment Into and Out of Court.]—*See* ante, G.

Vesting Orders.]—*See* ante, H. 1. *d*. iii.

Solicitor-Trustee, Rights of.]—*See* ante, C. 8.

2. Rights of Co-trustees Inter se.

Lien.]—A large balance was found due jointly from a trustee and the representatives of a deceased trustee; but costs were given to both when such balance had been paid. It being admitted that no part of it could be recovered from the estate of the deceased trustee:—Held, that the surviving trustee, on payment by him of the share of the deceased trustee, was entitled to a lien for it on the costs awarded to the representatives. The court ordered such costs to be carried over to a separate account, with liberty to apply. *Birks* v. *Mucklethwait*, 33 Beav. 409.

Solicitor-Trustee—Negligence.]—Where there were two trustees, one of whom was a solicitor, and entrusted by the other with the management of the trust estate, to which, by his negligence, loss accrued, as between the two trustees, the solicitor-trustee was held bound to reimburse his co-trustee all the costs, charges, and expenses properly incurred by the latter in suits and other proceedings rendered necessary by such negligence of the former. *Lockhart* v. *Reilly*, 25 L. J., Ch. 697; 3 W. R. 227.

—— **Vexatious Proceedings.**] — Where two co-executors of a trustee, one of them a solicitor, were jointly liable in respect of a breach of trust committed by their testator, the solicitor having had the sole management of the trust estate, and having resorted to vexatious means to evade legal proceedings, an order was made, as between him and his co-trustee, that the latter was entitled to recover from him the whole costs of the action. *Price* v. *Price*, 42 L. T. 626.

Joint Retainer of Solicitor.]—Though a solicitor who accidentally (or upon separate retainers) represents two or more parties ought to distinguish the charges incurred for each separate party, yet where there is a joint retainer (or by trustees not severing in their defence) he can enforce the whole bill of costs incurred against either of the parties. *Watson* v. *Rowe*, 43 L. J., Ch. 664; L. R. 18 Eq. 680; 22 W. R. 793.

Two trustees gave a joint retainer in a suit to administer the trust estate. One became insolvent and was indebted to the estate:—Held, that the solvent trustee should have the whole costs of himself and his co-trustee allowed out of the estate without any set-off in respect of the estate. *Ib.*

3. Indemnity to Trustee by Cestui que Trust.

Cestui que Trust using Trustee's Name as Co-defendant.]—A cestui que trust, using trustee's

name as co-defendant, ordered to give latter security for costs. *Annesley* v. *Simeon*, 4 Madd. 390.

Cestui que Trust about to bring Action.]—A cestui que trust, about to file a bill, should apply to his trustee to become a co-plaintiff, indemnifying him against costs. If he refuses, he must abide his own costs, as a defendant. If he is not applied to, plaintiff must pay his costs. *Reade* v. *Sparkes*, 1 Moll. 8.

Trustee requested to bring Action to Compel Payment of Settled Debt.]—Where, by the terms of a marriage settlement, it was declared that a trustee should stand possessed of a debt, upon trust, in the first instance, to call in or compel payment of such debt, unless the cestuis que trust consented to its remaining outstanding, and the trustee is requested by the cestuis que trust to call in the debt, he is not entitled to an indemnity from them previous to his bringing an action, if necessary, for the same; and a trustee, under such circumstances, was made to pay the costs of a suit made necessary by his neglecting to bring the action. *Kirby* v. *Mash*, 3 Y. & C. 295; 8 L. J., Ex. Eq. 33; 3 Jur. 221.

Receiver appointed to bring Actions in Name of Executrix.]—A receiver appointed to collect in assets, and to bring actions in the name of an executrix, must give security to indemnify the executrix on account of such actions. *Taylor* v. *Allen*, 2 Atk. 213.

4. Trustees Acting in a Professional Character.

Auctioneers.]—A. by deed assigned to B. timber and stock in trade, upon trust to sell and apply the money arising from the sale in paying the expenses of preparing for, making, and completing such sale or sales, "including the usual auctioneer's commission, and otherwise incidental to the aforesaid trusts." B. was an auctioneer, and had been employed as such by A.:—Held, that the words appeared to have been inserted to provide for B. being employed in the sale, and that B. was entitled to charge his commission. *Douglas* v. *Archbutt*, 2 De G. & J. 148; 27 L. J., Ch. 271; 4 Jur. (N.S) 315; 6 W. R. 306.

An assignee of a mortgage, being one of a firm of auctioneers, sells under a power contained in the mortgage deed, and charges for personal trouble and commission. On the question whether he was entitled to those charges:—Held, that so far as and when he was mortgagee in possession he was a trustee, and the rule of equity applied, and he was therefore not entitled to charge for personal trouble during that period. *Mathison* v. *Clarke*, 3 Drew. 3; 3 Eq. R. 127; 24 L. J., Ch. 202; 18 Jur. 1020; 3 W. R. 2.

Broker.]—A broker, having taken an assignment of several cargoes in trust to sell them on their arrival, and, out of the proceeds, to repay himself the amount of his advances, took possession of some of the cargoes, and sold them under the power in the deed, while the rest were sold under an order made in a suit instituted by him to enforce his security, by which it was directed, that they should be sold by him in such manner and at such time as he and the receiver in the cause should agree, and in the event of their differing, then as the master should direct:—Held, that, in the latter sales he was entitled to the usual commission allowed to brokers employed by the court, but that in the former he was not entitled to any commission, having sold as trustee. *Arnold* v. *Garner*, 2 Ph. 231; 16 L. J., Ch. 329; 11 Jur. 339.

Bankers.]—Where bankers become also trustees, they are not entitled, in the absence of any contract, either express or implied, to make a profit of their fiduciary duties, by employing themselves as bankers, and by advancing, in that character, to their cestuis que trust, money to be repaid with compound interest. *Crosskill* v. *Bower*, 32 Beav. 86: 1 N. R. 379; 32 L. J., Ch. 540; 9 Jur. (N.S.) 267; 8 L. T. 135; 11 W. R. 411.

The trustees were held not to be legally entitled to claim more than simple interest at 5 per cent. per annum on sums advanced by them. *Ib.*

Surveyors.]—When a testator declared that "his trustees should be entitled to receive all costs, charges, and expenses, fees to counsel, and for advice and for professional assistance and loss of time," one of the trustees, who was a land surveyor, was held entitled to compensation for loss of time. *Willis* v. *Kibble*, 1 Beav. 559.

A testator gave all his residuary real and personal estate to trustees, upon trust for his wife for life; and after her death he directed that a just and true valuation should be made of "all his freehold and leasehold estates, stocks, funds, and securities, and other residuary personal estate," and directed the same to be divided, or considered as divided, into seven equal parts, and then disposed thereof; and the testator directed that A. B., one of his executors, who was a surveyor by profession, "should be entitled to charge, and should be allowed all reasonable charges, as a surveyor, in valuing his said freehold and leasehold estates, and in letting the same, and in collecting the rents, or otherwise in the management of his said estates, whenever requested or instructed so to act by his co-trustees":—Held, that this latter clause applied solely to the valuation and management of the freehold and leasehold estates, and that A. B. was not entitled, under this clause, to make any charges in respect of valuations made by him of the residuary's personalty after the death of the testator's widow. *Knott* v. *Cottee*, 16 Jur. 752.

Solicitor—Trustee—Out of Pocket Expenses.]—A trustee, who is a solicitor, is entitled to be repaid such costs, charges, and expenses only as he has properly paid out of pocket; and it makes no difference in this respect that the instrument creating the trust may have directed that the trust moneys should be applied (inter alia) in payment of all expenses, disbursements, and charges to be incurred, sustained, or borne by the trustee in professional business, journeys, or otherwise, and that the trustee might retain all reasonable costs, charges, and expenses, which he might sustain or be put unto, such costs, charges, and expenses to be reckoned, stated, and paid as between attorney and client. *Moore* v. *Frowd*, 3 Myl. & Cr. 45; 6 L. J., Ch. 372; 1 Jur. 653.

A solicitor, who is trustee, is not entitled to

charge for his professional services, which must be assumed to have been rendered in his character of trustee; but under a contract entered into, he may be entitled to his professional charges. *Sherwood, In re*, 3 Beav. 338; 10 L. J., Ch. 2; 4 Jur. 982.

Where a trustee acts as solicitor in the trust matters, he is only entitled to costs out of pocket, although the rule is not inflexible, and, under special circumstances, the court may authorise compensation by a fixed salary, but not by allowing him to make the usual professional charges. *Bainbrigge* v. *Blair*, 8 Beav. 588; 9 Jur. 765; *S. C.*, nom. *Blair* v. *Bainbrigge*, 14 L. J., Ch. 405.

A trustee, who was a solicitor, came to a final settlement of accounts with his cestuis que trust, and thereupon a general release was executed. In the accounts, the trustee had taken credit for bills of costs for professional services, to which, under the general rule, he was not entitled. The cestuis que trust were assisted on the occasion by an independent solicitor, who perused the bills, and settled and attested the release:—Held, under the circumstances, that the trustee was entitled to the benefit of the release. *Stanes* v. *Parker*, 9 Beav. 385; 10 Jur. 603.

On a settlement of account between a cestui que trust and trustee (a solicitor), the latter charged for professional services in the trust; a release was executed, but the cestui que trust not having had any independent professional assistance on the occasion, the court relieved him from the professional charges, beyond costs out of pocket. *Todd* v. *Wilson*, 9 Beav. 486; 15 L. J., Ch. 450; 10 Jur. 626.

Unless there be an agreement for the purpose, a trustee who is a solicitor is not entitled to charge his cestui que trust more than the money out of pocket for his services in carrying on suits in relation to and managing the trusts. *Gomley* v. *Wood*, 3 Jo. & Lat. 678; 9 Ir. Eq. R. 418.

A solicitor, who accepts a trust under a will or settlement, is not entitled to charge for work and labour done by him as a solicitor in executing the trust. *New* v. *Jones*, 1 Hall & Tw. 631, n.; 1 Mac. & G. 668, n.

—— **Limit on Rule.**]—The rule that a solicitor, being also a trustee and a party to a cause, is not entitled to charge costs except costs out of pocket, does not extend beyond the case of his acting as solicitor for himself alone. *Cradock* v. *Piper*, 17 Sim. 41. Affirmed, 1 Mac. & G. 664; 1 Hall & Tw. 617; 19 L. J., Ch. 107; 14 Jur. 97.

Under an order to tax costs generally, or to tax costs as between solicitor and client, the taxing masters are at liberty to take notice of the fact that the solicitor is also a trustee, and to apply the rule accordingly. *Ib.*

The costs of a defendant trustee, notwithstanding he was a solicitor, ordered to be taxed as between solicitor and client. *York* v. *Brown*, 1 Coll. C. C. 260; 8 Jur. 567.

A trustee who acts as solicitor for himself is entitled to his full costs against parties, who unsuccessfully endeavour to set aside the trust deed. *Pince* v. *Beattie*, 2 N. R. 546; 9 Jur. (N.S.) 1119; 9 L. T. 315; 11 W. R. 979.

The trustee of the separate property of a married woman acted as her attorney in three several suits instituted in relation to the trust property. In the first of these suits he was not a party; in the others he was:—Held, that in the first suit he was entitled to his costs as between solicitor and client, but in the two others only to costs out of pocket. *Fraser* v. *Palmer*, 4 Y. & C. 515.

A decree in a redemption suit directed that solicitors who were mortgagees, and who acted for themselves, should be allowed their principal, interest, and costs, and the master allowed full costs. A motion for an order to review the taxation, on the ground that the costs out of pocket only ought to have been allowed, was refused, but without costs, there having been no objection to the form of the decree at the hearing. *Price* v. *M'Beth*, 33 L. J., Ch. 460; 10 Jur. (N.S.) 579; 10 L. T. 521; 12 W. R. 818.

A cestui que trust agreed that her trustee, if he acted as solicitor in a suit, should receive full costs. A bill was delivered on February 18, and on March 8, the solicitor ceased to act. After discussion as to the amount, and having received other professional advice, the client paid the bill on May 22, a deduction being made therein. On an application being made within twelve months, the court refused to order a taxation. *Wyche, In re*, 11 Beav. 209.

—— **Not Confined to Express Trust.**]—The rule that a solicitor trustee acting in the trust shall not be allowed profit costs is not restricted to cases of express trust, but applies to an executor or trustee, though there be no express trust. *Pollard* v. *Doyle*, 1 Dr. & Sm. 319; 6 Jur. (N.S.) 1139; 3 L. T. 432; 9 W. R. 28.

Profit costs disallowed to an executor who had acted as his own solicitor, upon an objection taken by a creditor who was a party to the suit. *Ib.*

—— **Acting for a Body of Trustees of whom he is One.**]—Where one of a set of trustees is a solicitor, and by the direction of his co-trustees acts professionally in matters relating to the trust estate (such business being done out of court, and not in a cause in chancery), he will not be allowed any remuneration for professional services, but only be entitled to costs out of pocket. *Broughton* v. *Broughton*, 5 De G. M. & G. 160; 25 L. J., Ch. 250; 1 Jur. (N.S.) 965; 3 W. R. 602.

Where one of a set of trustees is one of a firm of solicitors, and the firm act, by the direction of the trustees, professionally in the matters of the trust estate (such business being done out of court, and not in a cause in chancery), the firm will not be allowed any remuneration for their professional services, but only be entitled to costs out of pocket. *Ib.*

The principle of the general rule applicable to such cases explained. The case of *Cradock* v. *Piper*, infra, and, in connection with it that of *Lincoln* v. *Windsor*, infra, remarked upon. *Ib.*

The rule that a solicitor, being also a trustee and a party to a cause, is not entitled to charge costs, except costs out of pocket, does not extend beyond the case of his acting as solicitor for himself alone. *Cradock* v. *Piper*, 1 Mac. & G. 664; 1 Hall & Tw. 617; 19 L. J., Ch. 107; 14 Jur. 97.

Application of the rule to the case of a solicitor acting for a body of trustees, of whom he himself was one. *Ib.*

Under an order to tax costs generally, or to

tax costs as between solicitor and client, the taxing masters are at liberty to take notice of the fact that the solicitor is also a trustee, and to apply the rule accordingly. *Ib.*

The rule which allows a solicitor, being also a trustee and a party to a cause, to charge full costs where he acts in the suit for a body of trustees, of which he himself is one, does not apply to the case of a solicitor being a trustee and acting as solicitor for himself and his co-trustees in the administration of the trust estate out of court. *Lincoln* v. *Windsor*, 9 Hare 158; 20 L. J., Ch. 531; 15 Jur. 765.

Employing a professional person implies an undertaking to remunerate him, but the inference may be rebutted. *Monson* v. *Baillie*, 2 Macq. H. L. 80.

Six trustees appointed one of their own body, a solicitor, to act, with an allowance "of his necessary charges and expenses, and a reasonable gratification." He had an interest in the estate; those who appointed him had not. He contended, however, that they were responsible for the expenses incurred by him in attempting to realise the property for his own benefit, and that he was himself to be absolved from all participation in that responsibility:—Held, that he was wrong. *Ib.*

—— **Principal and Agent—Division of Profits.**]—A solicitor, one of three trustees, appointing another solicitor to act for him on agency terms, does so for the benefit of the trust, although it be done with the consent of his co-trustees; and any advantage which may arise to him by the contract is for the benefit of the trust estate:—Held, therefore, that a taxation of the solicitor's costs was properly made as between principal and agent, instead of solicitor and client. *Taylor, In re*, 23 L. J., Ch. 857; 18 Jur. 666; 2 W. R. 249.

—— **Executor.**]—Whether an executor, being a solicitor and acting as such in the administration of the estate, by bringing or defending suits or otherwise, is entitled to an allowance for costs in respect of his professional labour, beyond costs out of pocket, and if so, whether as between solicitor and client, quære. *Carmichael* v. *Willson* or *Wilson*, 4 Bligh (N.S.) 146; 2 Dow. & Cl. 51—H. L. (Ir.)

A solicitor was appointed executor, and was to be at liberty to charge for his professional services:—Held, that he was only entitled to charge for services strictly professional, and not for matters which an executor ought to have done without the intervention of a solicitor, such as for attendances to pay premiums on policies, attendances at the bank to make transfers, and attendances on proctors, auctioneers, legatees, and creditors. *Harbin* v. *Darby*, 28 Beav. 325; 29 L. J., Ch. 622; 6 Jur. (N.S.) 906; 8 W. R. 512.

The solicitor for the plaintiff in a mortgage suit, being also a co-plaintiff, as executor of the mortgagee is only entitled to the costs out of pocket. *Macartney* v. *Dickey*, 16 Ir. Ch. R. 409. And see *Pollard* v. *Doyle*, supra.

—— **Executor of Solicitor himself an Executor.**]—A solicitor, who was one of the executors of a testator, paid himself out of the assets a bill for business done for the testator. Twenty-six years after the death of the testator, and ten years after the death of the solicitor, a decree was made directing the usual accounts of the testator's personal estate. The executor of the solicitor, in bringing in his accounts under the decree, inserted the bill of costs as one of his items of discharge:—Held, that although as between solicitor and client the bill was no longer subject to taxation, yet, as against the executor, the persons beneficially interested were entitled to question its amount as an item of discharge, but that an order referring it for taxation was not proper, the right course being to direct the taxing master to state whether any items objected to were fair and proper to be allowed, and to what amount. *Allen* v. *Jarvis*, L. R. 4 Ch. 616; 21 L. T. 280; 17 W. R. 943.

—— **Partners.**]—Where one of the two partners was a trustee under a will:—Held, that the firm could only charge the testator's estate for costs out of pocket. *Collins* v. *Carey*, 2 Beav. 149.

Trustees can only be allowed costs out of pocket for professional business transacted by a firm one of whom is a trustee, though the business be done by one of the partners who is not a trustee. *Christophers* v. *White*, 10 Beav. 523.

The rule that a trustee shall make no profit of his trust does not extend to his partner, and therefore where a trustee, being a solicitor, employed his partner professionally in the matter of the trust, upon the terms of such partner being alone entitled to the profits, the court allowed the professional charges. *Clack* v. *Carlon*, 30 L. J., Ch. 639; 7 Jur. (N.S.) 441; 4 L. T. 361; 9 W. R. 568.

In a suit by a trustee against his co-trustee, a solicitor, and the parties beneficially interested under a will, some of them being infants, the costs of all parties had been ordered to be taxed and paid. It appeared that the defendant trustee, the solicitor, had conducted his defence by his partner. The taxing master allowed the solicitor trustee costs out of pocket only:—Held, that the rule which had allowed to solicitor trustees costs out of pocket only being well established, the court would not, with reference to the question of costs, inquire whether the conduct of the suit by the partner of the solicitor trustee was beneficial for all parties, though no party objected to such inquiry, but that all costs beyond those out of pocket must be disallowed. *Lyon* v. *Baker*, 5 De G. & Sm. 622.

5. Where Settlement Set Aside.

Voluntary Settlement — Bankruptcy.] — A voluntary settlement made by an insolvent having been set aside at the suit of the assignee, the court refused to order the trustee of the settlement to pay the plaintiff's costs, but gave him no costs as against the plaintiff. *Townsend* v. *Westacott*, 4 Beav. 58; 5 Jur. 743.

—— **Attempt to uphold Settlement—Lien on Fund.**]—Trustees of a settlement, originally valid, but which becomes void on the bankruptcy of the settlor, are entitled as against the trustee in bankruptcy to a lien on the trust property for expenses properly incurred in the performance of their duty as trustees. *Official Receiver, Ex parte, Holden, In re*, 57 L. J., Q. B. 47; 20 Q. B. D. 43; 58 L. T. 118; 36 W. R. 189.

The settlor of a post-nuptial settlement brought an action to set it aside. The trustees

of the settlement defended the action, which was dismissed with costs, but the costs were not paid. The settlor became bankrupt within two years after the date of the settlement, which accordingly became void under s. 47 of the Bankruptcy Act, 1883 :—Held, that, as the settlement was originally valid, and as the costs of the action had been incurred by the trustees in the performance of their duty as trustees, they were entitled, as against the official receiver, to a lien on the trust fund for such costs. *Ib.*

—— **Rectification—No Claim by Trustees.**]—In an action against the trustees of a voluntary settlement for rectification :—Held, that as they did not set up any claim, but represented absent parties, who could not be ascertained, it was their duty to attempt to maintain the settlement, and therefore the costs of the trustees were declared to be a charge on the trust estate. *James* v. *Couchman*, 54 L. J., Ch. 838; 29 Ch. D. 212; 52 L. T. 344; 33 W. R. 452. And see *Everitt* v. *Everitt*, 39 L. J., Ch. 777; L. R. 10 Eq. 405; 23 L. T. 136; 18 W. R. 1020.

—— **Appeal.**] — The judge of the county court set aside a voluntary settlement. He gave the trustee in the liquidation his costs out of the debtor's estate, but made no order as to the costs of the trustees of the settlement. The trustees of the settlement appealed to the chief judge, who discharged the order of the county court. The court of appeal restored the order of the county court :—Held, that the trustees of the settlement ought to have been satisfied with the decision of the county court, and that they must bear their own costs of the appeals, and must pay the costs of the trustee in the liquidation of both appeals. *Russell, Ex parte, Butterworth, In re*, 51 L. J., Ch. 521; 19 Ch. D. 588; 46 L. T. 113; 30 W. R. 584—C. A.

Where a settlement is set aside the trustee has no right to his costs as a matter of right, there being no contract in existence; and, therefore, if costs are given against him, he has no right of appeal. *Dutton* v. *Thompson*, 52 L. J., Ch. 661; 23 Ch. D. 278; 49 L. T. 109; 31 W. R. 596—C. A. And see *Turner* v. *Hancock*, 51 L. J., Ch. 517; 20 Ch. D. 303; 46 L. T. 750; 30 W. R. 480—C. A.

6. Opinion of Counsel.

Trustees Acting on Opinion.]—If counsel undertake to say they consider trustees would not have acted safely without taking the opinion of the court, semble, the court will not give costs against them, though in a clear case. *Young, Ex parte, Shanks* or *Gowen, In re*, Mont. & C. 599.

It is not necessarily sufficient to entitle trustees to their costs of a suit that they have acted under the advice of counsel. *Devey* v. *Thornton*, 9 Hare, 232; 22 L. J., Ch. 163.

Semble, where a trustee, on a doubtful point, has taken the opinion of counsel, which is directly opposed to that of counsel taken by the opposite party, but the trustee offers to be guided by the opinion of a third counsel, on a case stated on instructions approved by both parties, he is entitled to his costs of a suit under which a decree is made against him, directing him to do an act which his counsel advised him he was not bound to do, and especially where the trustee was not permitted to inspect the case and opinion of counsel taken by the other party. *Poole* v. *Pass*, 1 Beav. 600; 8 L. J., Ch. 325.

—— **Costs of Opinion.**]—A trustee is entitled to the costs of taking the opinion of counsel for his guidance. *Ib.*

A. B. was entrapped into becoming a trustee; but it was agreed that he should be discharged. He consulted counsel as to the liability he had incurred, and instructed him to prepare proper deeds for his protection. It was discovered that a breach of trust had been committed previous to his becoming trustee, and counsel prepared a bond and release for A. B.'s protection, but which were never executed, in consequence of a suit having been instituted by A. B. to set the matter right. During the above-mentioned suit the tenant for life made proposals to A. B. for a settlement, and on which the advice of counsel was obtained by A. B. in conference :—Held, that A. B. was entitled to the fee paid by him for this conference. *Stephens* v. *Newborough (Lord)*, 11 Beav. 403; 17 L. J., Ch. 332; 12 Jur. 319.

—— **Not Acting on Opinion.**]—Funds were settled for the benefit of the survivor of husband and wife for life, and after the death of the survivor, to be held in trust for all or one of the children or child or remoter issue of the marriage as husband and wife should jointly appoint, and in default as the survivor should appoint. There was only one child of the marriage, a son, and the wife died without having exercised the joint power. Two months after the son came of age the father appointed that the fund should be paid to him after his own decease. Soon after this the father and son applied to the trustees to transfer the funds into their joint names. The father had also, during the minority of the son, applied to the trustees to transfer the far greater part of the fund into his sole name. The trustees laid a case before counsel, who advised that if certain requisitions were complied with, the trustees might safely transfer without suit. The requisitions were complied with, but the trustees refused to transfer without the protection of the court. The father and son filed a bill to compel the transfer to them, and prayed that the trustees might pay the costs. One of the vice-chancellors made a decree for the transfer, but ordered the father and son to pay the costs of the suit; and upon appeal, as to costs, by the father and son :—Held, that the decree was correct : Knight Bruce, L.J., dissenting. *King* v. *King*, 1 De G. & J. 663; 27 L. J., Ch. 29; 4 Jur. (N.S.) 721; 6 W. R. 85.

7. Unsubstantiated Charges of Breach of Trust or Fraud.

In General.]—Where fraudulent charges are made against trustees, and inquiries into the truth of them are directed by the court, if in the result it is proved that such charges were unfounded, the costs consequent upon the investigation will be thrown upon the party making them. *Bartlett* v. *Wood*, 30 L. J., Ch. 614; 4 L. T. 692; 9 W. R. 817—L. C.

A bill contained allegations of great fraud against trustees, which all failed. The trustees were removed, but not, however, on the ground of misconduct :—Held, that they were entitled to the costs of the whole suit. *Passingham* v. *Sherborn*, 9 Beav. 424.

On a devise to two trustees, with a leasing power, and that they might become lessees, one declined to act, and the other became lessee, and was afterwards removed by order of the master of the rolls, at the instance of the cestuis que trust, on the ground of the inconsistency of

the character of trustee and lessee:—Held, to have been properly dismissed. *Ib.*

An action having been brought to try the question of injury to the estate and mismanagement, and on the account taken a balance having been found due to the trustees, and the charges of breaches of covenant having been abandoned at the hearing:—Held, that the trustees were entitled to the costs of the suit. *Ib.*

On a bill filed by C. against A. and B., alleging that F. would have made a higher offer if the negotiations had been continued, and charging the trustees with the consequent loss to the estate:—Held, that the trustees could not, under any circumstances, be made liable, and that they ought to be allowed the usual trustees' costs of the suit. *Selby* v. *Bowie*, 1 N. R. 420; 8 L. T. 18; 11 W. R. 559.

—— **Allegation that Compromise was Improper.**]—The trustees of a will agreed to settle disputes with the surviving partner in a firm of which the testator had been a member by selling the testator's share to him at a certain price. They then filed a bill to have this agreement sanctioned; a decree was made accordingly, and the sale carried out. Some years afterwards some of the residuary legatees, who were infants, filed a bill by their next friend to set aside the decree on the ground that the compromise was an improper one, and that it had been entered into, and the decree sanctioning it obtained, by the personal fraud of one of the trustees. This trustee answered separately; and at the hearing Lord Romilly dismissed the bill with costs, being of opinion that the compromise had been beneficial and the decree sanctioning it properly obtained. The next friend could not pay the costs, and the trustee applied by summons in a suit for the administration of the testator's estate to have them taxed as between solicitor and client and paid out of the estate:—Held, that the trustee was entitled to be paid his costs out of the estate, as he had defended the suit for the benefit of the estate, though he had at the same time defended his own character. *Walters* v. *Woodbridge*, 47 L. J., Ch. 516; 7 Ch. D. 504; 38 L. T. 83; 25 W. R. 469—C. A.

—— **Charges of Breach of Trust abandoned at Trial.**]—One of two tenants for life under a settlement brought an action, claiming to have the trusts executed by the court. The statement of claim alleged that the surviving trustee had committed a breach of trust, and asked to have new trustees appointed in the place of him and a deceased trustee. The settlement contained a power to appoint new trustees, exercisable by the tenants for life. The plaintiff's income had always been regularly paid to him. At the trial the charges against the trustee were abandoned, and it was admitted that there was no ground for his removal:—Held, that the plaintiff was entitled to judgment for the execution of the trusts, but that, the action being unnecessary, he must pay the costs of it up to and including the trial. *Fane* v. *Fane*, 49 L. J., Ch. 200; 13 Ch. D. 228; 41 L. T. 551; 28 W. R. 348.

8. Misconduct and Breach of Trust.

a. In General.

Misconduct—Liability for Costs.]—Considering the importance of securing intelligent, competent, and responsible persons to act as trustees, it is not the practice of the court to visit trustees with costs, except when they act from interested motives, or intentionally and wantonly conduct themselves in a vexatious and oppressive manner. *Noble* v. *Meymott*, 14 Beav. 471; 20 L. J., Ch. 612.

Matters of personal or private feeling cannot be considered in a question either of merits or of costs, as between trustee and cestui que trust; and therefore a trustee who deems himself to be or is assailed by imputations cast upon him by his cestui que trust, is not justified in refusing to do an act which his trust requires, until he receives an apology from the cestui que trust; and if he refuses, from want of such apology alone, to do an act which his duty as trustee requires, he will be liable to the costs of a suit brought to enforce the performance of such duty. *Moore* v. *Prance*, 9 Hare, 299; 20 L. J., Ch. 468; 15 Jur. 1188.

On a mortgagee of settled estates requiring to be paid off, or to have the interest increased, the tenant for life proposed a new mortgagee at same rate. The trustees insisted on being the proper persons to carry the transaction into effect, and procured another mortgagee, but at a higher rate; and, in order to raise the expenses thereby incurred, they proceeded to sell the estate under the ordinary powers of sale and exchange in the settlement, whereupon the tenant for life filed a bill to restrain the sale:—Held, that the conduct of the trustees was unjustifiable, and that they ought to pay all the costs of the suit. *Marshall* v. *Sladden*, 4 De G. & Sm. 468; 7 Hare, 428; 19 L. J., Ch. 57; 14 Jur. 106.

Trustee ordered to pay costs on misconduct. *Dawson* v. *Parrot*, 3 Bro. C. C. 236.

A trustee misbehaving himself ordered to pay costs out of his own pocket, and not out of the trust estate. *Lloyd* v. *Spillet*, 3 P. Wms. 347; 2 Eq. Cas. Abr. 241, pl. 30; 776, pl. 25. Affirmed, 2 Atk. 148. S. P., *Fell* v. *Lutwidge*, Barnard. 314.

Trustee how far charged with interest and costs and profits of a farm carried on by aid of testator's personal estate. *Killick* v. *Flexney*, 4 Bro. C. C. 163.

A trustee who has purchased the trust property, and sold it at a profit, and who has been compelled by a suit in equity to refund that profit, will not, except under circumstances affecting him with moral fraud, be charged with the costs of the suit. *Baker* v. *Carter*, 1 Y. & C. 250; 4 L. J., Ex. Eq. 12.

Relief on a bill charging default against trustee, who had changed the fund, and the trust fund secured, but costs given to the trustee against the plaintiff and the fund; the rule that trustee not having acted regularly shall pay costs being subject to be qualified where, though the conduct was irregular, the motive was not corrupt. *Fitzgerald* v. *O'Flaherty*, 1 Moll. 347.

A trustee, against whom a bill had been filed for breach of trust, after decree declaring him liable and ordering accounts to be taken, paid 4,000*l.* into court. On taking accounts it was found that the sum of 1,200*l.* more was still owing from the trustee:—Held, that he was liable for the costs of taking the accounts as well as for the costs up to the decree. *Payne* v. *Parker*, 17 W. R. 640.

—— **Depriving Trustee of Costs.**]—Costs refused to a trustee, setting up a trust different from what it really was; but general misconduct, &c., is not a sufficient ground. *Ball* v.

Montgomery, 2 Ves. 191; 4 Bro. C. C. 339; 2 R. R. 197.

The right of a trustee to his costs, like that of a mortgagee, is a matter of contract, and is not in the discretion of the judge; although he may be deprived of them for misconduct. The mere fact that a trustee denies that he is indebted to the estate, and on taking the accounts turns out to be indebted, is no reason for depriving him of the costs. *Turner* v. *Hancock*, 51 L. J., Ch. 517; 20 Ch. D. 303; 46 L. T. 750; 30 W. R. 480—C. A.

If a bill be filed against a trustee for an account to which he submits by an answer, though, on taking the account, he be found in debt, yet he shall not pay costs unless he has misbehaved himself. Secus, if he controverts the account; there, if found in arrear, he shall pay interest and costs. *Parrot* v. *Treby*, 1 Eq. Cas. Abr. 125; Pre. Ch. 254.

Trustee not deprived of costs for slight misconduct, in respect of which he is charged with interest. *Sammes* v. *Rickman*, 2 Ves. 36.

Trustees and executors do not necessarily lose their costs because charged with interest. *Woodhead* v. *Marriott*, C. P. Cooper, 62.

If a trustee has not misconducted himself, even though the court punish him, as by making him pay interest on funds in his hands, yet he shall get the costs of the suit; but if his account be greatly reduced in the office, he shall not get the costs of passing it. *Fozier* v. *Andrews*, 2 Jo. & Lat. 199; 7 Ir. Eq. R. 595.

A trustee in a will which directed money to be lent at such a rate of interest as the trustees should think reasonable, by consent of his co-trustee, keeps it at 4 per cent. Ordered to pay 5, and the executors to pay the costs of taking the accounts as to that interest. *Forbes* v. *Ross*, 2 Bro. C. C. 430.

—— **Costs subsequent to Judgment.**]—Where an action against a trustee has been occasioned by the trustee's own misconduct, his costs before and subsequent to judgment are in the discretion of the court. *Hewett* v. *Foster*, infra, explained. *Easton* v. *Landor*, 62 L. J., Ch. 164; 2 R. 176; 67 L. T. 883—C. A.

A trustee was declared liable for a breach of trust, and was ordered to pay the costs up to the hearing. He complied with the decree:—Held, that he was entitled to the costs of his subsequent proceedings for clearing and distributing the fund. *Hewett* v. *Foster*, 7 Beav. 348; 8 Jur. 769.

Costs, Allowance of, out of Estate.]—A trustee who, without the sanction of the court commences or defends an action unsuccessfully, does so at his own risk, and the court ought not to allow him such costs out of the estate except under very exceptional circumstances. *Beddoe, In re, Downes* v. *Cottam*, 62 L. J., Ch. 233; [1893] 1 Ch. 547; 2 R. 223; 68 L. T. 595; 41 W. R. 177—C. A.

Where the misapplication of the funds of a public body had gone on for a great length of time, and no imputation was cast upon the trustees, they, though removed, were allowed their costs out of the fund; this, however, not to be a precedent for cases which should be defended afterwards, where the same point should arise. *Att.-Gen.* v. *Drummond*, 2 Con. & L. 98; 3 Dr. & War. 162.

When the costs or expenses claimed have been incurred through the misconduct or negligence of the trustee, he will not be allowed them; but the fact of his having been unsuccessful in litigation, either as plaintiff or defendant, will not, in the absence of misconduct, disentitle him to be reimbursed his costs. *Courtney* v. *Rumley*, Ir. R. 6 Eq. 99.

—— **Tacit Obstruction to Cestui que Trust.**]—The executors of the sole executor of a deceased sole trustee whose sole executor had never acted in the trust, were applied to in April, 1883, to take steps to enable the tenant for life of a small sum of stock standing in the name of the deceased trustee to receive the dividends. In May, 1883, the executors handed to the solicitor of the tenant for life the probate of their testator's will, that he might produce it at the Bank of England, which he did. After some correspondence, in the course of which the executors asked for evidence of the title of the cestuis que trust, which did not appear to have been produced, the solicitor of the tenant for life, about the end of May, sent a power of attorney to be executed by the executors to enable her to receive the dividends. The executors did not execute or return the power. In July the solicitor of the tenant for life applied to the executors to appoint new trustees under the Conveyancing and Law of Property Act, 1881, to which the executors replied, stating their ignorance of the title of the cestuis que trust. Ultimately, in November, 1883, the cestuis que trust presented a petition for the appointment of new trustees and a vesting order:—Held, that the conduct of the executors, who appeared to have accepted the trust by taking a transfer of the stock into their own names, had been vexatious, and that they must pay the costs which would have been occasioned by a petition simply asking for payment of dividends to the tenant for life, and that they could not be allowed any costs out of the fund. But held, on appeal, that as the cestuis que trust had not taken proper steps to satisfy the executors as to their title, the executors had not been guilty of any such misconduct as is necessary to deprive a trustee of his right to costs out of the trust fund, and that they must have their costs below, but that as the court of appeal was not satisfied with their conduct they ought to have no costs of their appeal. *Knight's Trusts* or *Knight's Will, In re*, 26 Ch. D. 82; 50 L. T. 550; 32 W. R. 417—C. A. Reversing 53 L. J., Ch. 223.

—— **No Loss to Estate.**]—A trustee is not, in the absence of misconduct, to be deprived of costs by reason of his having invested in what is not, strictly speaking, an authorised security, if at the time of the judgment the fund has been replaced without loss. *Peacock* v. *Calling*, 54 L. J., Ch. 743; 53 L. T. 620; 33 W. R. 528—C. A.

Where improper application of a trust fund was of a small part, and promptly offered to be restored, and no imputation, trustee not disentitled to costs, a suit being necessary for another purpose of the trust. *Fitzgerald* v. *Pringle*, 2 Moll. 534.

Trustees had lent money on a technically insufficient security. In the master's office, they entered into evidence to prove its sufficiency, but failed; and they afterwards presented a petition for calling in and investing the money. This was done, and no loss occurred:—Held, that the

trustees were entitled to their costs of both proceedings. *Royds* v. *Royds*, 14 Beav. 45.

When trustees in good faith invest on a security not in strictness justified by the instrument creating the trust, but which is practically secure, and from which no loss to the trust fund occurs, they will not be decreed to pay the costs of a suit to compel them to bring in the fund so invested. In this case the court refused the trustees their costs, and directed the petitioner's costs to be paid out of the fund. *Fitzgerald* v. *Fitzgerald*, 6 Ir. Ch. R. 145.

Breach of Trust.]—On a decree against several trustees for breach of trust, the costs of suit are decreed against all, without regard to the degrees of culpability, but for the greater security for their payment. *Lawrence* v. *Bowle*, 2 Ph. 140 ; 1 G. Cooper, 241.

Generally, where trustees are guilty of a breach of trust, they must pay the costs of a suit to repair it. *Byrne* v. *Norcott*, 13 Beav. 336.

When in an action for administration of trusts the plaintiff makes a special case of breach of trust in relation to the property, not depending upon a mere point of construction, the rule is, that the breach of trust being established, the trustee must bear the costs of the action so far as it relates thereto. *Bell* v. *Turner*, 47 L. J., Ch. 75.

—— **Trustees Acting bonâ fide.**]—Trustees were directed by a will to place the trust moneys in the public funds, or on some good and approved freehold or leasehold securities, at interest. The trustees, acting bonâ fide, had, in 1828, upon the report of a surveyor (who had valued the property at 3,500*l.*, and the annual rental at 175*l.*), lent 2,600*l.*, part of the trust moneys, upon a mortgage, with powers of sale, of the valued property, and which consisted of four freehold messuages, at the time in an unfinished state, the actual yearly rent of which being only 105*l.* The mortgagor having become insolvent, the trustees sold the property in 1836, which then realised less than the amount lent by 353*l.* 4*s.* 2*d.*; and that sum was lost to the estate. In a suit by a cestui que trust, the court declined to charge the trustees with the loss, and allowed them their costs of suit, and their costs, charges, and expenses. *Jones* v. *Lewis*, 3 De G. & Sm. 471 ; 18 L. J., Ch. 430 ; 13 Jur. 877.

Costs of administration suit given to an executor, though charged with the consequences of an improper investment. *Knott* v. *Cottee*, 16 Beav. 76 ; 16 Jur. 752.

Where a trustee, at the request of the cestui que trust, a married woman, and tenant for life of the fund for her separate use, sold out the trust fund, and invested it on an improper security :—Held, in a suit by such tenant for life against the trustee to have the trust fund replaced in a proper state of investment, that no costs ought to be given, as between the plaintiff and the defendant, on either side :—Held, also that the costs of the parties entitled in remainder were to be paid by the plaintiff. *Mant* v. *Leith*, 15 Beav. 524 ; 21 L. J., Ch. 719 ; 16 Jur. 302.

Where a trustee commits a breach of trust and dies, and his heir incurs costs in unsuccessfully defending an action for trespass brought in consequence of steps taken by him to obtain possession of freeholds lost by reason of such breach, he was allowed such costs. *Melling* v. *Melling*, 6 W. R. 121.

Trustees having committed a breach of trust by granting longer leases than they had power by the deed to do, the fact of the cestui que trust receiving rents from the lessees, in ignorance of the invalidity of the leases, does not operate as a new agreement. But an account was only directed from the filing of the bill, without costs to the plaintiff. *Bowes* v. *East London Waterworks*, 3 Madd. 375 ; 23 R. R. 84.

Trustees who were directed to sell an estate as soon as conveniently might be after their testator's death, refused, by the desire of one of the parties interested, an offer of 6,600*l.* for the estate ; but they afterwards sold it for 3,600*l.* The court charged them with the loss, but gave them their costs, as their conduct had not been wilful nor perverse. *Taylor* v. *Tabrum*, 6 Sim. 281 ; 1 L. J., Ch. 189.

—— **Leaving Trust Money with Trading Firm.**]—A trustee of a marriage settlement, who allowed a sum of 350*l.* to remain in the hands of a trading firm for a period exceeding fifteen years after the death of the tenant for life, but who eventually, and before the bill was filed, paid the principal, with 5*l.* per cent. interest :—Held, liable to account with annual rests, and also to the costs of the suit. *Jones* v. *Foxall*, 21 L. J., Ch. 725.

—— **Mixing Trust Funds.**]—A trustee, with power to invest the trust property in leasehold or chattel personal securities, or upon the personal security of any person, advanced, at the request of his cestuis que trust, some of the property to two ladies on the security of mortgages (with the usual covenants) of a leasehold house in which the ladies were living, and of the furniture in it. The trustee was also the lessor of the house. The mortgagors became insolvent, paid no rent, and no part of the principal or interest on the loan. The trustee, as lessor, determined the lease by entry, and then sold all his interest in the leasehold premises and the furniture ; but he thereby so mixed up the trust property with his own that it was impossible to distinguish the one from the other, or to pronounce with certainty how much of the proceeds of the sale was his, and how much belonged to the cestuis que trust. The advance had been made at 5*l.* per cent. After some delay, the trustee replaced the principal money of the loan, but invested it against the wishes of his cestuis que trust in 3*l.* per cent. consols, the dividends on which, however, were paid to them :—Held, that the trustee was bound to make good to the trust estate the whole of the money advanced on the loan, with all interest due thereon at the rate of 5*l.* per cent. per annum, to be computed up to the date of the decree ; and that he must pay the costs of the suit. *Cook* v. *Addison*, 38 L. J., Ch. 322 ; L. R. 7 Eq. 466 ; 20 L. T. 212 ; 17 W. R. 480.

Trustees having mixed balances of the trust estate with their own moneys, and used them in their own business, although authorised to invest the trust funds in good private securities :—Held, liable to the costs of an unnecessary inquiry as to the state of the testator's family. *Westover* v. *Chapman*, 1 Coll. 177.

Defaulting Trustee—Payment into Court.]—Where in a chancery action money has been found due from a trustee, the proper form of order is to direct the money due to be paid into court before the trustee in default is allowed to receive his costs out of the trust estate, or even to receive any share in the trust estate to which

he is entitled. *Staniar* v. *Evans*, 56 L. J., Ch. 581; 34 Ch. D. 470; 56 L. T. 87; 35 W. R. 286.

A. and B., executors and trustees of a testator, set apart a fund to answer an annuity bequeathed to the plaintiff. A. and B. committed a breach of trust by means whereof the fund came into the name of B. alone, who misappropriated it. A. died, and by his will gave a legacy to B. and J. on certain trusts. B. having become bankrupt, in an action by the annuitant, J., was ordered to refund the trust legacy in his hands, which was insufficient to answer the breach of trust committed by his testator:—Held, that neither J. nor the trustee in bankruptcy of B. was entitled to have his costs out of the fund before it was paid into court. *Knott, In re, Bax* v. *Palmer*, 56 L. J., Ch. 318; 56 L. T. 1611; 35 W. R. 302.

—— **Bankruptcy of Defaulting Trustee.**]—A defaulting trustee is entitled to his costs of a suit for the execution of the trusts incurred after his bankruptcy, or after the registration of a creditor's deed, executed by him under the Bankruptcy Act, 1861. *Bowyer* v. *Griffin*, 39 L. J., Ch. 159; L. R. 9 Eq. 340; 18 W. R. 227.

In an administration action one defendant was an executor. He was a defaulting trustee under a settlement. After the action was commenced he was adjudicated bankrupt, and a trustee in bankruptcy was appointed and made a defendant:—Held, that the defaulting trustee was entitled to be paid his costs incurred after his bankruptcy. *Bowyer* v. *Griffin*, supra, followed. *Clare* v. *Clare, Clare, In re*, 51 L. J., Ch. 553; 21 Ch. D. 865; 46 L. T. 851; 30 W. R. 789.

Two executors, defendants in an administration action, were represented by the same solicitor, to whom they had given a joint retainer, and one of them was a debtor to the estate, and became bankrupt after the passing of the Bankruptcy Act, 1869:—Held, that the solvent executor was entitled to be paid his separate costs out of the estate, and that the separate costs of the insolvent executor must be set off against the debt due from him to the estate; but that whether the whole or what part of the common costs of both executors was to be paid out of the estate was a question for the taxing master to determine according to the settled practice of the taxing office. *McEwan* v. *Crombie*, 53 L. J., Ch. 24; 25 Ch. D. 175; 49 L. T. 499; 32 W. R. 115.

Where, after the commencement of an administration action against a defaulting executor or trustee, he becomes bankrupt, and, under s. 49 of the Bankruptcy Act, 1869, his debt remains undischarged by the bankruptcy, he is not entitled to be paid any of his costs of the action, whether incurred before or after the bankruptcy, until he has made good his default. But where the debt of the defaulting executor or trustee has been discharged by his bankruptcy, as where the bankruptcy has taken place prior to the Bankruptcy Act, 1869; or where, after the bankruptcy, his debt remaining undischarged, he renders services in the action in his character of executor or trustee, he is entitled to be paid his costs incurred subsequently to his bankruptcy, though his prior costs must be set off against his debt. *Lewis* v. *Trask*, infra, followed. *Clare* v. *Clare*, supra, not followed. *Basham, In re, Hannay* v. *Basham*, 52 L. J., Ch. 408; 23 Ch. D. 195; 48 L. T. 476; 31 W. R. 743.

Where the trustee of a settlement became bankrupt shortly after the commencement of an action for the execution of the trusts, and an order was made for payment by him into court of a sum of money certified to be due from him to the estate, he was held entitled to his costs of the action, though he was not to receive them until he had made good his default. *Bowyer* v. *Griffin*, supra, considered. *Lewis* v. *Trask*, 21 Ch. D. 862.

The official assignee of a defaulting trustee, whose assets had been distributed:—Held, not entitled to costs. *Williams* v. *Nixon*, Beav. 472; 9 L. J., Ch. 269.

Upon a bill to establish a lien upon real securities in respect of the trusts of a fund improperly applied by a trustee who afterwards became bankrupt, when it appeared that there was a possibility of an interest in the assignee in bankruptcy after the trust was satisfied, and he did not disclaim until the hearing:—Held, that he is not entitled to his costs. *Allan* v. *Sugden*, 10 Jur. (N.S.) 459; 10 L. T. 492.

In a suit to administer the estate of a testator, an executor had retained balances in his hands, and had subsequently become bankrupt:—Held, that he was entitled to his costs, although he was charged with interest on the balances in his hands from time to time:—Held, also, that he was entitled to have his costs out of the estate, and that they were not to be set off against what should be found due from him in respect of interest on the balances in his hands. *Cotton* v. *Clark*, 16 Beav. 134; 16 Jur. 879.

A suit was instituted against an executor and a trustee under a will for an account. On the hearing, a decree for a reference to take accounts of the real and personal estate was directed. He afterwards became bankrupt, and the suit was continued as against his assignees under the bankruptcy:—Held, that he was entitled to the costs of the suit as between solicitor and client from the date of his bankruptcy, and also the costs of his appearance on a petition for a vesting order in new trustees. *Turner* v. *Mullineux*, 3 L. T. 687; 9 W. R. 252.

b. Wilful Misconduct.

Liability for Costs.]—Interest and costs decreed against a steward upon fraud, wilful concealment, &c., and in such cases generally there is no limitation of time. *Hardwicke* v. *Vernon*, 14 Ves. 504; 9 R. R. 329.

Where trustees for infants persisted in unnecessary litigation, they were ordered to pay the costs generally. *Campbell* v. *Campbell*, 2 Myl. & Cr. 25.

If a trustee files a bill, and brings the cestui que trust before the court for his own private interest, he shall pay the whole costs of the suit. *Henley* v. *Philips*, 2 Atk. 48.

Where trustees, throughout transactions in reference to trust estates of a wife, endeavoured to aid the husband in defeating the wife's enjoyment of her separate estate:—Held, that the decree was right in ordering those trustees and the husband to pay the costs of the suit, the same having been rendered necessary by the unfounded claims of the husband, improperly recognised and supported by those two trustees. *Bagot* v. *Bagot*, 10 L. J., Ch. 116.

Held, also, that the husband and the two trus-

tees hostile to the wife were properly ordered to pay the costs of the parties interested in remainder under the settlement, and who were not necessary parties to the suit, inasmuch as they, on the part of the husband, set up the claim to a tenancy for life in the timber money, which raised a question (however untenable) in which the other persons entitled in remainder were interested. *Ib.*

By settlement, a trustee was required, immediately after the marriage, to compel payment of a sum of money secured by a covenant in the deed; he neglected to do so even when required to call it in, and allowed the interest to fall into arrear; he was held liable to pay the costs of a suit instituted to compel him to perform the trusts. *Kirby* v. *Mash*, 3 Y. & C. 295; 8 L. J., Ex. Eq. 33; 3 Jur. 221.

In a suit by the legatee of the vendor, against the devisees in trust of the purchaser, for payment of part of the purchase-money not payable by the contract till the death of the vendor, the trustees were decreed to pay the costs out of their own estate, because they had occasioned the suit by unfounded doubts they had raised as to whether the plaintiff was entitled absolutely or for life only. *Burrows* v. *Greenwood*, 4 Y. & C. 251; 5 Jur. 384.

So, where rents were allowed to fall into arrear in consequence of disputes between the trustees, the court compelled them to pay the costs of a suit by the tenant for life. *Wilson* v. *Wilson*, 2 Keen, 249.

Where trustees for sale purchased through a trustee at an undervalue, though without fraud, and by auction, and the cestuis que trust were infants, and therefore incapable of discharging the trustees, relief as to a re-sale was given with costs against them; but as to the other part of the case, with regard to accounts that must have been taken, they must have their costs, as they would have been entitled to them in the ordinary case. *Sanderson* v. *Walker*, 13 Ves. 601; 9 R. R. 234. And see *Hall* v. *Hallet*, 1 Cox, 134, 141; 1 R. R. 3.

A trustee unreasonably resisting the claims of his cestui que trust ordered to pay the costs of the suit. *Price* v. *Loaden*, 21 Beav. 508.

If trustees, by wilful neglect of their duty, render a suit for the administration of the estate under their charge necessary, they will be ordered to pay the costs of it. *Jefferys* v. *Marshall*, 23 L. T. 548; 12 W. R. 94.

On a marriage, the father of the wife purchased 1,000*l.* consols, and the same were vested in trustees to pay the dividends to the wife for her life; and then trusts were declared for the children of the marriage, under which the court had decreed, in a former suit, that the only child of the marriage, a daughter, took a vested interest. This daughter married J. M., and died in the lifetime of the mother, leaving J. M. her surviving. J. M. did not take out administration to the effects of his deceased wife, and afterwards died:—Held, that his executors were entitled to the 1,000*l.* consols, and that the representatives of the wife were not entitled. One of J. M.'s executors, who was a defendant, having colluded with the other defendant, the court gave costs against both of them. *Platt* v. *M'Dougall*, Tam. 390; 9 L. J. (o.s.) Ch. 150.

A trustee filing an administration suit against his cestui que trust in order to avoid a bill against himself for an account which he had neglected to render, was not made to pay costs, but the carriage of the decree was given to the cestui que trust. *Naylor* v. *Smith*, 15 W. R. 528.

Costs Disallowed.]—A trustee refused to join his co-trustee in suing to recover trust property, and put in an answer. He was disallowed costs. *Gompertz* v. *Kensit*, 41 L. J., Ch. 382; L. R. 13 Eq. 369; 26 L. T. 95; 20 W. R. 313. S. P., *Holcombe* v. *Jones*, 1 L. J., Ch. 46.

Trustee disallowed the costs of an improper answer. *Eddowes* v. *Eddowes*, 30 Beav. 603.

Where a trustee executed a deed of declaration of trust in favour of the wife, falsely reciting that the fund was the wife's separate property, and which was afterwards set aside as in fraud of creditors, the court refused to give the trustee his costs. *Turquand* v. *Knight*, 14 Sim. 643; 9 Jur. 546.

Trustees raising a charge of fraud, and taking no steps to satisfy themselves when they might easily do so, will not be allowed their costs of the discussion in court, if upon the evidence the court considers there was no reasonable ground of suspicion. *Cockroft* or *Cockcroft* v. *Sutcliffe*, 25 L. J., Ch. 313; 2 Jur. (N.S.) 323; 4 W. R. 339.

Costs Improperly Incurred—Costs of Action against Trustees.]—The trustees under a will employed a solicitor to collect the rents, and allowed him to deduct from the rents certain costs. The tenant for life brought an action against the trustees, alleging that some of the costs were chargeable against corpus and not against income, and that other of the costs had been unnecessarily incurred. The trustees alleged that the tenant for life was aware of what had been done and assented. The court thought that the tenant for life had not assented, and decided that the defendants had been wrong throughout:—Held, that the trustees must pay the costs of the action. *Weall, In re, Andrews* v. *Weall*, 58 L. J., Ch. 713; 42 Ch. D. 674; 61 L. T. 238; 37 W. R. 779.

—— **Of Administration Action.**]—Plaintiff, a trustee and executor under a will, brought an action for the administration of a small estate, on the ground that it was in the interest of all parties, as there were doubts as to the true construction of the will, and difficulties and disagreements with regard to the interpretation of the trusts, and that he needed the protection of the court. The defendants, the beneficiaries (who, after the commencement of the action, had suggested that the quickest and least expensive mode would be to state a special case for the opinion of the court), denied that it was in the interest of all parties that the estate should be administered under the direction of the court, and contended that the question of construction was in no way doubtful. They submitted that the action should be dismissed, as being unnecessary, harassing, and destructive of the trust property:—Held, that the action must be dismissed with costs to be paid by the trustee personally, as the court will not allow itself to be made an instrument or mere agent of oppression, nor interfere where the only result must be to despoil of their property persons unable to protect themselves, and in this case there was no ground whatever on which the court could be asked to interfere except the question of construction of the will, and that was not in doubt. *Cabburn, In re, Gage* v. *Rutland*, 46 L. T. 848.

—— **Suit Pending when the Judicature Act came into Operation.**]—A motion was made for leave to take evidence in a suit by affidavit. It was opposed by the defendants, who were trustees, and the court held that they were entitled to have the evidence taken viva voce, but reserved the costs of the motion. On the cause coming in for hearing no witnesses were called, and no reason was given for insisting upon the evidence being taken viva voce:—Held, that the costs of the motion must be paid by the defendants, the trustees, who had perversely, unreasonably, and unjustly refused to adopt the cheaper and more familiar mode of taking evidence. *Patterson* v. *Wooler*, 45 L. J., Ch. 274; 2 Ch. D. 586; 34 L. T. 415; 24 W. R. 455.

Trustees Paying Money into Court.]—Trustees who pay into court a fund claimed in default of appointment after satisfactory evidence of non-exercise of the power, will be ordered to pay the costs of paying the fund into court. *Cull's Trusts, In re*, 44 L. J., Ch. 664; L. R. 20 Eq. 561; 32 L. T. 853; 23 W. R. 850.

Trustees who have lodged money under the Trustee Relief Act will be allowed their costs of appearing on the hearing of a petition to draw it, if the claimant's title be doubtful. *Blayney's Trust, In re*, 9 Ir. Eq. R. 413.

The sum of 8*l.* is the proper sum to be deducted by trustees in the first instance for the costs of lodging the money. *Ib.*

Trustees, on paying a fund into court, deducted 44*l.* 14*s.* 6*d.* in respect of their costs. On a petition by the person entitled to the dividends, praying that the same might be paid to her, and that the costs of the trustees, who appeared on the petition might be taxed:—Held, that the costs of their appearance, and their costs, charges, and expenses properly incurred in relation to the fund in court, ought to be taxed, and that they ought to be charged with the sum deducted by them on payment into court. *Sweeper's Trust, In re*, 24 L. T. 413; 19 W. R. 793.

And see ante, G. 1. e.

—— **Appearing on Petition for Payment out of Dividends.**]—Upon a petition by tenant for life of stock which had been paid into court under the Trustee Relief Act, for payment out of the dividends, the trustee, who appears on the petition after notice from the petitioner's solicitor not to do so, upon the ground that the petition relates to the income only, will not be allowed his costs of the appearance out of the funds representing income. *Battell's Trust, In re*, 21 W. R. 138.

And see ante, G. 2. d.

c. Disclaimer or Refusal to Act.

Trustee who has not Acted putting in full Answer.]—Trustee who had not acted, putting in a full answer, disallowed the costs of such vexatious answer, and order made at the hearing to tax and allow the costs only of such answer as would have been necessary and proper. *Martin* v. *Persse*, 1 Moll. 146.

Answering Interrogatories and Disclaiming.]—A trustee who was required by the bill to answer certain interrogatories answered them and disclaimed:—Held, that he was only entitled to the costs of the disclaimer. *Murphy* v. *O'Shea*, 2 Jo. & Lat. 422; 8 Ir. Eq. R. 329.

Refusal to Act.]—Where the representative of a deceased trustee made a suit necessary by a wanton refusal to act in the trust, and to receive the dividends of the trust fund:—Held, she was entitled to the costs of a bill filed to remove her and appoint other trustees. *Legg* v. *Mackrell*, 2 De G. F. & J. 551; 4 L. T. 568. Reversing 1 Giff. 165; 5 Jur. (N.S.) 1154.

A person named a trustee in a deed, who declines to accept the office, is in the situation of any other defendant against whom a bill is dismissed, and can only have his costs, &c., between party and party. *Norway* v. *Norway*, 2 Myl. & K. 278; 3 L. J., Ch. 111, 163.

Trustee having Acted declining to perform Trusts.]—The court will not allow costs to a trustee who, after having acted, declines to perform the trusts reposed in him, and thereby renders a suit for the appointment of a new trustee necessary. *Howard* v. *Rhodes*, 1 Keen, 581; 6 L. J., Ch. 196.

9. Trustee Refusing to Give Accounts or Information.

In General.]—Owners of a privateer acting for themselves and the crew, in the sale of the prizes, having neglected to render accounts, and delayed the distribution of the proceeds, charged with interest on the balances, and costs. *Pearse* v. *Green*, 1 J. & W. 135; 20 R. R. 258.

The first duty of an agent, receiver, trustee, or executor, is to be constantly ready with his accounts, and neglect in this is a ground for charging him with interest. *Ib.*

Where trustees for creditors neglected, on the application of a creditor, to furnish an account of the trust estate, and the creditor filed a bill, to which the trustees put in an answer, setting forth an account substantially correct, the court made the acting trustee pay the plaintiff's costs to the hearing, but gave both trustees their subsequent costs out of the estate. *Springett* v. *Dashwood*, 2 Giff. 521; 7 Jur. (N.S.) 93; 3 L. T. 542.

—— **Refusal to Render Account.**]—A trustee refused to render sufficient accounts of a legacy bequeathed to a married woman for life, with remainder to her children, on the ground that the legatees wished to deal with the legacy in a manner inconsistent with the terms of the will, and stated her intention of retiring from the trusts by payment of the legacy into court:—Held, in a suit by the legatees, that the trustee was not justified in such refusal, and must pay the costs of the suit. *Henry* v. *Macdonald*, 15 W. R. 165.

An executor or trustee is bound, in the absence of very strong reasons to the contrary, to render the accounts of his testator's estate to the solicitor of the residuary legatee; and if he pertinaciously refuse to do so, will be ordered to pay the costs up to the hearing of a suit to have the accounts taken, although such suit may embrace other matters. *Kemp* v. *Burn*, 1 N. R. 257; 4 Giff. 348; 9 Jur. (N.S.) 375; 7 L. T. 666; 11 W. R. 278.

Trustee, under deed of trust, by a former petition, upholding the trust and praying to annul fiat, and failing, but consenting to have the account against him taken on that petition by reference, ordered to pay the costs of that petition, and to pay balance in his hands, under trust deed, to assignees, with interest at 4 per cent. from date of order of reference, although

there was no evidence of interest having been made. Costs of reference to be paid by estate. *Harding, Ex parte*, 4 Deac. & C. 793.

Where, after applications to see trusteeship accounts were refused, a bill was filed for the administration of real and personal estate, and the trustees by their answer denied that there was anything due from, but that a balance was due to them, and that the prosecution of the suit could lead to no useful result, as there was no estate remaining unapplied, but that they were ready to account on being paid their costs, and the chief clerk certified that a balance was due from the trustees, the court considered the conduct of the trustees, who had had the management of the estate, unsatisfactory; ordered them to pay the balance due, with interest at 4*l.* per cent., and directed them to pay all the costs of the suit, excepting the costs of the proceedings in reference to the real estate, the charge in the bill that the testator had real estate not having been proved by the plaintiff. *Eglin* v. *Sanderson*, 3 Giff. 424; 8 Jur. (N.S.) 329; 6 L. T. 151.

—— **Omitting to keep Accounts.**]—The estate of a testator, who died in 1832, was distributed in 1847, at the written request of the persons beneficially entitled. Another part of the estate, which fell in in 1852, was distributed also at the request, but not in writing, of the beneficiaries, and in 1871 the acting trustee died. No accounts or vouchers were forthcoming from the trustees. A bill filed in 1872 by one of the beneficiaries and her husband against the surviving trustee and the representative of the deceased trustee for administration was dismissed, but, owing to the negligence of the trustees in not keeping accounts and vouchers, without costs. *Payne* v. *Evens*, L. R. 18 Eq. 356.

Refusal of Information.] — When trustees refused information and an account of the property to the plaintiffs, who had an interest in the estate, and other proceedings had subsequently been taken whereby the costs of the suit were greatly increased, the trustees were directed to pay the costs of the suit up to the hearing, as if it had been an ordinary administration suit, and as to the rest of the costs each party to bear his own. *Talbot* v. *Marshfield*, L. R. 3 Ch. 622; 19 L. T. 223.

Repeated applications were made to a trustee requiring to know in what way certain legacies given by the will of the testator, and in which certain parties had life interests, had been invested. To these applications the trustee gave evasive answers:—Held, that he must individually pay the costs of a suit to secure those legacies. *Grierson* v. *Astle*, 3 L. T. 288.

10. Trustee Refusing to Convey or Transfer the Trust Fund.

Refusal to Convey.]—A man may be a trustee of land in such a sense as that the court will direct him to convey the legal estate without considering him entitled to trustee's costs and allowances. *Carter* v. *Carter*, 3 K. & J. 617; 27 L. J., Ch. 74; 4 Jur. (N.S.) 63.

An heir-at-law, claiming as such, was put to prove, and did prove his pedigree, as stated in his bill in detail:—Held, that the court might and ought to decide without a jury; and it appearing that the evidence of heirship was previously to the institution of a suit, submitted to the defendants, the trustees, and was such as they ought to have been satisfied with, the court gave the plaintiff the costs of the suit as against the trustees, including the expenses of the genealogical evidence. *Lancashire* v. *Lancashire*, 1 De G. & Sm. 283; 11 Jur. 1024.

A bill for a specific performance of an agreement was made necessary by a trustee refusing to join in the conveyance. The court being of opinion that the trustee ought to pay all the costs of the suit, the decree was, that the plaintiff should pay the costs of all the other defendants (although he had a decree against them), and recover over the whole costs from the defendant, the trustee. *Jones* v. *Lewis*, 1 Cox, 199.

Where, upon the sale of an estate by the equitable owner, the party having the mere legal estate refused to convey unless the cestuis que trust of the proceeds (declared by a deed of even date) were made parties to the conveyance:—Held, that he could not justify such refusal; but, as he appeared to have acted bonâ fide under advice which misled him, the court would not charge him with costs of the suit occasioned by his refusal. *Angier* v. *Stannard*, 3 Myl. & K. 566; 3 L. J., Ch. 216.

The wife of a testator having disposed of a moiety of his real estate by her will, purporting to be in exercise of the power given her by his will, her executor claimed to be entitled to receive a moiety of the proceeds of the testator's real estate from the trustees of his will; which claim they refused, on the ground that a later codicil did not revoke the power given by the will, although they were previously advised, by the opinions of two counsel, which they concealed from the executor of the wife, that it did:—Held, that they were liable to pay the costs of a suit instituted by the executor of the wife to recover a moiety of the proceeds of the testator's real estate, so far as it was rendered necessary by their conduct. *Ankers* v. *Sandford*, 4 Jur. 817.

A. filed a bill against B., praying that C. might be declared a trustee for him of a farm, and that an account of the profits of the farm might be taken, A. offering to allow for the sums advanced or expended by C., and to pay to C. what, if anything, should be found due on taking the account. C., by his answer, denied that he was a trustee, and stated that the carrying on of the farm had been attended with considerable loss. At the hearing, A.'s counsel waived the account which he had asked for, but Wood, V.-Ch., declared C. to be a trustee for A., and gave to A. costs up to the hearing, and directed the accounts to be taken. A. appealed from so much of the decree as directed the accounts, but the appeal was dismissed without costs, and the decree was varied by giving A. leave to apply for his costs subsequently to the hearing, on his paying C. what should be found due to him on taking the account. *Kendall* v. *Masters*, 29 L. J., Ch. 805.

Trustees refusing to recognise an appointment made by their cestui que trust, a tenant for life, in favour of his two sons, on the ground that such appointment is fraudulent from some supposed benefit resulting to the appointor, will not be allowed their costs of a suit to compel a conveyance of the legal estate where all taint of fraud is distinctly disproved by the evidence, and the trustees have contented themselves with taking counsel's opinion without taking any steps to inform themselves as to the circumstances.

Cockcroft or *Cockroft* v. *Sutcliffe*, 25 L. J., Ch. 313; 2 Jur. (N.S.) 323; 4 W. R. 339.

Where a trustee refused to re-convey trust property until the cestui que trust had apologised for an alleged imputation on the trustee, the costs of a suit for re-conveyance, occasioned by such refusal, were directed to be paid by the trustee. *Moore* v. *Prance*, 9 Hare 299; 20 L. J., Ch. 468; 15 Jur. 1188.

In a suit to compel the defendant to deliver up certain deeds and execute certain conveyances, the defendant having at last done what was required, and having been paid on the other hand a small part of his counter demand:—Held (notwithstanding the general rule as to suits which have been compromised), that the plaintiffs were entitled to bring the suit to a hearing for the purpose of getting their costs, and decree against the defendants accordingly. *Griffin* v. *Brady*, 39 L. J., Ch. 136; 18 W. R. 130.

Refusal by Trustees—To Assign Term.]—Trustees of a term, the trusts of which had been put an end to by the cestui que trust:—Held, entitled to their costs of a suit to compel an assignment of the term to the purchaser of the property, on the ground that full and accurate information had not been tendered them before bill filed. *Holford* v. *Phipps*, 4 Beav. 434; 10 L. J., Ch. 209.

Trustees who unsuccessfully resisted the claim of the assignees from the cestui que trust to have a term merged:—Held, entitled to trustees' costs. *S. C.*, 4 Beav. 475.

—— **To pay Legacy.**]—A trustee, refusing to pay a legacy without the direction of the court in a case which admitted of no doubt, was refused his costs, but was not made to pay the costs of the suit, because he might have acted from ignorance, and not from any improper motive. *Knight* v. *Martin*, 1 Russ. & M. 70; Tam. 237.

A legatee immediately upon attaining twenty-one required payment of a pecuniary legacy to which she then became entitled. The trustees of the will, who had stock to answer the legacy, were supplied with evidence of the legatee's age and identity and that she was unmarried, but, acting on representations made by the legatee's brother, they required that they or one of them should have a personal interview with the legatee for the purpose of explaining her rights, and guarding her against the influence of her mother and stepfather, with whom she was residing; and they proposed, unless such interview were granted, to pay the legacy into court under the trustee relief act. The legatee having brought an action to recover the legacy:—Held, that the trustees were not justified in withholding or delaying payment of the legacy, and they were ordered to pay the costs of the action. *De Burgh* v. *M'Clintock*, 11 L. R., Ir. 220.

A cestui que trust will have to pay his own costs if he institutes proceedings against his trustee for payment of a sum due unless every feasible means have been adopted by him to obtain payment without suit. *Aylmer* v. *Winterbottom*, 4 Jur. (N.S.) 19.

—— **To Transfer Trust Fund.**]—Trustees who had declined to transfer a fund to an assignee, on the ground of an alleged fraud in the assignment, were held entitled to costs as between solicitor and client, although the assignment was decreed to be carried into execution; there being some circumstances of suspicion attending the assignment, particularly a variance between the consideration expressed in the deed and the actual consideration. *Whitmarsh* v. *Robertson*, 1 Y. & C. C. C. 715; 11 L. J., Ch. 404; 6 Jur. 921.

A party to whose name a trust fund has been transferred by mistake is entitled to the sanction of the court before he joins in any transfer, and to his costs. *Dunkin* v. *Ward*, 1 Jur. 735.

It is the duty of the court to protect trustees to the utmost in exercising every reasonable caution, and requiring full proof; yet if a trustee, after having received full evidence of the title, perseveringly persist in withholding the fund from the party entitled to it upon grounds which wholly fail, and especially where a part of those grounds is a claim in which that trustee is himself interested, the court will not allow him so to conduct himself without paying the costs of such a mode of proceeding. *Froste* v. *Hamilton*, 6 Jur. 525.

If trustees take upon themselves to inquire into matters which do not concern them, and to raise questions of the title of their cestuis que trust, they must bear their own expenses of proceedings resulting from their own conduct. And the fact of their acting under the advice of counsel will not, in all cases, entitle them to the costs of a suit. *Devey* v. *Thornton*, 9 Hare, 22; 22 L. J., Ch. 163.

A trustee of two separate funds held not entitled to require from the cestui que trust of both funds a covenant of indemnity in respect of dealings with one of the funds before paying over the other fund, as to which there was no question; and the trustee was made to pay the costs of a suit instituted by the cestui que trust to obtain payment of the latter fund without any such indemnity. *Price* v. *Loaden* 21 Beav. 508.

An executrix of a deceased and sole trustee having declined to receive and pay the dividends on stock standing in the name of the trustee, the cestui que trust filed a bill against her for the appointment of new trustees, a transfer of the trust fund, and payment of a dividend:—Held, that the executrix was entitled to her costs out of the fund. *Legg* v. *Mackrell*, 2 De G. F. & J. 551; 4 L. T. 568. Reversing 1 Giff. 165; 5 Jur. (N.S.) 1154.

Executors of trustees decreed to pay the costs of a suit rendered necessary by their having refused to pay over the trust fund on reasonable evidence of a person's death; but inasmuch as the trustees had been guilty of a breach of trust in relation to the fund, such costs were decreed to be paid out of the assets of the trustees, and not personally by the executors. *Syse* v. *Kingdom*, 1 Coll. C. C. 184.

—— **Estate of Married Woman.**]—Trustees of the separate estate of a married woman decreed to pay the costs of a suit instituted to compel them to transfer the fund into her name. *Thorby* v. *Yeats*, 1 Y. & C. C. C. 438; 6 Jur. 939.

Where a married woman is entitled to a life interest to her separate use, under her marriage settlement, her receipt alone to be a sufficient discharge, that is not a restraint upon anticipation; but where the trustees, upon the clause as to the separate receipt, consider it so far doubtful that they refuse to pay either to the married woman or her assignee, and a bill is filed, they are still entitled to their costs in priority. *Rose* v. *Sharrod*, 1 N. R. 419; 11 W. R. 356.

An unmarried lady transferred a sum of stock to trustees for herself. The letter supposed to contain the terms of the trust was lost, and no evidence was given of its contents. After the marriage of the lady, the husband and wife demanded a transfer of the fund, which the trustees refused to make without the direction of the court, unless the fund should be settled for the benefit of the wife and her issue:—Held, that the trustees ought to have transferred the fund without suit, and must, therefore, pay the costs. *Penfold* v. *Bouch*, 4 Hare, 271.

—— **Appointment.**]—By a post-nuptial settlement, property in the funds, belonging to the wife, was settled in trust for the husband and wife for their lives, and then for such of their children in such parts, &c., as the wife should by deed or will appoint. There were four children. The husband died, and the wife appointed the whole fund, and assigned her life interest therein to the eldest (a daughter), who had attained the age of twenty-one, but who, together with the other children, was living with her mother. A trustee refusing to join in the transfer of the fund pursuant to the appointment, was not allowed his costs of a suit brought against him by the daughter to compel the transfer, though, under all the circumstances of the case, he was not decreed to pay the costs of the suit. *Campbell* v. *Home*, 1 Y. & C. C. C. 664; 7 Jur. 365.

Testatrix, having certain sums of stock standing in the joint names of herself and A., B. and C., bequeaths the same to A., D. and B. on certain trusts, and directs C. within six months after her decease to execute and deliver to the executors of her will a deed declaring that he, C., his executors, administrators, and assigns, would thenceforth stand and be possessed of the sums of stock respectively and the dividends on the trusts in her will mentioned, and she appointed A., D. and B. executors. C., having executed the deed, filed a bill to have the rights declared and the trusts executed. On the question as to costs, whether C. ought not to have transferred the funds into the names of A., D. and B. without suit:—Held, that he was a co-trustee of the funds, and could not safely transfer them to A., D. and B., without the sanction of the court. *Iredell* v. *Iredell*, 18 Beav. 202.

A fund was settled on A. for life, with remainder to such of his children or remoter issue by his deceased wife as he should appoint. Shortly before his son, the only child of the marriage, attained twenty-one. A. requested the trustees to prepare for a transfer of the fund to himself and his son, such transfer as to the greater part of the fund to be into A.'s own name. Not long before this A. had complained to one of the trustees of his son's extravagance, and had said to the solicitors of the trustees that a son ought to be dependent on his father. On the son's coming of age A. made an appointment of the fund to him, and they then applied to the trustees to transfer it into their joint names. The son was living with the father's solicitor:—Held, by Turner, L.J. (dissentiente Knight Bruce, L.J.), that the trustees had been rightly allowed their costs of a suit to obtain such transfer; for that they were justified in declining to make it without the sanction of the court, though the son was represented by a separate solicitor, and declarations were made that there was no bargain between him and the father for the father's benefit. *King* v. *King*, 1 De G. & J. 663; 27 L. J., Ch. 29; 4 Jur. (N.S.) 721; 6 W. R. 85.

—— **New Trustees.**]—Where a trustee is required to make a transfer of a fund to new trustees, and he alleges that he has a lien for charges (though he may have a right, under the act of parliament under which he acts, or by agreement, to recover payment), he has no right to interpose any delay in the way of making the transfer in respect of his alleged claim. *Wilson* v. *Parker*, 10 Jur. 979.

A surviving trustee who, without sufficient reason, declined to transfer trust funds to new trustees, duly appointed under a power in the instrument creating the trust, was ordered to pay the costs of an action to compel such transfer. *Coppinger* v. *Shekleton*, 15 L. R., Ir. 461.

11. Separate Defences.

General Rule.]—The mere fact of a trustee severing in his defence from his co-trustee is not, in the absence of evidence that the severance was improper, a ground for depriving him of costs. *Isaac, In re, Cronbach* v. *Isaac*, 66 L. J., Ch. 160; [1897] 1 Ch. 251; 75 L. T. 638; 45 W. R. 262—C. A.

"Outlay in Strict Line of Duty."]—Costs incurred by an executor, who, to meet a possible charge of devastavit, separately defends an action brought jointly against residuary legatees and himself, are not "an outlay in the strict line of his duty" towards his cestuis que trust; and he cannot call upon them to indemnify him in respect of his expenditure. *Hosegood* v. *Pedler*, 66 L. J., Q. B. 18.

Trustees in Same Interest.]—Trustees in the same interest will be allowed the costs of separate answers if the master finds the circumstances justified them in so answering. *Dudgeon* v. *Cormley*, 2 Con. & L. 422; 4 Dr. & War. 158.

Where several persons are made defendants in respect to a joint fiduciary character only, or if any beneficial interest which they may have does not conflict with their duty, they ought not to sever in their defences; otherwise one set of costs only will be allowed them. *Gaunt* v. *Taylor*, 2 Beav. 346; 4 Jur. 166.

The rule that where a joint fiduciary character exists, a joint defence should be always adopted, is too general. It does not apply where the joint parties are liable to account, and incur responsibility. *Reade* v. *Sparkes*, 1 Moll. 8.

Where the bill was dismissed with costs, the court referred it to the master to inquire whether it was necessary for parties, trustees, and cestuis que trust, appearing by same solicitor, to file separate answers. *Woods* v. *Woods*, 5 Hare, 229.

Trustees severing, even as defendants, are not allowed more than one set of costs without some very special reason. *Hughes* v. *Key*, 20 Beav. 395.

One Trustee out of Jurisdiction.]—If trustees separate in defence, they are only entitled to divide amongst them altogether the reasonable costs of one answer as against the fund, and the absence of one trustee out of the jurisdiction, it appears, makes no difference. The executor of mortgagor who has proved cannot have costs out of the surplus of the real estate. Whether a person named executor, but not having proved or acted as a necessary party, and by whom his costs

are to be paid, quære. *Nicholson* v. *Falkiner*, 1 Moll. 555.

Trustees Residing in Different Parts.]—The two co-heiresses of a trustee, who lived at a distance from each other, were made parties to a suit for enforcing the performance of marriage articles. They submitted to act as the court might direct, and defended separately:—Held, they were entitled to two sets of costs. *Aldridge* v. *Westbrook*, 4 Beav. 212; 10 L. J., Ch. 363.

Trustees appeared separately; one lived in a distant part of the country. The court declined making any special order as to costs. *Wiles* v. *Cooper*, 9 Beav. 298; 15 L. J., Ch. 129.

Trustees and their cestuis que trust and next of kin in the same interest, severing in their defences, entitled only to one set of costs, although stated (at the bar, but not by the answers) to reside in parts of the country remote from each other. *Farr* v. *Sheriffe*, 4 Hare, 528; 15 L. J., Ch. 89; 10 Jur. 630.

A hostile claim was filed for an account and administration against three trustees, only one having ever acted, and the acting trustee resided in a different part of England from the other two. No unreasonable conduct was proved against the acting trustee:—Held, that he was justified in appearing separately from his two co-trustees; and a double set of costs was allowed. *Cummins* v. *Bromfield*, 3 Jur. (N.S.) 657.

Declining to Transfer to Husband, Administrator of Wife.] — One of two trustees having declined to transfer the fund to the surviving husband, who was his wife's administrator, and having severed in his defence in a suit to obtain a transfer, was allowed no costs. *Allen* v. *Thorp*, 7 Beav. 72; 13 L. J., Ch. 5.

Filling Different Characters.]—Where trustees put in separate answers, and appeared by different solicitors, on the ground that in that case they filled different characters, the court gave them all costs as between solicitor and client. *Kampf* v. *Jones*, C. P. Cooper, 13.

Similar Demurrers.]—Defendants (trustees), who had severally filed similar demurrers, instead of joining in one demurrer, not allowed the costs of the demurrers, although successful. *Cooke* v. *Courtown* (*Lord*), 6 Ir. Eq. R. 279.

One Trustee charged with Misconduct.]—Two trustees severed in their defence; one was charged with misconduct, but not the other. The court allowed only one set of costs, and gave the whole of them to the innocent trustee. *Webb* v. *Webb*, 16 Sim. 55; 17 L. J., Ch. 13.

Refusal to Join in Answer of Co-trustee.]—A trustee who refuses to join in the answer of his co-trustee, and does not put in an answer differing from that of his co-trustee, is not entitled to his costs. *Young* v. *Scott*, 1 Jones, 71.

Trustee Dying before Further Consideration of Case.]—A trust fund, consisting of a debt from the estate of a testator, was recovered in a creditors' suit by the cestuis que trust; in which suit the two trustees of the fund were defendants. The two trustees (for reasons which were not denied to be sufficient) appeared separately; and one of them dying before the cause was heard on further directions:—Held, that he had acquired no lien for his costs on the trust fund in court; and the petition of his personal representative, that his costs might be taxed, and provided for out of the fund, was refused, with costs. *Malins* v. *Greenway*, 7 Hare, 391; 17 L. J., Ch. 26, 331; 18 L. J., Ch. 154; 12 Jur. 66, 319.

One Set of Costs Allowed—Contribution.]—Two trustees (A. and B.) were ordered to pay a sum of money into court; this was paid by A. alone. They had severed in their defences, and obtained but one set of costs. B.'s share of the costs was ordered to be paid to A. by way of contribution. *Prince* v. *Hine*, 27 Beav. 345.

—— Apportionment of Costs by Taxing-Master.]—When two trustees sever in their defence to an administration action, and it appears that the trustee who has separated himself from his co-trustee has separately done work in the administration of the trust estate, the proper order is to allow one set of costs only to the trustees, and to direct that such costs should be apportioned by the taxing-master between the trustees, but so as only to give to the severing trustee the costs of work actually done by him. *Isaac, In re, Cronbach* v. *Isaac*, supra.

Two trustees, who severed in their defences, were allowed one set of costs only. *Course* v. *Humphrey*, 26 Beav. 402; 28 L. J., Ch. 327; 5 Jur. (N.S.) 615.

One of them, by his answer, imputed misconduct to the other, which rendered it necessary for him to sever, and he asked for the whole costs. The court, being unable, on the answers, to determine the question, left the division to the master. *Ib.*

One set of costs being allowed to trustees who had severed in their defences, the division of it was left to the taxing-master. *Att.-Gen.* v. *Wyville*, 28 Beav. 464.

Allegation by Severing Trustee of Ignorance of the Accounts.]—Where one of two trustees, not the acting trustee, took a power of attorney from one of the cestuis que trust, and acted on her behalf, and claimed a payment in her right; and afterwards, on a suit being instituted by another cestui que trust, severed in his defence from the acting trustee, alleging that he knew nothing of the accounts:—Held, that only one set of costs could be allowed. *Hodson* v. *Cash*, 1 Jur. (N.S.) 864.

A trustee is not justified in severing in his defence on either of these ground: 1. That he did not know what the accounts were, or what had been done by his co-trustee; he ought to have inquired, and not severed unless he found something wrong. 2. That he was solicitor for one of the cestuis que trust, and held her power of attorney, that being a position which a trustee ought not to accept. *Ib.*

Charges of Personal Fraud against Severing Trustee.]—The trustees of a will agreed to settle disputes with the surviving partner in a firm of which the testator had been a member by selling the testator's share to him at a certain price. They then filed a bill to have this agreement sanctioned; a decree was made accordingly, and the sale carried out. Some years afterwards some of the residuary legatees, who were infants, filed a bill by their next friend to set aside the decree on the ground that the compromise was

an improper one, and that it had been entered into, and the decree sanctioning it obtained, by the personal fraud of one of the trustees. This trustee answered separately; and at the hearing Lord Romilly dismissed the bill with costs, being of opinion that the compromise had been beneficial and the decree sanctioning it properly obtained. The next friend could not pay the costs, and the trustee applied by summons in a suit for the administration of the testator's estate to have them taxed as between solicitor and client and paid out of the estate:—Held, that the trustee was entitled to be paid his costs out of the estate, as he had defended the suit for the benefit of the estate, though he had at the same time defended his own character. *Walters* v. *Woodbridge*, 47 L. J., Ch. 516; 7 Ch. D. 504; 38 L. T. 83; 26 W. R. 469—C. A.

12. FUND LIABLE FOR PAYMENT OF COSTS.

Action Instituted Unnecessarily by Owner of One Share.]—An action to carry into execution the trusts of a fund having been instituted unnecessarily by the beneficial owner of one out of six shares, the other beneficiaries, who had not been served with notice of or attended proceedings in the action, or derived any benefit therefrom, received payment for their shares in full from the trustee pending the action:—Held, that the costs of the action were to be borne by the plaintiff's share alone. *Chennell, In re, Jones* v. *Chennell*, 47 L. J., Ch. 80. Affirmed 47 L. J., Ch. 583; 8 Ch. D. 492; 38 L. T. 494; 26 W. R. 595—C. A.

Trustee Appearing on Petition for Payment of Dividends.]—The costs of a trustee, who was served with and appeared upon a petition by a tenant for life for payment of dividends, were ordered to be paid out of income. *Mason, In re, Smithett, Ex parte*, L. R. 12 Eq. 111; 24 L. T. 869; 19 W. R. 1025.

When a fund has been paid into court on account of the inability of a sole trustee to act, on an application relating solely to the payment of the dividends, the costs of the appearance of the trustee may be properly charged on the corpus. *Wood's Trusts, In re*, 40 L. J., Ch. 179; L. R. 11 Eq. 155; 23 L. T. 586; 19 W. R. 227.

Representatives of Defaulting Executor.]—The representative of a defaulting executor is entitled to costs out of the executor's assets, not out of the assets of the original testator, whose estate is being administered. *Gurney* v. *Gurney*, 48 L. T. 529.

Suit to Secure Particular Legacy.]—Executors and trustees having appropriated a legacy, and divided the residue:—Held, that the costs of a suit to secure the particular legacy must be paid thereout. *Governesses' Benevolent Institution* v. *Rushbridger*, 18 Beav. 467.

Trustee—Suing for Debt—Circumstances of Suspicion.]—Where the plaintiff is suing as a trustee, and there are circumstances of suspicion in the case, the court will stay proceedings on payment of the debt into court, and on payment of costs, leaving the plaintiff to apply to the court to have his extra costs out of the fund in court. *Jones* v. *Bramwell*, 3 D. P. C. 481.

—— **Owner of Property Charged with Trust Fund.**]—If a trustee becomes owner of property charged with a trust fund, and resists a suit by his co-trustee to call in and re-invest it, thus allowing his interest as owner to come into collision with his duty as trustee, on a decree he will not get costs out of the trust fund. *Costello* v. *O'Rorke*, 19 W. R. 143—Ir. Ch. App.

—— **Obtaining Discharge after applying to Tenant for Life to Appoint New Trustees.**]—The trustees of a settlement applied to be discharged from their trust, on the ground of the unexpected responsibility thrown upon them by the repeated charges and annuities to which the tenant for life had subjected his interest, and also stating, which was admitted, that they had applied to the tenant for life to appoint new trustees in their room, which he had failed to do:—Held, that the costs of obtaining the discharge should be paid out of the interest of the tenant for life. *Coventry* v. *Coventry*, 1 Keen, 758; 6 L. J., Ch. 275.

—— **Acting Bonâ Fide under Invalid Will of Real Estate.**]—A trustee, acting bonâ fide, and with the concurrence of the heir-at-law, under a will which was supposed to be valid as to real estate, but which afterwards turns out to be invalid, is entitled to be indemnified out of the personal estate. *Edgecumbe* v. *Carpenter*, 1 Beav. 171; 8 L. J., Ch. 17.

If an estate is devised to A. and his heirs on trust to sell, &c., and A. devises it, the costs of getting the legal estate out of his devisee must be borne by A.'s estate. *Cooke* v. *Crawford*, 13 Sim. 91; 11 L. J., Ch. 406; 8 Jur. 723.

Direction to Accumulate and Purchase Lands to be Settled to Uses.]—Under a direction by will to accumulate and lay out a certain sum of money in the purchase of land to be settled to uses thereby declared, the costs of the investment are to be paid out of the particular sum directed to be invested. *Gwyther* v. *Allen*, 1 Hare, 505.

Sale by Devisees of Lands in Trust for Charitable Purposes.]—Devisees of lands in trust for charitable purposes, having sold part of those lands, under the provisions of the London Bridge Acts, were held not entitled to their costs out of the fund arising from the sale, although the will creating the trust directed that the estate should defray the expenses of defending the trust property. *Towgood* or *Thorowgood, Ex parte, London Bridge Acts, In re*, 1 Y. & C. 588; 5 L. J., Ex. Eq. 97.

Action by Married Woman Against Trustee Dismissed but Receiver Appointed.]—By marriage settlement property was vested in trustees for the wife in trust for her sole and separate use, the trustees being authorised to reimburse themselves, out of the moneys which should come to their hands under the trusts, all expenses to be incurred in the execution of the trusts, or by reason of any matter whatsoever relating thereto or connected therewith. The wife filed a bill to make the trustees liable for a breach of trust and to have new trustees appointed. The bill was dismissed as to the breach of trust, but a receiver was appointed:—Held, that the trustees were entitled to receive their costs of the suit out of the income

of the trust funds in the hands of the receiver since the decree. Plaintiff's next friend having become insolvent, the proceedings were stayed. *D'Occhsner* v. *Scott*, 24 Beav. 239.

Question as to Trust Fund Separated from General Residue.]—Where a question arises on the interest in a trust fund, separated from the general residue, the costs must come out of the particular fund; and having been given by the decree, as specifically prayed by the bill, out of general personal estate, the decree, although affirmed in other respects, was corrected in that particular; being considered as relief prayed; and therefore not within the rule against appealing for costs only. *Jenour* v. *Jenour*, 10 Ves. 562.

Action by Trustees against Tenant for Life for Permissive Waste.]—A court of equity will not interfere at the instance of a remainderman in cases of permissive waste, either by injunction or to give satisfaction against an equitable tenant for life in possession. Testator, by his will, directed his trustees, after payment of the expenses of keeping his estates in repair, and all such costs as "my said trustees shall expend or be put unto by means of the trusts hereby reposed in them," to pay out of the overplus rents and profits certain sums, and after payment thereof, to pay the rents to A. and B. successively for life, with remainder to trustee to preserve, with remainder to the first and other sons of B. successively in remainder, and the several heirs male of the bodies of such sons. On a bill filed by the trustees at the instance of one of the remaindermen in tail, against the second tenant for life, for the purpose of making him accountable for permissive waste:—Held, that the costs of the trustees, whose bill was dismissed, ought to be paid out of the corpus, and not out of the rents and profits of the estate. *Powys* v. *Blagrave*, 4 De G. M. & G. 448; 24 L. J., Ch. 142.

Annuity given by Will, and Legacy directed to be Accumulated for Infant—All the Rents Applied to Annuity.]—By a will an annuity was given and a legacy was directed to be accumulated by trustees for the benefit of an infant. The trustees, being in possession of the whole of the testator's estate, applied all the rents and profits in payment of the annuity. A suit was instituted for the payment of the legacy and for administration of the estate. The estate proved insufficient to pay all the costs of the plaintiff and of the defendant trustees; therefore only part of the costs of the latter was ordered to be paid out of the estate, and the whole costs of the plaintiff out of the remaining moneys. *Beer* v. *Tapp*, 31 L. J., Ch. 513; 6 L. T. 269; 10 W. R. 277.

Assignment of Debt agreed to be Paid by Instalments.]—A man had become indebted to B., and had agreed under a letter of licence to pay the amount by monthly instalments. B. assigned the benefit of this debt to C. on the occasion of a loan to him, C. thereupon gave notice to A. of the assignment. B. was obliged to proceed against C. for the repayment of the loan, and required A. to make the payment of the instalments to him (B.), and he filed a bill against C. and A. for an account. One instalment had been paid by C. to A. after notice:—Held, that A. was entitled to retain his costs of suit out of the next instalments as they became due, the amount to be added to the original debt due from B. to C. *Aplin* v. *Cates*, 30 L. J., Ch. 6; 3 L. T. 288; 9 W. R. 92.

Charge of Costs on Capital and Income, when properly Incurred.]—The trustees of a freehold estate of which the plaintiff was equitable tenant for life under a will, brought actions under the advice of counsel against two persons for interfering with the property, and compromised them before trial. The plaintiff had no notice of the proceedings, but had some time previously warned the trustees, on the occasion of an injury done by persons other than the defendants to these actions, that he should hold them liable if they did not take all necessary steps to protect the property. In December, 1881, the plaintiff applied to the trustees for the rents accrued since May, 1880. The trustees' solicitor answered stating the amount of the rents received, and saying that it was less than the costs incurred by the trustees in the action, and that they were out of pocket. A correspondence ensued, in the course of which the trustees expressed their willingness to concur in any arrangement for raising the costs out of the estate, but the plaintiff insisted on having the rents paid to him irrespective of any arrangement for raising the costs, and brought his action to enforce payment. The vice-chancellor of the Lancaster court made an order, declaring that as the actions were brought without the knowledge or consent of the plaintiff, the costs were not chargeable against the income. And the court "being of opinion that the actions were commenced under the advice of counsel," ordered the trustees' costs of them to be raised and paid out of the estate, but ordered the trustees to pay the plaintiff his costs of the present action up to the hearing. The plaintiff appealed against the direction to raise the costs of the former actions out of the estate, and the trustees from the order as to the costs of the present action:—Held, on appeal, that the direction to raise the costs of the trustees of the old actions out of the estate ought to be affirmed, for that the actions appeared to have been brought bonâ fide and to have been beneficial to the estate, but that the reason given in the decree for allowing them ought to be varied, as that result did not necessarily follow from their having been commenced under the advice of counsel. But held, that the order on the trustees to pay costs must be reversed, and directions given for raising their costs of this action out of the estate, for that the costs of trustees properly incurred in the administration of the trust are a first charge on both the capital and income of the trust estate, and that the trustees were not bound to part with the income till their costs had been otherwise provided for, and they therefore had been guilty of no misconduct. *Stott* v. *Milne*, 25 Ch. D. 710; 50 L. T. 742—C. A.

Assignee in Insolvency—Parties Necessarily Brought Before Court.]—Assignee in insolvency being obliged to obtain a decree in the execution of his trust, costs of persons necessarily brought before the court were ordered to be paid out of the fund, not personally by the plaintiff. *Spunner* v. *Spunner*, 2 Moll. 473.

Establishing Right to Fund.]—P. invested money in consols in the names of herself and her granddaughter B., and subsequently filed a bill for the purpose of making B. a trustee of the fund, and for a transfer. The

bill was after the death of P. dismissed. On petition to have the costs of the defence paid out of the fund, an order was made for that purpose; but a difficulty having occurred in the registrar's office, his honour directed the fund to be brought into court, a sufficient sum to be raised for the payment of costs, and the dividends to be accumulated for the benefit of the infant. *Pitt, In re*, 1 Jur. (N.S.) 1155. See also *Hepworth* v. *Scale*, 1 Jur. (N.S.) 698.

Refusal of Cestuis que Trust to Accept Compromise.]—By settlement, dated in 1846, executed on the marriage of S., a debt of 1,200*l.*, due to her from the firm of Q., H. & Co., was assigned to N. and H. (H. being a member of the firm of Q., H. & Co.) as trustees, upon trusts for the benefit of S. and her family. It was provided that the money should be left with Q., H. & Co. until S. gave notice to the trustees to withdraw it, when they were within three months to recover it, and invest elsewhere; but so long as it should remain in the hands of Q., H. & Co., with the permission of S., the trustees, nor either of them, were not to be responsible for the sufficiency of the security. There was no power in the deed to change trustees. The husband died soon after. In November, 1851, Q., H. & Co. stopped payment. In January, 1852, S. gave notice to the trustees to recover the money. N. thereupon demanded the money, but was informed of the stoppage, and offered a compromise. The bill was brought to enable the trustee to act, he having no express power to accept a compromise. The cestuis que trust refused to accept it, and the money being ordered to be paid into court, it was ultimately paid in:—Held that H. was not entitled to receive any costs of the suit out of the fund, but under the circumstances he was not ordered to pay any costs. *Norton* v. *Steinkopf*, Kay, 45; 23 L. J., Ch. 35; 18 Jur. 720; 2 W. R. 34.

Trustees resisting Enforcement of Improper Orders.]—The costs of trustees in resisting the enforcement of orders improperly made against them in a suit not warranted by the practice of the court of chancery will be ordered to come out of the trust fund. *Muskerry* v. *Sheffington*, L. R. 3 H. L. 144.

Application for Payment of Annuity by Tenant for Life in Possession.]—The time for which a receiver was appointed having expired, and the cestui que trust having, in the absence of the trustee, entered into possession of the estates, subject to the payment of an annuity, and having omitted to pay the same:—Held, that the costs of an application to the court for a direction for payment by the cestui que trust in possession of the annuity were payable out of the estate. *Devaynes* v. *Noble*, 8 L. J., Ch. 256.

Priority of Trustees.]—Trustees in an administration action brought by their cestuis que trust, where an order has been made for payment of costs out of the estate, and it appears probable that the estate will not be sufficient to pay all their costs in full, are entitled to an order directing the payment of their costs, charges, and expenses in priority to the costs of all other parties to the action. *Dodds* v. *Tuke*, 53 L.J., Ch. 598; 25 Ch. D. 617; 50 L. T. 320; 32 W. R. 424.

Trustees' costs have priority over the claims of a mortgagee claiming under their cestui que trust *Rose* v. *Sharrock, or Sharrod*, 1 N. R. 419; 11 W. R. 356.

Where a married woman is entitled to a life interest to her separate use under her marriage settlement, her receipt alone to be a sufficient discharge, that is not a restraint upon anticipation; but where the trustees, upon the clause, as to the separate receipt, consider it so far doubtful that they refuse to pay either to the married woman or her assignee, and a bill is filed, they are still entitled to their costs in priority. *Ib.*

Sanction of Agreement by Court.]—Part of the property of a testator consisted of a cotton mill which he directed his trustees not to sell, nor to work themselves, but to let. The will also contained a direction to the trustees not to lend any of the personal estate on mortgage, and prescribed certain strict modes of investment. The cotton mill being out of repair could not be let as it then stood; the trustees, therefore, entered into a provisional agreement with a firm of cotton spinners, by which the latter agreed to take a lease of the mill for twenty-one years, and to spend large sums of money in machinery and repairs, provided the trustees advanced to them, on the security of the machinery, rather more than half the sum required for such machinery and repairs, and also spent a considerable sum in the erection of steam boilers and other landlord's fixtures. Under the terms of the will the trustees could not comply with such proposals; but, upon it being clearly proved that such an arrangement would be highly beneficial to the trust estate, and was one which it was not unusual for lessors in similar cases to enter into, the court sanctioned the agreement, and directed the costs of all parties to the application to come out of the testator's residuary personal estate. *Lee's Trusts, In re*, 32 L. T. 298.

Person made Party to Suit for Protection of Trustees.]—Person made party to suit only for protection of trustees is entitled to his costs out of trust fund. *Hicks* v. *Wrench*, 6 Madd. 93.

Immediate Sale to Defray Costs of Cestui que Trust.]—Where a cestui que trust, having a life interest only, is declared entitled to his costs out of the fund property, the court will not give him a mere lien on it to be enforced by subsequent proceedings, but will direct an immediate sale for the purpose of defraying them. *Burkett* v. *Spray*, 1 Russ. & M. 113.

13. Taxation of Costs.

a. As between Party and Party.

In General.]—Where the costs of a trustee are directed to be taxed, that means as between party and party; but where a trustee has expended money by reasonably and properly taking opinions, and procuring directions that are necessary for the due execution of his trust, he is entitled, not only to his costs, but also to his charges and expenses, under the head of just allowances. *Fearns* v. *Young*, 10 Ves. 184.

Trustee or the next friend of an infant is entitled to fair expenses, beyond taxed costs, under the head of just allowances. *Ib.*

Trustees, however, in chancery, on application, generally obtained costs as between attorney and client. *Ib.*

A mere trustee is only allowed an answer of one skin and a guinea for previous expense. *Parsons* v. *Potter*, 2 Hog. 281.

A trustee shall be allowed his full and necessary costs, and shall not be confined in his account to the costs taxed of course, in obtaining a decree. *Amand* v. *Bradbourne*, 2 Ca. Ch. 138.

Where, on a motion, affidavits of great length were filed by the plaintiff complaining of the conduct of the trustees, and by the trustees vindicating their conduct, the court, in acceding to the application of the plaintiff, ordered that none of the parties be allowed their costs of any of the affidavits used on the motion. *Horner* v. *Wheelwright*, 2 Jur. (N.S.) 367.

A. B. was entrapped into becoming a trustee; but it was agreed that he should be discharged. He consulted counsel as to the liability he had incurred, and instructed him to prepare proper deeds for his protection. It was discovered that a breach of trust had been committed previously to his becoming trustee, and counsel prepared a bond and release for A. B.'s protection, but which were never executed, in consequence of a suit having been instituted by A. B to set the matter right:—Held, overruling the decision of the taxing-master, that, under an order to tax A. B.'s costs, charges, and expenses of and incidental to the trust, A. B. was entitled to the costs of the draft bond and release, though they had never been used. *Stephens* v. *Newborough* (*Lord*), 11 Beav. 403; 17 L. J., Ch. 332; 12 Jur. 319.

Costs to defendant, a mere trustee by consignment of goods, as to plaintiff in bill of interpleader, not as between attorney and client, but according to the course of the court as between party and party. *Dunlop* v. *Hubbard*, 19 Ves. 205; 12 R. R. 170.

Where a bill is dismissed against a trustee, and there is no estate to be administered, he only has costs as between party and party. *Saunders* v. *Saunders*, 3 Jur. (N.S.) 727; 5 W. R. 479.

County Court Scale.]—When a trust fund is reduced to 500*l.* before the filing of the bill, the court will only allow costs according to the county court scale. *Ali* v. *Forrester*, 21 L. T. 819.

On Disclaimer.]—A person named a trustee in a deed, who declines to accept the office, is in the situation of any other defendant against whom a bill is dismissed, and can only have his costs as between party and party. *Norway* v. *Norway*, 2 Myl. & K. 278; 3 L. J., Ch. 111, 163.

A trustee, who after disclaiming is continued as party to the hearing, is entitled to costs only as between party and party. *Bray* v. *West*, 9 Sim. 429.

A trustee disclaiming at the bar has his costs only as between party and party. *Bulkeley* v. *Eglinton* (*Earl*), 1 Jur. (N.S.) 994.

Where the name of a party appears upon documents as a trustee, and he is therefore made a defendant, but asserts by his answer that he never accepted the trust nor acted, he is entitled to costs as between party and party. *Heap* v. *Jones*, 5 W. R. 106.

Semble, a disclaiming trustee is entitled only to costs as between party and party. *Legg* v. *Mackrell*, 1 Giff. 165; 5 Jur. (N.S.) 1145. But see *S. C.*, 2 De G. F. & J. 551; 4 L. T. 568.

Right of Cestui que Trust to Tax.]—A cestui que trust has no right to question his trustees' retainer of a solicitor as between himself and the solicitor; or to obtain on order for the separate taxation of the solicitor's bill of costs: but he has a right to attend the taxation of the trustees, and raise the question of retainer only as one between himself and his co-trustees. *Story. In re, Marwick, Ex parte*, 1 L. T. 16; 8 W. R. 15.

b. As between Solicitor and Client.

Administration Action.]—One of two executors and trustees commenced an action against the other for the administration of the estate, and a decree was made. There was no allegation of any misconduct on the part of the defendant. On the action coming on for further consideration, the court gave the plaintiff his costs as between solicitor and client, but gave the defendant costs only as between party and party, holding that two sets of costs as between solicitor and client ought not to be allowed to the trustees:—Held, on appeal, that a trustee is entitled to costs as between solicitor and client in an administration action, unless a case of misconduct is made out against him, and that the defendant must have costs as between solicitor and client. *Lore, In re, Hill* v. *Spurgeon*, 54 L. J., Ch. 816; 29 Ch. D. 348; 52 L. T. 398; 33 W. R. 449—C. A.

Testator, by his will, gives the rents of his real property to his wife for life, and bequeaths the bulk of his personal property to her absolutely, constituting her sole executrix, and directs that certain trustees shall, as soon as conveniently may be after his decease, convert all the convertible residue of his personal estate into money, and invest it in government or real securities, and pay the dividends to his wife for life. The ultimate trusts, both of the real and residuary personal property, are in favour of persons who are not in esse or not ascertained. Twenty years elapse, during which the trustees leave the widow in the possession and management of the whole property, and then the surviving trustee files a bill against her for an account. It appears in the suit that she has paid all the testator's debts to an amount exceeding the amount of personalty not specifically bequeathed, but that she had left some of the assets outstanding, and claims to be a purchaser of those assets, in part satisfaction of the moneys which she had overpaid:—Held, that whatever might be her right at law as a purchaser of those assets upon a plea of plene administravit, her right as a purchaser in equity is not absolute, but subject to the rules of equitable administration; and, consequently, that the bill being filed on reasonable grounds, the surviving trustee is entitled to the costs of the suit; but, held, under the circumstances of the case, that he is not entitled to costs as between solicitor and client. *Hearn* v. *Wells*, 1 Coll. C. C. 323.

Suit as to the Validity of Election of a Vicar.]—Costs as between solicitor and client allowed to the archbishop and bishop when made parties to a suit respecting the validity of the election of a vicar. In what case trustees are allowed costs only as between party and party.

Edenborough v. *Canterbury* (*Archbishop*), 2 Russ. 93.

Trustees—Nominated by Void Instrument.]—Persons nominated trustees by an instrument which, being void, passes no trust fund, not allowed costs as between solicitor and client. *Mohun* v. *Mohun*, 1 Swanst. 201; 18 R. R. 58.

—— **Person named Trustee without his Knowledge.**]—A person named a trustee without his knowledge, and in that character a party to the suit, having never accepted the trust, is entitled to his costs as between solicitor and client. *Sherratt* v. *Bentley*, 1 Russ. & M. 655.

—— **Declining to Transfer a Fund.**] —Trustees who had declined to transfer a fund to an assignee on the ground of an alleged fraud in the assignment were:—Held, entitled to their costs as between solicitor and client, although the assignment was decreed to be carried into execution, there being some circumstances of suspicion attending the assignment, particularly a variance between the consideration expressed in the deed and the actual consideration. *Whitmarsh* v. *Robertson*, 1 Y. & C. C. C. 715; 11 L. J., Ch. 404; 6 Jur. 921.

—— **Committing Breach of Trust.**] — A trustee who had committed a breach of trust was held entitled to the general costs of the suit as between solicitor and client, but was directed to pay as between party and party the costs relating to the inquiry arising out of the breach of trust. *Pride* v. *Fooks*, 2 Beav. 430; 9 L. J., Ch. 234; 4 Jur. 213.

Action for Account against Trustee—Subsequent Bankruptcy.]—A suit was instituted against an executor and a trustee under a will for an account. On the hearing, a decree for a reference to take accounts of the real and personal estate was directed. He afterwards became bankrupt, and the suit was continued as against his assignees under the bankruptcy:—Held, that he was entitled to the costs of suit as between solicitor and client from the date of his bankruptcy, and also the costs of his appearance on a petition for a vesting order in new trustees. *Turner* v. *Mullineux*, 3 L. T. 687; 9 W. R. 252.

When a defaulting trustee against whom a bill is filed becomes bankrupt, and the suit is prosecuted against him after his bankruptcy, he is entitled to his costs incurred after bankruptcy, and that as between solicitor and client. *Bowyer* v. *Griffin*, L. R. 9 Eq. 340; 18 W. R. 227.

Action Dismissed with Costs as against Trustees.]—Where a bill is dismissed with costs as against trustees, the court having no estate under its control, and payment of an alleged claim is asked out of the residue of the testator's estate, there is not such a specialty as to induce the court to give the trustees of such estate their costs as between solicitor and client. *Saunders* v. *Saunders*, 5 W. R. 479.

Defendant Trustee Solicitor.]—The costs of a defendant trustee, notwithstanding he was a solicitor, ordered to be taxed as between solicitor and client. *York* v. *Brown*, 1 Coll. C. C. 260; 8 Jur. 567

14. PRACTICE ON ALLOWANCE OF COSTS.

Further Consideration.]—If the decree at the hearing make no provision for the costs of a trustee, the court will not entertain any petition in respect of them at the hearing on further directions. *Malins* v. *Greenway*, 7 Hare, 391; 18 L. J., Ch. 154.

A trustee not appearing at the hearing, a decree was made against him, with leave to show cause against it. He then set down the cause again, and prayed his costs of the suit, on paying the costs of the day, which were granted, the master of the rolls saying, that his having paid the costs of the day placed him rectum in curia. *Norris* v. *Norris*, 1 Cox, 183.

Upon the death of one of three trustees, no provision having been made for his costs, his executors, by consent, without a revivor, appeared for the purpose of claiming his costs. *Kampf* v. *Jones*, C. P. Cooper, 13.

Where a bill is dismissed without costs so far as it seeks to charge trustees with wilful default, the court may by its order upon further consideration give the defendants the whole of their costs. Also, a sum advanced by the trustees and disallowed by the chief clerk's certificate may be allowed by the order on further consideration. *Massey* v. *Massey*, 17 L. T. 233.

Exercise of Powers without Sanction of Court.]—On the hearing on further consideration of an administration action, an order was made by which all the questions raised were practically disposed of, but liberty to apply was reserved. Subsequently the trustees of the will of the testator in the action, in exercise of the powers under the will, and with the consent of the tenant for life, sold land forming part of the estate, and carried out other transactions, without applying for or obtaining any sanction of the court:—Held, that the trustees were entitled to their proper costs of carrying out such transactions. *Mansel, In re, Rhodes* v. *Jenkin*, 54 L. J., Ch. 883; 52 L. T. 806; 33 W. R. 727.

W. A. G. W.

TURNPIKE.

See WAY.

UMPIRE.

See ARBITRATION—LANDS CLAUSES ACT.

UNCONSCIONABLE BARGAINS.

See FRAUD.

UNDERWRITER.

See COMPANY (SHARES)—INSURANCE—SHIPPING.

UNDUE INFLUENCE.

See FRAUD—WILL.

UNDUE PREFERENCE.

See CARRIERS.

UNION.

Poor.]—*See* POOR LAW.

Trade.]—*See* TRADE AND TRADE-MARK.

UNIVERSITY.

1. *Election of Fellows, &c.*, 1063.
2. *Visitation*, 1066.
3. *Conusance*, 1067.
4. *Vice-Chancellor's Court*, 1068.
5. *Other Matters*, 1070.

1. ELECTION OF FELLOWS, &C.

Universities Tests Act.]—By the Hertford College Act, 1874 (37 & 38 Vict. c. 55), Magdalen Hall, in the University of Oxford, was dissolved, Hertford College created, and the property of Magdalen Hall transferred to Hertford College. An endowment for a lay fellowship, restricted to members of certain specified churches, was afterwards accepted by Hertford College. T., who was not a member of any of the specified churches, tendered himself for examination as a candidate, and was informed that he might be examined if he desired it, but he must understand that he would not be elected even if he stood at the head of the list. He did not present himself for examination, and M., a duly qualified candidate, was elected, after examination, to the fellowship. After the election T. applied for a mandamus:—Held, first, that there was no refusal to examine T. *Reg.* v. *Hertford College*, 47 L. J., Q. B. 649; 3 Q. B. D. 693; 39 L. T. 18; 27 W. R. 347—C. A.

Held, secondly, assuming that T. was refused examination, the office being full, of a candidate properly qualified, a mandamus would not lie commanding the college to examine T. and to proceed to an election; and that his remedy, if any, was by way of appeal to the visitor. *Ib.*

The operation of the Universities Tests Act, 1871 (34 Vict. c. 26), is confined to colleges subsisting before it was passed; and the act does not prevent the creation in the universities of fresh colleges, the endowments of which are confined to the members of a particular religious community. *Ib.*

The Universities Tests Act, 1871, is not incorporated with the Hertford College Act, 1874; and s. 13 of the latter act, which provides "that nothing in this act contained shall be construed to repeal any of the provisions of the Universities Tests Act, 1871," does not render Hertford College a subsisting college within the former statute. *Ib.*

Right to Nominate to Fellowship.]—The right of nomination to a fellowship being in dispute between two parties claiming under the same grant, the court directed an issue to try "whether the plaintiff had a better right than the defendant to nominate." On the trial it appeared that the defendant had nominated for nearly twenty years, and that vacancies occurred about once in five years; that the right of nomination was limited by the grant to the heirs male of E., with limitations over in default of such heirs; that the eldest son of E. had three sons; that the plaintiff was lineally descended from the third; but that in 1634 the two elder sons were living, and one had then living male issue. No further evidence was given:—Held, that, on the issue directed, the plaintiff might recover upon this evidence, without showing that the two elder branches were extinct. *Sandys* v. *Sandys*, 1 Q. B. 316, n.

Dispensation Presumed.]—In a college of royal foundation, a practice having for many years prevailed of electing two fellows of a county, for which the statutes allowed only one, a dispensation from the crown authorising that practice is to be presumed. *Queen's College Case*, Jac. 1.

Assignment of Emoluments.]—An assignment of the emoluments of a fellow of a college is valid in equity and effect will be given to a security thereon, out of the dividends apportioned to such fellow from time to time in respect of his fellowship. *Feistel* v. *King's College, Cambridge*, 10 Beav. 491; 16 L. J., Ch. 339; 11 Jur. 506.

Election of Warden.]—James I., by letters-patent, in 1619, granted to A. licence to found a college, which should consist of one master, one warden, four fellows, six poor brethren, six poor sisters and twelve poor scholars, to be maintained, sustained, governed and ruled according to the ordinances, statutes and foundation as should be made and established by A.; and that A. should have power to ordain and make ordinances, rules, constitutions and statutes, for the maintenance, sustenance, education, instruction, government and rule of the master, warden, &c. The letters-patent named the college, and created the master, warden, &c., a body corporate. In 1619, A. founded the college, and endowed it with land in three parishes. By an instrument, in 1626, A., by virtue of the power given to him by the letters-patent, made ordinances and statutes for the maintenance, relief, sustenance, education, government and ordering of the college. The 2nd statute ordained that there should be "six assistants touching the ordering of the college, and the rents, revenues and profits thereof"; and the 8th, that the churchwardens of the three parishes in which the college lands were situate should be "assistants to the master, warden and fellows of the college in the governing thereof." The 10th, 11th and 23rd statutes gave the assistants power to nominate poor persons of the parishes to which they respectively belonged, to be the poor brethren and sisters and scholars.

By the 15th statute, "upon the day of the election of the warden, the master, the assistants and fellows shall go into chapel, and after service and sermon proceed to the election of a new warden; after that, the senior fellow shall read the ordinances expressing of what condition and quality the person elected ought to be; and after that, the electors shall make the election." By the 20th statute, if both the places of master and warden should be void at one time, notice was to be given by the senior fellow to the assistants to repair to the college within three days, "to join with the fellows in the election of a new master, which shall be in all points as is formerly described in the election of warden." A mandamus to admit the prosecutor to the office of warden, alleged that the assistants had always, from the foundation of the college, been accustomed as of right to vote at the election of warden. The return did not negative the usage:—Held, first, that by the 15th statute the assistants had a voice in the election of warden; and that if that statute was doubtful, the usage would so interpret it. *Reg.* v. *Dulwich College*, 17 Q. B. 600; 21 L. J., Q. B. 36; 16 Jur. 654.

Held, secondly, that although in 1626, after the foundation and endowment of the college, A. could not alter the constitution of the college, or add to the number of the corporate members, he had power to make ordinances for the government of the college, and to give the right of voting in the election of warden to the assistants who were not members of the corporation. *Ib.*

Election of President.]—The statutes of a college, directing that the president on his election should be admitted, and prescribing an oath to be taken by him, and some other ceremonies to be performed:—Held, upon evidence of a particular form of admission, besides the oath and ceremonies mentioned in the statutes having been used, and upon the ground that in such offices the admission is generally a distinct act, that the admission did not consist in taking the oath, and going through the ceremonies mentioned in the statutes, but in the observance of that particular form. The president elect did not, therefore, forfeit his office by taking the oath, and going through these ceremonies, without having previously subscribed the declaration required by the act of uniformity. *Queen's College Case*, Jac. 1.

Member of Council of Medical Education.]—By 21 & 22 Vict. c. 90, s. 4, the general council of medical education and registration is to consist of one person chosen from time to time by each of the several bodies therein named, and by the university of London:—Held, that the authority to choose such member is vested in the senate, consisting of the chancellor, vice-chancellor and fellows for the time being, and not in the whole body of the graduates of the university. *Reg.* v. *Storrar*, 2 El. & El. 133; 28 L. J., Q. B. 326; 5 Jur. (N.S.) 1304; 7 W. R. 612.

Remedies.]—Disputes as to elections in lay foundations are to be tried in the king's courts. *Marriott* v. *Gregory*, Lofft, 21.

In the case of a private eleemosynary lay foundation, if no special visitor is appointed by the founder, the right of visitation, in default of his heirs, devolves upon the king, to be exercised by the great seal; on this ground the court refused to interfere by mandamus to compel the master and fellows to declare one of the fellowships vacant, and to proceed to a new election. *Rex* v. *St. Catherine's Hall, Cambridge*, 4 Term Rep. 233; 2 R. R. 369.

The court thought that a mandamus was the proper mode of trying the validity of an election to a vacant fellowship made by the fellows of Trinity Hall, Cambridge, which was disputed by the master. *Rex* v. *Gregory*, 4 Term Rep. 244; 2 R. R. 371, n.

2. Visitation.

Appointment of Visitor.]—The appointment of a visitor may be collected from the general tenure of the statutes. *St. John's College, Cambridge* v. *Todington*, 1 Burr. 158; 1 Ld. Ken. 441.

In the case of a private eleemosynary lay foundation, if no special visitor is appointed by the founder, the right of visitation, in default of his heirs, devolves upon the king, to be exercised by the great seal. *Rex* v. *St. Catherine's Hall, Cambridge*, 4 Term Rep. 233; 2 R. R. 369.

Jurisdiction of.]—The visitors of colleges are not tied up to any particular forms, nor are they liable to prohibition for irregularity in their proceedings, or informality in their acts, but only for want of jurisdiction. *Ely (Bishop)* v. *Bentley*, 2 Bro. P. C. 220.

A visitor's power may be limited by the founder. *St. John's College, Cambridge* v. *Todington*, supra.

Visitors, though restrained to certain times, may visit whenever called in. *Ib.*

The power to interpret statutes constitutes a visitor. *Rex* v. *Ely (Bishop)*, 1 W. Bl. 85.

Visitatorial power may be delegated generally or specially. *Ib.*

It is incidental to the office of visitors to hear complaints. *Ib.*

Where a university is incorporated by charter under a visitor, all matters relating to the internal management of the domus, as to passing resolutions, holding examinations, conferring degrees, &c., are under the exclusive control of the visitor, a court of law or equity having only jurisdiction with respect to matters out of the house, as between the university and third persons. *Thomson* v. *London University*, 33 L. J., Ch. 625; 10 Jur. (N.S.) 669; 10 L. T. 403; 12 W. R. 733.

Appeal.]—If the visitor of a college in one of the universities refuses to exercise his visitatorial power by receiving and hearing an appeal, the court will grant a mandamus to compel him. *Rex.* v. *Ely (Bishop)*, 5 Term Rep. 475; 2 R. R. 644. And see *Rex* v. *Worcester (Bishop)*, 4 M. & S. 415; 16 R. R. 512.

But cannot afterwards review his decision. *Buller, Ex parte*, 1 Jur. (N.S.) 709.

And where it is doubtful who is the visitor of a college, the court will not grant a mandamus. *Rex* v. *Ely (Bishop)*, 1 Wils. 266; 1 W. Bl. 52. See also *Reg.* v. *Hertford College*, ante, col. 1063.

The visitor need not hear parol evidence on an appeal to him; it is sufficient if he receives the grounds of the appeal, and the answer to it, in writing. *Rex* v. *Ely (Bishop)*, 2 Term Rep. 475; 1 R. R. 484.

3. Conusance.

Claiming.]—Conusance must be claimed either in the first instance, or at the first day. *Rex* v. *Agar*, 5 Burr. 2820.

But need not be before appearance in the action. *Parsons* v. *Willoughby de Broke (Lord)*, 11 L. T. 628; 13 W. R. 315, 402.

How the claim of conusance by the chancellor of Oxford is made. *Kendrick* v. *Kynaston*, 1 W. Bl. 454. And see *Leasingby* v. *Smith*, 2 Wils. 406.

When Allowed.]—A claim of conusance was refused to the university of Oxford, because the party, although a member, was not resident at Oxford. *Hayes* v. *Long*, 2 Wils. 310.

But a claim of conusance was allowed in an action against a proctor, a pro-proctor, and the marshal of the university, though the affidavit of the latter, describing him as of a parish in the suburbs of Oxford, only verified that he then was and had been for the last fourteen years a common servant of the university, called marshal of the university; and that he was sued for an act done by him in discharge of his duty, and in obedience to the orders of the other two defendants, without stating that he resided within the university, or was matriculated. *Thornton* v. *Ford*, 15 East, 634; 13 R. R. 542.

Conusance of a plea of trespass sued against a resident member of the university of Cambridge, for a cause of action verified by affidavit to have arisen within the town and suburbs of Cambridge, over which the university court had jurisdiction, was allowed upon the claim of the vice-chancellor on behalf of the chancellor, masters and scholars of the university, entered on the roll in due form. *Browne* v. *Renouard*, 12 East, 12; 11 R. R. 319. And see the objections to the claim fully stated.

A claim of conusance by the vice-chancellor of the university of Oxford, in the vacancy of the office of chancellor by death, on behalf of the university, allowed. *Williams* v. *Brickenden*, 11 East, 543; 11 R. R. 264.

Where the university of Cambridge claimed conusance in the case of A., B. and C., alleged in the claim to have been summoned in an action of trespass, at the suit of D., against the form of the privilege of the university; and the affidavit stated that B. and C. were servants of the university, called proctor's men; and that the trespass was an act done by them in discharge of their duty, in obedience to the order of a pro-proctor of the university:—Held, that an affidavit might be received in answer, showing that B. and C. were constables appointed under 6 Geo. 4, c. 97; and therefore liable to be sued at common law, notwithstanding any privilege of the university. *Turner* v. *Bates*, 10 Q. B. 292.

Held, also, that the affidavit, alleging that B. and C. were constables in and for the university, appointed and acting under and by virtue of the above statute, and that the action was brought against them for and in respect of acts done by them in execution of their office, without further detail, was an answer to the claim as to B. and C. *Ib.*

In an action by an indorsee against a maker of two promissory notes, with a count for interest, he pleaded to the jurisdiction of the court, that he was a member of the university of Oxford, and resident within the suburbs of the borough and city of Oxford and university of Oxford, and a student and scholar thereof; and that the causes of action arose in respect of the promissory notes, which were made and given by him within the borough and city of Oxford, and within the university of Oxford, as securities for money lent to the defendant within the borough and university; and that the cause of action in the third count arose in respect of interest which had become due in respect of the notes:—Held, a bad plea. *Dormor* v. *Howard*, 9 Jur. 737.

4. Vice-Chancellor's Court.

Jurisdiction of.]—The chancellor's court in Oxford hath not jurisdiction of matters of freehold. *Stephens* v. *Berry*, 1 Vern. 212.

In an action for libels alleged to have been published in London, the defendant was a resident undergraduate member of Oxford University; the plaintiff resided in London and had no connection with the university. The chancellor of the university having claimed conusance of the action in his court under the Oxford charter of 14 Hen. 8, confirmed by statute 13 Eliz.:—Held, that the privilege of the charter extended to cases in which the plaintiff resided outside the limits of the city of Oxford, and therefore that the claim must be allowed. *Ginnett* v. *Whittingham*, 55 L. J., Q. B. 409; 16 Q. B. D. 761; 34 W. R. 565.

The publication of a pamphlet against the established religion in the university of Cambridge is an offence within one of the statutes of the university, and punishable by banishment by the vice-chancellor, assisted by the heads of colleges in the vice-chancellor's court. *Rex* v. *Cambridge University*, 6 Term Rep. 89.

The governing body of a university may lawfully issue a decree, that every tradesman with whom a person in statu pupillari within the university contracts a debt exceeding 5*l.* shall make the same known to the tutor of such person's college, on pain of being discommoned if he omits doing so; and, in case of disobedience, they may enforce such decree by ordering that no person in statu pupillari shall deal with the tradesman for a given period. *Heath, Ex parte*, 18 Q. B. 647; 21 L. J., Q. B. 337; 17 Jur. 112.

If the vice-chancellor, attended, on summons, by the heads of colleges, makes an order to discommon, in pursuance of such decree, this is not a judicial proceeding which the superior courts can restrain by prohibition. *Ib.*

A milliner residing in Cambridge was apprehended by the proctors while proceeding to a party given by a bachelor of arts of the university and his friends, and conveyed by them to the spinning-house, a gaol used by the university for confining women suspected of evil found within its precincts. Upon arriving at the gaol the vice-chancellor was sent for, and he heard the statements of the proctors and examined the woman, but not on oath, and finally committed her for imprisonment, but no warrant in writing was made out. An action was brought by her against the vice-chancellor:—Held, first, that as the charter, in express terms, invested the vice-chancellor with authority to punish by imprisonment or otherwise, as he should think fit, he thereby became invested with judicial authority as a judge of record, and entitled to all the protection attached by law to the judicial office. *Kemp* v. *Neville*, 10 C. B. (N.S.) 523; 31 L. J.,

C. P. 158; 7 Jur. (N.S.) 913: 4 L. T. 640; 10 W. R. 6.

Held, secondly, that as judges of a court of record have power to commit to the custody of their officer, sedente curiâ, by oral command without any warrant made at the time, and that as the vice-chancellor was a judge of a court of record, therefore a warrant was not necessary, and a committal in the exercise of this peculiar jurisdiction, where no special method was directed by the charter, although it was not shown to be made under a warrant, gave no cause of action. *Ib.*

Held, thirdly, that the hearing was legal, as there was no express provision in the charter which enabled him to administer an oath, and that it was not essential for the purpose that he should do so. *Ib.*

Held, fourthly, that the place of confinement appeared to be the accustomed place used for that purpose by the university, and therefore that the usage must be presumed to be lawful till the contrary was shown. *Ib.*

Rule nisi for a writ of habeas corpus and also for a writ of certiorari on behalf of one H., who had been arrested at Cambridge by the university constables, and charged before the vice-chancellor of the university with "walking with a member of the university." This charge was read over to her, and she pleaded "not guilty." Evidence was given as to her being seen walking with a member of the university, and also as to her being a woman of bad character. The vice-chancellor committed her for fourteen days to the spinning-house, and the warrant of commitment stated that she had been charged with, and convicted of, "walking with a member of the university." It appeared that the above was a common form adopted in the vice-chancellor's court when it was intended to charge a woman with walking with such a member "for immoral purposes," and that for a long time it had been taken to mean such a charge, and that it was intended in this case so to charge and convict the said H., and so to enter the conviction on the warrant of commitment:—Held, that the rule should be made absolute; that the proceedings in the vice-chancellor's court were irregular; that the appellant had not been charged within the words of the charter as "suspected of evil"; that she had been charged with an offence not within the jurisdiction of the vice-chancellor; that she had not been charged with any other offence, nor had the charge been altered or amended, and that consequently the conviction was bad. *Hopkins, Ex parte*, 61 L. J., Q. B. 240; 66 L. T. 53; 17 Cox, C. C. 444; 56 J. P. 262.

The Church Discipline Act does not debar a university judge from trying a resident clergyman for a breach of university law, notwithstanding such breach may also constitute an ecclesiastical offence. *Pusey* v. *Jowett*, 1 N. R. 488.

Where the chancellor's court of the university of Oxford had proceeded against a party, not a member of the university, for contumacy in suing a resident undergraduate in one of the superior courts of Westminster, and had issued a warrant to arrest him for not paying the costs of the proceedings, the court made a rule absolute for a prohibition without requiring the applicant to declare in prohibition. *Reg.* v. *Oxford University*, 1 G. & D. 537; 1 Q. B. 952; 11 L. J., Q. B. 37; 6 Jur. 319.

5. OTHER MATTERS.

Congregation—"Residents."]—By 17 & 18 Vict. c. 81, s. 16, the congregation of the university of Oxford shall be composed of the chancellor and certain other persons, and also of all residents. By s. 48 the word "residents" means and includes all members of convocation who shall have resided twenty weeks within one mile and a half of Carfax during the year that shall expire on the 1st of September next preceding the making of the register. A fellow of a college held a living which was distant nine miles from Oxford, and he resided at the vicarage house; but he rented a set of rooms within St. John's College (of which he was a resident), which he had furnished, and for which he paid rent, and which were not occupied by any one else. When he visited Oxford, he sometimes slept there, but he generally returned to the vicarage the same day:—Held, that there must be an actual as distinguished from a constructive residence, and that he was not a resident. *Reg.* v. *Oxford (Vice-Chancellor)*, L. R. 7 Q. B. 471; 26 L. T. 506.

Erection of New College Buildings—Application of Purchase Money of Land paid into Court.]—The effect of ss. 2 and 4 of the Universities and Colleges Estates (Amendment) Act, 1880, in conjunction with ss. 27 and 28 of the Universities and Colleges Estates Act, 1858, is that the purchase money of land, belonging to a college, which has been compulsorily taken under the provisions of the Lands Clauses Consolidation Act, 1845, may be applied, with the consent of the board of agriculture, in the erection of new buildings upon land belonging to such college and repaid into court by thirty equal annual instalments. *King's College, Cambridge, Ex parte*, 60 L. J., Ch. 508; [1891] 1 Ch. 333, 677; 64 L. T. 623; 39 W. R. 331.

College Bursar—Office of Profit—Official not Member of Corporation.]—The statutes of St. John's College, Oxford, provide for the office of bursar, the remuneration to be such as the president and fellows shall decide. The respondent, who was not on the foundation of the college, was appointed bursar at a fixed salary:—Held, that the respondent was an officer of the college at a salary, and that such salary was therefore assessable to income tax under section 146, schedule E, rule 3, of the Income Tax Act, 1842. *Langston* v. *Glasson*, 60 L. J., Q. B. 356; [1891] 1 Q. B. 567; 65 L. T. 159; 39 W. R. 476; 55 J. P. 567.

Benefaction—Founder's Design—Condition of Eligibility—"Designed for Holy Orders"—Alteration of Conditions of Eligibility.]—Edward Pauncefort, who died in 1726, by will made in 1723 gave property to a corporation upon trust to divide the income thereof equally between ten of the servitors of Christ Church College, Oxford, such as certain members of the college should recommend "for their sobriety, diligence at their studies, and of parts fit for a minister of the gospel and designed for holy orders." By the Universities of Oxford and Cambridge Act, 1877, commissioners were empowered to make statutes for any college altering the conditions of eligibility for any emolument or office connected with the college, but in so doing they were to have regard to the

main design of the founder, except where the conditions had been altered in substance under any other act; by the same act, a mode of and time for appeal against such statutes before approval by order in council was provided, and it was enacted that after such approval such statutes should be binding on every college, and should be effectual notwithstanding any instrument of foundation. By statutes made for Christ Church under this act, and duly approved, the commissioners in effect provided that the exhibition of the foundation of Mr. Pauncefort should be applied to the support of certain college exhibitioners without the attachment of any condition as to such exhibitioners being designed for holy orders. Upon a summons taken out by the corporation under Ord. LV. r. 3:—Held, that the statutes having been duly approved were binding upon the corporation notwithstanding the instrument of foundation, and that the condition that the recipients of the benefaction should be designed for holy orders could no longer be enforced. *Pauncefort, In re, Sons of the Clergy Corporation v. Christ Church, Oxford*, 58 L. J., Ch. 578; 42 Ch. D. 624; 61 L. T. 109; 38 W. R. 172.

Right of Undergraduates to Vote.]—The undergraduates of Oxford and Cambridge are not permitted to reside in their rooms during the vacations, which comprise nearly six months of the year, without special leave from the college authorities, who are accustomed to let and otherwise make use of their rooms during their absence:—Held, that such compulsory absence amounted to a break of residence disqualifying them for the exercise of the franchise. *Tanner* v. *Carter*, 55 L. J., Q. B. 27; 16 Q. B. D. 231; 53 L. T. 663; 34 W. R. 41; 1 Colt. 435.

Privileges.]—Statutes conferring privileges on the members of the universities, mean only the members of the universities of Oxford and Cambridge, unless otherwise expressed. *Jones* v. *Smart*, 1 Term Rep. 49.

A college barber at Oxford, though he resides in the city out of college, is entitled to the privileges of the university. *Rex* v. *Routledge*, 2 Dougl. 531.

Independent members of a college are mere boarders, and have no corporate rights; nor can they appeal to the visitor. *Rex* v. *Grundon*, Cowp. 319.

If a college does not exceed its jurisdiction, the king's courts have no cognizance; and expulsion of a member is a matter entirely within its jurisdiction. *Ib.*

The head of a college has the whole seisin in his office. *Phillips* v. *Bury*, 2 Term Rep. 355.

Person having privilege of Oxford loses it when joined defendant with another. *White* v. *Lowgher*, Cary, 55.

Heretical Teaching.]—The provisions in the statutes of the university of Oxford prohibiting a professor from directly or indirectly teaching, or dogmatically asserting, anything repugnant to the Catholic faith, are to be read by the context, and do not extend to any book published by such professor in his private capacity, and not used by him in his official teaching. *Pusey* v. *Jowett*, 1 N. R. 488.

A power conferred by an university statute, of banishing heretics in general, is not to be abridged by the institution, in a later part of the same statute, of a test for heresy—that test being applicable only to a particular class of persons. *Ib.*

University Degrees.]—A member of a corporation cannot institute a suit against the governing body of the corporation, unless there is also an infringement of a personal or a proprietary right, or an injury to him as an individual. It must be by the corporation itself, or by information by the attorney-general, if it is for an injury to the public. The loss of a monopoly of university degrees is not a personal injury. *McCormac* v. *Queen's University*, 15 W. R. 733. And see *Prestney* v. *Colchester Corporation*, 51 L. J., Ch. 805; 21 Ch. D. 111.

Seal.]—A mandamus lies to compel the warden of a college to affix the common seal of the college to an answer of the fellows, in chancery, contrary to his own separate answer put in. *Rex* v. *Windham*, Cowp. 377.

Also to the keeper of the common seal of the university of Cambridge, commanding him to put it to the instrument of appointment of their high steward, pursuant to a grace passing in senate. *Rex* v. *Cambridge University*, 3 Burr. 1647; 1 W. Bl. 547.

Affiliation.]—The Universities (Scotland) Act, 1889, appointed a temporary commission charged with the duty of making provision for improving the administration of the Scottish universities and extending their usefulness. By s. 15 the commissioners might, if they thought fit, make ordinances to extend any of the universities by affiliating new colleges to them subject to certain prescribed conditions. By s. 16, "without prejudice to any of the powers hereinbefore conferred, the commissioners shall with respect to the university of St. Andrews and the university college of Dundee have power (1) to affiliate the said university college to, and make it form part of, the said university with the consent of the university court of St. Andrews and also of the said college with the object, inter alia, of establishing a fully equipped conjoint university school of medicine. . . . ." Section 19 contained provisions as to the preparation and publication by the commissioners of ordinances relating to any university. By s. 20, all ordinances made by the commissioners are to be published in the "Edinburgh Gazette," laid before parliament, and submitted to the queen in council for approval, and "no such ordinance shall be effectual until it shall have been so published, laid before parliament, and approved by her majesty in council." The commissioners, assuming to act under the powers of s. 16, executed an instrument in writing by which they declared that they had affiliated and did thereby affiliate the university college of Dundee to, and make it form part of, the university of St. Andrews. This instrument was not published or laid before parliament or submitted to her majesty for approval, as required by s. 20 in the case of all ordinances made by the commissioners:—Held, that the order of the commissioners contained all the elements of an "ordinance" properly so termed, and that although s. 16 gave the power of affiliation to the commissioners in direct terms without requiring them to make an ordinance for that purpose, yet, having regard to the language of ss. 19 and 20, taken in connection

with other clauses, it appeared to be the general policy of the legislature that all acts of the commissioners altering the constitution of a university, and necessarily affecting interests public or private or both, should be attended with the precautions and safeguards provided by the statute; that the instrument executed by the commissioners must, therefore, be taken to be an "ordinance," subject to the procedure enacted by s. 20 with regard to "ordinances," and that for want of due compliance with this procedure it was invalid. *Metcalfe* v. *Cox*, 64 L. J., P. C. 148; [1895] A. C. 328; 72 L. T. 511—H. L. (Sc.)

The Universities (Scotland) Act, 1889, s. 16, provides: "Without prejudice to any of the powers hereinbefore conferred, the commissioners" charged with the administration of the Scottish universities "shall with respect to the university of St. Andrews and the university college of Dundee have power to affiliate the said university college to, and make it form part of, the said university with the consent of the university court of St. Andrews, and also of the said college, with the object, inter alia, of establishing a fully equipped conjoint university school of medicine. . . . ." By s. 15, sub-s. 3, "The university court, or any college which under this act shall have been affiliated to the university, may respectively at any time thereafter resolve that such college shall cease to be affiliated to such university. . . . ." By s. 21, "After the expiration of the powers of the commissioners, the university court of each university shall have power to make such ordinances as they think fit with the approval of Her Majesty in council . . . ." (2) with respect to "altering or revoking any of the ordinances affecting such university which have been or may be framed and passed under the Universities (Scotland) Act, 1858, or this Act, and making new ordinances." An agreement purporting to be the consent under s. 16 of the Act of 1889 contained, inter alia, a stipulation that the said union shall as regards duration be dissoluble only by act of parliament:—Held, that the stipulation was not ultra vires, for ss. 15 and 16 did not apply to an affiliation of the nature of an incorporation which had the effect of merging the college into the university with a joint object:—Held, also, that the court had jurisdiction to decide the legal question notwithstanding the fact that the consent sought to be set aside was before the privy council in respect to a pending ordinance. *Metcalfe* v. *Cox*, [1896] A. C. 647—H. L. (Sc.)

Educational Charities.]—*See* CHARITY.

Rating.]—*See* RATES.

J. M.

UNLAWFUL ASSEMBLY.

See CRIMINAL LAW.

UNSOUND MEAT.

See LOCAL GOVERNMENT—METROPOLIS.

USAGE.

See CUSTOM—EVIDENCE.

USE AND OCCUPATION.

See LANDLORD AND TENANT.

USES AND TRUSTS.

Executory Uses and Interests.] — *See* POWERS—VESTED, CONTINGENT AND FUTURE INTERESTS—WILL.

See also TRUST.

USURY.

1. *Generally*, 1074.
2. *Usurious Transactions*, 1076.

1. GENERALLY.

Effect of Repeal of Usury Laws.]—The repeal of the usury laws does not affect the power of a court of equity to review and set aside usurious transactions where they are founded on fraud. *Howley* v. *Cook*, Ir. R. 8 Eq. 571.

Accordingly, a series of deeds, charging sums advanced by a money-lender with exorbitant interest, on the borrower's estates, which were ample security, was set aside, save to the extent of securing the actual advances, with moderate interest; the deeds containing unprecedented clauses, such as authorising a sale without notice, and empowering the lender to pay off existing charges (which bore interest at 6*l.* per cent. only), and to charge 20*l.* per cent. thereon, and other clauses of a similar character; the court being of opinion that the clauses were introduced by the fraud and device of the money-lender without the knowledge of the borrower, who was unprotected by proper professional advice. *Ib.*

The repeal of the usury laws, and the alteration of the law as to reversionary interests (effected by 31 Vict. c. 4), have not affected the jurisdiction of equity to relieve expectant heirs from unconscionable bargains. *Aylesford (Earl)* v. *Morris*, 42 L. J., Ch. 546; L. R. 8 Ch. 484; 28 L. T. 541; 21 W. R. 424. S. P., *O'Rorke* v. *Bolingbroke*, 2 App. Cas. 814; 26 W. R. 239. *Tyler* v. *Yates*, 40 L. J., Ch. 768; L. R. 6 Ch. 665; 25 L. T. 284; 19 W. R. 909. *Miller* v. *Cook*, 40 L. J., Ch. 11; L. R. 10 Eq. 641; 22 L. T. 740; 18 W. R. 1061.

Deduction from Legatee's Share.]—A testator directed that one of his residuary legatees should be answerable for all debts due to him from the father of the legatee. A debt, though usurious, must be deducted from the legatee's share. *Stanton* v. *Knight*, 1 Sim. 482.

What is.]—Usury is taking more than the law allows upon a loan or for forbearance of a debt. *Spurrier* v. *Mayoss*, 1 Ves. J. 527; 4 Bro. C. C. 28.

To make a contract usurious, intention of forbearance for exorbitant interest must appear. *Ib.*

Usury is a conclusion of law, resulting from the facts and circumstances attending each transaction. There must be forbearance. Usury is taking more than the law allows upon a loan, or for forbearance of a debt. To make a contract usurious, it must be apparent upon the face of it, or by evidence, that the intent of the parties in the creation of it was, by means of shift or device, to take more than legal interest for the loan or forbearance of money. Where there was no obligation to pay money advanced, there could be no forbearance; consequently the profit derived from the use of the money was not usurious. *Moore* v. *M'Kay*, Beat. 287; 2 Moll. 137.

There is no usury where there is a risk. *Wilson, Ex parte, Bates, In re*, 2 Jur. 98.

An agreement may be perfectly equitable, although it is usurious, but if it is usurious, the law determines it, and its bona fides cannot avail it. *Brophy* v. *Holmes*, 2 Moll. 1.

If usurious interest is not contracted for, the security is not invalidated by subsequently taking usurious interest. *Jennings, Ex parte*, 1 Madd. 331.

If a bargain was really for an annuity, though bought at ever so low a price, it is no usury; if on the foot of borrowing and lending money, otherwise. *Chesterfield (Earl)* v. *Janssen*, 1 Atk. 340.

Where there is a borrowing of money, a device to have more than the legal rate of interest is within the Statutes of Usury. *Ib.*

If there be a loan of money with more than legal interest, and a casualty goes to the interest only, it is usury; secus, if it goes to the principal and interest. *Ib.*

The receipt of interest at a rate of more than 5 per cent. under a bargain, which, in substance, though not in form is corrupt, is usury within 12 Anne, stat. 2, c. 16. But the question whether such bargain and the mode of receipt was colourable only and contrived for the purpose of evading the statute is a question for the jury. *Solarte* v. *Melville*, 7 B. & C. 430; 1 M. & Ry. 19; 6 L. J., K. B. (o.s.) 68.

The use of the word "interest" in an instrument will not of itself make a transaction usurious with reference to the rate of percentage: the court will look to the substance of the dealing. *Beete* v. *Bidgood*, 7 B. & C. 453; 1 M. & Ry. 143; 6 L. J., K. B. (o.s.) 35.

A fair and bonâ fide sale is not usurious, though the principal money should carry a rate of interest exceeding 5 per cent., if the principal sum and the rate and mode of payment formed part of the contract of sale. *Ib.*

Loan of 200*l.*; 300*l.* to be repaid by three instalments extending over eighteen months, if both parties should be living as the instalments fell due:—Held, valid, there being no proof that the transaction was a mere contrivance to cover usury. *Flight* v. *Chaplin*, 2 B. & Ad. 114; 9 L. J., K. B. (o.s.) 137.

Usurious Bargains — Setting aside.] — *See* FRAUD.

Who entitled to take Advantage of.]—Usury could be set up as the foundation of a jus tertii, where the third person had settled with the plaintiff, and abandoned all further claim. *Betteley* v. *Reed*, 4 Q. B. 511; 3 G. & D. 561; 12 L. J., Q. B. 172.

If A. mortgage stock to B. by a conveyance, which is apparently absolute, and B. assigns it to C. as a security for an usurious loan, A.'s right of redemption is not affected by the transaction between B. and C., but is as extensive against C. as against B. *Johnson* v. *Williamshurst*, 1 L. J., Ch. (o.s.) 112.

Payment not in this Country.]—A revolted colony of Spain, not recognised as an independent state of Great Britain, executed bonds, at six per cent. interest, as security for a loan:—Held, that the bonds were not usurious, as it did not appear that the contract for the loan was made, or the amount of it to be paid, in this country. *Thompson* v. *Powles*, 2 Sim. 194. See *Harrey* v. *Archbold*, 3 B. & C. 626; 5 D. & R. 500; 1 R. & M. 184.

Relief against.]—The court does not relieve against an usurious contract, so as to make the principal lost, as well as interest. *Pitt* v. *Cholmondeley*, 2 Ves. 567.

Demurrer to a cross bill to have an usurious security delivered up, not offering to pay the sum really due, allowed. *Mason* v. *Gardiner*, 4 Bro. C. C. 436.

If it be necessary to have the assistance of a court of equity to set aside an usurious contract, it must be on the terms of paying what is fairly due, with legal interest. *Scott* v. *Nesbitt*, 2 Cox, 183; 2 Bro. C. C. 641.

Bill to stay proceedings at law and discover usury, charging an agreement to take, but not the taking, usurious interest, and not offering to pay the amount, which the plaintiff by bill admitted legally due, is demurrable. *Whitmore* v. *Francis*, 8 Price, 616.

2. Usurious Transactions.

Annuities.]—2,000*l.* lent on condition to pay in a year 200*l.* and the principal, or 250*l.* per annum during borrower's life, not an usurious contract. *Wortley* v. *Pitt*, 1 Ves. 164.

The owner of a leasehold for fifty years unexpired, in consideration of 300*l.*, granted an annuity of 45*l.* charged on the leasehold, and assigned the latter to secure the annuity, and the annuitant covenanted at any time, on payment of 300*l.*, and on getting six months' notice, to re-convey:—Held, on a re-hearing, that this was an usurious transaction. *Kenny* v. *Lynch*, 9 Ir. Eq. R. 530; 2 Jo. & Lat. 319; 8 Ir. Eq. R. 207.

If A., his necessities requiring an advance of 1,000*l.*, obtain it from B., upon a bargain that, in consideration of it, A., his executors and administrators, shall pay B., &c., an annuity of 80*l.* per annum for a term of seventy years, commencing immediately, the annuity to be secured by the covenant of A., binding himself personally, and after his death his assets generally, the transaction is usurious, and bad on that ground, unless upheld by those provisions of the legislature which have recently, as to certain cases, repealed or relaxed the usury laws. *Belcher* v. *Vardon*, 2 Coll. 162; 14 L. J., Ch. 427; 9 Jur. 546.

Where an annuity is granted for a term of years to be paid half-yearly, and at the same time promissory notes are given by the grantee for the payment of each half-year's annuity when it becomes due, and it appears that the several half-yearly payments will repay the purchase-money with interest exceeding the rate of 5 per cent., the transaction is usurious. *Fereday* v. *Wightwick*, 1 Russ. & M. 45; Taml. 250; 31 R. R. 93.

A. applied to B. to lend him 400*l.* on mortgage of certain leasehold houses, but B. refused. It was then agreed that A., in consideration of the 400*l.*, should grant to B. two annuities of 21*l.* each for forty years, to be issuing out of the houses:—Held, that the transaction was usurious. *Chillingworth* v. *Chillingworth*, 8 Sim. 404; 6 L. J., Ch. 223; 1 Jur. 304.

Annuities with Insurance.]—The circumstances of the re-payment of the purchase money of an annuity being secured by an insurance on the life of the grantor, and the grantor having covenanted to pay the premiums, does not bring the case within the statute of usury. *Manly* v. *Hawkins*, 1 Dr. & Wal. 363.

The payment of annual sums, exceeding 5*l.* per cent. per annum on the sum advanced, was secured, by an annuity deed, upon land, and the principal by a policy on the life of one of the grantors, with a covenant for payment of the premium:—Held, that as the principal was in some risk, the transaction was not void on the ground of usury. *Hawkins* v. *Bennett*, 7 C. B. (N.S.) 507; 30 L. J., C. P. 193; 1 L. T. 297; 8 W. R. 237.

Covenant from the grantor in an annuity deed that, at his own expense, he would effect an insurance upon the lives for which the annuity was granted, to the amount of the purchase money, for the grantee's benefit, is not usurious nor a shift to avoid the statute. *French* v. *Morgan*, 2 Moll. 493.

The grant of an annuity for the grantor's life is not void, though it appears that, by the agreement between the parties, a portion of the annuity was to be employed in maintaining an insurance for the grantor's life. Semble. *Byrne* v. *Kennefeck*, 1 Hog. 184.

Bills—Collateral Security.]—A loan on bills of three months, on which more than 5 per cent. interest is allowed, is not taken out of 3 & 4 Will. 4, c. 98, s. 7, by taking collateral security. *Knight, Ex parte, Pownall, In re*, 2 Mont. & Ayr. 568; 1 Deac. 459; 5 L. J., Bk. 20.

Where two bills of exchange, upon which, were it not for the provisions of the 3 & 4 Will. 4, c. 98, s. 7, an usurious interest was taken, had become due, and the holder declared, that unless a security was handed to him, he would sue the acceptor upon the bills, whereupon a deposit of an annuity deed, issuing out of lands, was made by the acceptor:—Held, that such deposit was not invalid on the ground of usury. *Bell* v. *Coleman*, 9 Jur. 974.

Held, also, that this transaction having taken place prior to the passing of the 2 & 3 Vict. c. 37, it could not be affected by the provisions of that statute. *Ib.*

Where the bankrupt had borrowed 1,600*l.* upon a bill for three months, renewable, at his option, for three other months, till the expiration of eighteen months, the original proposal having been for a loan for that time, and the bankrupt agreed verbally to pay interest at the rate of 10½ per cent. per annum upon each of such bills:—Held, upon proof tendered on one of such bills, that it was a transaction protected by 3 & 4 Will. 4, c. 98, s. 7. *Terrewest, Ex parte, Poynter, In re*, Mont. & C. 351; 4 Deac. 144; 9 L. J., Ch. 6; 3 Jur. 994.

Advances made upon promissory notes not having more than twelve months to run, although further secured upon leaseholds by a contemporaneous agreement:—Held, to be within the protection of the 2 & 3 Vict. c. 27, s. 1. *Warrington, Ex parte*, 3 De G. M. & G. 159; 22 L. J., Bk. 33; 17 Jur. 430; 1 W. R. 261. S. P., *Thomas* v. *Cooper*. 2 Eq. R. 1185; 18 Jur. 688; 2 W. R. 619.

Held, also, that even if this were not so, such of the promissory notes as had not more than three months to run were within the 3 & 4 Will. 4, c. 98, which does not mention land, and that this enactment was not repealed or affected by the 2 & 3 Vict. c. 27. *Ib.*

In 1853 money was borrowed at usurious interest, and secured by a bill of exchange at six months, and by a judgment entered up and registered. The bill was continually renewed till 1856, when the lender filed a bill against the subsequent assignee of leaseholds belonging to the borrower, claiming a judgment lien on the leaseholds:—Held, that the judgment was void as against the land under the 2 & 3 Vict. c. 37, but is not void in toto. *Bond* v. *Bell*, 4 Drew. 157; 27 L. J., Ch. 233; 3 Jur. (N.S.) 1290; 6 W. R. 163.

The 2 & 3 Vict. c. 37, before its repeal, did not, in cases of loans on security of lands, merely invalidate the security on lands, and leave the contract valid, but it left in such cases the statute of Anne untouched, and consequently, the contract being invalid, not only were the securities on land avoided, but also any personal securities, whether bonds or bills of exchange, were likewise avoided. *Langton* v. *Haynes*, 1 H. & N. 366; 25 L. J., Ex. 319. S. P., *Hodgkinson* v. *Wyatt*, 4 Q. B. 749; 13 L. J., Q. B. 54. *Fussell* v. *Daniel*, 10 Ex. 581; 24 L. J., Ex. 130. Overruling *Warrington, Ex parte, Leake, In re*, 3 De G. M. & G. 159; 1 Kay, 231; 22 L. J., Bk. 33; 17 Jur. 430; 1 W. R. 261.

Where money was advanced at usurious interest on the security of bills of exchange, having only three months to run, such advance was protected, and the bills themselves were valid under 3 & 4 Will. 4, c. 98, s. 7, and though a warrant of attorney to confess judgment might be taken at the same moment on which judgment was the next day entered up and registered, so as to become a charge on the lands of the debtor, the transaction was not thereby rendered invalid under the proviso of s. 1 of the 2 & 3 Vict. c. 37. *Lane* v. *Harlock*, 5 H. L. Cas. 580; 25 L. J., Ch. 253; 2 Jur. (N.S.) 289; 4 W. R. 408.

The 2 & 3 Vict. c. 37, did not repeal 3 & 4 Will. 4, c. 98, s. 7. *Ib.* See *Boyle* v. *Bull*, 3 C. L. R. 1054.

A mortgage on land, or other charge given as a collateral security for the payment of a bill or a note bonâ fide discounted, was valid, independently of the statutes relaxing the operation of the usury laws. *Doe* d. *Haughton* v. *King*, 11 M. & W. 333; 12 L. J., Ex. 320; 7 Jur. 517. S. P., *Downes* v. *Garbutt*, 2 D. & L. 944; 12 L. J., Q. B. 269.

—— **Renewed Securities.**]—Bills of exchange

given after the repeal of the usury laws, in renewal of bills given while those laws were in force, to secure payment of money lent with usurious interest, are valid, the receipt of the money being a sufficient consideration to support a new promise to pay it. *Flight* v. *Reed*, 1 H. & C. 703 ; 32 L. J., Ex. 265 ; 9 Jur. (N.S.) 1016 ; 8 L. T. 638 ; 12 W. R. 53.

—— **Discounting.**]—Where on the discount of a bill, part of the amount was given in cash and the remainder in goods, legal interest being charged for the money and an advanced price being charged for the goods for the time the bill had to run, which was the charge usually made in the trade for an extension of credit :—Held, not usurious. *Evans* v. *Whyle*, 5 Bing. 485 ; 3 M. & P. 130 ; 7 L. J., C. P. (o.s.) 205.

Bonds.]—Where an action was brought on bonds, and a cognovit was given in the action, and judgment entered up for the principal and interest then due :—Held, that it was not competent to the representatives of the obligor, at the distance of ten years afterwards, in a suit for the administration of the obligor's assets, to question the validity of the bonds on the ground of usury. *Berrington* v. *Evans*, Younge, 276.

A revolted colony of Spain, not recognised as an independent state by Great Britain, executed bonds at 6 per cent. interest as securities for a loan. P., acting in collusion with B., a holder of the bonds in England, by falsely representing that he had purchased some of them, induced the plaintiff to become a purchaser :—Held, on demurrer, that the bonds were not usurious, as it did not appear by the bill that the contract for the loan was made, or the amount of it to be paid, in this country ; that P. and B. would have been answerable to the plaintiff for losses sustained upon his purchase, but that, as the original contract was made with a government not acknowledged by Great Britain, the court could not relieve him. *Thompson* v. *Powles*, 2 Sim. 195.

Bottomry not within the statute of usury, because a real risk is run. *Chesterfield (Earl)* v. *Janssen*, 2 Ves. 143. And see this case more generally as to usury, 1 Atk. 350.

Bottomry bonds may be so constructed as to be an evasion of the statute against usury, as well as any other contract. *Id.* 341.

Bonds given for instalments made up of principal and interest, being the consideration of a purchase or assignment of real and personal estate, though they necessarily carry interest, are not usurious. *Tarleton* v. *Backhouse*, G. Coop. 231.

On a loan, upon a security of an equitable deposit and bond, which appeared on the face of it to be usurious, an action was brought, and the plaintiff failed at law, but having filed his bill alleging that the bond had been erroneously prepared, the court, being satisfied of the error, decreed the bond to be rectified, and an account of which was due. *Hodgkinson* v. *Wyatt*, 9 Beav. 566. And see *S. C.*, at law, 4 Q. B. 749 ; 13 L. J., Q. B. 54.

Commission of Agents.]—Charge by bill broker in the country of ½ per cent. commission in respect of bill payable in London not usurious. *Henson, Ex parte*, 1 Madd. 114.

A bill broker, in order to get a bill discounted at 4 per cent., takes upon himself the responsibility of indorser, and charges his principal 5 per cent. discount, which is the lowest sum at which he could have done the business, except for his indorsement : — Held, that although he also charged ½ per cent. for his trouble, &c., it was not usury, and that he was entitled to do so for his del credere commission. *Goss. Ex parte, Wessen, In re*, 2 Deac. & C. 240 ; 2 L. J., Bk. 96.

A reasonable commission beyond legal interest for extra incidental charges, as upon agency in the remittance of bills, not usurious. *Baynes* v. *Fry*, 15 Ves. 120.

The charge of 10 per cent. for commission besides the legal interest, on a loan of money, is not usurious, if it is referable to trouble and expense bonâ fide incurred by the lender ; although he may not be a banker or a person engaged in trade, or although the money lent is his own, and not that of other persons. *Gwyn, Ex parte*, 2 Deac. & C. 12 : 1 L. J., Bk. 73.

A covenant in a mortgage of property in the West Indies on the part of the mortgagor, to consign the produce of the estate of the mortgagee to be sold on commission for the mortgagor ; and to take all such plantation stores as may be wanted for the use of the estate from the mortgagee, is not usurious. A mortgagee is entitled to the benefit of such a covenant, and to charge a commission on the sale of the produce consigned to him. On the assignment by a mortgagee, the cost of supplies and contingencies furnished to the plantation previously to the assignment, but paid for subsequently by the assignee, may be added to the mortgage debt and charged against the estate. *Sayers* v. *Whitfield*, 1 Knapp, 133.

A. & Co. were general merchants, bankers, and commission agents at Montreal, and their course of trade consisted principally in procuring and advancing to colonial dealers supplies of goods, cash, and negotiable securities, as required, from time to time, by their customers, to support them in their dealings, returns being made by them, after some interval of time, at their convenience, in the freight of produce, and in the payment of cash and negotiable securities. In the accounts they kept with C. and D. there was kept a column on both sides for interest from the time the payment was made or due ; and, at the periodical close of the account, A. & Co. made a charge for their commission, calculated upon the balance due, and afterwards upon the cash advances :—Held, that it did not appear from the accounts that the charge for commission was a cloak for usury, but was to be treated as a bonâ fide compensation for the labour and inconvenience in conducting such business. *Pollok* v. *Bradbury*, 8 Moore, P. C. 227.

Mortgages — Interest.] — Mortgagor gives second mortgage for what is due for the principal and interest on the first mortgage, and also for interest upon interest due on the first mortgage ; quære, if second mortgage void as founded on usury. *Sackett* v. *Bassett*, 4 Madd. 58.

Where the interest due upon a mortgage had become in arrear, and in the mortgagee's account of arrears rests were made from time to time, on which interest was calculated, and ultimately a general account of all arrears calculated on the footing of those rests was signed by the mortgagor, and confirmed by a deed executed by

him three years afterwards, for securing repayment of the balance to the mortgagee:—Held, that the transactions were not usurious, and that the mortgagee was liable for the balance. *Blackburn* v. *Warwick*, 2 Y. & Coll. 92; 6 L. J., Ex. Eq. 17.

An agreement made upon the occasion of the intended transfer of a mortgage, that the interest of the mortgage money at 5 per cent. (to be reduced to 4 per cent. if paid within a limited time) should run from the date of the proposed transfer, being the date of the deed of transfer, although, owing to the mortgagor being then unprepared to procure the execution of that deed, the mortgage money which was then ready to be advanced, was not actually advanced until a subsequent time:—Held, not to be usurious, less than 5 per cent. having in fact been taken, the transaction being bonâ fide, and there having been no absolute reservation of more than 5 per cent., but only a reservation from the burthen of which the mortgagor might at his option have discharged himself. *Long* v. *Storie*, 9 Hare, 542; 21 L. J., Ch. 521; 16 Jur. 340.

S. mortgaged certain hereditaments to N. for 7,500*l.*, and his equity of redemption to C. for 5,000*l.* L. afterwards agreed to take a transfer of both mortgages, and to advance a sum of 12,500*l.* for that purpose, at an interest at 5 per cent., reducible on prompt payment to 4 per cent. The transfer of the first mortgage not being ready to be executed, through the default of S., at the time appointed, L. advanced the 5,000*l.* at once, and took a transfer of the second mortgage; and at the same time S. signed a memorandum, acknowledging that the remainder of the money was ready (which was the case), and agreeing that interest on the first mortgage, when transferred to L., should run as from the date of that agreement, and that the deed of transfer of the first mortgage should bear date on that day. The deed of transfer of the first mortgage was not in fact executed, nor the 7,500*l.* paid over to N., until nearly six weeks afterwards:—Held, that the transaction was nevertheless good under the 12 Anne, c. 16. *Ib.*

Semble, a transaction not void in the first instance, and from which the borrower has the power to free himself by the payment of the principal and legal interest within a limited time, is not afterwards to be avoided because the borrower cannot, after the limited period, free himself without paying more than 5 per cent. *Ib.*

Covenant, before the Usury Act, reducing the rate of interest, to pay 6 per cent. is not prejudiced by the act, but interest turned into principal by the course of the court, was directed to carry interest at 5 per cent. only from the passing of the act. Interest, by course of court, discretionary. *Astley* v. *Powis*, 1 Ves. 483.

If a mortgage be drawn for 5 per cent. and the mortgagee takes 6, it would be void on the word "take" in the 12 Anne, stat. 2, c. 16, s. 1. *Adlington* v. *Cann*, 3 Atk. 154.

A customer applied to his banker to lend him 4,000*l.* at 5 per cent., which the bankers agreed to do. He then asked the bankers what balance he was expected to keep with them; they answered that he must not keep less than 1,000*l.*, upon which the customer said, "Very well, they might leave it to him." The customer paid into and drew out from the banking-house in one year various sums amounting to 108,000*l.*:—Held, that under these circumstances, the loan was not usurious. *Geddes, Ex parte, Holthouse, In re*, 3 Deac. & C. 638; 1 Mont. & Ayr. 385.

Agreement by A. to purchase houses from B. for 431*l.* 10*s.*; possession to be given, and 200*l.* paid immediately, the rest with interest at Michaelmas; but if not then paid, A. to pay, in lieu of interest upon the same, a clear rent of 42*l.* per annum, out of which was to be deducted interest for the 200*l.* paid, not usurious. *Spurrier* v. *Mayoss*, 1 Ves. J. 527; 4 Bro. C. C. 28.

Where the title deeds were originally deposited to secure an advance of money at usurious interest, but without any written memorandum, and afterwards a further advance was made upon the promissory note of the depositor, also at usurious interest, and it was subsequently agreed by parol that a mortgage should be executed of the premises comprised in the deeds for both debts, with interest at 5*l.* per cent. per annum:—Held, upon motion ex parte (the defendant not appearing), to take pro confesso a bill praying for a foreclosure or sale of the premises comprised in the deeds, that though the original deposit was void under the usury statutes, and the deeds had thenceforth remained in the possession of the plaintiff, yet the subsequent parol agreement constituted a valid equitable mortgage by deposit to secure both debts, just as if the deeds had been returned to the defendant, and re-delivered by him to the plaintiff upon the occasion of such agreement being entered into. *James* v. *Rice*, 5 De G. M. & G. 461; 23 L. J., Ch. 819; 2 Eq. R. 746; 18 Jur. 818; 2 W. R. 542.

—— **Redemption.**]—W. lends to B. 200*l.* on the bond of B. and W., bearing interest at 5 per cent., and at the same time purchases from B. the rent-charges for lives of 50*l.* per annum for 300*l.* with a covenant that B. should be at liberty to re-purchase the rent-charge on giving three months' notice, and paying 350*l.* and all arrears of interest; W. and B. execute their joint and several bonds to W. in the penal sum of 700*l.* conditional for the payment of 350*l.* and for the regular payment of the rent-charge:—Held, to be a security for the loan of 200*l.* and 300*l.*, on the ground that W. was at all events secured by a bond for 700*l.*; but neither the right of re-purchase, nor the additional sum of 50*l.* to be paid thereupon, would have been sufficient to turn the transaction into a loan. *Verner* v. *Winstanley*, 2 Sch. & Lef. 393.

Bill praying re-assignment of lease, and stating a clause in assignment of power of redemption on paying a sum larger than the legal interest, added to original sum given, and in default thereof a foreclosure, is not demurrable on the ground of usury. *Metcalf* v. *Brown*, 5 Price, 560.

A., a pawnbroker, sold to B. his trade and business, and stock in trade, and all profits, benefits, advantages, and emoluments resulting therefrom, for 600*l.*, which sum was allowed to remain in the purchaser's hands, and for which he was to pay A. 30*l.* a year, as secured by deed. By a lease of the premises on which the business was carried on, bearing even date with the deed securing the payment of 30*l.* a year, the rent reserved on the premises was 120*l.* B. became bankrupt; and when A. sought to put his debt on the file, the premises were sworn not to have been worth more than 60*l.* It was:—Held, that

the additional 60*l*., unaccounted for, did not necessarily make the original transaction between the parties usurious, so as to prevent A. from filing his proof against B.'s estate, but that the 60*l*. a-year above the rent might well be put down to the account of certain "facilities" afforded by A. to B., and which were in the nature of "goodwill," although "goodwill" was not expressed in terms to have been sold. *Lynn, Ex parte, Tovey, In re*, 5 Jur. 1089.

In such a case as that above stated, there is not any usury, unless the assignee can show that a greater part of the 150*l*. a year than 30*l*. is for the interest of the 600*l*. left in the purchaser's hands; and it lies with the assignee to show this, and not with the creditor seeking to put his debt on the file. But see *Campbell, Ex parte, Bromer, In re* (2 Rose, 51). *Ib.*

In a foreclosure suit the master was to state incumbrances and their priorities. A claim was carried in in respect of an usurious bargain which he disallowed altogether. The claimant excepted, and the other incumbrancers, who were co-defendants, then contended that the transaction was void ab initio, though no objection to the security was taken upon the pleadings. The court allowed the amount actually advanced by the claimant with interest as a debt, and would not permit the other incumbrancers as co-defendants to contest the validity of his security. *Mansfield (Earl)* v. *Ogle*, 24 L. J. Ch. 450; 1 Jur. (N.S.) 415; 3 W. R. 299. But on appeal:—Held, that the master was right in disallowing the claim, although no objection had been taken to the usurious security on the pleadings. *S. C.*, 3 Eq. R. 907; 24 L. J. Ch. 450; 1 Jur. (N.S.) 603; 3 W. R. 557.

A person lent money to a remainderman upon the security of his reversion, upon condition that, if the tenant for life died within five years, the money repaid should be double that which was lent, and, if the tenant for life lived beyond five years, the money repaid should be treble that which was lent. Although it was not impossible that the tenant for life might live so long that the lender would receive no more than his principal with lawful interest, yet:—Held, that the transaction was a colourable evasion of the usury laws and void. *Ib.*

Semble, that an agreement between A. and B., that A. should sell a leasehold interest in lands to B., and that B. should advance a certain sum of money to A., who should build a house of greater value upon the lands, and that B. should demise the lands and house to A. at a certain rent, calculated at the rate of 9 per cent. on the money to be advanced, with liberty to A. to fine down the rent at 9 per cent., is not usurious. *Dowling* v. *Legh*, 3 Jo. & Lat. 716; 9 Ir. Eq. R. 413.

A., a builder, being lessee of lands for terms of seventy years for building purposes, signed an agreement in writing, whereby in consideration of moneys to be advanced to him by B. for building, he agreed to assign the leases to B., subject to the ground rents and to the several conditions therein contained, and to take the under-leases from B. (when the houses should be completed) for the whole of the terms, wanting ten days, at a rent that should amount to 8 per cent. upon the money to be advanced, such rents to commence from the time of the respective advances. By a subsequent document, signed by A., in which he acknowledged certain advances, and stated that he had built two shops; after repeating the above agreement, he added: "It is also agreed that I am to have the privilege of selling the two shops, provided I repay you the amount advanced on the shops, and all interest due thereon, to the day you assign the lease or leases to me or my nominee":—Held, that these agreements were usurious. *Belcher* v. *Vardon*, 2 Coll. 162; 14 L. J., Ch. 427; 9 Jur. 546.

—— **Leases to Mortgagee.**]—A contract between mortgagor and mortgagee for a lease to be granted by the former, in consideration of forbearance, is usurious. *Gubbins* v. *Creed*, 2 Sch. & Lef. 218; 9 R. R. 71.

A lease for 999 years made by mortgagor to mortgagee, set aside; the policy of the law upon which the statutes of usury are founded not permitting such a transaction between persons standing in the relation of the mortgagor and mortgagee. And this, semble, although the lease was made at a fair value. *Webb* v. *Rorke*, 2 Sch. & Lef. 661; 9 R. R. 122.

A fee-farm grant or lease of mortgaged premises from mortgagor to mortgagee at a fixed annual rent, is among that description of transaction at which courts of equity look with great jealousy. *Hickes* v. *Cooke*, 4 Dow, 24.

Partnership.]—Deed by which A., B., and C., partners in trade, in consideration of 4,000*l*. paid to them by D., in augmentation of their capital, agree to admit him into partnership with them for a term: it was agreed that A. should receive in lieu of profits a clear sum of 550*l*. per annum, and all the property of the concern was charged with the payment of this sum quarterly, and of the 4,000*l*. at the determination of the partnership. A., B., and C. were to pay rent, taxes, wages, and other outgoings out of the trade, which was to be carried on by them and in their names only, and D. was not to be required to attend to it. D. was at liberty to retire on giving twelve months' notice, and on his retiring, or at the end of the term, the 4,000*l*. and the arrears (if any) of the 550*l*. per annum were to be paid to him by A., B., and C. by instalments, to be secured by their bonds, and they were to indemnify him from the debts of the partnership:—Held, that this deed was not usurious. *Fereday* v. *Hordern*, Jac. 144; 23 R. R. 11.

Agreement between two traders, that one shall advance the fund and the other superintend the business; the profit to be equally divided, but the entire loss, if any, to be borne by the latter; not usurious but nudum pactum as to the last clause, and such an agreement ought to be construed as constituting a partnership, the loss to be borne as well as the profits shared equally. An agreement may be perfectly equitable, although it is usurious. But if it is usurious, the law determines it, and its bonâ fides cannot avail it. *Brophy* v. *Holmes*, 2 Moll. 1.

A. lends B. money to enable him to commence business at 5 per cent. interest. After the loan B. agrees to pay to A. one-eighth of the annual profits by monthly payments, which offer A. accepts, and B. accordingly makes several monthly payments, for which A. gives B. receipts on account:—Held, that the balance of the principal and interest due from B. to A. was a good petitioning creditor's debt, not arising out

of a partnership, nor affected by usury. *Briggs, Ex parte*, 3 Deac. & C. 367 ; 1 Mont. & Ayr. 46.

The Frugal Investment Association was formed in 1845, and was certified under the 4 & 5 Will. 4, c. 40. Its objects were to advance the society's funds to its members, and to accumulate them, and to divide the profits periodically. The advances were made by putting up a share at one of the meetings for competition among the members, and the member offering the highest premium for it was entitled to that share, and as many more, to the number of twenty, as he chose to take at the same premium. For each share so taken he was to pay the premium agreed upon, and also 8*s.* a month for 100 months (during which time only the society was to exist) as redemption money ; and on these conditions he might have an immediate advance of 100*l.*, the full value of his share, on giving security for the repayment of it, together with such premium and redemption money. He was also entitled to participate in the general profits of the society. B. became a member, and obtained an advancement of five shares, at premiums of 71*l.* for three, and 73*l.* for the other two ; and he gave security as required, and received an advance of 500*l.* B. died, and on the society pressing for payment of the moneys so secured to them, B.'s executrix filed a bill against them, alleging that the transaction was usurious, and the society illegal, and claiming to redeem the security on repayment of 500*l.* with legal interest only:—Held, on the authority of *Silver* v. *Barnes* (6 Bing. (N.C.) 180), that the transaction, being between partners, was not usurious. *Burbidge* v. *Cotton*, 5 De G. & Sm. 17 ; 21 L. J., Ch. 201 ; 15 Jur. 1070.

Where an association raised funds by contributions, portions of which were to be advanced to the members on certain conditions, viz., that the portions were to be put up to auction and advanced to the highest bidder, who in addition to the sum bid was also to pay 5*l.* per cent. interest, the advance is a partnership transaction not a loan of money, and consequently a promissory note given by the defendant as the highest bidder for the sum advanced with interest was not tainted with usury. *Silver* v. *Barnes*, 6 Bing (N.C.) 180 ; 8 Scott, 300 ; 9 L. J., C. P. 118.

Stock, Re-transfer of.]—Contract for repayment of a debt with legal interest, or, at the option of the creditor, to transfer so much stock as it would have produced on the day it was payable, void as usurious, the principal and interest being secured, with a chance of a rise of the stock : not therefore like a contract to replace stock absolutely which might fall. *Barnard* v. *Young*, 17 Ves. 44.

One agrees to lend 1,000*l.* at 5 per cent., and for that purpose sells 1,000*l.* South Sea annuities, which, being under par, did not produce 1,000*l.* ; he advances the money so produced, and takes mortgage for 1,000*l.* :—Held, a shift within the statute of usury ; and the difference between the price at which the stock was sold ordered to be repaid, on a bill brought after a decree for foreclosure, and the whole money allowed in the account taken under that decree. *Moore* v. *Battie*, Ambl. 371.

C. being indebted to G. in 1,000*l.* agreed to transfer within a given time 100*l.* per annum, long annuities, at the then price, and in the meantime pay G. the dividends, and that the debt of 1,000*l.* should constitute part of the purchase money. The stock was not purchased at the time, and there was a rise in the price of stocks. The agreement held not usurious or within the Stock Jobbing Acts. *Clark* v. *Giraud*, 1 Madd. 511.

A contract of loan which gives the lender the option of claiming either a sum of money or a certain amount of stock in repayment of the principal is usurious. *Johnson* v. *Williamshurst*, 1 L. J. (O.S.) Ch. 112.

A. executed a bond and mortgage to B., to secure 2,000*l.* lent to him by B., with interest at 5 per cent., B. having sold out a sum of stock to enable him to make the loan, the dividends of which exceeded the interest of 2,000*l.* at 5 per cent. A. afterwards agreed, in consideration of her letting the 2,000*l.* continue secured at interest as aforesaid, to transfer to her, when requested so to do, the amount of the stock sold out ; or at her option to pay to her a sum of money sufficient to re-purchase it, in the meantime to pay to her the amount of the dividends of it instead of the interest of the 2,000*l.* :—Held, that the agreement was additional to and not substitutional for the bond and mortgage, and was therefore usurious. *Powney* v. *Blomberg*, 14 Sim. 179 ; 13 L. J., Ch. 450 ; 8 Jur. 476.

In 1816 A. transferred 10,000*l.* three per cents. to B., which he sold, and, after retaining 6,000*l.*, repaid the surplus to A. Concurrently, B. gave to A. a bond conditioned for the repayment of 6,000*l.*, and 5 per cent. interest, and he wrote to A. engaging to replace the 6,000*l.* in the three per cents. In 1822, B. admitted his obligation to restore to A. the stock sold out. The court, in 1852, considering that the contract was for restoring the stock, and that A. had not the option of taking stock or money, held that the contract was not usurious. *Goddard* v. *Lethbridge*, 16 Beav. 529.

It was questionable whether the law as to usury applied to a bare transfer of stock by a proposed lender (the proposed borrower being under no obligation to sell it and convert it into money), it being of the essence of usury that there should be an advance of money. *Att.-Gen.* v. *Hollingworth*, 2 H. & N. 416 ; 27 L. J., Ex. 102 ; 5 W. R. 684.

Trade Custom.]—Under an agreement to take off a discount above 5 per cent., for prompt payment, though according to the custom of the trade, the creditor cannot, upon failure, charge more than 5 per cent. *Aynsworth, Ex parte*, 4 Ves. 678. *See* 18 R. R. 204, n.

A custom in Liverpool for the banker to strike a balance every quarter, and send the account to the merchant, and then to make the balance carry interest for the next quarter, is not usury. *Caliot* v. *Walker*, 2 Anstr. 425.

Where sums of money advanced, and to be advanced, are secured by deed, and the dealings then contemplated by the parties are tainted with usury, the deed is wholly void as a security, although the legal debt is not impeached. A. employs B. as a calico printer, and before the accounts become due, from time to time advances him various sums of money, charging him, besides interest, with 1½ per cent. as a trade premium, which it was customary for persons in the same trade to take under the like circumstances. A. was also in the habit of paying debts owing by B. to other persons before they became due,

when A. deducted the usual discount, but charged B. with the full amount, besides interest and the trade premium above mentioned. Semble, that both these modes of dealing were usurious; they were however at best of so suspicious a nature, that the court declined to make an order for the sale of the property under the deed, but directed an action of ejectment to to be brought by A. against the assignees. A., having succeeded upon the trial, applied for the costs of the petition, which the court under these circumstances declined to grant, the petition being against the judgment of the commissioners. *Millington, Ex parte*, 3 Deac. & C. 298; 1 Mont. & Ayr. 114.

An agreement between two houses in the habit of dealing with each other, that either party should pay interest to the other on the balance which might be due from it in the course of trade, is an agreement for a loan of money within the usury laws. *Guillebert, Ex parte, Trye, In re*, 3 Mont. & Ayr. 455; 2 Deac. 509; 7 L. J., Bk. 25.

J. M.

VACATION.

See PRACTICE.

VACCINATION.

What Children are Affected by Acts.]—Under the Vaccination Acts, 1867 (30 & 31 Vict. c. 84), and 1871 (34 & 35 Vict. c. 98), every child is subject to the legislation thereby provided, whether born within or without the district of the registrar who gives the information, or whether born before or after either act was passed, until the age of fourteen. *Knight* v. *Halliwell*, infra.

Summary Proceedings—Authority of Officer.]—A resolution of guardians, appointing a vaccination officer, is sufficient authority for the officer so appointed to take proceedings under 30 & 31 Vict. c. 84, s. 31. *Ib.*

An order of the local government board, made under the powers conferred by the Vaccination Acts, 1867 and 1871, directed that no general directions of the guardians "shall authorise the vaccination officer to take further proceedings under s. 31 of the Vaccination Act, 1867, in any case in which an order has already been obtained and summary proceedings taken under that section, until he shall have brought the circumstances of the case under the notice of the guardians and received their special directions thereupon." A parent had been fined for neglecting to have his child vaccinated. The child still remaining unvaccinated, the vaccination officer received special instructions from the guardians, and obtained a second order against the parent. Upon his failure to comply with that order, the officer, without further directions from the guardians, took out a summons for penalties against him under the provisions of s. 31 of the Vaccination Act, 1867. The justices refused to hear the summons, on the ground that the officer had no special instructions:—Held, that as special instructions had been given by the guardians for such further proceedings as a whole, no further instructions were necessary for taking out the summons for penalties. *Reg.* v. *Brockhurst*, 61 L. J., M. C. 48; [1892] 1 Q. B. 566; 65 L. T. 714; 40 W. R. 64; 17 Cox, C. C. 409; 56 J. P. 182.

Section 31 of the Vaccination Act, 1867, empowers the vaccination officer, appointed by minute of a board of guardians, to institute proceedings to enforce vaccination as cases arise, without further authority or direction of the board, notwithstanding the provisions of article 16 of the general order of the local government board dated October 31, 1874. *Bramble* v. *Lowe*, 66 L. J., Q. B. 243; [1897] 1 Q. B. 283; 45 W. R. 366; 61 J. P. 168.

—— Order to Procure Child being Vaccinated—Signature of Justice—Validity of Order.]—The justice who grants a summons upon an information under s. 31 of the Vaccination Act of 1867, that a child has not been successfully vaccinated, need not hear the summons nor sign a vaccination order made upon it. *Southcombe* v. *Yeovil Guardians*, 66 L. J., Q. B. 294; [1897] 1 Q. B. 343; 76 L. T. 58; 45 W. R. 318; 18 Cox, C. C. 489; 61 J. P. 230.

An objection to an order, upon the ground that it was not signed by the justice who granted the summons, must be taken to the order itself, and cannot be made in subsequent proceedings for recovery of a penalty for omission to carry the order into effect. *Ib.*

Limitation as to Time.]—By 34 & 35 Vict. c. 98, s. 11, any complaint may be made and any information laid for an offence under the Vaccination Acts, 1867 and 1871, at any time not exceeding twelve calendar months from the time when the matter of such complaint or information arose, and not subsequently. On the 10th of May, 1872, a father received a notice under 30 & 31 Vict. c. 84, s. 31, requiring him to have his child vaccinated within fourteen days. Having disregarded the notice, on the 24th of June, 1873, he was summoned before justices, who made an order that he should procure the child to be vaccinated:—Held, that the information having been laid at a time exceeding twelve months from the time the matter of such complaint (that is, the giving of the notice) arose, the father could not be convicted without a fresh notice being given. *Knight* v. *Halliwell*, 43 L. J., M. C. 113; L. R. 9 Q. B. 412; 30 L. T. 359; 22 W. R. 689.

The Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 11, which provides that any complaint may be made for an offence under that act, or the Vaccination Act of 1867, at any time not exceeding twelve months from the time when the matter of complaint arose, impliedly repeals s. 44 of the Metropolitan Police Act (2 & 3 Vict. c. 71), so far as regards the limitation of time (six calendar months) for proceedings under the Vaccination Acts, within the metropolis as well as elsewhere. *Miller* v. *Rhind*, 29 L. T. 29.

Notice to Procure Child being Vaccinated—Service.]—There is no statutory provision as to

the mode of service of a notice given under s. 31 of the Vaccination Act, 1867, to procure a child being vaccinated; and if the justices are satisfied that the notice reached the person intended the service will be sufficient. *Holloway* v. *Coster*, 66 L. J., Q. B. 293; [1897] 1 Q. B. 347; 76 L. T. 57; 45 W. R. 319; 18 Cox, C. C. 487; 61 J. P. 218.

—— **Power of Justices to State Case.**]—A special case may be stated by justices for the opinion of the high court upon an order made by them to procure vaccination of a child. *Ib.*

Neglect — Reasonable Excuse — Tendency to Injury.]—R. was summoned under 30 & 31 Vict. c. 84, s. 29, for unlawfully neglecting to cause his child to be vaccinated, and stated as reasonable excuse that vaccination would prove injurious to his child, and that his family had a tendency to injury from vaccination. The justices held such an excuse had no special reference to his particular case, and declined to hear any arguments in support of it, and convicted R.:—Held, the justices were wrong and ought to have heard the arguments and evidence, as the excuse was reasonable if proved. *Rutter* v. *Norton*, 57 J. P. 8.

Order to Vaccinate — Periodical Visits of Vaccinator.]—A parish was visited twice a year by the public vaccinator. F. had received the usual notices to vaccinate, but his child, aged twenty months, had not been vaccinated. A justice having made an order on F. to vaccinate his child in 14 days, such days not being within the visiting period, afterwards convicted F. under s. 31 of 30 & 31 Vict. c. 84, for disobedience:—Held, that it was no defence that the order had been made at a time when it was impracticable to act on it. *Francis* v. *Smith*, 58 J. P. 429.

—— **Default of Appearance of Parent.**]—By the Vaccination Act of 1867 (30 & 31 Vict. c. 84, s. 31), upon an information that a notice to the parent of a child to procure its being vaccinated has been disregarded, a justice may summon such parent to appear with the child before him, and "upon the appearance" the justice may make an order directing such child to be vaccinated. By s. 33, the 11 & 12 Vict. c. 43 (Jervis's Act), except s. 11 thereof, shall apply to all proceedings to be taken under the act:—Held, that an order for the vaccination of a child may be made under s. 31 of the Vaccination Act, 1867, on a parent duly summoned, even when he has failed to appear upon the summons. *Reg.* v. *Cinque Ports JJ.* or *Crawford*, 55 L. J., M. C. 156; 17 Q. B. D. 191; 34 W. R. 789.

—— **Non-Production of Child.**]—Under 30 & 31 Vict. c. 84, s. 31 (repealed), a parent having been summoned appeared before the justice, but refused to produce his child; the justice was satisfied upon the evidence given that the child was under two years old, and had not been vaccinated:—Held, that the production of the child was not a condition precedent to the justice's power to make an order for it to be vaccinated. *Dutton* v. *Atkins*, 40 L. J., M. C. 157; L. R. 6 Q. B. 373; 24 L. T. 507; 19 W. R. 799.

Certificate.]—A parent who holds a certificate of his child having had small pox, but not one of its insusceptibility of successful vaccination, is not within, and is not required by, the terms of s. 7 of the Vaccination Act, 1871 (34 & 35 Vict. c. 98), to transmit such certificate to the vaccination officer; nor, inasmuch as having had small pox and insusceptibility of successful vaccination are two distinct and different things, is he liable to the penalty imposed by that section upon persons failing to transmit a certificate of such insusceptibility. *Broadhead* v. *Holdsworth*, 2 Ex. D. 321; 46 L. J., M. C. 172; 36 L. T. 320.

By 30 & 31 Vict. c. 84, s. 34, in any prosecution for neglect to procure the vaccination of a child, . . . if the defendant produces the certificate in the form B., it shall be a sufficient defence, except when the time specified therein for the postponement of the vaccination shall have expired before the time when the information shall have been laid:—Held, that the certificate was no answer to proceedings under s. 31. *Allen* v. *Worthy*, infra.

Previous Conviction.]—T. was ordered by a magistrate, under s. 31 of the Vaccination Act, 1867 (30 & 31 Vict. c. 84), to cause his child to be vaccinated upon a notice from the vaccination officer headed Vaccination Acts, 1867 and 1871, and reciting that he was in default under the above acts in respect of his child; the notice proceeded to require him to have the child vaccinated within fourteen days, and do all other things the law requires touching the vaccination; failing which it would be the vaccination officer's duty to report the case in order that proceedings should be taken as the law directs. He had been twice before fined in reference to the vaccination of the same child, who was two years old:—Held, that there was nothing in the Vaccination Act of 1871 (34 & 35 Vict. c. 98), to prevent a repetition of a conviction for breach of s. 31 of the Act of 1867, and that this notice was well adapted to the requirements of that section. *Tebb* v. *Jones*, 37 L. T. 576.

A parent, having been fined under 30 & 31 Vict. c. 84, s. 31, for disobeying an order to have his child vaccinated, may be proceeded against from time to time as long as the child remains unvaccinated. *Allen* v. *Worthy*, 39 L. J., M. C. 36; L. R. 5 Q. B. 163; 21 L. T. 665.

Where a parent, or person having the care, nurture, or custody of a child, has incurred and paid the penalty for neglecting to have it vaccinated within the time specified by 16 & 17 Vict. c. 100, and 24 & 25 Vict. c. 59, a continuous neglect to have it vaccinated is not a further breach of the statutes. *Pilcher* v. *Stafford*, 4 B. & S. 775; 33 L. J., M. C. 113; 10 Jur. (N.S.) 651; 9 L. T. 759; 12 W. R. 407.

Where, after proper notice to a defendant, an order has been made upon him to have his child vaccinated, and upon his disobedience to such order a conviction has been obtained and a penalty imposed for such disobedience under s. 31 of the Vaccination Act, 1867, a second conviction cannot be sustained upon the same order. *Reg.* v. *Portsmouth JJ.*, or *Pink*, 61 L. J., M. C. 126; [1892] 1 Q. B. 491; 66 L. T.

677; 40 W. R. 413; 17 Cox, C. C. 523; 56 J. P. 470.

Costs of Order—Default—Imprisonment.]—Sect. 6 of the Summary Jurisdiction Act, 1879, repeals s. 18 of the Summary Jurisdiction Act, 1848, only so far as the latter gives justices jurisdiction to enforce by distress and imprisonment an order directing the payment of money when such order was made on a complaint that a sum of money was claimed to be due. W. was summoned under s. 31 of the Vaccination Act, 1867, to show cause why he should not have his child vaccinated, and an order was made on the summons directing that he should have the child vaccinated within a given time, and also directing that he should pay the costs of the order, and on his failure to do so that there should be distress, and in default of distress he should be imprisoned. On certiorari to quash this order:—Held, that it was good under s. 18 of the Summary Jurisdiction Act, 1848. *Reg.* v. *Burrows*, 77 L. T. 338; 46 W. R. 29; 61 J. P. 724.

Enforcement of Proceedings for—Application by Urban Sanitary Authority—Mandamus.]—A metropolitan district board of works, as the local sanitary authority, have no specific legal interest entitling them to a mandamus directing the local board of guardians to enforce the provisions of the vaccination acts. *Reg.* v. *Lewisham Union*, 66 L. J., Q. B. 403; [1897] 1 Q. B. 498; 76 L. T. 324; 45 W. R. 346; 61 J. P. 151.

J. M.

VAGRANT.

Not Maintaining Wife and Children.]—*See* POOR LAW.

Impostures by Palmistry.]—The imposture of exercising, with intent to deceive, a pretended power of holding intercourse with the invisible world, and of obtaining manifestations and communications from supernatural and invisible spirits, is an attempt to deceive by using "subtle craft, means or device by palmistry or otherwise," within s. 4 of the Vagrancy Act, 5 Geo. 4, c. 83. *Monck* v. *Hilton*, 46 L. J., M. C. 163; 2 Ex. D. 268; 36 L. T. 66; 25 W. R. 373.

It is not necessary, to constitute a man a rogue and vagabond within this section, that he should lead a wandering and vagabond life. *Ib.*

The appellant was convicted under 5 Geo. 4, c. 83, s. 4, which makes punishable as a rogue and vagabond "every person pretending or professing to tell fortunes . . . to deceive and impose on any of his majesty's subjects." He had published advertisements in various newspapers offering to cast nativities, give yearly advice, and answer astrological questions. A detective wrote to him and received from him a circular setting forth the appellant's views of astrology as a science, and stating that by the positions of the planets in the nativity, and their aspects to each other, he was able to tell any applicant's fortune in the various events of life in return for certain remuneration. He never actually told anything to the detective, and there was no evidence to show whether or not he believed in the truth of his professions:—Held, that on this evidence the appellant was rightly convicted. *Penny* v. *Hanson*, 56 L. J., M. C. 41; 18 Q. B. D. 478; 56 L. T. 235; 35 W. R. 379; 16 Cox, C. C. 173; 51 J. P. 167.

—— **Indictment, Form of.**]—A conviction under s. 4 of 5 Geo. 4, c. 83, which stated that the defendant "did use a certain subtle craft, means and device" with intent, &c., is bad for uncertainty in not showing a conviction for an offence punishable by the statute. *Reg.* v. *Slade*, 35 L. T. 911.

—— **Conviction, Validity of.**]—By 5 Geo. 3, c. 83, s. 4, every person pretending or professing to tell fortunes, or using any subtle craft, means or device, by palmistry or otherwise, to deceive and impose on any of her majesty's subjects, shall be deemed a rogue and a vagabond, within the true intent and meaning of that act, and may be committed by a justice of the peace to prison for three months. S. having been convicted under this statute, the conviction set out that he had used certain craft, &c., which craft was that he wrote words upon a slate, which he pretended to be written by the spirit of a certain person deceased, to deceive L. and D.; but the conviction omitted the words "by palmistry or otherwise," and was quashed by the quarter sessions on that account:—Held, that it was a question for the sessions to determine whether the omission of the words rendered the conviction bad, and a rule for a mandamus to enter continuances was discharged. *Reg.* v. *Middlesex JJ., Slade, In re*, 46 L. J., M. C. 225; 2 Q. B. D. 516; 36 L. T. 402; 25 W. R. 610.

Begging and Gathering Alms.]—Colliers "on strike," who were householders in a colliery district and had wives and families, went from house to house in a street of a town four miles distant, with a waggon inscribed "children's bread waggon," and begged for assistance in money or kind. They were not disorderly. Having been convicted under the Vagrant Act (5 Geo. 4, c. 83), s. 3, which enacts that every person wandering abroad in any public highway to beg or gather alms shall be deemed an idle and disorderly person:—Held, that, as it was not their habit and mode of life to wander abroad and beg, they were not within the meaning of the act, and the conviction was wrong. *Pointon* v. *Hill*, 53 L. J., M. C. 62; 12 Q. B. D. 306; 50 L. T. 268; 32 W. R. 478; 15 Cox, C. C. 461; 48 J. P. 341.

If a person is committed to prison as a rogue and vagabond for procuring charitable contributions under a false pretence that he is able to abstain from food for five years and six months, the court will grant a habeas corpus to bring up his body. *Cavanah, In re*, 1 D. (N.S.) 546; 6 Jur. 220.

—— **Encouraging Child to Beg—Age.**]—On an information against a person for encouraging a child to beg, the magistrate is justified in disregarding the statement made by the child that he was sixteen years of age, that being the only evidence as to age, if his appearance

warrants his belief that he is a child under the age of fourteen, the question of age being one of fact entirely for the magistrate. *Reg.* v. *Viasani*, 15 L. T. 240.

Pauper unlawfully returning to Parish.]—A conviction stated that a party having been brought before a justice upon an information charging him with having unlawfully returned to his parish without a certificate, from which he had been legally removed, confessed himself guilty of the offence:—Held, that the conviction was good on the face of it without stating in it an express act of vagrancy, it being necessary for the party convicted to show in his defence that he had a sufficient excuse for returning, and that he did not return in a state of pauperism. *Mann* v. *Danvers*, 3 B. & Ald. 103.

Being in Place for Unlawful Purpose.]—An information charged that the appellants were found in the dwelling-house of the respondent "for an unlawful purpose, to wit, for the purpose of feloniously stealing and converting to their own use certain provisions" of the respondent's. The facts were, that the appellants had been admitted into the house of the respondent by night, and without his knowledge, by his servants, and there entertained by them with the provisions in question. The justices convicted the appellants of the offence charged, upon the ground that they were, under the circumstances proved on the hearing, in the house for an unlawful purpose, within the meaning of the act:—Held, that the conviction was bad, as not amounting to a conviction for felony, the offence charged in the information. *Kirkin* v. *Jenkins*, 32 L. J., M. C. 140; 9 Jur. (N.S.) 1013; 8 L. T. 243; 11 W. R. 618; 9 Cox, C. C. 311.

Being in a garden for the purpose of fornication is not being there for an unlawful purpose, within 5 Geo. 4, c. 83, s. 4. *Hayes* v. *Stevenson*, 3 L. T. 296; 9 W. R. 53.

Gaming in Public Place.]—*See* GAMING AND WAGERING.

"Frequenting" Public Thoroughfare with Intent to Commit a Felony.]—A man who "frequents" a public street, having in his mind the intent to commit a felony when and wheresoever opportunity arises, is liable to the penalties of the Vagrant Act, 5 Geo. 4, c. 83, s. 4, even though no opportunity should arise, and may be committed as a rogue and vagabond, if the justices are satisfied on sufficient evidence, first, that he frequented the street, and secondly, that he did so with intent to commit a felony. The overt act, or the attempt to carry out the intent, is not an essential part of the offence against the act. The appellant was found and apprehended by two constables at about two o'clock in the morning in a public thoroughfare called Victoria Road, having in his possession a portion of a brass pump which appeared to have been wrenched off from the continuation pipe. Being stopped and questioned as to how he became possessed of it and whither he was taking it, he gave an account which proved to be false, and also a false name and address. Being charged before two justices on suspicion of having stolen the pump, and the proof failing, he was then charged under 5 Geo. 4, c. 83, s. 4, with frequenting the street in question with intent to commit a felony; and on proof that he was an associate of thieves, and had four years before been convicted and sentenced to imprisonment for a felony,—although there was no proof that he had ever before been seen in the street in question, or that the pump had been stolen,—he was convicted as a rogue and vagabond under s. 4 of the Vagrant Act, for "frequenting the public thoroughfare with intent to commit a felony," and sentenced to be imprisoned:—Held, that the evidence did not warrant the conviction, inasmuch as it did not show a frequenting of Victoria Road with intent to commit a felony. *Clark* v. *Reg.*, or *Reg.* v. *Clark*, 54 L. J., M. C. 66; 14 Q. B. D. 92; 52 L. T. 136; 33 W. R. 226; 49 J. P. 246.

—— **Place of Public Resort.**]—Under 5 Geo. 4, c. 83, s. 4, a person is well convicted of being a rogue and a vagabond if the conviction states that he, "being a reputed thief, did frequent the public highway," at, &c., "with intent to commit felony." It is not essential to the offence that the highway should lead to any river, canal or navigable stream, dock or basin, quay, wharf or warehouse, or that it should be adjacent to any place of public resort, or avenue thereto. *Reg.* v. *Brown*, 17 Q. B. 833; 21 L. J., M. C. 113.

A public highway is not necessarily a "place of public resort," within the meaning of 5 Geo. 4, c. 83, s. 4. *Tinson, Ex parte*, 39 L. J., M. C. 129; L. R. 5 Ex. 257; 22 L. T. 614; 18 W. R. 849.

A man was committed to gaol by justices, under a warrant which stated him to have been convicted, under 5 Geo. 4, c. 83, s. 4, as "a rogue and vagabond, for that he, being a suspected person, did frequent a certain public highway . . . . with intent to commit a felony":—Held, that the commitment was bad, for not showing that the highway led or adjoined to any "river, canal, &c.," or to any "place of public resort," or that it was itself a place of public resort. The case of *Jones, In re* (7 Ex. 586; 21 L. J., M. C. 116), adhered to, and *Reg.* v. *Brown* (17 Q. B. 833) not followed. *Ib.*

Where a commitment stated that the prisoner being a suspected person "did frequent a certain street, with intent to commit felony":—Held, that the commitment was bad, for not alleging that the street was leading to a river, canal or place of public resort, or was adjacent to a place of public resort. *Jones, In re*, 7 Ex. 586; 21 L. J., M. C. 116; 16 Jur. 801.

Premises on which a sale, which has been publicly advertised, is going on by public auction, are, for the occasion, a place of public resort, within 5 Geo. 4, c. 83, s. 4. *Sewell* v. *Taylor*, 7 C. B. (N.S.) 160; 29 L. J., M. C. 50; 6 Jur. (N.S.) 582; 1 L. T. 37; 8 W. R. 26.

Where a warrant of commitment set out a conviction, which alleged that the prisoner, on a certain day, in the city of London, then being a suspected person and reputed thief, frequenting the public streets and places of and in the city, then and there was found in Railway Place, being a public thoroughfare, and one of the places of public resort of and in the city, with intent feloniously to steal the moneys, goods, and chattels of S. S., from her person therein:—Held, sufficient. *Cross, Ex parte*, 1 H. & N. 651; 26 L. J., M. C. 28; 3 Jur. (N.S.) 320; 5 W. R. 307. S. P., 1 C. B. (N.S.) 573.

A conviction alleged that the defendant being

a suspected person, at the railway station in a parish, the same being at the time a place of public resort, did frequent the platform of the station with intent to commit felony :—Held, that it sufficiently appeared that the platform was a place of public resort, and that the conviction was, therefore, good. *Davis, Ex parte*, 2 H. & N. 149 ; 26 L. J., M. C. 178 ; 5 W. R. 522.

—— **Apprehension.**]—The London Police Act (3 Geo. 4, c. 55), s. 16, authorising the apprehension of suspected persons or "reputed thieves," only applied to the apprehension of persons of general bad character, as rogues and vagabonds, and not to apprehension on suspicion of a particular felony. *Cowles* v. *Dunbar*, M. & M. 37 ; 2 Car. & P. 565.

Proof of Previous Conviction.]—A previous conviction, under 5 Geo. 4, c. 83, s. 17, can be proved only by proof of the record thereof ; and neither oral testimony nor the minute-book of the convicting justices is sufficient. *Giles* v. *Siney*, 11 L. T. 310 ; 13 W. R. 92.

The certificate of a previous conviction required by 5 Geo. 4, c. 84, s. 24, is sufficient, by virtue of 8 & 9 Vict. c. 113, s. 1, if it purports to be signed by an officer having the custody of the records, although that officer is therein described as the deputy clerk of the peace of a borough. *Reg.* v. *Parsons*, 35 L. J., M. C. 167 ; L. R. 1 C. C. 24 ; 12 Jur. (N.S.) 436 ; 14 L. T. 450 ; 14 W. R. 662 ; 10 Cox, C. C. 243.

The certificate need not aver that the quarter sessions at which the prisoner was convicted were held by the recorder. *Ib.*

Enforcing Warrant for Apprehension.]—Where a conviction of one as a rogue and a vagabond had been appealed against and confirmed, and the convicting magistrate issued his warrant for the apprehension of the party convicted :—Held, that the magistrate had not the power, and that it belonged to the quarter sessions. *Moore, Ex parte*, W. W. & D. 72 ; 1 Jur. 135.

Process of Execution—Subsequent Court.]—Under 5 Geo. 4, c. 83, s. 14, a subsequent court of quarter sessions has power to give effect to a judgment pronounced at a previous sessions of the same court, by issuing process of execution upon a conviction as awarded at such previous sessions. *Rex* v. *Warwickshire JJ.*, 4 N. & M. 370 ; 2 A. & E. 768 ; 1 H. & W. 18 ; 4 L. J., M. C. 62.

A mandamus to the court of quarter sessions will go, commanding them to issue such process of execution where there has been no delay in making the application, or the delay has been satisfactorily accounted for. *Ib.*

J. M.

VALUATION.

Of Annuities.]—*See* ANNUITY—BANKRUPTCY—COMPANY (WINDING-UP).

Sale at.]—*See* VENDOR AND PURCHASER.

VALUER.

Liability for Negligence.]—*See* NEGLIGENCE.

VENDOR AND PURCHASER.

[BY E. E. H. BIRCH.]

A. HE CONTRACT AND MATTERS RELATING THERETO.

1. *In General.*
   - *a.* Parties, 1100.
   - . Construction, 1106.
2. *Agreements for Sale. Statute of Frauds.*
   - *a.* When Concluded.
     - . In General, 1110.
     - ii. Withdrawal of Proposal, 1112.
     - iii. Acceptance.
       - a. In General, 1113.
       - b. Subject to Approval of Title, 1115.
       - c. Subject to Consent of Third Parties, 1116.
     - iv. Reference to a Further or Formal Agreement, 1116.
   - *b.* Interconnected Documents, 1120.
   - *c.* Vagueness and Uncertainty, 1122.
   - *d.* Statute of Frauds. *See* CONTRACT, A. 2.
     - i. Interests in Land, 1125.
     - ii. Signature. *See* CONTRACT, A. 2, c.
     - iii. Parties. Sufficiency of Description, 1134.
     - iv. Subject-Matter. Sufficiency of Identification, 1137.
     - v. Description of Interest contracted to be Sold, 1140.
     - vi. Completeness of Terms of Contract, 1141. *And see* A. 2, c, supra.
     - vii. Communications addressed to Third Parties, 1142.
     - viii. Admission of Contract by Answer, 1144.
     - ix. Part Performance. *See* LANDLORD AND TENANT, SPECIFIC PERFORMANCE.
     - x. Parol Variation. *See* LANDLORD AND TENANT, SPECIFIC PERFORMANCE.

3. *Time when of the Essence of the Contract.*
a. By Original Stipulation, 1145.
b. By Notice, 1149.
c. From Nature of Subject Matter of Contract, 1150.
d. Waiver, 1151.

4. *Options and Pre-emptions.*
a. Who may Exercise, 1153.
b. Time for and Delay, 1155.

5. *Sale at a Valuation*, 1157.

6. *Sale by Agent.*
a. Authority.
i. In General, 1161.
ii. Sufficiency and Proof of, 1162.
b. Personal Liability of Agent, 1166.

7. *Sale by Auction.* *See* AUCTION AND AUCTIONEER.

8. *Particulars and Conditions of Sale.*
a. Particulars in General, 1166.
b. Conditions in General, 1169.
c. When Misleading.
i. Description of Property, 1171.
ii. Value, 1176.
iii. Quantity and Acreage, 1177.
iv. Matters Material to Enjoyment of the Property, 1181.
v. Tenure and Interest of Vendor, 1185.
d. Conditions as to Title. *See* infra, D. 9.

9. *Covenants for Title.* *And see* Covenants, infra. A. 11.
a. In General, 1197.
b. For Quiet Enjoyment, 1199.
c. For Freedom from Incumbrances, 1202.
d. For Further Assurance, 1203.

10. *Conveyance.*
a. Form and Execution of, 1203.
b. What Passes by, 1210.
c. Costs and Stamps, 1214.

11. *Covenants.* *And see* Abatement and Compensation for Misrepresentation, infra, B. 1, f. v.
a. In General, 1216.
b. Restrictive.
i. In General, 1219.
ii. Breach of, 1230.
iii. Waiver of, 1235.

12. *Rescission and Abandonment.*
a. In General, 1239.
b. For Mistake, 1242.
c. For Fraud and Misrepresentation, 1245.
d. Condition as to Rescission. *See* infra, D. 9, c.

B. RIGHTS AND LIABILITIES ARISING FROM CONTRACT.

1. *Of Vendor and Purchaser.*
a. General Rights, 1251.
b. Possession and Receipt of Rents and Profits, 1255.
c. Expenses and Deterioration, 1261.
d. Purchase-Money and Deposit.
i. Deposit.
a. Payment and Forfeiture of, 1267.
b. Return of, 1269.
ii. Purchase-Money.
a. Payment in General, 1277.
b. To whom Payable, 1279.
c. Payment into Court, 1282.
d. Application and Apportionment, 1287.
e. Return of, 1290.
f. Investment and Appropriation, 1291.
iii. Interest.
a. In General, 1294.
b. Under Express Stipulation, 1300.
e. Lien.
i. In General, 1307.
ii. Discharge of, 1310.
iii. Enforcement of, 1313.
iv. Priorities, 1315.
v. Purchaser's Lien, 1318.
f. Abatement and Compensation.
i. In General, 1320.
ii. After Conveyance Executed, 1325.
iii. Charges and Outgoings, 1327.
iv. Outstanding Estates and Interests, 1329.
v. Misrepresentation. *And see* Rescission, supra, A. 12, *c.*
a. As to Quantity, 1332.
b. As to Nature of Property, 1335.
g. Breach of Contract, 1339.
h. Title Deeds, 1347.
And see infra, c. 7.

2. *Of Third Parties.*
a. Purchaser without Notice.
i. In General, 1352.
ii. On Acquiring the Legal Estate, 1358.
iii. Practice and Pleading, 1361.
b. Purchaser with Notice, 1364.
c. Sub-Purchaser, 1371.
d. Assignment of the Contract, 1373.

C. SALE BY THE COURT. *And see* POWERS—POWER OF SALE.

1. *In General*, 1373.

2. *Mode and Conduct of Sale.*
a. In General, 1376.
b. Biddings.
i. Who may Bid, 1379.
ii. Opening Biddings.
a. In General, 1381.
b. Deposit, 1386.
c. After Report, 1386.
d. Since 30 & 31 Vict. c. 48, 1388.
e. Costs, 1388.
c. Resale, 1389.
3. *Possession, Rents and Profits*, 1390.
4. *Losses and Outgoings*, 1392.
5. *Purchase-Money.*
a. Payment into Court, 1393.
b. Payment out and Application, 1397.
6. *Costs and Expenses*, 1399.
7. *Conveyance*, 1403.
8. *Setting Aside Sale*, 1405.
9. *Substitution of Purchaser*, 1414.
10. *Completion of Sale.*
a. Report, 1415.
b. Enforcing Completion, 1416.

D. TITLE.
1. *In General*, 1417.
2. *Proof of.*
a. Sufficiency and Verification of Abstract, 1424.
b. Identity, 1427.
c. Heirship and Descent, 1430.
d. Will, Probate, or Establishment of, 1431.
3. *Production of Title*, 1432.
4. *Waiver of Title*, 1436.
5. *Reference.*
a. In General, 1440.
b. Extent of, 1443.
6. *Report.*
a. Form of, 1446.
b. Exceptions to, 1447.
7. *Doubtful or Defective Title.*
a. In General, 1450.
b. Objections.
i. In General, 1453.
ii. Defective as to Part, 1462.
iii. Voluntary Deeds, 1464.
iv. Bankruptcy, 1466.
v. Charges and Incumbrances, 1468.
vi. Outstanding Estates and Interests, 1470.
vii. Non-Performance of Covenants, 1476.
8. *Title made Good*, 1479.
9. *Conditions as to Title.*
a. In General, 1482.
b. Special Conditions, 1486.
c. Condition as to Rescission, 1493.
And see Rescission and Abandonment, supra, A. 12.
10. *Costs of Investigating Title*, 1499.
11. *Covenants for Title.* *See* supra, A. 9.

E. VENDOR AND PURCHASER ACT, 1874.
1. *Jurisdiction*, 1502.
2. *Practice*, 1505.

A. THE CONTRACT AND MATTERS RELATING THERETO.

I. IN GENERAL.

a. Parties.

Limited Owner—Easement.]—An enactment in a special act, incorporating the Lands Clauses Act, 1845, that "the persons empowered by the Lands Clauses Act, 1845, to convey lands shall have full power to convey or grant in perpetuity at an annual or other rent any lands for the purposes of this act, or any easement," has the effect of extending section 10 of the Lands Clauses Act so as to give to a limited owner the same power of selling lands as an absolute owner has under that section, and also of enabling him to sell an easement for a rent-charge on the rates and tolls payable under the special act. *Gerard (Lord) and Beecham's Contract, In re*, 63 L. J., Ch. 695; [1894] 3 Ch. 295; 7 R. 519; 71 L. T. 272; 42 W. R. 678—C.A.

Trustees—Apportionment.]—It is the duty of trustees who, having a trust or power to sell, join with the owner of another property in selling both together, first, to see that such a sale is beneficial to their cestuis que trustent; secondly, that their share of the purchase-money is apportioned before the completion of the purchase, and thirdly, to apportion the share themselves, *Cooper, In re*, 46 L. J., Ch. 133; 4 Ch. D. 802; 35 L. T. 890; 25 W. R. 301.

The proper mode of apportioning the prices of a life estate and reversion when sold together for a lump sum, is to value both interests separately, and not to put a value on one and deduct that from the total price. *Ib.*

——**Power to give Receipts.**]—The doctrine of *Forbes* v. *Peacock* (12 Sim. 528; 15 L. J., Ch. 371) amounts only to this, that where prior to 22 & 23 Vict. c. 85, and 23 & 24 Vict. c. 145, there is a trust to sell real estate, and pay debts and legacies out of the proceeds, there is also an implied power in the trustees to give receipts for the purchase-money. *Carlyon* v. *Truscott*, 44 L. J., Ch. 186; L. R. 20 Eq. 348; 32 L. T. 50; 23 W. R. 302.

——**Sale by One.**]—A trustee, without the authority of his co-trustees, signed an agreement for the sale of trust property. Held, that specific performance could not be ordered either as to the whole or as to the part in which the contracting trustee had a beneficial interest. *Naylor* v. *Goodall*, 47 L. J., Ch. 53; 37 L. T. 422; 26 W. R. 162.

——**Conversion postponed.**]—A testator gave to his wife the personal use of a leasehold messuage for her life, and if she should not think fit to reside therein, then the premises should form part of his residuary estate. He then directed

the conversion of his real and the residue of his personal estate, and gave a power to postpone such conversion. A company, having taken the premises under its compulsory powers while the widow was in occupation, made an agreement with her as to her interest, and a separate agreement with the trustees. The latter required the consideration money to be paid into court:—Held, that the trustees could not assign, for it would not be a proper exercise of the trust to sell during the occupation of the widow. *Smith* v. *G. N. R.*, 23 W. R. 126.

—— **Bare Trustee.**]—A vendor of freeholds who let the purchaser into possession before payment of the purchase-money and execution of the conveyance, was, by reason of his having a lien on the property for his purchase-money and not being bound to convey until payment, held not to be a "bare trustee." *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582; 27 W. R. 283. And see *Docwra, In re*, infra, col. 1207.

——**Existence of Debts.**]—Trustees, as vendors, are not bound to state whether there exist any debts which make a sale necessary. *Flux* v. *Best*, 31 L. T. 645; 23 W. R. 228.

—— **Breach of Trust.**]—Trustees having power to sell under such special conditions as they should think fit, sold with a condition limiting the title to commence in 1858 (fourteen years previously). The next convenient root of title was a deed of 1819, from which a good title could be deduced, but the trustees could not find this deed, and had only recitals of its contents. There was also a condition that all recitals and statements in the deeds and particulars should be accepted as conclusive evidence:—Held, that the sale under such conditions was a breach of trust, and an injunction was granted at the suit of a cestui que trust to restrain completion. *Dance* v. *Goldingham*, 42 L. J., Ch. 777; L. R. 8 Ch. 902; 29 L. T. 166; 21 W. R. 761. S. P., *Dunn* v. *Flood*, 49 L. T. 678; 32 W. R. 197.

—— **Under Lands Clauses Consolidation Act.**]—Trustees of lands for femes couverts who were absolutely entitled for their separate use, are not persons competent to contract with a railway company for the sale of land under the 7th section of the Lands Clauses Act, 1845. *Peters* v. *Lewes and East Grinstead Ry.* 50 L. J., Ch. 839; 18 Ch. D. 429; 45 L. T. 234; 29 W. R. 875—C. A.

—— **Sale by Devisee of surviving Trustee.**]—Devise to trustees and their heirs to sell:—Held, that devisees in trust of a surviving trustee could not sell. *Cooke* v. *Crawford*, 13 Sim. 91; 11 L. J., Ch. 406; 6 Jur. 723.

Where real estate is devised to trustees and "their heirs" (omitting "assigns") in trust for sale, the trust must be considered as annexed, not to the person, but to the fee simple estate taken by the trustees, so that the trust can be executed by the devisees of trust estates of the surviving trustee. *Cooke* v. *Crawford* (supra) overruled. *Osborne and Rowlett, In re*, 49 L. J., Ch. 310; 13 Ch. D. 774; 42 L. T. 650; 28 W. R. 365. See *Morton and Hallett, In re*, infra.

Devise to trustees, their heirs, executors, and administrators, that they, or the survivor of them, or the heirs, executors, or administrators of such survivor, should sell. H. S. the survivor devised all his trust estates to A. and B., whom he also appointed his executors, to hold to them, their heirs, executors, administrators, and assigns upon the same trusts as the testator H. S. held them. A. and B. sold to C., who contracted to sell to the plaintiffs:—Held, that the title of the devisees of H. S. to convey to C. was too doubtful for a court of equity to compel specific performance of the contract. *Stevens* v. *Austen* 3 El. & El. 685; 30 L. J., Q. B. 212; 7 Jur. (N.S.) 873; 3 L. T. 810.

—— **Devise to Trustees for A. for Life, and after her Decease to stand seised thereof for such Purposes as she should appoint—Devise by A. to Executors and Trustees upon Trust to sell.**]—Where a testator devised his copyholds to trustees upon trust for A. for life, and after her decease to stand seised thereof for such purposes as she should appoint, and such trustees were duly admitted as tenants, and A. subsequently by her will devised the same to her executors and trustees upon trust to sell and assure to the purchaser, it was held that the legal estate remained in the trustees of the will of the testator, and that the executors and trustees of A. could not give a good title. *Doe* d. *Woodcock* v. *Barthrop* (5 Taunt. 382) distinguished. *Townsend's Contract, In re*, 64 L. J., Ch. 334; [1895] 1 Ch. 716; 13 R. 328; 72 L. T. 321; 43 W. R. 392.

—— **Sale by Customary Heir.**]—A testator devised his freehold and copyhold estates to trustees and their heirs "upon trust that they his said trustees or the trustees or trustee for the time being of that his will," should sell the estates. The trustees having died, the customary heir of the survivor contracted to sell part of the copyholds:—Held, that the customary heir was competent to execute the trust for sale. *Morton and Hallett, In re*, 49 L. J., Ch. 559; 15 Ch. D. 143; 42 L. T. 602; 28 W. R. 895—C. A.

Whether *Cooke* v. *Crawford* (supra) is to be treated as overruled, quære. *Osborne and Rowlett, In re* (supra), doubted. *Ib.*

Trustees when Beneficiaries.]—On the sale by the court of real estate vested in trustees having a power of sale, and being themselves beneficiaries:—Held, that a good title could not be made by the exercise of the power of sale without the concurrence of the assignee in insolvency of one of the trustees. *Young* v. *Tregear*, 21 W. R. 215.

Purchase by Trustees from Trustee.]—H. was surviving trustee for sale of freeholds, part of the proceeds of which were to be held on the trusts of his marriage settlement, his wife being the testator's daughter. H. put up the property for sale, and instructed his trustees to purchase five of the lots, and he instructed the auctioneer to put reserved prices on the lots. The lots were fairly valued. H., acting as solicitor for the purchasers, instructed an agent to bid for the lots. The agent bought the five lots above the reserved prices, and H. then conveyed them to the trustees of his settlement:—Held, that the sale was unimpeachable. *Hickley* v. *Hickley*, 45 L. J., Ch. 401; 2 Ch. D. 190; 34 L. T. 441; 24 W. R. 604.

Sale to Tenant for Life.]—As a tenant for life stands in no fiduciary position towards the remainderman, and is as free as anyone else to buy from the trustees, a sale to him cannot be impeached, his motives being immaterial to the trustees, provided they sell on terms advantageous to the estate. *Dicconson* v. *Talbot*, L. R. 6 Ch. 32 ; 24 L. T. 49 ; 19 W. R. 138.

Tenant for Life only Surviving Trustee.]—The circumstances of the tenant for life of real estate being the sole surviving trustee in whom the power of sale is vested is no objection to a sale under the power. *Forster* v. *Abraham*, 43 L. J., Ch. 199 ; L. R. 17 Eq. 351 ; 22 W. R. 386.

Consent of Tenant for Life.]—The trustees of a settlement having power to sell the fee at the request of the tenant for life, can, upon his request, after he has alienated his particular estate and with the consent of his alienee, made a good title in fee to a purchaser. *Alexander* v. *Mills*, 40 L. J., Ch. 73 ; L. R. 6 Ch. 124 ; 24 L. T. 206 ; 19 W. R. 310.

N. devised estates in trust for A. for life, then for B. for life, and then for C. in tail, with a power of sale with consent of person for the time being entitled as beneficial tenant for life ; and directed that no repurchase or reinvestment should be made while there should be any person entitled as beneficial tenant for life or tenant in tail in possession, and of the age of twenty-one years, without the previous consent of such person. A. and B. were both dead, and C. was an infant :—Held, that the trustees could during the minority of C. exercise the power of sale without consent, and make a good title. *Neave and Chapman, In re*, 49 L. J., Ch. 642 ; 43 L. T. 152 ; 28 W. R. 976.

Service of Petition for Sale.]—A petition under 25 & 26 Vict. c. 108, s. 2, by trustees having power to sell settled lands with the consent of the tenant for life, for leave to sell the land and minerals separately, need not be served on the remaindermen. *Nagle, In re*, 6 Ch. D. 104.

Concurrence of Beneficiaries.]—A trustee having a discretionary trust for sale with power to postpone the sale, leased the property with the concurrence of the beneficiaries. Before the lease expired the property was put up for sale by the lessee and the trustees conjointly, the facts being disclosed by the particulars of sale ; and the purchase-money was apportioned between the two interests according to the valuation of a skilled valuer :—Held, that the purchaser was not entitled to insist on the concurrence of the beneficiaries on account of the valuation not having been made before the sale. *Morris* v. *Debenham*, 2 Ch. D. 540 ; 34 L. T. 205 ; 24 W. R. 636.

A testator who had entered into a contract with the plaintiff for the sale of lands, died before completion, and devised the legal estate in the hands of the defendant. The testator gave several annuities, and devised the residue of his estate to the defendant, after payment of the annuities. After the death of the testator, the plaintiff entered into an agreement with the defendant to take a conveyance of the lands from the defendant and the annuitants, or such of them as were entitled to annuities charged upon the lands. In an action for breach of the last-mentioned agreement :—Held, that the plaintiff was entitled to require the concurrence of the annuitants in the conveyance. *Cumming* v. *Reid*, Ir. R. 8 C. L. 166.

—— **Will—Legacies charged on Realty—Beneficial Owners.**]—Where residuary realty charged with the payment of debts and legacies is given to trustees with an unlimited power of sale, and is subsequently devised absolutely to beneficiaries, the trustees can exercise the power of sale and confer a good title upon a purchaser without the concurrence of the beneficiaries, so long as the exercise of the power is necessary in order to perform the trusts of the will. *Dyson and Fowke's Contract, In re*, 65 L. J., Ch. 791 ; [1896] 2 Ch. 720 ; 74 L. T. 759 ; 45 W. R. 28.

Conveyance by trustee under deed of assignment. See *Poppleton and Jones's Contract, In re*, 74 L. T. 528, infra, col. 1467.

Infants bound by Sale.]—A mortgagee contracted to sell two properties, leasehold and freehold, to the equity of redemption in which the mortgagors were entitled. The vendor filed a bill for specific performance. At the date of the bill the mortgagors were willing to concur ; but before decree, some of them died, leaving infants interested in the equity of redemption : —Held, that the 23 & 24 Vict. c. 145, s. 15, empowered the vendor to sell the whole of the term of the leaseholds, though they were only demised to him for the residue of the term less one day. *Hiatt* v. *Hillman*, 25 L. T. 55 ; 19 W. R. 694.

Held, also, that the infants interested in the equity of redemption must be bound by the sale, as it was for their advantage that the two properties should be sold together ; and that the vendor could make a good title. *Ib.*

—— **Infant Customary Heir.**]—A widow was entitled to dower out of gavelkind land of which her three sons (two being infants) were co-heirs. The widow and adult son conveyed by deed to A., and this conveyance was confirmed by charters of feoffment by the infants on the youngest attaining fifteen years, the age at which by the law of gavelkind they could convey. It appeared that on such conveyance and feoffment the infants had not received their full share of the purchase-money. The property being subsequently put up for sale, the purchaser declined on this ground to accept the title, the two sons being still infants, so that they could not release their rights :—Held, that the vendor had not made out such a title as the purchaser could be compelled to accept. *Maskell and Goldfinch's Contract, In re*, 64 L. J., Ch. 678 ; [1895] 2 Ch. 525 ; 13 R. 685 ; 72 L. T. 836 ; 43 W. R. 620.

Vendor Purchasing from Trustees.]—Defence to an action for specific performance stated that since the contract the defendant had notice that the purchasers were trustees of a marriage settlement, and that the property, which was an underlease, might be an improper investment of the trust funds. Interrogatories by the defendant, directed to establish the case that the investment was a breach of trust, were ordered to

be struck out as irrelevant. *Mansfield* v. *Childerhouse*, 46 L. J., Ch. 30; 4 Ch. D. 82; 35 L. T. 590; 25 W. R. 68.

Semble, that an innocent vendor of lands, discovering before completion that the purchasers are trustees, is not concerned to see that the investment is authorised by the trust. *Ib.*

Conviction for Felony.]—Section 8 of the Felony Act, 1870, which renders a convict during the time he is subject to the operation of the act incapable of alienating any property, does not apply to property vested in such convict as trustee or mortgagee. He could consequently alienate such property before the Trustee Act, 1893. *Levy and the Debenture Corporation, In re*, 8 R. 820; 42 W. R. 533.

Sale by Mortgagees.]—Under a will A. was tenant for life, with remainder to B., his son, in fee, of lands in which the legal estate was outstanding. A. mortgaged his equitable life estate, and B. mortgaged his remainder in fee to the same persons, with powers of sale. Default was made, and the mortgagees in exercise of the powers of sale conveyed a portion of the lands to C. C. devised the purchased lands to D. A portion of the purchased lands was afterwards sold:—Held, that the mortgagees' powers of sale were properly exercised. *Cooper, In re*, 46 L. J., Ch. 133; 4 Ch. D. 802; 35 L. T. 890; 25 W. R. 301.

Legal Personal Representatives of Mortgagee.]—The 4th section of the Vendor and Purchaser Act, 1874, does not apply to a transfer of a mortgage, and therefore the legal personal representative of a mortgagee of a freehold estate cannot, on receiving payment of the mortgage debt, convey the estate to a transferee. *Spradbery's Mortgage, In re*, 49 L. J., Ch. 623; 14 Ch. D. 514; 43 L. T. 82; 28 W. R. 822.

Sale by Administratrix.]—Where executors with power to sell for the payment of debts have renounced probate, an administratrix with the will annexed has no power to sell under the statute 22 & 23 Vict. c. 35, s. 16. *Clay and Tetley, In re*, 16 Ch. D. 3; 43 L. T. 402; 29 W. R. 5—C. A.

Sale to Husband of Administratrix.]—The husband of an administratrix is in a fiduciary position, and cannot purchase from a co-administratrix without the consent of all the cestuis que trustent. *Pepperell, In re, Pepperell* v. *Chamberlain*, 27 W. R. 410.

Sale by Administrator durante minore ætate.]—A vendor deduced title as administrator durante minore ætate. It did not appear that the sale was necessary for payment of debts:—Held, that the vendor had not under the circumstances power to sell. *Robinson and Sords, In re*, 3 L. R., Ir. 429.

Sale by Executor—Lis pendens.]—An executor has power to make valid sale of any part of the assets pending a general administration action in which no decree has been made. *Neeves* v. *Burrage*, 14 Q. B. 504; 19 L. J., Q. B. 68; 14 Jur. 177.

Held, also, that the rule of equity by which a party is entitled to sell, pending the suit, is not a mere rule of practice, but one of which the court takes judicial cognisance, and that evidence of the invalidity of the sale on that account was not admissible. *Ib.*

—— **Presumption as to Payment of Debts.**]—The rule laid down by Jessel, M.R., in *Tanqueray-Willaume and Landau, In re* (infra, col. 1352), that where an executor is selling real estate, after twenty years have elapsed from the testator's decease, a presumption arises that the debts have been paid, and the purchaser is therefore put upon enquiry, is not applicable to the case of an executor selling leaseholds. *Whistler, In re* (35 Ch. D. 561) followed. *Venn and Furze's Contract, In re*, 63 L. J., Ch. 303; [1894] 2 Ch. 101; 8 R. 220; 70 L. T. 312; 42 W. R. 440.

Charge of Debts.]—Where an estate has been devised to trustees to sell for payment of debts, and, subject thereto, for the younger children of the testator, semble, that a purchaser from them will, in all cases, buy subject to the debts. *Garnett* v. *Armstrong*, 2 Con. & L. 458; 4 Dr. & War. 182; 5 Ir. Eq. R. 533.

—— **Sale of Advowson.**]—A testator, after charging his real estate with the payment of his debts, devised an advowson, upon trust to present his youngest son to the living when vacant, and subject thereto in trust to sell and apply the produce of the sale for the special purposes therein mentioned, and he appointed three executors, one of whom was his youngest son, and another one of the trustees of the advowson. The personal estate being insufficient for the payment of his debts, the trustees of the advowson contracted to sell the advowson, before any vacancy had occurred in the living. Held that, the charge being in effect a devise of real estate, in trust to pay debts, a good title could be made by plaintiffs without institution of a trust to ascertain deficiency of personal estate, and that purchaser was not bound either to inquire whether other sufficient property ought not to be applied in payment of debts, or to see to the application of purchase money. *Shaw* v. *Borrer*, 1 Keen, 559; 5 L. J., Ch. 364.

b. Construction.

Title to Freeholds of Bankrupt when Trustee Disclaims.]—An owner of property subject to an equitable mortgage became bankrupt. The trustee in bankruptcy disclaimed. Subsequently he and the bankrupt purported to convey the property to the equitable mortgagee, whose assigns contracted to sell the same to a purchaser. Held, that after the disclaimer by the trustee the subsequent conveyance was inoperative; and that the legal estate was outstanding and could not be got in under the Trustee Act, 1850. *Mercer and Moore, In re*, 49 L. J., Ch. 201; 14 Ch. D. 287; 42 L. T. 311; 28 W. R. 485.

Assignee of Bankrupt.]—It is no answer to an action for nonpayment of the remainder of the purchase-money agreed to be paid to the vendor that the vendor purchased at a sale of the property of a bankrupt, whose assignee he was. *Willett* v. *Clarke*, 10 Price, 207.

Appurtenances—Right of Way.]—A contract to sell land with the appurtenances does not pass

a right to a way to the land sold which the vendor has used over adjoining land of his own. Where a grantee is entitled to a way of necessity over another tenement belonging to the grantor, and there are to the tenement granted more ways than one, the grantee is entitled to one way only, which the grantor may select. *Bolton* v. *Bolton*, 48 L. J., Ch. 467; 11 Ch. D. 968; 40 L. T. 582. See also 2 Wms. Saunders, 400 (*a*).

Joint Authority to Sell.]—A. and B. advertised an estate for sale. The advertisement stated that "to treat and view the property applications are to be made to A. or B." :—Held, that this did not give A. authority to sell the estate, so as to bind B. without his concurrence. *Godwin* v. *Brind*, 39 L. J., C. P. 122, n.; L. R. 5 C. P. 299, n.; 17 W. R. 29.

Varying Contract.]—Conditions of sale cannot avail to modify the contract, so far as to vary the very subject-matter of the contract. *Evans* v. *Robins*, 2 H. & C. 410; 33 L. J., Ex. 68; 10 Jur. (N.S.) 473; 11 L. T. 211; 12 W. R. 604—Ex. Ch.

What included in "Outgoings."]—By contract for sale the defendant vendor agreed to discharge "all rates, taxes, and outgoings" up to the time of completion. Moneys paid after completion for improving the street before the defendant became owner. Held, an outgoing for which the defendant was liable *Midgley* v. *Coppock*, 48 L. J., Ex. 674; 4 Ex. D. 309; 40 L. T. 870—C. A.; and see *Lawes* v. *Gibson*, infra, col. 1265.

Possession.]—Conditions of sale provide that the purchaser shall be entitled "to the possession or the receipt of the rents and profits" of the land from a specified date:—Held, that the vendor was bound to give possession to the purchaser on the date specified, and that evidence was not admissible to prove an alleged contemporary parol agreement varying the condition as to possession. *Anker* v. *Franklin*, 43 L. T. 317; 44 J. P. 830.

Occupation.]—"Occupation under a lease" means occupation of all that passed under the lease, whether in actual enjoyment and use or not, and whether known to exist at the time of the lease or not; and therefore a cellar under certain demised premises was held to be in the "occupation of the lessee under the lease," although the tenant of the neighbouring tenement was in the actual use of such cellar. *Whittington* v. *Corder*, 16 Jur. 1034

Title to be Approved.]—Quære, whether the addition, in a written document, of the words "subject to the title being approved by our solicitor" could affect a contract for the sale of land, otherwise complete in itself. *Hussey* v. *Horner-Payne*, 48 L. J., Ch. 846; 4 App. Cas. 311; 41 L. T. 1; 27 W. R. 585—H. L. (E.)

Quære, whether the proper meaning of such words is more than that the title offered is not to be accepted without investigation, and that objections made on such investigation would be subject to the decision of a legal tribunal. *Ib.*

Evidence.]—An allegation in a plea that "A. by his writing sold the aftermath of land to B." is not proved by evidence that at an auction held for the purpose of settling it B. was the purchaser; that B. gave a promissory note for the sum, and that B.'s name was written (by A.'s agent) in the printed catalogue as the buyer. *Symonds* v. *Ball*, 8 Term Rep. 151.

—— **Of Agency.**]—When an agent contracts it may be proved by parol evidence who is his principal. *Morris* v. *Wilson*, 5 Jur. (N.S.) 168.

Parol evidence cannot be admitted to shew that a party having agreed for the purchase of an estate in his own name had in fact purchased it on behalf of another person. *Bartlett* v. *Pickersgill*, 1 Cox, 5; 4 East, 577, n.; 1 R. R. 1.

Recognition.]—The subsequent recognition of an unsigned contract in writing for the sale of lands, by the signature of his lawfully-authorised agent to a notice specifying and adopting the contract, is sufficient to bind the party contracting to be charged therewith. *Norris* v. *Cooke*, 7 Ir. C. L. R. 37.

Death of Party.]—By a settlement real estate was limited to such uses as A. and B. (husband and wife) should appoint, and in default of appointment to the use of trustees during the life of B., in trust for her separate use, with remainder to A. in fee. A. contracts to sell to C., and purchase money is paid to the trustees. Before completion A. died, and B. then refused to convey her life interest:—Held, that C. was entitled to specific performance to the extent of A.'s reversion in fee, with compensation in respect of B.'s life interest, and a lien on the purchase-money in the hands of the trustees. *Barker* v. *Cox*, 46 L. J., Ch. 62; 4 Ch. D. 464; 35 L. T. 662; 25 W. R. 138.

A. verbally agreed with B., his solicitor, for the sale of land to B. This agreement, which was never reduced to writing, provided that B. should bear all expenses of making out the title and that possession should be at once given. B. entered into possession, but took no steps in completion, and, before the purchase-money became due, died. In a suit by A. against the executor of B.:—Held, that B., as A.'s solicitor, ought to have had an agreement in writing prepared, and that the executor was bound to complete the purchase and pay the costs of the suit. *Bradfield* v. *Scriven*, 22 W. R. 202.

Where a vendor has died before completion of the contract the court will on a petition under the Trustee Act, 1850, make an order vesting the property in the purchaser and thereby in effect decree specific performance. Per Fry, L.J., a decree for sale or specific performance is a condition precedent to such a vesting order under the trustee act. *Colling, In re*, 55 L. J., Ch. 486; 32 Ch. D. 333; 54 L. T. 809; 34 W. R. 464—C. A.

—— **Defective Title.**]—Testator (who married after 1838), gave all his real estate to trustees, on trust to convert and invest 1,000*l.* out of the proceeds of sale, and then gave certain legacies, but did not dispose of the residuary proceeds of sale. The testator at the date of his death had contracted to sell certain lands for 3,000*l.* After his death his trustees found that no title could be made to part of the lands, and rescinded the contract. They then put up the lands to which they had a title for sale by auction, and

sold them for 2,500*l.* to the same purchaser :—Held, that there was no conversion of the testator's real estate beyond the purposes declared by the will, and that the undisposed-of proceeds of sale resulted to the heir. *Thomas, In re, Thomas* v. *Howell*, 56 L. J., Ch. 9 ; 34 Ch. D. 166 ; 55 L. T. 629.

Family Arrangement—Purchase by Trustees from Cestuis que Trustent.]—By deed of family arrangement the children of an intestate mortgaged to trustees their shares in the intestate's property considerably under the real value of such shares. The trustees were to hold the property subject to the mortgage in trust for the three eldest brothers, two of whom had taken out administration. By a subsequent marriage settlement one daughter settled on certain trusts her share under the deed of arrangement. In an action, commenced more than nine years after the deed of arrangement, by the daughter, her husband and infant children, against her brothers and the trustees of the deed of settlement, to have the deed set aside, except so far as it was a security on account of her share, and to have the settlement rectified :—Held, the plaintiffs were entitled, immediately after the execution of the deed, to have it set aside, and that the mere lapse of time was no fatal bar ; but held, also, that the subsequent marriage settlement constituted a fatal bar to the deed being set aside, since it was not established that the effect of setting aside the deed would be to benefit the parties interested under the settlement, and the settlement therefore could not be allowed to be varied ; and held, further, that an inquiry could not be granted in the present action whether it would be for the benefit of the parties entitled under the settlement for the deed to be set aside, and the settlement varied. *Worssam, In re, Hemery* v. *Worssam*, 51 L. J., Ch. 669 ; 46 L. T. 584.

Contract not carried out.]—A. articles to buy land, and pays part of the purchase money ; afterwards he enters into several orders of court to pay the residue by such a day, or, in default thereof, to give up the articles, and lose what he had before paid. Court will relieve, though these articles have not been complied with. *Vernon* v. *Stephens*, 2 P. Wms. 66.

Conveyance set aside.]—A. conveyance of one moiety of an estate being set aside, a contract for the sale of the other moiety, to the same party, based on the previous conveyance of the first moiety, cannot be supported. *Reynell* v. *Sprye*, 8 Hare, 222. Affirmed, 21 L. J., Ch. 633.

Sale by Son to Father—Fair Contract.]—The father, vendor, claimed the estate by purchase from his son ; the purchaser is entitled to evidence of the fairness of the transaction. *Boswell* v. *Mendham*, 6 Madd. 373 ; 1 L. J. (O.S.) Ch. 160 ; 23 R. R. 250.

Suppression of Facts.]—Sale held bad from suppression of articles of marriage. *Beatniff* v. *Smith*, 1 Eq. Ca. Abr. 357.

Several or Separate Lots.]—Where several lots are knocked down to a bidder at an auction, and his name marked against them in the catalogue, a distinct contract arises for each lot. *Roots* v. *Dormer* (*Lord*), 4 B. & Ad. 77 ; 1 N. & M. 667.

2. Agreements for Sale. Statute of Frauds.

a. When Concluded.

i. *In General.*

Contract in Correspondence.]—Where a court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration. *Hussey* v. *Horne-Payne*, 48 L. J., Ch. 846 ; 4 App. Cas. 311 ; 41 L. T. 1 ; 27 W. R. 585—H. L. (E.)

When no Consensus.]—An agreement is the result of the mutual assent of two parties to certain terms : and if it is clear that there is no consensus, what may have been written or said becomes immaterial. *Chinnock* v. *Ely* (*Marchioness*), 4 De G. J. & S. 638 ; 6 N. R. 1 ; 11 Jur. (N.S.) 329 ; 12 L. T. 251 ; 13 W. R. 597.

As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorised, there exist all the materials which a court of equity requires to make a legally binding contract. *Ib.*

But where to a proposal or an offer an assent was given subject to a provision as to a contract : —Held, that the stipulation as to the contract was a term of the assent, and there was no agreement independent of that stipulation. *Ib.*

M., by letter to G., proposed to sell to him premises for 5,000*l.* M. had no legal title to the premises, and, at an interview at the office of F., M.'s solicitor, G. refused to give more than 4,800*l.* M. said he would not give any title but that which he would himself get under a family arrangement, and said he would not take less than 5,000*l.*, and that there was an end to the matter. Subsequently, at the same interview, G. said he would give 5,000*l.* F., in answer to G., said he could not allow M. to enter into a contract at that moment, nor advise G., in the absence of his solicitor, to agree to the conditions which he, F., would think necessary :—Held, that G. could not sustain a bill for specific performance. *Gradwell* v. *Maguire*, Ir. R. 6 Eq. 477.

A plaintiff filed a bill for a specific performance of an agreement with the defendant. The defendant swore that his intention at the time of executing the agreement was not according to the construction contended for by the plaintiff. The court being satisfied that there had been no concord between the parties, dismissed the bill. *Griffin* v. *Coleman*, 28 L. T. 493.

Where Construction Doubtful.]—Evidence on which the court might decree the specific performance of an agreement, according to one construction of a writing, which was of doubtful meaning, where a conveyance, according to a different construction, had been executed by the vendor, and accepted by the purchaser. *Humphries* v. *Horne*, 3 Hare, 277.

Compromise—Fraud Charged.]—A bill was filed by a principal against an agent to enforce

specific performance of an agreement entered into for the purpose of settling certain matters in dispute between them, including alleged frauds by the agent. In the bill these charges of fraud were repeated as substantive allegations, and the defendant went into evidence to rebut the charges:—Held, that the evidence did not show that any concluded agreement had been come to between the parties. *Forester* v. *Read*, L. R. 6 Ch. 40; 24 L. T. 79; 19 W. R. 114.

Contract Executed by one Party.]—A., being entitled to certain lands in fee, granted annuities out of them to B. A. subsequently agreed to sell the lands to C., representing to him that B. would join in the conveyance. A. executed the conveyance to C., but C. refused to allow A. to get the purchase money until B. would discharge the lands of the annuities, which B. refused to do unless he were paid off. A. subsequently sold the lands to B., who had notice of the prior deed. —Held, that by C.'s conduct the contract was incomplete, notwithstanding that the deed was executed, and that A. had a right to sell. *Leader* v. *Ahearne*, 5 Con. & L. 534; 4 Dr. & War. 495.

Agreement with Third Party.]—It is no objection to a mutual contract between A. and B., for the one to buy or sell from or to the other of them his interest in certain property, that at the time of that contract there existed a conditional agreement by one of them with a third party to sell the whole property to him. *Cartwright* v. *Insole*, 16 L. T. 445.

Vendor Subsequently acquiring Property.]—Effect of an agreement to sell land not then the property of the vendor, but which afterwards became his. *Morse* v. *Faulkner*, 3 Swanst. 429.

No Acceptance—Request for Draft Contract.]—An offer for the sale of land was sent by the vendors to the purchaser upon certain terms. No acceptance of such offer came, but only a request to be furnished with draft contract. A draft was sent, and nothing further was done for two months, when the vendors wrote to say that they treated the proposed sale as entirely off:—Held, the vendors had a right to refuse to proceed with the sale. *Rummens* v. *Robbins*, 3 De G. J. & S. 88; 11 Jur. (N.S.) 631; 14 L. T. 717; 13 W. R. 979.

Purchaser Referring to "Engagement."]—Where the proposed vendor wrote: "I have let this house to you (the proposed purchaser) on the following terms, &c." (stating the terms at length), to which he replied: "I have to ask you if you will for a pecuniary consideration allow me to withdraw from my obligation to take your house and farm," &c. and in the subsequent correspondence the purchaser referred to his "engagement," &c.:—Held, that the contract could be inferred from the tenor of this correspondence with certain telegrams taken together, and specific performance decreed. *Coupland* v. *Arrowsmith*, 18 L. T. 755.

Offer by Tenant in Common—Uncertainty.]—A tenant in common of leaseholds in a negotiation for their purchase offered by letter to send an abstract of title, but the terms of the contract were too uncertain to bind his co-tenant; neither such offer, nor his refusal to disclose the lessor's title will entitle the purchaser to specific performance. *Mason* v. *Tyler*, 27 L. T. 371.

Agreement by Tenant for Life.]—Bill against a remainderman for the specific performance of an agreement by the tenant for life, dismissed, the agreement not having been so finally concluded that either party might have had it specifically executed. *Low* v. *Swift*, 2 Ball & B. 529.

Contract concluded by Conduct of Parties.]—Circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either. *Brogden* v. *Metropolitan Ry.*, 2 App. Cas. 666.

In such a case the word "approved," written by one of the parties at the end of the draft agreement, must be taken as an approval of the substance of the draft, and not, as in the case of a conveyancer's or solicitor's draft, an approval of the mere form. *Ib.*

The onus of showing that both parties had acted on the terms of an agreement which had not been, in due form, executed by either, lies upon the party who rests his case on that circumstance. *Ib.*

Acceptance by Leaseholders of Rent—Action by Reversioner.]—Two of the plaintiffs were the legal owners of a leasehold interest in a house, and claimed 36*l.* from the defendant for the use and occupation of it. They authorised him to pay this amount to another plaintiff, owner of the reversion. She refused to receive it, and demanded more. The plaintiffs then sued the defendant for the use and occupation, and claimed 23*8l.*:—Held, that as soon as the defendant expressed his readiness to pay the 37*l.* there was a concluded agreement between him and the plaintiffs for that amount, and the plaintiffs could not recover more. *Gretton* v. *Mees*, 7 Ch. D. 839; 38 L. T. 506; 26 W. R. 607.

Abandonment of Contract.]—Specific performance of an agreement, whereby a company agreed to construct and maintain a siding on land, was decreed, although the owner of the land had previously entered into negotiations with the company, for compensation in respect of the breach of the agreement. *Greene* v. *West Cheshire Ry.*, 41 L. J., Ch. 17; L. R. 13 Eq. 44; 25 L. T. 409; 20 W. R. 54.

Suggestions made by a vendor or purchaser as to the course which might be adopted for the purpose of obviating difficulties in the completion of a contract, are not to be taken as an abandonment of the original contract, and the substitution of a new one. *Munro* v. *Taylor*, 8 Hare, 51. Affirmed, 3 Mac. & G. 713; 21 L. J., Ch. 525.

ii. *Withdrawal of Proposal.*

Addition of New Terms to Contract.]—When an offer in writing is made by the owner to sell an estate on specified terms, and this is unconditionally accepted, there is a binding contract, which neither party can vary, but the owner is entitled at any time before his offer has been definitively accepted to add any new terms to his proposal. If these be refused, the treaty is at an end. *Honeyman* v. *Marryat*, 6 H. L. Cas. 112; 26 L. J., Ch. 619; 4 Jur. (N.S.) 17. Affirming 21 Beav. 14; 3 W. R. 502.

Notice to Purchaser—Sale to Third Party.]—An offer to sell property may be withdrawn before acceptance without any formal notice to the person to whom the offer is made. It is sufficient if that person has actual knowledge that the person who made the offer has done some act inconsistent with the continuance of the offer, such as selling the property to a third person. *Dickinson* v. *Dodds*, 45 L. J., Ch. 777; 2 Ch. D. 463; 34 L. T. 607; 24 W. R. 594.

Semble, that the sale of the property to a third person would of itself amount to a withdrawal of the offer, even although the person to whom the offer was first made had no knowledge of the sale. *Ib.*

Semble, that the acceptance of an offer to sell constitutes a contract for sale only as from the time of the acceptance. The contract does not relate back to the time when the offer was made. *Ib.*

A. signed a memorandum of agreement, by which he agreed to sell to B. all his interest in a partnership business on a certain valuation, "this purchase being contingent upon B. being able to agree on the purchase with the rest of the retiring partners." The memorandum was not then signed by B., who proceeded to negotiate with the other partners for the purchase of their interests. A fortnight after signing the memorandum A. wrote to B., withdrawing from his offer, on the ground that he had not complied with the condition alleged to have been verbally made by him that B. should accept within a week:—Held, that there had been no such acceptance by B. before A. had withdrawn from his offer, as to constitute a binding agreement against him of which specific performance could be enforced. *Horsfall* v. *Garnett*, 6 W. R. 387.

And see, TIME, WHEN OF THE ESSENCE, infra, col. 1145.

iii. *Acceptance.*

a. In General.

Within reasonable Time.]—Unless a valid acceptance be given, within a reasonable time, to a written offer to sell an estate, it will be treated as abandoned. *Williams* v. *Williams*, 17 Beav. 213.

An offer to sell land, to be binding upon the person making it, must be accepted within a reasonable time. *Meynell* v. *Surtees*, 25 L. J., Ch. 257; 2 Jur. (N.S.) 737; 3 W. R. 535. Affirming 3 Sm. & G. 101.

If the person making the offer die, become bankrupt, or sell, before acceptance of the offer, the land is not bound. *Ib.*

When not notified to Principal by Agent.]—A. was authorised by the defendant to make a proposal of sale of some land to the plaintiff, but to be accepted within a week. The plaintiff wrote to A. within that time, accepting the offer, but A. did not communicate the acceptance to the defendant until long after:—Held, that there was a valid contract, which was not destroyed by the neglect of A. to communicate the acceptance to the defendant. *Wright* v. *Bigg*, 15 Beav. 592.

Unconditional Acceptance.]—The court will not enforce the specific performance of a contract constituted by a proposal on one side, and an acceptance on the other, unless the acceptance is unqualified and unconditional. *Oriental Inland Steam Navigation Co.* v. *Briggs*, 5 L. T., 477; 10 W. R. 125.

—— **Where Term to be supplied in Contract.**]—Where a letter contains the entire terms of an agreement for purchase of lands, it is not necessary for the plaintiff to prove that he accepted the terms; if it require the plaintiff to supply a term in the agreement, there must be a special acceptance in writing, supplying that term, in order to take the case out of the statute of frauds. *Boys* v. *Ayerst*, 6 Madd, 316.

Letters will constitute an agreement which the court will specifically perform, unless the answer is a simple acceptance, without the introduction of a new term. *Wright* v. *St. George*, 12 Ir. Ch. R. 226. S. P., *Ford* v. *Compton*, 2 Bro. C. C. 32.

In order to constitute an agreement by letter, the answer to the written proposals must be a simple acceptance of the terms proposed without the introduction of any new or different terms. *Holland* v. *Ayre*, 2 Sim. & S. 194.

A proposal by a purchaser to take the remainder of a lease, was answered by letter, which, after acceding to the proposal, added, "We hope to give you possession at half-quarter day":—Held, that the addition did not introduce a new term, but that the acceptance was unconditional. *Clive* v. *Beaumont*, 1 De G. & Sm. 397; 13 Jur. 226.

Letter and Postscript.]—A wrote to B. offering to sell him an estate for 37,500*l.*, or a part of the estate for a less sum, and added a postscript reserving the right to remove the materials of a house. B. replied: "I beg to acknowledge the receipt of your letter stating that you are willing to accept 37,500*l.* for the whole of your freehold land at N. I hereby accept your terms as above, and agree to pay you the said sum of 37,500*l.* for your land":—Held, that this was an acceptance of the terms in A.'s letter, including the postscript. *Hussey* v. *Horne-Payne*, 48 L. J., Ch. 846; 4 App. Cas. 311; 41 L. T. 1; 27 W. R. 585—H. L. (E.)

Conditions of Sale to be signed.]—The owners of land, in answer to a written offer to buy it, wrote saying they had received the offer, and added, "which offer we accept," and now hand you two copies of conditions of sale which we have signed; we will thank you to sign same, and return one of the copies to us":—Held, that this was not an unqualified acceptance, and did not make a contract. *Crossley* v. *Maycock*, 43 L. J., Ch. 379; L. R. 18 Eq. 180; 22 W. R. 387.

Day for Completion specified.]—A letter, accepting an offer to purchase an estate on the terms stated in an advertisement, added a sum for deposit, and a day for completing the purchase. No reply was given to this letter:—Held, that there was no complete contract on which to sustain a bill for specific performance. *Honeyman* v. *Marryat*, 6 H. L. Cas. 112; 26 L. J., Ch. 619; 4 Jur. (N.S.) 17. Affirming 21 Beav. 14; 3 W. R. 502.

Shares—Interest on Allotment Money.]—A letter allotting shares stated that the allotment money must be paid on the 21st March, and punctual payment was requisite, and that the bankers were instructed not to receive payment after that day without interest at 10 per cent.:—Held, that this addition relative to interest was not an introduction of a new term. *Imperial Land Co. of Marseilles, In re, Harris's case*, 41 L. J., Ch. 621; L. R. 7 Ch. 587; 26 L. T. 781; 20 W. R. 690.

Alteration in Price.]—The defendant offered in writing to sell his farm for 1,000*l.*: but the plaintiff offered 950*l.*, which the defendant refused to accept. Subsequently the plaintiff, by letter, agreed to give 1,000*l.*, but there appeared to be no assent on the part of the defendant:—Held, that there was no binding contract within the statute of frauds. *Hyde* v. *Wrench*, 3 Beav. 334; 4 Jur. 1106.

Contract by letter thus:—I will give 16,000*l.*; answer, I will not take less than 17,000*l.*; answer returned, I will give 17,000*l.*:—Held, not agreement within statute. *Popham* v. *Eyre*, Lofft, 786.

Extension of Time for Acceptance.]—A., the agent of an intending purchaser of leaseholds, wrote to B., the vendor's agent, that he "could give him 50*l.* for the lease, plant, &c., if accepted at once." B., in reply, asked A. to allow the offer to remain open for twenty-four hours, in order that he might submit it to his employer. On the following day he wrote to A., "I am directed to accept your offer of 50*l.* for the lease, &c. . . . I shall be here at 11 to 11.30 to-morrow morning to sign contract." A. did not reach B.'s office until 12 o'clock. B. had waited for him until 11.45, and then sold the property to a third party:—Held, that the letters contained a binding contract, and specific performance was enforced against the vendor. *Branson* v. *Stammers*, 28 W. R. 180.

Assent to Contract by filing Bill.]—Filing a bill, held to be sufficient evidence of plaintiff's assent to an agreement of which the bill seeks to enforce specific performance. *Agar* v. *Biden*, 2 L. J., Ch. 3.

And see ADMISSION BY ANSWER, infra, col. 1144.

b. Subject to Approval of Title.

Whether a new Term.]—A. made a written offer to B. to sell him property at a certain price, and B. wrote in reply, and accepted the offer, "subject to the title being approved by our solicitors":—Held, that the words "subject to the title being approved by our solicitors" was a new term introduced by B., which, not having been acceded to by A., there was no concluded contract. *Hussey* v. *Horne-Payne*, 48 L. J., Ch. 846; 5 App. Cas. 311; 47 L. T. 1; 27 W. R. 585—H. L. (E.)

Per the Lord Chancellor:—Quære, whether the addition, in a written document, of the words "subject to the title being approved by our solicitor," could affect a contract for the sale of land, otherwise complete in itself. *Ib.*

When Title not Approved of.]—A contract for the purchase of a lease stated that it was made "subject to the approval of the title by the purchaser's solicitor":—Held, that, in the absence of mala fides or unreasonableness, on the part of the purchaser or his solicitor, the vendor could not enforce specific performance if the purchaser's solicitor disapproved of the title. *Hudson* v. *Buck*, 47 L. J., Ch. 247; 7 Ch. D. 683; 38 L. T. 56; 26 W. R. 190.

—— **Claim for Commission.**]—Where under a similar contract the title was never submitted to the solicitor:—Held, that the plaintiff (who sued for commission on the sale) must prove that the solicitor approved the title, or else that such a title was submitted to him as it was unreasonable for him to disapprove. *Clack* v. *Wood*, 9 Q. B. D. 276; 47 L. T. 144; 30 W. R. 931—C. A.

c. Subject to Consent of Third Parties.

Consent to Building.]—A contract for the sale of land provided that one party was to be consulted on any houses proposed to be built thereon by the other, and in case of difference, that A. and B., or their nominees, should have power to decide any such question. There having been no decision:—Held, that the court could not specifically perform the contract. *Tillett* v. *Charing Cross Bridge Co.*, 26 Beav. 419; 28 L. J., Ch. 863; 5 Jur. (N.S.) 994.

Consent given within reasonable Time.]—Where a contract is made which both parties to it know at the time cannot be carried out without the act or consent of a third party, and that act or consent is done or given by the third party within a reasonable time, and he does nothing inconsistent with such act or consent, want of mutuality at the time of contract is no bar to its performance. *Blackburn Union* v. *Brooks*, 26 W. R. 57.

iv. *Reference to a Further or Formal Agreement.*

Where only Preliminary Agreement.]—Specific performance of an agreement that appeared to be only a preliminary foundation for a future agreement refused. *Robertson* v. *Londonderry* (*Marquis*), 2 L. J., Ch. 137.

Intention of Parties.]—If contracting parties agree on terms of which there is sufficient evidence, but contemplate in addition a more formal document, it becomes a question of intention merely whether they intend it as a memorial of the terms already agreed on, or as the instrument by which alone they meant to be bound. If there is a paper signed by an agent duly authorised thereto, which, though agreeing to do something, leaves the subject-matter of the agreement unexplained, but refers to another paper which contains the full particulars of the explanation, the two may be connected together, so as to constitute a contract valid under the statute of frauds. *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; 27 L. J., Ch. 46; 4 Jur. (N.S.) 173; 5 W. R. 804. Affirming 2 Eq. R. 839; 3 De G. M. & G. 677.

The contract so constituted by A.'s authorised agent will be binding on A., though the second paper may have been sent by the agent to A.'s solicitor to put it into form, provided that the agent and the person with whom he was dealing agreed that it should be sent for that purpose but not otherwise. The act of sending such a paper to a solicitor to have the matter reduced into form affords cogent evidence that the parties do not intend to bind themselves till it is reduced into form. *Ib.*

A builder sent in the plaintiff's agent a tender to execute works for a certain sum. The agent replied by letter accepting the tender, and adding, "The contract will be prepared by," etc.:—Held, that there was a contract binding upon the builder; the additional words merely suggesting a convenient mode of carrying out their intention. *Lewis* v. *Brass*, 26 W. R. 152.

Final Agreement arrived at.]—Where the parties have come to a final agreement, and one of the terms is that such agreement shall be embodied in a formal contract, the agreement may be enforced, even though such formal contract has not been executed. *Rossiter* v. *Miller*, 48 L. J., Ch. 10 ; 3 App. Cas. 1124 ; 39 L. T. 173 ; 26 W. R. 865—H. L. (E.)

When the cardinal points of a proposed contract are definitely agreed upon by letters, the mere fact that in the course of the correspondence reference has been made to a more formal agreement, or subsidiary non-essential stipulations, will not deter the court from considering the agreement arrived at by the letters as concluded. *Cayley* v. *Walpole*, 22 L. T. 900 ; 18 W. R. 782.

Appointment to draw Agreement.]—A party directed his agent to buy a lease of a house for 3,200*l.*, and sign an agreement. This agent wrote to the agent of the owner, offering 3,200*l.* The owner wrote across the last-mentioned letter, "I agree to sell my house upon these terms" ; and the agent of the owner wrote to the agent of the other party, "My employer will take your offer" ; and added, "Make an appointment to meet to draw the agreement" :—Held, that the letters constituted a contract to buy, and specific performance was decreed. *Cowley* v. *Watts*, 22 L. J., Ch. 591 ; 17 Jur. 172 ; 1 W. R. 218, 484.

Reference to Future Contract.]—The defendant placed a leasehold property in the hands of an agent for sale. The plaintiff wrote to the agent. "In reference to J.'s property, I think 800*l.* for the lease, fixtures, &c. is about what I should be willing to give. Possession to be given me within fourteen days from date. This offer is made subject to the conditions of the lease being modified to my solicitor's satisfaction." The agent wrote back, "We are instructed to accept your offer of 800*l.* for these premises, and have asked J.'s solicitor to prepare contract" :—Held, that, notwithstanding the reference to a future contract, the two letters constituted a complete contract. *Bonnewell* v. *Jenkins*, 47 L. J., Ch. 758 ; 8 Ch. D. 70 ; 38 L. T. 81 ; 26 W. R. 294.

When an offer in writing is accepted in writing, the mere reference in the document accepting the offer to the preparation of a more formal contract does not amount to the introduction of a new term. *Ib.*

Letters may be sufficient to constitute a binding contract, though they refer to the intended execution of a more formal instrument. *Thomas* v. *Dering*, 1 Keen. 729 ; 6 L. J., Ch. 267 ; 1 Jur. 427.

M. offered by letter to give C. 15,000*l.* for the next presentation afterwards to the living of B. C. replied by letter, saying that he accepted the proposal : "An article, as is usual in such cases, to be drawn up between us to the above effect, in which I will undertake to make out a good title to the satisfaction of any counsel you may appoint ; this preliminary matter, however, cannot be arranged till A., my solicitor, returns to town" :—Held, that the contract, was final and complete, the thing to be bought and the sum to be given, being distinctly stated in the proposal, and explicitly accepted in the answer thereto. *Dowling* v. *Maguire*, Ll. & G. Plunk. 1.

Solicitor to Prepare Contract.]—Agreement in writing for sale of estate, binding, though signed only by vendor, and followed by direction to attorney to prepare proper agreement for both parties to sign. *Fowle* v. *Freeman*, 9 Ves. 351.

Solicitor to Approve Formal Contract.]—No action lies upon an agreement to buy a lease, and sign a "formal contract" when approved by the purchaser's solicitor, in the event of such solicitor not approving of it, unless the approval is withheld malâ fide or unreasonably. *Bartlett* v. *Greene*, 30 L. T. 553.

And see *Hudson* v. *Buck*, supra, col. 1115.

Condition as to Corrected Agreement.]—The plaintiff wishing to sell a medical practice, with the lease of the house where it was carried on, placed it on the books of a medical agent. The premiums asked for the practice and for the lease were stated in a letter from the agent to the defendant, but no time for completing was mentioned. The defendant replied to the agent accepting the terms offered, and adding that he should be ready to pay the deposit money "on receipt of corrected agreement." A formal agreement was drawn up, but never signed :—Held, that inasmuch as the time for the commencement of the purchase was left uncertain, and the stipulation as to the three months' introduction was not agreed to, and as the parties contemplated a formal agreement, there was no binding contract between the parties. *May* v. *Thomson*, 51 L. J., Ch. 917 ; 20 Ch. D. 705 ; 47 L. T. 295.

Terms to be Settled by a Formal Contract.]—Plaintiff was the lessee of vaults under a lease. The defendant company entered into a negotiation for the purchase of the lease. The secretary of the company wrote to the agents for the plaintiff a letter in which he said that the directors thereby offered to purchase the vaults for 2,500*l.* cash, and to take over a mortgage for 3,500*l.* on the lease, these terms to include the lease, goodwill, fixtures, &c. The house agents answered as follows : "In reply to your letter of the 7th inst. we are now instructed to accept the offer therein contained, and will forward contract as soon as we obtain it from the solicitor" :—Held, that no binding contract had been entered into, because the letters mentioned only what was the property to be purchased and the price to be given for it, but left the other necessary terms of the agreement, such as the time when possession was to be given, to be settled by a formal contract to be prepared by a solicitor in the ordinary way. *Donnison* v. *People's Cafe Co.*, 45 L. T. 187.

A memorandum that A. had paid to B. 50*l.* as a deposit, in part payment, of 1,000*l.* for the purchase of a house, the terms to be expressed in an agreement to be signed as soon as prepared :—Held, not a sufficient agreement in writing. *Wood* v. *Midgley*, 5 De G. M. & G. 41 ; 2 Eq. R. 729 ; 23 L. J., Ch. 553 ; 2 W. R. 301.

Special Conditions of Sale.]—Where the vendors of land, in a letter acknowledging the receipt of an offer by intending purchasers, wrote as follows :—"Which offer we accept, and now hand you two copies of conditions of sale," and therewith inclosed a formal agreement with conditions of a special character :—Held, that the acceptance was only conditional, and that there was no final agreement of which specific performance could be enforced as against the purchasers. *Crossley*

v. *Maycock*, 43 L. J., Ch. 379; L. R. 18 Eq. 180; 22 W. R. 387.

Draft Contract to be Prepared.]—A. wrote "to confirm" a previous verbal offer of 6,000*l.* for property. B. accepted the offer in writing, coupled with the words, "I will send draft contract in due course":—Held, there was no contract contained in the writings. *Vale of Neath Colliery Co.* v. *Furness*, 45 L. J., Ch. 276; 34 L. T. 231; 24 W. R. 631.

A. instructed her solicitors to sell a house, subject to stipulations, for a fixed sum; and an intending purchaser agreed to give the sum. The solicitors of the vendor wrote to the purchaser to say that they had "been instructed to proceed with the sale to you of these premises. The draft contract is being prepared, and will be forwarded to you for approval in a few days":—Held, that this acceptance was conditional upon the terms of the draft contract being agreed to. *Chinnock* v. *Ely* (*Marchioness*), 4 De G. J. & S. 638; 6 N. R. 1; 11 Jur. (N.S.) 329; 12 L. T. 251; 13 W. R. 597.

Acceptance Subsequently Qualified.]—A vendor and purchaser had agreed by parol upon the sale of a house at a specified price. The purchaser, by arrangement, wrote a letter to the vendor confirming his offer, repeating the terms, and requesting a reply. The vendor's solicitor replied, stating that he was instructed to carry out the sale of the house according to the purchaser's letter, but adding, "There are some details to be embodied in a contract of sale which I will prepare and forward for your approval and signature":—Held, that the latter words as to details to be embodied qualified the otherwise unconditional acceptance of the offer in the purchaser's letter. *Ball* v. *Bridges*, 30 L. T. 430; 22 W. R. 552.

Acceptance subject to further Contract.]—In reply to a telegram offering 1,200*l.* for lands, with respect to which negotiations for a sale had been pending, the vendor telegraphed: "Accept your offer of 1,200*l.*, subject to letter, and agreement to be sent to your solicitor." A draft contract of sale was subsequently furnished to the purchaser's solicitor:—Held, that the vendor's acceptance being expressly made subject to a further agreement, did not amount to a concluded contract. *Brien* v. *Swainson*, 1 L. R., Ir. 135.

Where a person proposing to sell an estate receives an offer, and his agent answers, "he has authorised us to accept the offer, subject to the terms of a contract being arranged between his solicitor and yourself," the answer does not constitute a complete contract, and the vendor is at liberty to add other terms, and on their non-acceptance, to break off the treaty. *Honeyman* v. *Marryat*, 6 H. L. Cas. 112; 26 L. J., Ch. 619; 4 Jur. (N.S.) 17. Affirming 21 Beav. 14; 3 W. R. 502.

Specific performance of an agreement "subject to a contract to be settled," or "subject to a proper contract," will not be enforced. *Harvey* v. *Barnard's Inn* (*Principal*), 50 L. J., Ch. 750; 45 L. T. 280; 29 W. R. 922.

Option to purchase.]—A testator gave to each of his sons an option to purchase an estate, and required a formal agreement to be executed within two months from receiving the offer to purchase. A. accepted by letter within the two months, and offered to execute a formal agreement:—Held, that the letter was such a contract as would be enforced in equity even if the formal agreement was not executed in time. *Austin* v. *Tunney*, 15 W. R. 1.

And see Cases in next Section.

b. Interconnected Documents.

Contract in Correspondence.]—Where court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration. *Hussey* v. *Horne-Payne*, 48 L. J., Ch. 846; 4 App. Cas. 311; 45 L. T. 1; 27 W. R. 585—H. L. (E.)

Previous Parol Contract.]—A note or memorandum in writing, made subsequently to, but evidencing a previous parol contract, is sufficient, within s. 4 of the Statute of Frauds (29 Car. 2, c. 3). *Bradford* v. *Boulston*, 8 Ir. Ch. R. 468.

Acceptance long after Offer.]—A written notice, signed, referring to a written proposal not signed, and made several years before, may be so connected with it as to render the two documents a contract within the statute of frauds sufficiently signed. *Lowry* v. *Dufferin*, 1 Ir. Eq. R. 218.

Reference to Agreement.]—An agreement having been made and reduced into writing, but not signed, and letters having passed between the parties referring to the agreement in which the defendant had said, "his word should be as good as any security he could give," this takes it out of the statute of frauds, and he shall be compelled to perform the agreement. *Tawney* v. *Crowther*, 3 Bro. C. C. 318. *See* this case, *Id.* 161.

What evidence admissible.]—When a memorandum in writing, signed by the parties to be charged, refers to another document in writing it may be proved by parol evidence that a certain document is the one referred to. *Morris* v. *Wilson*, 6 Jur. (N.S.) 168.

A paper was signed by a duly authorised agent; it contained an agreement to do a certain thing, but not any explanation of the necessary details; but it referred to another paper, which did contain them:—Held, that the two might be connected together, by parol evidence, so as to constitute an agreement sufficient within the statute of frauds. *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; 27 L. J., Ch. 46; 4 Jur. (N.S.) 173; 5 W. R. 804. Affirming 3 De G. M. & G. 677; 2 Eq. R. 839.

A., by advertisement, offers land to be let for three lives, or thirty-one years; and an agreement is executed between B. and the agent of A., authorised to contract for him, for a lease of the lands, in which agreement the term for which the lease is to be made is not mentioned. There being no reference in the agreement to the advertisement, parol evidence cannot be received to connect the one with the other, so as to ascertain the term. *Clinan* v. *Cooke*, 1 Sch. & Lef. 22.

If one written instrument refers to another written instrument, parol evidence may be admitted to show what was the thing so referred to. *Id.* 33.

Plaintiff and defendant being in treaty for the sale of lands of the defendant, the latter made an offer in writing that plaintiff should pay off an incumbrance on the lands, and that thereupon the deeds should be lodged with the plaintiff, who should be let into possession on paying balance of purchase-money to defendant. This offer was declined. Soon after the parties met and for the first time agreed on the amount of the purchase-money. Defendant then handed to plaintiff a writing signed by defendant specifying the denominations and quantities of the premises, the price and deposit, but with no mention of the plaintiff's name, or of an expression of intention to sell. No deposit was paid. Defendant afterwards consulted plaintiff by letter as to letting the land :—Held, that the writing of the defendant did not alone, or in connection with the previous and subsequent correspondence, constitute a sufficient memorandum in writing within the statute. *Skelton* v. *Cole*, 1 De G. & J. 587.

E. P. W. made a parol agreement to sell her share in certain leasehold property to J., at 200*l*. The only evidence in writing of the terms of the contract consisted of a receipt as follows, "September 22nd, 1882.—Received of J., one pound of my share in the B. property, the sum of 200*l*.—(Signed) E P. W.," and a letter dated the 19th March, 1893, the material part being :—"Mr. J. Sir, If the balance of 199*l*. on account of the purchase of my share of the property be not paid on or before the 22nd inst., I shall consider the agreement (made September 22nd, 1882) not any longer binding" :—Held, first, that the documents being connected constituted a sufficient note or memorandum in writing; and, secondly, assuming that there was no reference in one document to connect it with the other, the terms contained in the parol contract being the same as the terms contained in the two documents, there was a sufficient note or memorandum in writing to satisfy the statute of frauds. *Studds* v. *Watson*, 33 W. R. 118.

Letter Referring to Draft Conveyance.]—The memorandum or note of an agreement required by the 4th section of the statute of frauds must be a memorandum complete at the time it is made. *Mundy* v. *Asprey*, 49 L. J., Ch. 216; 13 Ch. D., 855; 28 W. R. 347.

A letter from an alleged purchaser inclosing and referring to a draft conveyance in which it was recited that he had agreed to purchase land :—Held, not to be a memorandum of a completed agreement. *Ib.*

Letter Referring to Memorandum.]—A letter signed by the purchaser, not containing the terms of the contract, but, on a fair view of the evidence, referring (though not in terms) to a memorandum containing them :—Held, sufficient within the statute of frauds. *Morgan* v. *Holford*, 1 Sm. & G. 101; 17 Jur. 225; 1 W. R. 101.

Receipt Referring to Conditions of Sale.]—The plaintiff claimed specific performance of a contract to purchase a house and premises sold by auction. After the sale the auctioneer signed the following memorandum at the foot of the conditions : "The property duly sold to A. S., butcher, Pinxton, and deposit paid at close of sale," and he also signed this receipt : "Pinxton, March 29th, 1880. Received of A. S., the sum of 21*l*. as deposit on property purchased at 420*l*. at Sun Inn, Pinxton, on the above date. Mr. G. C., owner" :—Held, that the word "purchased" was enough to connect the receipt with the conditions of sale, and that the description in the receipt and conditions was sufficient to satisfy the statute of frauds. *Shardlow* v. *Cotterell*, 51 L. J., Ch. 353; 20 Ch. D. 99; 45 L. T. 572; 30 W. R. 143.

Letter to Solicitor to Prepare Conveyance.]—A letter to a solicitor, with directions for preparing the conveyance of a purchase described generally as the land bought of A., not specifying the term, is not sufficient evidence of a contract within the statute of frauds. *Rose* v. *Cunningham*, 11 Ves. 550.

Where Documents Suppressed.]—Whether letters referring to other letters which have been suppressed, but not containing in themselves certain terms of agreement, can be made the foundation of a specific performance, quære. *Collett* v. *Butler*, 3 Swanst. 402.

A.'s agent wrote to B., "I am directed to offer you for the premises 3,000*l*." B. replied, "We accept your offer. If you approve of the enclosed, sign the same, and we will, on the receipt of the deposit, sign you a copy." B. filed a bill for specific performance, and A. did not produce the enclosure :—Held, that the two letters constituted a valid contract, intended to be carried into effect by the enclosure; and that, though it did not appear that the inclosure had been approved of, still that this did not affect the prior valid contract. *Gibbins* v. *North Eastern Metropolitan Asylum District Board*, 11 Beav. 1; 17 L. J., Ch. 5; 12 Jur. 22.

And see Cases under preceding section.

c. Vagueness and Uncertainty.

Rule in Equity.]—Specific performance decreed of an agreement, though an uncertain one. *Allen* v. *Harding*, 2 Eq. Ca. Abr. 17.

Equity will not decree a specific execution upon a contract, the terms of which are uncertain as to its extent. *Harnett* v. *Yielding*, 2 Sch. & Lef. 549.

If there be uncertainty as to the terms of an agreement, it cannot be carried into execution, even though reduced to writing. *Lindsey* v. *Lynch*, 2 Sch. & Lef. 7.

When part of an agreement is to do certain acts upon certain contingencies, equity will not decree a specific performance. *Gervais* v. *Edwards*, 2 Dr. & War. 80; 1 Con. & L. 242; 4 Ir. Eq. R. 555.

Ambiguous Contract.]—Specific performance refused from ambiguity of contract. Purchaser having insisted on one construction of contract, not permitted to compel vendor to convey upon the terms that vendor originally offered. *Clowes* v. *Higginson*, 1 V. & B. 524.

A. contracts with B. to sell a manor described as "The Manor of S., an extensive parish with the right of free warren, &c., sporting over about 3,000 acres, embracing nearly the whole parish of S. At the date of the contract it was supposed that the manor was co-extensive with the parish of S. A. subsequently discovered that the manor extended beyond the limits of the parish and included valuable land without the parish. Upon a bill filed by B. for specific performance of the contract, as including the

whole manor:—Held, that the terms of the contract were ambiguous; and both parties at the date of the contract being in error as to what was included therein, the court would not compel the performance of it so as to include property not intended to be sold by the vendor. *Baxendale* v. *Seale*, 24 L. J., Ch. 385; 1 Jur. (N.S.) 581.

Where Purpose Specified—Making Road.]—An agreement to give so much of a thing as may be necessary for a specified purpose confers a right of a nature known to the law, and is not open to the objection of uncertainty. Upon an agreement to give so much of a specified piece of land as may be necessary for a specified purpose, when the quantity has been determined the right of selecting the position of the piece to be given belongs to the promisee. If the promisor, however, had any objection to the promisee's selection, and made a reasonable offer in lieu thereof, the court might listen to it. But it is not reasonable to wish to interpose a road between a burial ground and the church to which it is to belong. *Rumble* v. *Heygate*, 18 W. R. 749.

—— **Making Railway.**]—Contract for the sale of an estate, vendor reserving "the necessary land for making a railway" through the estate to P.:—Held, that the reservation was void for uncertainty and that the contract could not be enforced. *Pearce* v. *Watts*, 44 L. J., Ch., 492; L. R. 20 Eq. 492; 23 W. R. 771.

—— **Making Footpath.**]—Land was sold to B., consisting of a circular plot, surrounded by a ring called the Drive. It was stipulated (inter alia) that a footpath of the width of fifteen feet should be laid out round the whole of the northern, southern, and western boundaries of the said land. The Drive belonged to B.; the part outside had originally been his, but had been sold by him:—Held, that the condition about the footpath was too vague to be enforced. *Taylor* v. *Gilbertson*, 2 Drew. 391.

Freeholds and Leaseholds—Boundaries not Defined.]—In a contract for sale, lands were described as partly freehold and partly leasehold. The title-deeds did not clearly define the boundaries and extent of the two properties:—Held, that such an uncertainty was not an objection to a decree for specific performance. *Monro* v. *Taylor*, 8 Hare, 51. Affirmed, 3 Mac. & G. 713; 21 L. J., Ch. 525.

Commencement of Title.]—An agreement for the sale of lands, which shows on the face of it that the parties are not agreed as to the terms of the contract between them, and as to the commencement of the title, does not express the intention of the parties with such certainty that a court of equity will enforce performance of it. *Rummens* v. *Robins*, 3 De G. J. & S. 88; 11 Jur. (N.S.) 631; 14 L. T. 717; 13 W. R. 979.

Date not Specified.]—Semble, that where a date has not been specified in the agreement, although intended to be so, as that at which an important obligation is to arise, this would of itself be, on the ground of uncertainty, an adequate reason for not enforcing the contract. *Fitzpatrick* v. *Nolan*, 1 Ir. Ch. R. 671.

Information as to Title Required.]—After negotiations for the purchase of tithes, in which the terms were discussed, but not finally settled, the vendor wrote to his solicitor a letter, which contained the following passage:—"Previously to paying the amount" (then followed the illegible word) "for tithes, glebe, &c., it would be advisable to have information as to title," &c.:—Held, that this letter did not amount to a note or memorandum in writing within the statute of frauds. *Savile* v. *Kinnaird*, 11 Jur. (N.S.) 195.

Royalty on Minerals if found.]—A. agreed to sell to B. a house and land, with a clause that in the event of there being any coals or iron stone under the land, a royalty of so much per ton was to be paid thereon; and that any mines required to be left by a certain railway company were to be paid for the same as if gotten, out of the money received for them from the railway company. The court refused to enforce specific performance of this agreement. *Williamson* v. *Wootton*, 3 Drew. 210.

Covenant for Pre-emption—Subsequent Devise.]—A., on the marriage of his daughter to B., covenants that B. shall have his land called C. for 1,500*l.* less than any other, and afterwards devises the premises over, and dies. The court refused specific performance by reason of uncertainty and want of mutuality of it. *Bromley* v. *Jefferies*, 2 Vern. 415; Pre. Ch. 138.

Price not fixed.]—A. agreed to sell an estate to B. for 3,000*l.*, "and the further sum of 20*l.* per cent. on any sum the property might realise above that sum at the sale by auction advertised to take place" the next day:—Held, that the contract was sufficiently certain to be enforced. *Langstaff* v. *Nicholson*, 25 Beav. 160.

Whether Purchase or Lease.]—Where an agreement is in its terms so uncertain as to raise a doubt as to its true effect, whether to be considered as a purchase of premises or a lease, a demurrer will lie to a bill for a specific performance of it. *Dolling* v. *Evans*, 36 L. J., Ch. 474; 15 L. T. 604; 15 W. R. 394.

Lease—Term not Fixed.]—An agreement for the purchase of a lease which does not mention the length of the term granted by the lease is void for uncertainty. *Southern* v. *Harriman*, 14 W. R. 487.

—— **No Time fixed for Completion.**]—The plaintiff wishing to sell a medical practice, with the lease of the house where it was carried on, placed it on the books of an agent. The premiums asked for the practice and for the lease were stated in a letter from the agent to the defendant, but no time for completing was mentioned. The defendant replied in a letter to the agent accepting the terms, and adding that he should be ready to pay the deposit money on receipt of corrected agreement. A formal agreement was drawn up, but never signed:—Held, that inasmuch as the time for the commencement of the purchase was left uncertain, and as the parties contemplated a formal agreement, there was no binding contract between the parties. *May* v. *Thomson*, 51 L. J., Ch. 917; 20 Ch. D. 705; 47 L. T. 295.

Pass over Railway.]—S., carrying on business in the vicinity of the defendants' railway, signed an agreement, whereby, in consideration of receiving from the defendants yearly, so long as he should carry on business, a free pass over their line, he promised, so long as the scale of charges of the defendants and of a canal company bore the same proportion to each other which they then did, to have his corn carried by the defendants in preference to the said canal company. Subsequently he made a money payment, by way of nominal consideration, for the said pass, which the defendants ultimately refused to renew:—Held, that the agreement was unilateral in its nature and uncertain in its terms, and could not be specifically enforced. *Sturge* v. *Midland Ry.*, 4 Jur. (N.S.) 273; 6 W. R. 233.

Agreements as to Future Inventions.]—Specific performance of an agreement between four persons, regulating the right to all their future inventions, refused on the ground (inter alia) that it was too vague and uncertain as to its duration. *Firth* v. *Ridley*, 33 Beav. 516.

Concession to make Telegraphs.]—The plaintiffs alleged that a concession to take telegraph wires across the A. Islands, which was granted to W. by the P. government in 1857, was sold by him to them; but that no time for the completion of the agreement was fixed. They also alleged that, in 1860, an intending company obtained a concession from the F. government to carry telegraph wires across territory between Spain, Portugal, and France and America; and that, in 1864, it was agreed between the plaintiff and the company, "that the plaintiff should sell to the intending company all his right and title to the P. concession for 80,000*l.* Demurrer allowed, on the ground of vagueness in the terms of the agreements of 1857 and 1864. *European and American Submarine Telegraph Co.* v. *Elliot*, 12 L. T. 416.

Compromise of Litigation.]—Litigation was carried on between the plaintiff and his two sons and the defendant in this country and in Peru. An agreement was afterwards signed in England between the plaintiff and the defendant, whereby it was agreed that a patent standing in the name of the plaintiff should be held for their mutual benefit, the defendant to pay 100*l.* towards the expenses of taking out the patent. The plaintiff agreed to "raise" all proceedings here and in Peru by the plaintiff and his sons, each party paying his own costs, "it being agreed that all claims between the defendant and the plaintiff and his sons are settled up to this date:—Held, that the agreement was such an one as the court would decree the performance of; and that it was not bad for uncertainty, nor for want of mutuality. *Marsh* v. *Milligan*, 3 Jur. (N.S.) 979.

And see COMPLETENESS OF TERMS OF CONTRACT. Infra, col. 1141.

d. Statute of Frauds.

And see CONTRACT, A. 2.

i.—*Interests in Land.*

Rents—Abatement.]—Agreement for an abatement of rent of lands is within the statute of frauds. *O'Connor* v. *Spaight*, 1 Sch. & Lef. 306.

—— **Loan to be Paid Out of.**]—A. in July borrowed 200*l.* from his bankers upon a verbal agreement that the loan should be repaid out of the rent of a farm which would become due at Michaelmas. The money was advanced and the customer gave a letter addressed to the tenant of the farm, by which he authorised and requested the tenant, when his Michaelmas rent became due, to pay 200*l.* to the bankers. The bankers sent the letter to the tenant. The customer was adjudicated a bankrupt in August:—Held, that as the rent was an interest in land, the agreement was one which, by virtue of s. 4 of the statute of frauds, could not be proved by parol evidence, and that therefore the letter could alone be looked at. *Hall, Ex parte, Whitting, In re*, 48 L. J., Bk. 79; 10 Ch. D. 615; 40 L. T. 179; 27 W. R. 385—C. A.

—— **Advowsons.**]—Advowsons are rents within the statute of frauds, but an annuity in fee not a personal inheritance. *Stafford (Earl)* v. *Buckley*, 2 Ves. Sen. 177.

Where Contract Executed.]—An agreement between the plaintiff and the defendant, that if the plaintiff would surrender her tenancy, and prevail on her landlord to accept the defendant as tenant in her place, the defendant would pay the plaintiff 100*l.* as soon as he should become tenant, is a contract relating to an interest in land, and cannot be enforced unless in writing, even where the contract is executed. *Cocking* v. *Ward*, 1 C. B. 858; 15 L. J., C. P. 245.

But after the contract has been executed, a parol admission by the defendant that he owes the 100*l.* to the plaintiff is evidence of money due on an account stated. *Ib.*

A tenant having agreed with his landlady that if she would accept another for her tenant in his place, he would pay her 40*l.* out of 100*l.*, which he was to receive for the goodwill, if her consent was obtained:—Held, that having received the 100*l.*, he was liable to the landlady for money had and received for her use, the consideration being executed, and therefore the case was taken out of the statute, as a contract for an interest land. *Griffith* v. *Young*, 12 East, 513.

The plaintiff and the defendant agreed by word of mouth that the plaintiff should pay 37*l.* for the interest of the defendant in a slaughter-house, and for the fixtures; the defendant to return 10*l.* if the plaintiff was refused a licence to use the premises as a slaughter-house. The premises and fixtures were transferred to the plaintiff and the defendant received the 37*l.* Subsequently an action was brought to recover 10*l.* on an allegation that the licence to use the premises had been refused:—Held, that the contract being executed as far as regarded the land, and the promise sued on relating wholly to money, the plaintiff might recover, though the contract was not in writing. *Green* v. *Saddington*, 7 El. & Bl. 503; 3 Jur. (N.S.) 717; 5 W.R. 593.

A verbal agreement was made between the plaintiff and defendant, that, in consideration of the plaintiff giving up to the defendant immediate possession of a house which the plaintiff held under a seven years' lease, the defendant would pay the plaintiff 100*l.* The plaintiff gave up possession to the defendant, who came in, and paid to the plaintiff a portion of the 100*l.* The plaintiff brought an action to recover the balance:—Held, that this was a contract concerning an interest in land, and that, as it was

not in writing, the statute of frauds prevented any action being maintainable upon it, though it been so far performed. *Kelly* v. *Webster*, 12 C. B. 283; 21 L. J., C. P. 163; 16 Jur. 838.

Agreement as to Improvements.]—An agreement whereby the landlord lays out money in repairs and the tenant agrees to pay an increased rent is not a contract for an interest in land. *Donnellan* v. *Read*, 3 B. & Ad. 899; 1 L. J., K. B. 269.

Vendor's Lien.]—The benefit of the vendor's lien for purchase money unpaid may be assigned by parol to a third party, semble. *Dryden* v. *Frost*, 3 Myl. & Cr. 670; 8 L. J., Ch. 235; 2 Jur. 1030.

—— Premium on Lease.]—A premium on a lease is in the nature of purchase money, for which, when unpaid, there is a lien on the land, and consequently unpaid premium is an interest on land within 9 Geo. 2, c. 36, s. 3. *Shepheard* v. *Beetham*, 46 L. J., Ch. 763; 6 Ch. D. 597; 36 L. T. 909; 25 W. R. 764.

Agreement for Foreclosure and Sale.]— Bill to carry into execution a parol agreement between solicitors, that there should be a decree of foreclosure, that the estate should be sold, the mortgagee paid her principal and interest, and the remainder to the mortgagor, dismissed as within the statute of frauds. *Cox* v. *Peele*, 2 Bro. C. C. 334.

Award—Lease.]—In the course of the proceeding before an arbitrator, the parties agreed by parol that the arbitrator shall determine as to a lease to be granted. Such an agreement is within the statute of frauds, and the award cannot be enforced. *Walters* v. *Morgan*, 2 Cox, 369.

Agreement to share Purchase.]—If two neighbours agree that one should take a lease of houses for the benefit of both, the other shall have the benefit, though the agreement is not in writing. *Atkins* v *Rowe*, Moseley, 39.

A. and B. being severally in treaty for a purchase of a house and land, agreed by parol that A. shall desist, and that B. shall purchase, and let A. have part of the ground at a reasonable price. B. purchases, and refuses to perform the agreement. This being a parol agreement, is within the statute of frauds. *Lamas* v. *Bayly*, 2 Vern. 627.

Declaration of Trust.]—A. verbably agreed to bid for B. at an auction of a house; the house was bought and a deposit paid by A. In an action by B. against A. to have it declared that A. was his agent and trustee:—Held, that although under s. 4 of the statute of frauds an agency might be established by parol, s. 7 applied, by which all declarations of trusts of lands, tenements, &c., must be proved by some writing. *James* v. *Smith*, [1891] 1 Ch. 384; 63 L. T. 524; 39 W. R. 396. Affirmed, on other grounds, 65 L. T. 544—C.A.

Agreement to charge Lands—Deposit of Title-deeds.]—An agreement to charge hereditaments with the value of property which has been lost through the wrongful act of a third person must be in writing, as being within the 4th section of the statute of frauds; but it may be taken out of the statute by a deposit of title-deeds. *Whitmore* v. *Farley*, 45 L. T. 99; 29 W. R. 825; 14 Cox, C. C. 617.

And see *Mounsey* v. *Rawkin*, infra.

Growing Crops.]—A contract for the sale of a growing crop of lands is within s. 4. *Carrington* v. *Roots*, 2 M. & W. 248; 1 M. & H. 14; 6 L. J., Ex. 95.

The keep, viz. growing grass of fields, is an interest to land. *Shelton* v. *Livius*, 2 Tyrw. 420; 2 C. & J. 411; 1 L. J., Ex. 139.

A contract with the owner of a close for the purchase of a growing crop of grass there, for the purpose of being mown and made into hay by the vendee, is a contract of an interest in or concerning land, and void if not reduced to writing. *Crosby* v. *Wadsworth*, 6 East, 602; 2 Smith, 559.

A verbal agreement for the sale of the then-growing crop of potatoes, is not an interest in or concerning them, within s. 4, but a sale of goods within s. 17. *Evans* v. *Roberts*, 5 B. & C. 829; 8 D. & R. 611; 4 L. J. (o.s.) K. B. 313.

A contract to sell to the defendant the potatoes at so much per sack, the defendant to get them out of the ground immediately, is not a contract for any interest in land, but the same as if the potatoes, which had done growing and were to be taken up immediately, had been sold in a warehouse. *Parker* v. *Staniland*, 11 East, 362. S. P. *Warwick* v. *Bruce*, 2 M. & S. 205. *Sainsbury* v. *Matthews*, 4 M. & W. 343; 7 D. P. C. 23; 8 L. J., Ex. 1.

A contract, by which the defendant was to give 25*l.* for crops of growing corn and potatoes, and the stubble afterwards, and whatever lay grass was in the fields; the defendant to harvest the corn and dig the potatoes, and the plaintiff to have the liberty of turning his own cattle on, and to pay the tithes—is not a contract for the sale of an interest in land; for the growing crops are mere chattels; and, with regard to the grass, as the plaintiff did not part with his possession of the soil, the contract was to be construed as an agistment of the defendant's cattle by the plaintiff. *Jones* v. *Flint*, 2 P. & D. 594; 10 A. & E. 753; 9 L. J., Q. B. 252.

A sale of growing turnips, no time being stipulated for the removal, and the degree of their maturity not being positively found, is a sale of an interest in land, and must be in writing. *Emmerson* v. *Heelis*, 2 Taunt. 38. And see *Mayfield* v. *Wadsley*, 3 B. & C. 357; 5 D. & R. 224; 3 L. J. (o.s.) K. B. 31.

An agreement for the sale of growing fruit and vegetables is an agreement for the sale of an interest in land. *Rodwell* v. *Phillips*, 9 M. & W. 501; 1 D. (N.S.) 885; 11 L. J., Ex. 217.

—— Paid as Rent.]—A. agreed with B. to let him land rent-free, on condition that A. should have the moiety of the crops; such an agreement need not be in writing. *Poulter* v. *Killingbreck*, 1 Bos. & P. 397. See *Waddington* v. *Bristow*, 2 Bos. & P. 452.

Agreement for Sale of Crops and Work and Labour.]—In an action upon an account stated, the defendant pleaded a verbal agreement for the sale of the crops growing upon the plaintiff's land, and for work, labour, and materials done and used in preparing the land for tillage; and that there was a treaty for the plaintiff's letting and the defendant's taking the land for fourteen years, to which the defendant assented, and that the money to be paid for the crops, and the work,

labour, and materials, was the money concerning which the account was stated; and that there was no agreement in writing or any note thereof:—Held, that the contract, as appearing on the pleadings, was within the statute of frauds, and that the plaintiff could not recover. *Falmouth (Earl)* v. *Thomas*, 1 C. & M. 89; 3 Tyrw. 26; 2 L. J., Ex. 57.

Growing Wood.]—The sale of growing underwood, to be cut by the purchaser, confers an interest in land under the statute. *Scorell* v. *Boxall*, 1 Y. & J. 396.

A., being owner of trees growing upon his land, verbally agreed with B., while they were standing, to sell him the timber at so much per foot:—Held, that the contract was not a contract for the sale of an interest in land. *Smith* v. *Surman*, 4 Man. & Ry. 455; 9 B. & C. 561; 7 L. J. (o.s.) K. B. 296.

A sale of growing timber, to be taken away as soon as possible by the purchaser, is not a contract for sale of land, or any interest therein, within s. 4 of the statute of frauds. *Marshall* v. *Green*, 45 L. J., C. P. 153; 1 C. P. D. 35; 33 L. T. 404; 24 W. R. 175.

Right of Shooting—Taking away Game.]—A grant of a right to shoot and take away a part of the game killed is a grant of an interest in land and within the statute of frauds. *Webber* v. *Lee*, 51 L. J., Q. B. 485; 9 Q. B. D. 315; 47 L. T. 215; 30 W. R. 866; 47 J. P. 4—C. A.

Fixtures.]—Before the expiration of a lease the landlord agreed with the tenant to purchase his fixtures at a valuation. The lease expired, and the tenant having quitted, the broker appointed by the landlord appraised the fixtures at more than 10*l.*, and signed the valuation:—Held, that the plaintiff having, at the defendant's request, waived his right to remove the fixtures, the matter bargained for was not an interest in land, and that the amount ascertained by the broker might be recovered in an action for fixtures and effects bargained and sold. *Hallen* v. *Runder*, 3 Tyrw. 959; 1 C. M. & R. 266.

Tenant's fixtures of over 10*l.* in value having been sold by the tenant's trustee in bankruptcy to the plaintiff, and resold by him to the defendant, who was the landlord of the premises:—Held, that no memorandum of this latter sale was necessary under the statute of frauds, it being neither a sale of an interest in land, under s. 4 of the statute of frauds, nor of goods and chattels, under s. 17. *Lee* v. *Gaskell*, 45 L. J., Q. B. 540; 1 Q. B. D. 700; 34 L. T. 759; 24 W. R. 824.

House and Furniture.]—The plaintiff agreed to let a house to the defendant, and to sell him the furniture and fixtures therein, and to make alterations; and the defendant agreed to take the house, and to pay for the furniture and fixtures and alterations:—Held, an agreement relating to an interest in land. *Vaughan* v. *Hancock*, 3 C. B. 766; 16 L. J., C. P. 1; 10 Jur. 926.

And where such an agreement was by parol:—Held, that it could not be severed so as to make the defendant liable to pay the plaintiff the amount expended in repairs. *Ib.*

In August D. became tenant to the plaintiff of a house and furniture, for six months from July preceding, under a written agreement. In September, it was, by a memorandum, agreed that the plaintiff had sold the house to D. the purchase money to be paid on the completion of a good title. In January the furniture was seized by the sheriff under a fi. fa. issued by the defendant against D. In February, D. sent to the plaintiff both agreements, and shortly after consented to rescind the contract of sale. The title to the premises was never completed, nor the purchase money paid:—Held, that the contract for the sale of the house and furniture was entire, and that the purchase of the former not having been completed, no property in the furniture passed to D. *Lanyon* v. *Toogood*, 13 M. & W. 27; 13 L. J., Ex. 273.

Machinery affixed.]—Machinery affixed to a building is land within the meaning of the statute of frauds. *Jarvis* v. *Jarvis*, 63 L. J., Ch. 10; 8 R. 361; 69 L. T. 412; 1 Manson, 199.

Sale of Greenhouse and Assignment of Lease.]—A., lessee for years of premises, under a lease bargained with B. to assign the lease to him, and to sell him a greenhouse which he had erected, and which was affixed to the freehold, together with the furniture, crops of fruit, and plants therein. B. was let into possession of the greenhouse and its contents, but no assignment was made to him:—Held, that the contract was an entire one for the assignment of the lease and the sale of the greenhouse, and that, until the lease was assigned, B. could not be sued by A. for the price of the greenhouse. *Sleddon* v. *Cruikshank*, 16 M. & W. 71; 16 L. J., Ex. 61.

Furnished Lodgings.]—A contract to let furnished lodgings is a contract for an interest in land. *Edge* v. *Strafford*, 1 C. & J. 391; 1 Tyrw. 293; 9 L. J. (o.s.) Ex. 101. S. P., *Inman* v. *Stamp*, 1 Stark. 12.

Board and Lodging.]—By a parol agreement between the plaintiff and the defendant, the defendant agreed to pay the plaintiff for the board and lodging of himself and man, and accommodation for his horse, the agreement to be terminable by a quarter's notice on either side:—Held, that the contract was not one for any interest in or concerning land. *Wright* v. *Stavert*, 2 El. & El. 721; 29 L. J., Q. B. 161; 6 Jur. (N.S.) 867; 2 L. T. 175; 8 W. R. 413.

Lessor to Furnish.]—A contract by which A. in consideration of B. hiring a house of him, agrees to send in proper and necessary furniture, is not divisible, and since it relates to an interest in land, must be in writing. *Michelen* v. *Wallace*, 2 N. & P. 224; 7 A. & E. 49; 6 L. J., K. B. 217.

Brickyard and Plant.]—By an agreement, not in writing, it was agreed that the plaintiff should take possession of a brickyard, which the defendant was occupying as tenant, and take the plant and bricks there at a valuation; and that the defendant should pay up all rent due, and endeavour to induce the landlord to accept the plaintiff as tenant. The plaintiff took possession but a distress was put in, and the plant and bricks sold for rent due from the defendant before the agreement; and the plaintiff was turned out of possession:—Held, that the contract and consideration were each single and entire; that the contract, taken in its entirety, was a contract for the sale of an interest in lands, and, not being in

writing, was voidable, and that the plaintiff, therefore, could not sue upon that part which related to the payment of the rent. *Hodgson* v. *Johnson*, El. Bl. & El. 685; 28 L. J., Q. B. 88; 5 Jur. (N.S.) 290.

Materials of Building—Consideration for Surrender.]—A tenant from year to year of a plot of ground and a cottage agreed to surrender the premises in consideration of being permitted to pull down the cottage and hold the materials for his own use, or of being paid the value of the materials:—Held, that the agreement required to be in writing under the statute of frauds, although the interest in land moved, not to, but from, the tenant. *Ronayne* v. *Sherrard*, Ir. R. 11 C. L. 146.

Sale of Building Materials.]—A contract for the sale of building materials to be taken down and removed by the purchaser is a contract for the sale of an interest in land within s. 4 of the statute of frauds. *Marshall* v. *Green*, supra, discussed and distinguished on this point. *Lavery* v. *Purssell*, 57 L. J., Ch. 570; 39 Ch. D. 508; 58 L. T. 846; 37 W. R. 163.

To procure Assignment of Lease.]—A contract to procure for a person the assignment of a lease of a house is a contract of an interest in or concerning land within the statute of frauds, s. 4, and must therefore be in writing, although it is made by one who has not the lease himself, or any interest under it. *Horsey* v. *Graham*, 39 L. J., C. P. 58; L. R. 5 C. P. 9; 21 L. T. 530; 18 W. R. 141.

Sale of Oral Bargain.]—The plaintiff having orally bargained with E. for the sale of some houses, sold the bargain to the defendant for 40*l.*; and E., at the request of the defendant, conveyed the premises to P., who was not a trustee for the defendant; the court refused to enter a nonsuit, which was moved for on the ground that the oral bargain for the interest in the houses could never have been enforced, and therefore could not form the consideration of an assumpsit. *Seaman* v. *Price*, 2 Bing. 437; 1 Car. & P. 586; 10 Moore, 34.

To give up Possession.]—Where A., being possessed of a messuage and premises for the residue of a term of years, agreed with B. to relinquish possession to him, and to suffer him to become tenant for the residue of the term, in consideration of B.'s paying a sum of money towards completing certain repairs:—Held, an agreement relating to the sale of an interest in land. *Buttermere* v. *Hayes*, 5 M. & W. 456; 7 D. P. C. 489; 9 L. J., Ex. 44. And see *Kelly* v. *Webster*, supra, col. 1126.

Profits of Living.]—A clergyman entered into an agreement to permit the profits of his living to be received by a third person, for the surplus (after paying a stipend to a curate) being applied in liquidation of his debts:—Held, that such an agreement, signed by the creditors only, and not by the debtor, was a contract for an interest in or concerning lands, tenements, or hereditaments, within the statute. *Alchin* v. *Hopkins*, 4 M. & Sc., 615; 1 Bing. (N.C.) 99; 3 L. J., C. P. 272.

Partnership—Purchase of Lands.]—A partnership agreement between A. and B. that they shall be jointly interested in a speculation for buying, improving for sale, and selling lands, may be proved without being evidenced by any writing signed by, or by the authority of, the party to be charged therewith, within the statute of frauds. *Dale* v. *Hamilton*, 5 Hare, 369. On appeal, 2 Ph. 266; 16 L. J., Ch. 397; 11 Jur. 574.

Where a partner agrees to retire from a partnership, the assets of which include an interest in land, and it is an essential term of the agreement that the retiring partner shall assign his share in the assets, the contract is within s. 4 of the statute of frauds, and must be in writing. *Gray* v. *Smith*, 59 L. J., Ch. 145; 43 Ch. D. 208; 62 L. T. 335; 38 W. R. 310—C. A.

Contract for Purchase of Debentures—"Floating Security."]—The sale of debentures in a company that create a "floating charge" on its property consisting in part of leaseholds is a contract for the sale of an interest in land within s. 4 of the statute of frauds. *Driver* v. *Broad*, 63 L. J., Q. B. 12; [1893] 1 Q. B. 744; 4 R. 411; 69 L. T. 169; 41 W. R. 483—C. A.

Milk Business.]—A., a yearly tenant of premises, on which he carried on the business of a milkman, agreed with B. to sell such business, and to give up possession of the premises to B., who was to be allowed by A. to occupy the same:—Held, that the agreement related to an interest in land, and was therefore required to be in writing. *Smart* v. *Harding*, 15 C. B. 652; 3 C. L. R. 351; 24 L. J., C. P. 76; 1 Jur. (N.S.) 311; 3 W. R. 245.

Shares in Mine.]—A contract for the sale of shares in a mining company, conducted on the cost-book principle, is not a contract for the sale of land or an interest in land. *Watson* v. *Spratley*, 10 Ex. 222; 2 C. L. R., 1434; 24 L. J., Ex. 53; 2 W. R. 627. S. P., *Powell* v. *Jessop*, 18 C. B. 336; 25 L. J., C. P. 199; 4 W. R. 465; and *Walker* v. *Bartlett*, 18 C. B. 845; 25 L. J., C. P. 263; 2 Jur. (N.S.) 643; 4 W. R. 681—Ex. Ch.

An agreement to become partners in a colliery which was to be demised upon royalties, and the royalties to be divided in certain proportions, is an interest in land, and must be in writing, signed by the parties. *Caddick* v. *Skidmore*, 27 L. J., Ch. 153; 3 Jur. (N.S.) 1185; 6 W. R. 119—L. C.

C. and W. and M. were partners in working a colliery, of which they were the lessees under an agreement for a lease from the freeholder, and of which P. was the manager, at a weekly salary. Being in want of money, W., M. and P. borrowed of a bank, on their joint note, money to pay the colliers' wages, on which note P. was afterwards sued, and judgment obtained against him, and he was also summoned by the colliers for wages, which he was adjudged by the magistrates to pay. At a meeting subsequently held at which C., P., W. and M. were present, C. refused to join the company unless P. retired from all connection with it, when it was agreed, by all present, that 60*l.* should be paid to P. "for any interest he might have, and for his services rendered in working the colliery":—Held, that the interest of P. in the colliery was not an interest in or concerning land, and that therefore the agreement for a breach of which the claim was brought need not be in writing. *Cheadle* v. *Proctor*, 19 L. T. 289.

Railway Shares.]—By a railway act, it was declared that the shares in the undertaking, or the joint stock or funds of the company, should to all intents and purposes be deemed personal estate, and be transmissible as such, and should not be of the nature of real property:—Held, that the shares of individual proprietors were not an interest in land, and, therefore, might be sold by verbal contract. *Beadley* v. *Holdsworth*, 3 M. & W. 422.

Advance of Money on Security.]—An agreement to advance money on the security of land is an agreement which requires to be in writing by s. 4 of the statute of frauds. *Mounsey* v. *Rankin*, 1 Cab. & E. 496.

Use of Docks.]—A corporation, the owner of a graving-dock, issued regulations for its use, viz. that the dock would "be let to parties requiring the same for the repair of vessels," at certain rates; that a book would be kept for the entering of the names of vessels intended for repair, and that as far as practicable priority would be given to vessels in the order of entry. A sum of three guineas was to be paid on entering each vessel:—Held, that the contract for the use of the dock did not amount to an interest in land within the 4th section of the statute of frauds, and that it did not require to be under seal. *Wells* v. *Kingston-upon-Hull Corporation*, 44 L. J., C. P. 257; L. R. 10 C. P. 402; 32 L. T. 615; 23 W. R. 562.

Alteration by Parol Agreement.]—The plaintiffs agreed in writing with the defendant to let him a public-house from year to year, with an option for him to call on them to grant him a lease for twenty-eight years, and a stipulation that if he sold such lease for more than 1,200*l.* he should give the plaintiffs half the difference. The plaintiffs subsequently granted him a lease differing from that agreed to be granted in the following particulars.—It was for thirty-two years instead of twenty-eight. The rent was 105*l.* instead of 100*l.* The premium was 800*l.* instead of 1,200*l.* Some covenants burthensome on the defendant which had been agreed for were omitted. These alterations were arranged by parol only:—Held, that the effect of the alteration of the original terms agreed upon was that the old agreement was dissolved, and a new one made incorporating such parts of the old agreement as the parties did not choose to alter; and that as such new agreement related to land, and was not in writing it could not be enforced. *Sanderson* v. *Graves*, 44 L. J., Ex. 210; L. R. 10 Ex. 234; 33 L. T. 269; 23 W. R. 797.

Waiver.]—A. agreed to assign a lease to B., and to deliver possession by the 3rd May; and undertook that he had lawful right to assign. This contract was in writing. Neither party was ready to carry the agreement into effect on the 3rd May, and thereupon it was agreed by parol that another day should be substituted in its place:—Held, that this parol waiver was void, being in contravention of the statute of frauds. *Stowell* v. *Robinson*, 3 Bing. (N.C.) 928; 5 Scott, 196; 3 Hodges, 197; 6 L. J., C. P. 326.

An agreement to grant a lease of lands, that all straw, &c., on the lands on taking possession should be valued; that on execution of the lease a counterpart should be executed; and that either of the contracting parties making default in performance should forfeit 300*l.*, is an entire agreement relating to an interest in lands, and necessarily in writing, and a part of it cannot be verbally waived. *Harvey* v. *Grabham*, 5 A. & E. 61; 6 N. & M. 154; 2 H. & W. 146; 5 L. J., K. B. 235.

—— **Title to Lots.**]—A. contracted in writing to sell B. several lots of land, and to make a good title to them, and a deposit was paid. It was afterwards discovered that a good title could not be made to one of the lots, and it was then verbally agreed between the parties that the vendee should waive the title as to that lot:—Held, that oral testimony was not admissible to show the waiver of the vendee's right to a good title as to that lot, inasmuch as the effect of such waiver was to substitute a different contract for the one in writing. *Goss* v. *Nugent* (*Lord*), 5 B. & Ad. 58; 2 N. & M. 28; 2 L. J., K. B. 127.

Recited Agreement.]—In an action by vendee against vendor, he produced an agreement, made as follows: "H. having agreed to purchase of B. two leasehold houses, B. hereby agrees to paper, &c., H. to pay, &c., at the time of the conveyance," &c.:—Held, that the agreement to purchase though recited as an existing agreement, was to be considered as forming part of the agreement produced. *Hall* v. *Betty*, 4 Man. & G. 410; 5 Scott (N.R.) 508; 11 L. J., C. P. 256.

Breach—Promise to Pay Expenses.]—Where a plaintiff sued for breach of an agreement, which was void, being for an interest in land, and not being in writing:—Held, that he might recover on the count for an account stated, having proved a distinct promise of the defendant's to pay plaintiff the expenses he had been put to in consequence of the breach. *Seago* v. *Deane*, 4 Bing. 459; 1 M. & P. 227; 3 Car. & P. 170.

In an action to recover the expenses incurred by the plaintiff in investigating the defendant's title to mortgage lands, upon the ground that his title had turned out to be defective, the declaration stated that, in consideration that the plaintiff would advance 2,000*l.* upon the security of a mortgage of the land, upon the defendant's making out a good title to mortgage the lands to the plaintiff, the defendant promised the plaintiff to pay him the expenses to which he might be subjected in case the loan should go off by reason of the defectiveness of the defendant's title:—Held, that this agreement was not within s. 4 of the statute of frauds. *Jeakes* v. *White*, 6 Ex. 873; 21 L. J., Ex. 265.

ii. *Signature.*

See CONTRACT, vol. iv. col. 51.

iii. *Parties, Sufficiency of Description.*

What Words sufficient.—"Vendor."]—In order to satisfy the requirements of the statute of frauds, the note or memorandum must contain either the names of the contracting parties or such a description of them that there cannot be any fair dispute as to their identity. *Potter* v. *Duffield*, 43 L. J. Ch. 472; L. R. 18 Eq. 4; 22 W. R. 585.

The term "vendor" is not of itself a sufficient description of one of the contracting parties. *Ib.*

And see *Thomas* v. *Brown*, 45 L. J., Q. B. 811; 1 Q. B. D. 714; 35 L. T. 327; 24 W. R. 821; *Hodgens* v. *Keon*, [1894] 2 Ir. R. 657—C. A

If, in a contract for sale, the vendor is described simply as "proprietor," "owner," "mortgagee," or the like, the description is sufficient to satisfy the requirements of the statute of frauds, but not so if he is described as "vendor," or "client," or "friend" of a named agent, or as "solicitor to the vendor," even where the solicitor is himself the vendor and is described in the contract as "A. B., solicitor to the vendor." *Jarrett* v. *Hunter*, 56 L. J., Ch. 141; 34 Ch. D. 182; 55 L. T. 727; 35 W. R. 132; 51 J. P. 165.

The particulars of sale of a leasehold house stated that it was the property of Admiral F., deceased, and that the sale was by direction of his executors, not naming them. A memorandum of the sale, endorsed on the particulars, was signed by the auctioneers as agents "for the vendors":—Held, that the contract was valid, and specific performance decreed. *Hood* v. *Barrington, (Lord)*, L. R. 6 Eq. 218.

—— **"Proprietor."**]—On the sale of real estate the particulars stated that the property was put up for sale by "the proprietor." The auctioneer signed a memorandum by which he agreed that "the vendor on his part should in all respects fulfil the conditions of sale mentioned in the particulars":—Held, that on the particulars and memorandum there was a sufficient description of the vendor. *Sale* v. *Lambert*, 43 L. J., Ch. 470; L. R. 18 Eq. 1; 22 W. R. 478.

An estate was offered for sale in lots shown upon a plan on which various conditions were printed. M. made a verbal offer to W., the agent of the owners, to purchase certain lots for 1,000*l*. W. informed him that he must purchase subject to the conditions, and promised to lay his offer before the proprietors. Shortly afterwards W. wrote to M. saying that the "proprietors" accepted his offer to purchase the specified lots for 1,000*l*., subject to the conditions on the plan:—Held, that the word "proprietors" was sufficient to identify the vendors within the statute of frauds. *Rossiter* v. *Miller*, 48 L. J., Ch. 10; 3 App. Cas. 1124; 39 L. T. 173; 26 W. R. 865—H. L. (E.)

—— **"The Property of Mr. A."**]—A receipt given by the auctioneer's clerk to D. three days after the auction, and signed by the clerk, acknowledging payment of part of the purchase-money for "Lot 4, Mr. John Stafford's property," is not such a memorandum in writing as would bind the vendor within s. 4 of the statute. *Dyas* v. *Stafford*, 7 L. R., Ir. 590.

—— **"Owner."**]—The memorandum which was at the foot of the particulars and conditions stated that V. & Son were agents for the "vendor," who was described as "vendor" throughout the conditions. The particulars stated that the sale was by direction of the "owner." The eighth condition, by mistake, stated that the vendor was a trustee for sale:—Held, that although the word "owner" was by itself a sufficient description of the vendor, the subsequent mistake was fatal, and the vendor was not sufficiently designated. *Butcher* v. *Nash*, 61 L. T. 72.

—— **Legal Personal Representative.**]—In conditions of sale the vendor was described as "legal personal representative of L." At the date of the contract there was no person filling that character. But the vendor was the only person in a position to become "legal personal representative," and he subsequently took out letters of administration to L.'s estate:—Held, that there was a valid contract. *Towle* v. *Topham*, 37 L. T. 308.

—— **Trustee.**]—A contract for the sale of land in which the vendor is not named, but is stated to be "a trustee selling under a trust for sale," is sufficient within the statute of frauds. *Catling* v. *King*, 46 L. J., Ch. 384; 5 Ch. D. 660; 36 L. T. 526; 25 W. R. 550.

Sale by Party in Possession.]—An agreement for the sale of real estate did not disclose the name of the vendors, but it appeared therefrom that the vendors were a company in possession of the property:—Held, that the vendors were sufficiently described to satisfy the statute of frauds. *Commins* v. *Scott*, 44 L. J., Ch. 563; L. R. 20 Eq. 11; 32 L. T. 420; 23 W. R. 498.

Name not Disclosed.]—Plaintiff was the lessee of vaults. The defendant company entered into a negotiation for the purchase of the lease. The secretary of the company wrote to the agents acting for the plaintiff a letter in which he said that the directors thereby offered to purchase for 2,500*l*. cash, and to take over a mortgage for 3,500*l*. on the lease. The agents answered: "In reply to your letter, we are instructed to accept the offer therein contained":—Held, that no binding contract had been entered into, because (inter alia) the name of the vendor had not been disclosed or a sufficient description given so as to satisfy the statute of frauds. *Donnison* v. *People's Café Co.*, 45 L. T. 187.

An offer in writing to take a lease, signed by the intending lessees and attested by the lessor's agent, but not naming the lessor and only addressed to him as "Sir," followed by an acceptance in writing by the agent, addressed to the intending lessees, but not naming the lessor, which letter was not signed by them nor referred to in any other writing, is not an agreement in writing within the statute of frauds so as to entitle the lessor to have the same specifically performed. *Williams* v. *Jordan*, 46 L. J., Ch. 681; 6 Ch. D. 517; 26 W. R. 230.

Acceptance by Agent in name of Principal.]—Where an offer is made to an agent, who accepts it in the name of his principal, this is a sufficient description of the principal. *Filby* v. *Hounsell*, 65 L. J., Ch. 852; [1896] 2 Ch. 737; 75 L. T. 270; 45 W. R. 232.

Vendor's Name mentioned by Purchaser.]—Where a memorandum of agreement did not contain the name of the vendor, but his name was referred to in a subsequent letter written by the purchaser:—Held, that this was a sufficient reference within the statute of frauds. *Warner* v. *Willington*, 3 Drew. 523; 25 L. J., Ch. 662; 2 Jur. (N.S.) 423; 4 W. R. 531. And see *Coombs* v. *Wilkes*, 61 L. J., Ch. 42; [1891] 3 Ch. 77; 65 L. T. 56; 40 W. R. 77.

Purchaser's Name mentioned by Vendor.]—During parol negotiations for the purchase of an estate, the vendor wrote to the purchaser's solicitor, proposing that the solicitor's "client" should advance a sum to pay off a mortgage on the pro-

perty. After further negotiations, the vendor signed and handed to the purchaser a written statement of the particulars of the property and of the price. Subsequently he signed and addressed to the purchaser a letter containing the following passages: "I am about to relet the land at P. for another year, concluding you will agree to it. . . . The Ladyday rents will be mine, and the Michaelmas yours":—Held, that the signed statement of particulars was not a sufficient memorandum in writing, the purchaser's name not being mentioned in it, and that the defect was not supplied by the correspondence. *Skelton* v. *Cole*, 1 De G. & J. 587.

Name mentioned in Abstract of Title.]—Conditions of sale stated that the vendors were trustees, but did not name or otherwise describe them. The contract of sale was signed by the purchaser's agent, the auctioneers, as agents for the vendors. An abstract was delivered to the purchaser, entitled with the names of the vendors, and the purchaser's requisitions were headed with the vendor's name:—Held, that the abstract might be referred to for the purpose of curing the defect in the contract. *Bourdillon* v. *Collins*, 24 L. T. 344; 19 W. R. 556.

Letters by Vendor.]—Where it does not appear upon the face of a contract or by reference of whom property is purchased, letters written by persons in the character of vendors may be connected with the contract for the purpose of supplying this defect. *Dobell* v. *Hutchinson*, 5 N. & M. 251; 3 A. & E. 355; 1 H. & W. 394; 4 L. J., K. B. 201.

iv. *Subject-Matter. Sufficiency of Identification.*

In General.]—An agreement in writing for sale of a house, did not by description ascertain the particular house, but it referred to the deeds as being in the possession of a person named in the agreement. The court held the agreement sufficiently certain; it could be ascertained by an inquiry before the master that the deeds in the possession of the person named referred to the house in question. *Owen* v. *Thomas*, 3 Myl. & K. 353; 3 L. J., Ch. 205.

Freehold and Leaseholds—Boundaries.]—Held, that a party having agreed to purchase premises stated to be partly freehold and partly leasehold could not, in the absence of fraud, concealment, or misrepresentation, resist a specific performance on the ground that the exact position of the boundary line between the freehold and leasehold portions could not be ascertained. *Monro* v. *Taylor*, 8 Hare, 51. Affirmed, 3 Mac. & G. 713; 21 L. J., Ch. 525.

Company—Purchase under powers of Act.]—A decree for specific performance of a contract to purchase land made against a company, the contract being made out by reference to proceedings taken under the compulsory powers of the company's act. *Inge* v. *Birmingham, Wolverhampton, and Stour Valley Ry.*, 3 De G. M. & G. 658; 2 Eq. R. 80; 2 W. R. 22.

What words sufficient—"Property."]—Sale by auction under conditions which did not contain any description of what was sold, but it could be inferred from them that the subject of sale was real estate. A. became the purchaser. After the sale the auctioneer signed and gave to him the following memorandum at the foot of the conditions: "The property duly sold to A. and deposit paid at close of sale," and at the same time signed and gave to him the following receipt: "Pinxton, March 29th, 1880. Received of A. the sum of 21*l.* as deposit on property purchased at 420*l.*, at 'Sun Inn,' Pinxton, on the above date. Mr. G., owner":—Held, that the receipt, memorandum, and conditions contained a sufficiently definite description of the property sold to enable the court to receive parol evidence of what the property consisted, and that the statute of frauds was no defence. *Shardlow* v. *Cotterill*, 51 L. J., Ch. 353; 20 Ch. D. 90; 45 L. T. 572; 30 W. R. 143.

The receipt alone without the memorandum and conditions was a memorandum sufficient to satisfy the requirements of the statute. *Ib.*

The words "the property," in reference to a colliery, are not sufficient description of the colliery plant and stock on which to found an action for specific performance. *Vale of Neath Colliery Co.* v. *Furness*, 45 L. J., Ch. 276; 34 L. T. 231; 24 W. R. 631.

The words "the mill property, including two cottages in E. village," are a sufficient description of the subject-matter of a contract to take the case out of the statute of frauds, though part of the property is not in the parish of E. *M'Murray* v. *Spicer*, 37 L. J., Ch. 505; L. R. 5 Eq. 527; 15 W. R. 332.

—— **The "F. Estate."**]—A receipt for a deposit "on account of the purchase money of the F. estate":—Held, sufficient when connected by parol evidence with a signed memorandum which contained all the terms except the description of the property. *Oliver* v. *Hunting*, 59 L. J., Ch. 255; 44 Ch. D. 205; 62 L. T. 108; 38 W. R. 618.

—— **"This place."**]—A vendor of leasehold premises wrote a letter to her solicitor stating: "I have closed with W. for this place":—Held, a sufficient memorandum in writing within the statute of frauds, and that parol evidence was admissible to show what "this place" was. *Waldron* v. *Jacob*, Ir. R. 5 Eq. 131.

—— **Public-House Name.**]—Contract to sell freehold property described as "'The Jolly Sailor,' offices, &c.":—Held, that the subject-matter of the contract was sufficiently defined, as the vagueness (if any) about the meaning of the words "'Jolly Sailor,' offices, &c." might be removed by an inquiry at chambers. *Naylor* v. *Goodall*, 47 L. J., Ch. 53; 37 L. T. 422; 26 W. R. 162.

Parcels—Extrinsic Evidence.]—A written agreement to sell and purchase "twenty-four acres of land at T." must be taken to refer to land belonging to the vendor, and is a sufficient description within the statute of frauds to make extrinsic evidence admissible for the purpose of identifying the land. *Plant* v. *Bourne*, 66 L. J., Ch. 643; [1897] 2 Ch. 281; 76 L. T. 820; 46 W. R. 59—C. A.

By Reference to Plan.]—Where an agreement expressly refers to a plan, as an existing document forming a term in the contract, evidence is admissible for the purpose of identifying the plan; but unless the evidence of identity is clear and satisfactory, specific performance of such an

agreement will be refused. *Hodges* v. *Horsfall*, 1 Russ. & M. 116.

On a purchase by reference to a ground plan an infringement of the rule cujus est solum ejus est usque ad cœlum is sufficient to avoid the contract between vendor and purchaser. *Pope* v. *Garland*, 4 Y. & C. 394; 10 L. J., Ex. Eq. 13.

—— **Plan to be Settled.**]—A. agrees by letter and verbally to take land on a building lease, and a rough draft is prepared, and fair copy and plan made, after which a new clause is inserted at A.'s request, and agreed to by the defendant's (the landowner's) solicitor:—Held, that as no copy of the agreement was signed, and as it clearly appeared that the plans had still to be settled, and therefore the premises were not defined, demurrer must be allowed. *Adams* v. *Wheatley*, 3 W. R. 96.

—— **Plan Lost.**]—A. by will, in 1832, devised estates, including M. In 1835 he entered into a written agreement (unstamped) with A. and B. for the sale of M. The purchasers paid a deposit, entered into possession, and received the rents and profits until 1838, when the survivor became bankrupt. The assignees abandoned all interest under the agreement, and the testator became the purchaser of M., being treated as having an equitable lien for the purchase-money. The agreement referred for the parcels to an accompanying map or plan, and to a schedule which showed their extent. The testator died, and this was a suit to establish the will. The master found that the map or plan was lost:—Held, that the agreement for sale was a valid contract, notwithstanding the loss of the map or plan, and that it was never stamped. Held, also, that it was a revocation of the will: but the heir-at-law must exhaust all means of information as to the lost map or plan before the court will deal with the contract without reference to the plan of which it forms a part. *Andrew* v. *Andrew*, 3 W. R. 337.

—— **Different Plans.**]—A memorandum of an agreement for sale signed by the vendor referred to the property as "The 'Jolly Sailor,' offices, &c., with all the rights and privileges as per plan," and on the back was indorsed "Mr. M." (the vendor's solicitor)—"Please put on the number in the plan." There were two plans, and the lot comprising the "Jolly Sailor" in one plan was not identical in number or contents with that containing the "Jolly Sailor" in the other plan:—Held, that the memorandum was sufficient within the statute of frauds, the plan intended having been identified by the vendor in cross-examination. *Naylor* v. *Goodall*, supra.

—— **Part Coloured on Plan.**]—By a contract B. agreed to sell, and C. to purchase, 200 acres of land or thereabouts, more or less, parts of the lands, delineated in a plan thereunto annexed, and thereon coloured brown. It turned out that the marked land contained much less than the 200 acres, and the measurement was extended beyond the lands delineated:—Held, that the additional lands were not comprised in the agreement. *Bellaney* v. *Knight*, 5 L. T. 785; 10 W. R. 289.

Drainage commissioners agreed to sell a property to D. The contract did not refer to any plan, but the agents who signed it for the parties signed at the same time the following memorandum written upon a plan of the property:—"Plan of Property sold to and purchased by D. 23rd Oct. 1874. N.B.—The property included in the purchase is edged with red colour":—Held, that the plan was sufficiently incorporated, and that the description in the contract was controlled by it. *Nene Valley Drainage Commissioners* v. *Dunkley*, 4 Ch. D. 1.

And see *Lindsay & Forder's Contract, In re*, infra, col. 1169.

Part not belonging to Lessor.]—A. entered into an agreement for the transfer of his tenancy in a public-house, and the sale of the goodwill to B. The subject-matter of the agreement, which was in writing, was therein described as "the house and premises he now occupies, known by the sign of the White Hart." There was a coach-house which belonged to the White Hart, and which, at the time of the agreement, was not in A.'s occupation, but of S., who held it as tenant to A. for a period which had not expired at the time fixed for the completion of the transfer by the agreement:—Held, that the words, "he now occupies" formed an essential part of the description of the subject-matter of the agreement, and could not be rejected as falsa demonstratio, and consequently that the agreement did not include the coach-house. *Magee* v. *Lavell*, 43 L. J., C. P. 131; L. R. 9 C. P. 107; 30 L. T. 169; 22 W. R. 334.

v. *Description of Interest Contracted to be Sold.*

Where Interest not expressed.]—An agreement to sell land, not expressing what interest in it, construed to mean the whole of the interest of the vendor. *Bower* v. *Cooper*, 2 Hare, 408; 11 L. J., Ch. 287; 6 Jur. 681.

The court will not assume that a purchaser has agreed to purchase the vendor's interest, whatever it may be, unless the language of the agreement is clear. *Southern* v. *Harriman*, 14 W. R. 487.

An agreement for the purchase of a lease, which does not mention the length of the term granted by the lease, is void for uncertainty, and cannot be enforced. *Ib.*

"All his Estate and Interest."]—An agreement by a vendor to sell "all his estate and interest" in certain premises, is primâ facie good; and does not necessarily mean an agreement to sell an estate in fee simple, but may mean an equity of redemption only. *Priddle* v. *Wood*, 4 N. R. 320.

Leasehold.]—Construction of contract for sale of leasehold, whether for vendor's interest therein, or a good title to the leasehold. *Anderson* v. *Higgins*, 1 Jo. & Lat. 718.

The lessee of a house put it up for auction subject to certain conditions of sale, one of which was that the purchaser should not require the lessor's title, but the property was bought in. Afterwards the defendant authorised his agent to offer a price for the lease. The agent wrote to the agent of the vendor, offering the price fixed; the vendor's agent replied, accepting the price for the house. In neither of these letters was the nature of the vendor's interest mentioned:—Held, that the letters formed a valid contract

for the purchase of the lease. *Cowley* v. *Watts*, 22 L. J., Ch. 591 ; 17 Jur. 172 ; 1 W. R. 484.

An agreement was in the following words : "A. agrees to pay 625*l.* for the cottage and stable, B. paying the expenses of the lease held by Mr. C.—signed, A." :—Held, that such an agreement was not sufficient within the statute of frauds. *Cox* v. *Middleton*, 2 Drew. 209 ; 2 Eq. R. 631 ; 23 L. J., Ch. 618 ; 2 W. R. 284.

—— **Sub-Contract.**]—A., to whom the owner of a quarry had agreed to grant a lease, agreed on behalf of himself and all persons interested to sell the quarry to B., and "that the lease agreed to be granted by the lessor should be granted as B. might direct" :—Held, that the memorandum was sufficient within the statute of frauds. *Morgan* v. *Worthington*, 38 L. T. 443.

vi. *Completeness of Terms of Contract.*

General Rule.]—Specific performance may be decreed of agreement founded on letters and notes, if fully and completely settled in all points. *Popham* v. *Eyre*, Lofft, 801.

Where from letters a contract can be specifically and explicitly defined, court will decree performance, but not otherwise. *Gordon* v. *Trevlyan*, 1 Price, 64.

Agreement not enforced on a letter unless it contain the full terms of the agreement. *Clerk* v. *Wright*, 1 Atk. 12.

Before Filing Bill.]—The contract on which specific performance is sought, must have been complete in all its essential parts before the filing of the bill. *Adams* v. *Broke*, 1 Y. & C. C. C. 627.

Whether Contract or Treaty.]—No specific performance of an agreement by letters unless, upon a fair interpretation, concluded ; if doubtful whether more than treaty, to be left to law. *Huddlestone* v. *Briscoe*, 11 Ves. 591.

Contract for land by letters, sufficient within the statute of frauds ; not specifically executed, unless upon a fair interpretation importing a concluded agreement, and not doubtful whether only treaty. *Stratford* v. *Bosworth*, 2 V. & B. 341.

Term of Contract not Supplied.]—Equity has jurisdiction to compel the specific performance of a complete contract, but cannot supply any term not agreed on. *Ormond* v. *Anderson*, 2 Ball & B. 369.

The court cannot, when called on to decree specific performance of an agreement, direct any act to be done whereby the agreement itself, if not already legally binding, can be made so. *Leominster Canal Co.* v. *Shrewsbury & Hereford Ry.*, 3 Jur. (N.S.) 930 ; 5 W. R. 868.

An offer by letter to sell or buy cannot be carried into effect unless from the whole letter taken together an inference can be drawn from which the material terms of the contract can be ascertained. In the absence of that it amounts but to an offer to treat, as nothing can be supplied by conjecture. *Cooper* v. *Hood*, 28 L. J., Ch. 212.

What Terms Required.]—In order to form a contract by letter, of which the court will decree a specific performance, nothing more is necessary than that the amount and nature of the consideration to be paid on one side and received on the other should be ascertained, together with a reasonable description of the subject-matter of the contract. It is the clearly established doctrine that the court will carry into execution an agreement so constituted. *Kennedy* v. *Lee*, 3 Mer. 441.

Memorandum Referring to Draft Conveyance.]—The memorandum of an agreement required by the statute of frauds must be a memorandum complete at the time the memorandum is made. *Mundy* v. *Osprey*, 49 L. J., Ch. 216 ; 13 Ch. D. 855 ; 28 W. R. 347.

A letter from an alleged purchaser inclosing and referring to a draft conveyance in which it was recited that he had agreed to purchase land :—Held, not to be a memorandum of a completed agreement. *Ib.*

Whole Correspondence to be Considered.]—Where a court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration. *Hussey* v. *Horne-Payne*, 48 L. J., Ch. 846 ; 4 App. Cas. 311 ; 41 L. T. 1 ; 27 W. R. 585—H. L. (E.)

Per Lord Selborne :—The observation stated in *Jervis* v. *Berridge* (L. R. 8 Ch. 360), that "The statute of frauds is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties," affirmed. *Ib.*

Purchase Subject to Vendors Approval.]—D. at a sale by auction signed a memorandum that he had "this day purchased from Mr. Stafford, the vendor, by public auction, subject to his approval, the premises mentioned in the annexed particulars, for the sum of 250*l.*, subject to the conditions of sale also annexed hereto." This was not agreed to by the vendor, nor was there any subsequent adoption of the contract under his hand :—Held, that there was no agreement enforceable against the vendor, as the contract having been made expressly "subject to his approval," the memorandum of that date only amounted to a proposal, and did not constitute a note in writing, within the statute of frauds. *Dyas* v. *Stafford*, 9 L. R., Ir. 520.

Verbal Agreement Followed by Letter.]—W. entered into a verbal agreement with S. to sell him an inn called the L. Inn for 950*l.* On the following day W.'s solicitor wrote to S.'s solicitor :—"W. has been with us to-day, and stated that he had arranged with your client S. for the sale to the latter of the L. Inn for 950*l.* We therefore send herewith draft contract for your perusal and approval" :—Held, that this letter was not such a note or memorandum of an agreement as is required by the statute of frauds. *Smith* v. *Webster*, 45 L. J., Ch. 528 ; 3 Ch. D. 49 ; 35 L. T. 44 ; 24 W. R. 894. *And see Cases*, supra, cols. 1120—1125.

vii. *Communications Addressed to Third Parties.*

General Rule.]—Agreement by letter to third person to sell sufficient to take case out of the statute of frauds. *Seagood* v. *Meale*, Pre. Ch.

561; 1 Str. 426. And see *Child* v. *Comber*, 3 Swanst. 423, n.

Party bound by Letter to his Agent.]—There have been cases where a letter written to a man's own agent, and setting forth the terms of an agreement as concluded by him, has been deemed to be a signing within the statute of frauds, and agreeable to the provisions of it. *Welford* v. *Beazley*, 3 Atk. 503.

After negotiations between the agents of the vendor and purchaser, a letter was written to the vendor by his agent, stating that the purchaser had agreed by his agent to purchase the property (which was sufficiently identified) at a certain price. The vendor frequently wrote to his agent in reference to the transaction, such letters being communicated to the purchaser's agent:—Held, that there was a binding contract within the statute of frauds. *Carpenter* v. *Churchill*, 2 W. R. 364.

—— **Agency, how Constituted.**]—A. and B. having entered into a verbal treaty for the purchase of premises belonging to A., and not being able to agree as to the amount of the purchase-money, A. addressed a letter to C., stating that he would take a certain sum from B. for the premises, reserving a small portion of the same for his sister, if C. approved of it. B. subsequently lodged the sum named by A. with C., of which lodgment C. made a memorandum on A.'s letter, with a remark that it was "a great price":—Held, that C. must be considered the agent of A., and that as he had signed the contract acknowledging the receipt of the purchase-money, A. was bound to perform the agreement. *Field* v. *Boland*, 1 Dr. & Wal. 37.

—— **Solicitor Agent for both Parties.**]—A., being entitled to certain lands, proposed to his solicitors, who were also the solicitors of certain trustees, to sell to such trustees the lands. The proposal was made by a series of letters written by A. to his solicitors, and such letters were replied to by the solicitors. The proposal having been agreed to on behalf of the trustees:—Held, that there was no binding contract. *Shrewsbury* (*Earl*) v. *Shrewsbury* (*Countess*), 18 Jur. 397.

Letter to Solicitor—Sub-sale.]—The executrix of a lessee agreed to sell to A. the residue of her term (except a day) for 400*l*. This agreement was entered into by the executrix without a written memorandum except a letter written by the executrix to her own solicitor. Subsequently the landlord agreed with the executrix for the purchase of the residue of the term for 550*l*. A., on hearing of this, offered the executrix, if she would complete her contract with him, 1,000*l*. as purchase-money, and indemnity against any proceedings on the part of the landlord. She accepted the offer, and demised the premises to A. for the whole term, wanting a day:—Held, that the landlord was entitled to a specific performance of his agreement, not only against the executrix, but against A., quære, whether the letter to the solicitor was a sufficient memorandum in writing within the meaning of the statute of frauds, &c. *Goodwin* v. *Fielding*, 4 De G. M. & G. 90; 1 W. R. 343.

Lease—Letter to Stranger.]—On bill for specific performance of parol agreement to let lands, evidence that defendant had suffered his wife to receive money from the plaintiff in consideration of fines (he being incapable of receiving them), and had written a letter to a third person acknowledging the demise, and stating that he was ready to make leases:—Held, sufficient to take case out of statute. *Hartley* v. *Wilkinson*, 1 Ridgw. L. & S. 357.

Promise to leave Property at Death—Repetition of Promise in Affidavit.]—B. files a bill stating that on his marriage with his late wife no portion was given to her, but that her father Y. had promised and contracted with B. that he would, at his death, leave to his daughter an equal share of his property with his other children; that B.'s wife died leaving two children, who had lived with and been brought up by their aunt at Y.'s house; that B., wishing to take his children under his own protection, Y. applied for a commission of lunacy against him, and filed an affidavit stating the words he used upon B.'s marriage to be, that his daughter should, at his death, share with the rest of his children; and that Y. died, leaving considerable personal property. B., under the circumstances, claimed to have the promise made on his marriage specifically performed. Demurrer for want of equity overruled. *Barkworth* v. *Young*, 4 Drew. 1; 26 L. J., Ch. 153; 3 Jur. (N.S.) 34; 5 W. R. 156.

viii. *Admission of Contract by Answer.*

Parol Agreement Admitted.]—A court of equity will decree a specific execution of a parol agreement, if it be set forth in the bill, and confessed by answer. *Symondson* v. *Tweed*, Pre. Ch. 374.

Whether an agreement by parol, but confessed in the answer, shall be executed though not in writing. *Hosier* v. *Read*, 9 Mod. 86.

Equity will decree performance of parol agreement, if it is admitted in the answer. *Gunter* v. *Halsey*, Amb. 586.

Plea of Statute of Frauds.]—If on a bill brought to have execution of a parol agreement, the defendant, by answer, confesses the agreement without insisting on the statute of frauds, &c., the court will decree an execution. *Croyston* v. *Banes*, Pre. Ch. 208.

Defendant, by answer, admitting agreement, may, if he insist on the statute of frauds, have benefit of it at hearing. *Cooth* v. *Jackson*, 6 Ves. 17, 37.

Amended Bill.]—In a bill for the specific execution of an agreement, the plaintiff may abandon the agreement, and may, by amended bill, seek to have the benefit of an agreement admitted in the answer. *Willis* v. *Evans*, 2 Ball & B. 228.

Form of Decree.]—Decree upon the answer, admitting a contract, and a letter, offering to sell at a valuation, for a conveyance on payment of the purchase-money into the bank by the plaintiff, on a certain day; in default of payment the bill to be dismissed with costs. No binding contract until payment. The estate, therefore, did not pass by a previous devise, but descended to the heir. *Gaskarth* v. *Lowther* (*Lord*), 12 Ves. 107; 8 R. R. 310.

ix. *Part Performance.* *See* LANDLORD AND TENANT. SPECIFIC PERFORMANCE.

x. *Parol Variation.* *See* LANDLORD AND TENANT. SPECIFIC PERFORMANCE.

3. TIME WHEN OF THE ESSENCE OF THE CONTRACT.

a. **By Original Stipulation.**

Rule in Equity.]—Time is not generally regarded as the essence of contract in equity. *Seton* v. *Slade*, 7 Ves. 273; 6 R. R. 124; where several instances of this doctrine are mentioned.

Time held not essence of contract. *Gibson* v. *Patterson*, 1 Atk. 12.

The time at which a contract is to be performed, is not essential in equity as at law. The relief against the lapse of time is in the discretion of the court upon the circumstances, as if the contract is abandoned. *Radcliffe* v. *Warrington*, 12 Ves. 326.

A contract of which time is the essence, and a chief term in which is the punctual payment of interest, not enforced, where interest was left in arrear two or three days. *Hicks* v. *Gardner*, 1 Jur. 541.

On a bill for specific performance, the questions whether the time was originally of the essence of the contract, and whether being so, the defendant has done any act whereby he has waived it, as a ground of objection to the performance, are questions depending on evidence, and not to be decided except upon the hearing. *Levy* v. *Lindo*, 3 Mer. 81.

If time is to be considered as of the essence of a contract, that point must be made promptly. *Monro* v. *Taylor*, 8 Hare, 51. Affirmed 3 Mac. & G. 713; 21 L. J., Ch. 525. And see *Madeley* v. *Booth*, 2 De G. & Sm. 718; *Price* v. *Griffith*, 1 De G. M. & G. 80; 21 L. J., Ch. 78; 15 Jur. 1093.

Time will, in equity, be deemed of the essence of the contract, in all cases where it can be collected, from the terms of the contract, that the parties intended that the time for its completion should be strictly adhered to. *Hipwell* v. *Knight*, 1 Y. & C. 401; 4 L. J., Ex. Eq. 52.

Delivery of Abstract.]—Merely undertaking to deliver an abstract and possession at a particular time does not make it the essence of the contract. *Boehm* v. *Wood*, 1 J. & W. 419; 21 R. R. 213.

When a contract for sale is entered into by which it is stipulated that the abstract is to be delivered on a particular day, and it is not delivered within a reasonable time after that day, the purchaser is at liberty to repudiate the contract. *Venn* v. *Cattell*, 27 L. T. 469.

Conditions of sale stated that an abstract of title would be furnished within seven days from the day of sale. The purchaser's solicitor called for the abstract two days after the sale, but the abstract was not delivered till thirteen days after the sale:—Held, that the time of the delivery of the abstract was not of the essence of the contract, the importance of stipulations as to time being differently regarded in courts of law and equity. *Roberts* v. *Berry*, 3 De G. M. & G. 284; 22 L. J., Ch. 398.

Payment of Purchase Money.]—Upon sale of a reversion, part of the terms was that the money be paid by a certain time; not being so by default of vendee, vendor discharged from his contract. *Newman* v. *Rogers*, 4 Bro. C. C. 391.

Deposit.]—The time for paying the deposit may be made an essential term for entering into a contract for sale of an estate. *Honeyman* v. *Marryat*, 6 H. L. Cas. 112; 26 L. J., Ch. 619; 4 Jur. (N.S.) 17. Affirming 21 Beav. 14; 3 W. R. 502.

Completion of Purchase.]—Conditions of sale stated that the purchaser should pay a deposit as part of the purchase-money and sign agreements for payment of the remainder on or before August 17th, when the purchases were to be completed; should the completion be delayed from any cause whatever beyond that period the purchasers were to pay interest on the balance from that date until completion:—Held, that as by the conditions a possible postponement of the purchase was contemplated, time was not of the essence of the contract. *Patrick* v. *Milner*, 46 L. J., C. P. 537; 2 C. P. D. 342; 36 L. T. 738; 25 W. R. 790.

Title not Shown.]—Bill for specific performance of articles for purchase, dismissed with costs, because title was not laid before counsel within time limited. *Lewis* v. *Lechmere* (*Lord*), 10 Mod. 502.

If the vendor does not show a clear title by the day specified, the purchaser may recover back his deposit and rescind the contract, without waiting to see whether the vendor may ultimately be able to establish a good title or not. *Wilde* v. *Fort*, 4 Taunt. 334; 13 R. R. 616.

And if the vendor contracts to make out a good title by a certain day, the vendee is not bound to apply to the vendor respecting it before that day. *Berry* v. *Young*, 2 Esp. 640, n.

A purchase was to be completed on the 25th October. Before that day arrived the purchaser, at the vendor's request, extended the time to the 5th November. The title, however, was not completed on that day:—Held, that the purchaser was at liberty to abandon the contract. *Parkin* v. *Thorold*, 2 Sim. (N.S.) 1. Affirmed 16 Beav. 59; 22 L. J., Ch. 170; 16 Jur. 959.

In equity the time appointed for the completion of a contract is not, as at law, of the essence of the contract, but it may be made so by direct stipulation or necessary implication. *Ib.*

By a contract in writing, E. agreed to purchase freeholds from N., subject to the title being accepted by his solicitor. The purchase-money was to be paid on the 29th September, on which day it was presumed that the contract would be completed and possession given; but in the event of the purchase not being completed on that day, the purchaser was to pay interest up to such reasonable time as might be agreed upon by his solicitor. When the title was produced it appeared that E. was not the legal owner of the land, but had agreed to purchase the same by a contract which was not completed till after the 29th September, 1873. Held, that, on the construction of the agreement, it was to be completed on the 29th September, and that, the action having been commenced before the Judicature Act came into operation, time was of the essence of the contract; and that, the vendor not being on that day in a position to make a good title and execute a conveyance, he could not sustain an action for damages. *Noble* v. *Edwardes*, 5 Ch. D. 378; 37 L. T. 7—C. A.

Special Condition.]—Time held to be of the essence of the contract upon construction of conditions of sale. *Seaton* v. *Mapp*, 2 Coll. C. C. 556.

Time made of the essence of a contract by a special condition. *Hudson* v. *Temple*, 29 Beav. 536; 30 L. J., Ch. 251; 7 Jur. (N.S.) 248; 3 L. T. 495; 9 W. R. 243.

If a vendor of leaseholds makes time the essence of a contract, and on the day specified for the completion of the purchase insists upon the money being paid, he may, in the event of the purchaser's neglect, omission, or refusal to comply with such request, avail himself of a power in the contract to annul the sale. *Ib.*

By an agreement between the plaintiff and a company, the company was to take portions of the plaintiff's lands, and make and maintain, for the convenience of the plaintiff, so many crossings and of such kinds as the plaintiff's surveyor should direct and notify in writing within one month after the company's obtaining possession of the land. In December the company entered into possession, but no award or notification of the works required was made until March following:—Held, that the stipulation as to time must be regarded as of the essence of the contract; and specific performance of the works mentioned in the award or notification was refused. *Darnley* (*Earl*) v. *L. C. & D. Ry.*, 33 L. J., Ch. 9; 9 Jur. (N.S.) 452; 8 L. T. 94; 11 W. R. 388.

Delivery of Objections.]—The conditions of sale provided that all objections to the title not taken within a certain time after delivery of the abstract, should be deemed to be waived:—Held, that the time for objecting was not to be computed from the time of the delivery of an imperfect abstract; and that the purchaser was not precluded from taking an objection after the time fixed on, which arose out of evidence called for before the expiration of that time. *Blacklow* v. *Laws*, 2 Hare, 40.

Where it was stipulated that all objections to the title should be taken within twenty-one days of the delivery of the abstract, or be deemed waived, and time as to this was to be considered the essence of the contract:—Held, that the twenty-one days did not begin to run till a perfect abstract had been delivered. *Hobson* v. *Bell*, 2 Beav. 17; 8 L. J., Ch. 241; 3 Jur. 196.

In a condition of sale, that objections to the vendor's title are to be sent in within a given time, time is of the essence of the contract. *Oakden* v. *Pike*, 34 L. J., Ch. 620; 11 Jur. (N.S.) 666; 12 L. T. 527; 13 W. R. 673.

If a vendor does not deliver the abstract of title within the time specified in the conditions, he cannot hold the purchaser bound to send in his objections within the time limited for that purpose, even though it was stipulated in the condition for sending in the objections that time in that respect should be of the essence of the contract. In such a case, the time within which objections will be considered as waived will depend upon the general principles of the court and the conduct of the parties. *Upperton* v. *Nickolson*, 40 L. J., Ch. 401; L. R. 6 Ch. 436; 25 L. T. 4; 19 W. R. 733.

Delay in Taking Objections.]—The contract provided that all objections to and requisitions in support of the title not delivered in writing in a month after delivery of the abstract should be deemed to be waived. The vendor delivered an abstract showing title to be in a trustee. No objection was made within the month. On an action by the purchaser, B., for breach of contract:—Held, that no objection having been made within the month, the issue was satisfied by the abstract delivered. *Blackburn* v. *Smith*, 2 Ex. 783; 18 L. J., Ex. 187.

Held, also, that B. could not rescind the contract and recover the deposit, inasmuch as, having taken possession of the land, the parties could not be placed in statu quo. *Ib.* See also *Rosenberg* v. *Cook*, 51 L. J., Q. B. 176; 8 Q. B. D. 162; 30 W. R. 344—C. A.

—— **No Title.**]—A condition that all objections not delivered within fourteen days to be considered waived, and in this respect time to be of the essence of the contract, does not apply where the vendor has no title at all. *Want* v. *Stallibrass*, 42 L. J., Ex. 108; L. R. 8 Ex. 175; 29 L. T. 293; 21 W. R. 685.

Where conditions of sale make time for delivery of objections of the essence of the contract, a purchaser can, after the time has expired, object that vendors have no title at all. *Want* v. *Stallibrass* (supra) followed. *Tanqueray-Willaume and Landau, In re*, 51 L. J., Ch. 434; 20 Ch. D. 465; 46 L. T. 542; 30 W. R. 801.

And see Cases infra, col. 1453.

Construction of Objections.]—Where all objections not taken by a certain day were to be considered as waived, and, before the day named, the purchaser's solicitor wrote to the vendor's solicitor objecting to the title on one ground, but inclosing an opinion upon the title in which a further objection was disclosed:—Held, that the letter and the opinion must be read together and sufficiently stated the latter ground of objection. *Mosley* v. *Hyde*, 17 Q. B. 183; 20 L. J., Q. B. 539; 15 Jur. 809.

Possession.]—If the contract stipulated that the possession should be given at a specified day, it is competent for the purchaser to insist that both time and a vacant possession are of the essence of the contract, and the court will receive, as evidence that such was the purchaser's intention, statements made by the agent of the purchaser at the time of signing the contract. Where a purchaser has consented to enlarge the time for completion, and where a vacant possession was of the essence of the contract, it is competent for him to object to complete at the expiration of such enlarged time, if the possession is not then vacant, and if he has done no act towards completion of the contract after he had notice that vacant possession could not be given at the day. *Nokes* v. *Kilmurey*, 1 De G. & Sm. 444.

On the 14th December C. signed an agreement for the purchase from T. of a leasehold house and premises. The agreement contained these words; "Possession to be given on the 14th January next." Possession without proof of T.'s title was tendered on the 14th January, but C. refused to accept it. On bill for specific performance:—Held, that possession meant possession with a good title shown. *Tilley* v. *Thomas*, L. R. 3 Ch. 61; 17 L. T. 422; 16 W. R. 166. And see *Boehm* v. *Wood*, supra, col. 1145.

—— **Occupation.**]—A. agreed to sell to B. an orchard, described as being in the occupation of

P., and that the purchaser should have possession on the day appointed for completion :—Held, that possession did not mean personal occupation, and a decree for specific performance was made against B., although A. was unable, by reason of P.'s tenancy, to put him in actual occupation of the premises. *Lake* v. *Dean*, 28 Beav. 607.

Wager Contract.]—On a wager contract as to price of opium at a sale on 30th November :—Held, time not of the essence, and therefore the contract binding, though the sale took place on 7th December. *Chotayloll* v. *Manickchund*, *Chotayloll* v. *Uggerchund*, 6 Moore, Ind App. 251 ; 4 W. R. 317.

b. By Notice.

General Rule.]—Time may by the terms of the contract be made the essence thereof. But it is not decided, that where there is no special stipulation to that effect, it can be made so by a subsequent notice that it will be so considered. *Reynolds* v. *Nelson*, 6 Madd. 26.

Though time be not of the essence of a contract, it may be made so by notice, where there has been great and improper delay on one side in completing. *King* v. *Wilson*, 6 Beav. 124. And see *Stewart* v. *Smith*, 6 Hare, 223, n.

Where time is not the essence of the contract, by its original terms, it may be made so on reasonable notice by either party ; but where an objection, founded on such a notice, is set up and fails, the defendant will have to pay the costs up to the hearing. *Taylor* v. *Brown*, 2 Beav. 180 ; 9 L. J., Ch. 14. S. P., *Parkin* v. *Thorold*, 16 Beav. 59 ; 2 Sim. (N.S.) 1 ; 22 L. J., Ch. 170 ; 16 Jur. 959.

Reasonable Time.]—When, after a contract for the sale of land has been entered into, a notice is given to make time of the essence of the contract, the question whether the notice is reasonable or not must be judged of as at the date when it is given. After considerable negotiations a notice was given on 24th September for completion on or before the 31st October :—Held, that the notice of the 24th September fixed an unreasonably short time for the completion of the purchase, and was therefore invalid. *Crawford* v. *Toogood*, 49 L. J., Ch. 108 ; 13 Ch. D. 153 ; 41 L. T. 549 ; 28 W. R. 248.

Where a contract for sale fixes a day for completion, and provides that if the purchase is not completed on that day the purchaser shall pay interest from that day until completion, time is not of the essence of the contract so as to entitle the purchaser immediately to repudiate if, in consequence of a defect of conveyance merely and not of title, the vendor is unable to complete on the day fixed. Where the defect is one of conveyance and time is not of the essence of the contract, the purchaser is not entitled to repudiate after the day fixed for completion until he has given the vendor notice to remove the defect within a reasonable time, and the vendor has failed to do so. *Hatten* v. *Russell*, 57 L. J., Ch. 425 ; 38 Ch. D. 334 ; 58 L. T. 271 ; 36 W. R. 317.

Consideration of the questions, whether time was of the essence of the contract, whether reasonable notice to complete was given, and whether that notice was complied with. *Macbryde* v. *Weekes*, 22 Beav. 533 ; 2 Jur. (N.S.) 918.

When time is not originally of the essence of a contract, one of the parties is not entitled afterwards by notice to make it of the essence, unless there has been some default or unreasonable delay by the other party. After a delay of two years the vendor gave notice to the purchaser to complete within three weeks :—Held, that the time was unreasonably short, and the notice therefore of no effect. *Green* v. *Sevin*, 49 L. J., Ch. 166 ; 13 Ch. D. 589 ; 41 L. T. 724; 44 J. P. 282.

Contract to be completed on 1st August ; on 4th August two requisitions remaining uncomplied with the vendor gave notice to rescind unless completed within a month :—Held, that the notice was not reasonable. *Wells* v. *Maxwell*, 32 Beav. 408. Affirmed, 33 L. J., Ch. 44 ; 9 Jur. (N.S.) 1021 ; 8 L. T. 713 ; 11 W. R. 842.

—— **Limited Title.**]—In November, 1861, S. agreed to purchase property, and verbally agreed to take a limited title. Negotiations were carried on as to the title till December, 1864, when the purchaser gave notice that unless within one week the vendor would agree to comply with the requisitions, he should require a good marketable title to the whole property, and if that were not shown within five weeks the contract would be treated as rescinded :—Held, that the purchaser having agreed to accept a limited title, and the negotiations having gone on upon that footing, a complete title could not be demanded ; and that the time limited by the notice to rescind was not reasonable. *M'Murray* v. *Spicer*, 37 L. J., Ch. 505 ; L. R. 5 Eq. 527 ; 16 W. R. 332.

—— **No Title.**]—The rule that where time is not made of the essence of the contract for the purchase of land, the purchaser cannot, in the absence of unreasonable delay on the part of the vendor, arbitrarily fix a short day after which he will not be bound, does not apply to a case where, at the date of the contract, the vendor had not power to sell the estate. *Lee* v. *Soames*, 59 L. T. 366 ; 36 W. R. 884.

Option to Purchase.]—An option to purchase became effective on 14th August. On 2nd November vendor gave notice to complete within six weeks :—Held, that six weeks was not a reasonable time. *Pegg* v. *Wisden*, 16 Beav. 239 ; 16 Jur. 1105 ; 1 W. R. 43.

Notice to Rescind.]—A. purchased a mine from an agent of the owners, and contracted to sell it to a company. The company discovered that the original owners had sold the mine to other parties, and then gave A. three months' notice to rescind the contract unless completed. A bill by A. for specific performance dismissed with costs. *Reed* v. *Don Pedro North Del Rey Gold Mining Co.*, 10 L. T. 836 ; 12 W. R. 1049.

c. From Nature of Subject-Matter of Contract.

Value Fluctuating.]—Time is of the essence, where subject of contract is of nature liable to daily fluctuation in value. *Doloret* v. *Rothschild*, 1 Sim. & S. 590 ; 2 L. J. (O.S.) Ch. 125 ; 24 R. R. 243.

Public-house.]—Time held to be of the essence of the contract by reason of the nature of the trade,

viz. that of a publican. *Seaton* v. *Mapp*, 2 Coll. C. C. 556. S. P., *Coslake* v. *Till*, 1 Russ. 376; 25 R. R. 75. *Day* v. *Luhke*, 37 L. J., Ch. 330; L. R. 5 Eq. 336; 16 W. R. 717. *Cowles* v. *Gale*, 41 L. J., Ch. 14; L. R. 7 Ch. 12; 25 L. T. 524; 20 W. R. 70.

Where on the sale of a public-house as a going concern negotiations continued after the date fixed for completion, and ultimately the vendor gave ten days' notice to complete:—Held, that the notice was reasonable under the circumstances. *Smith* v. *Batsford*, 76 L. T. 179.

Sale of Reversion.]—Specific performance refused, the contract being for a sale of a reversionary interest for life, which in the interval fell into possession. *Spurrier* v. *Hancock*, 4 Ves. 667.

Leasehold Sold for Freehold.]—Specific performance of agreement to buy fee-simple of lands and right, &c., refused, where part proves only leasehold, and the right is qualified; object being to work commercial speculation, which could only be done by enjoyment of unqualified right. *Wright* v. *Howard*, 1 Sim. & S. 190; 1 L. J. (o.s.) Ch. 94; 24 R. R. 169.

d. Waiver.

General Rule.]—Time may be made the essence of a contract, but may be waived by conduct. *Hudson* v. *Bartram*, 3 Madd. 440.

Payment by Instalments.] — Contract by plaintiff, a subsequent mortgagee, with the prior mortgagees, to purchase their interests and pay the purchase-money by a certain date, and time was to be of the essence of the contract. The plaintiff did not pay the instalments until a considerable time after the stipulated period, but such later payments were accepted by the vendors. On a bill for specific performance by the subsequent mortgagee:—Held, that every default by the plaintiff in payment of the instalments at the stipulated time is a new breach of the contract, but that in this case the breach had been waived. *Hunter* v. *Daniell*, 4 Hare, 420; 14 L. J., Ch. 194; 9 Jur. 520.

Delivery of Abstract.]—Where the parties entered into a stipulation that an abstract of title should be delivered immediately, and that, in case the contract was not completed by a given day, the purchaser should be released from his contract, and the abstract was not immediately delivered, but communications on the subject of the title were continued between the parties until the time limited by the contract had expired:—Held, that under these circumstances, the benefit of the stipulation as to time was waived by the purchaser. *Hipwell* v. *Knight*, 1 Y. & C. 401; 4 L. J., Ex. Eq. 52.

Ejectment.]—Where it was stipulated in the agreement of purchase, that it should be void if the money was not paid on a day stated:—Held, that the purchaser continuing in possession, and giving a warrant to confess judgment in ejectment, was a waiver of the forfeiture. *Gardiner, Ex parte*, 4 Y. & C. 503; 10 L. J., Ex. Eq. 46.

Delivery of Objections.]—Conditions of sale stipulated that objections to the title, not made within twenty-one days from the delivery of the abstract, should be considered as waived. The purchaser delivered objections some weeks after the twenty-one days, and the vendor's solicitors received them and corresponded with the purchaser about them:—Held, a waiver by the vendor's solicitors. Where objections to title are to be considered as waived, unless made within a certain time after the delivery of the abstract, quære, whether that condition can be insisted on, if the abstract is very defective. *Cutts* v. *Thodey*, 13 Sim. 206; 6 Jur. 1027. Affirmed, 1 Coll. C. C. 223, n.

—— **Special Condition.**]—A special condition of sale stipulated, that by a fixed day the purchaser should either reject or accept the title, and if not rejected it was to be good. Within the time fixed the purchaser took an objection, but stated at the same time he did not reject the title upon that ground, but wished to hear how the vendor met the difficulty. The vendor insisted at first on the condition, by which the purchaser, not having rejected the title, was to be held to have accepted it, but subsequently entered upon a long correspondence:—Semble, that the vendor had by his conduct waived the condition. *Lane* v. *Debenham*, 17 Jur. 1005.

What delay Sufficient.]—Circumstances of delay held not to amount to a waiver of requisitions of title. *Cooch* v. *Warden*, 46 L. J., Ch. 639.

Specific performance decreed, the abstract having been delayed and kept without objection, and the vendee, upon the construction and the circumstances, not being entitled to insist on the same as the essence of the contract. *Seton* v. *Slade*, 7 Ves. 265; 6 R. R. 124.

Specific performance of an agreement to purchase may be decreed after considerable delay, if the vendee has not demanded his deposit or shown a determination not to proceed in the purchase. *Pincke* v. *Curteis*, 4 Bro. C. C. 329.

By the terms of an auction the title deeds were to be produced by a certain day; they were not, but the purchaser received them afterwards without objection; he cannot afterwards object to the delay. *Smith* v. *Burnam*, 2 Anstr. 527; 3 R. R. 620.

Where, by the terms of an auction, the sale is to be completed by a certain day; yet, if neither party take any step to quicken the other, till it becomes impossible to execute the agreement by the day fixed, the time is waived, and equity will interfere to prevent the purchaser taking advantage of it at law. *Jones* v. *Price*, 3 Anstr. 924; 1 East, 81; 4 R. R. 874.

Time is of the essence of the contract; waived by a protracted treaty. *Wood* v. *Bernal*, 19 Ves. 220; 12 R. R. 173.

Negotiations after Time to Complete.]—Agreement for sale, and if through default of the vendor sale is not completed by 20th May, agreement to be void. On 24th May negotiations were going on, and the purchaser then discovered on searches a deed not disclosed in abstract, which affected the title. The land was pasture land, and possession was necessary before the end of May, so that lands could be stocked. On the 29th May, purchaser refused to complete:—Held, that although negotiations continued after the time fixed for completion of the contract, that this did not amount to a waiver of the con-

dition; that, under the circumstances, time was of the essence of the contract, and that the purchaser ought not to be compelled to complete. *Dyas* v. *Rooney*, 27 L. R., Ir. 4—C. A.

Though time be not of the essence of the contract, it may be made so by notice, where there has been great and improper delay on one side in completing. It may, however, be waived by proceeding in the purchase after the expiration of time fixed by notice. *King* v. *Wilson*, 6 Beav. 124.

Where upon a sale on the terms of the deposit forfeited if the purchase, through default of the purchaser, is not completed on a certain day, the vendor's agent is informed on that day that the purchase will not be completed until the following day, and no objection is made—the vendor cannot insist that there was a forfeiture on the second day. *Carpenter* v. *Blandford*, 3 Man. & Ry. 93; 8 B. & C. 575; 7 L. J. (O.S.) K. B. 58.

Where a purchaser had by his acts waived the time of completion in the first instance, and had gone on for some time inducing the vendor to incur expenses to perfect his title, and suddenly, upon the discovery that vacant possession could not be given according to stipulation, declined to complete, the court, though it dismissed a bill filed against such a purchaser for specific performance, dismissed it without costs. *Nokes* v. *Kilmorey*, 1 De G. & Sm. 444.

New Date Substituted.]—If it is of the essence of the contract that an act should be completed by a fixed date, an extension of the time does not operate as an absolute waiver of that condition, but only substitutes the extended time for the original time. *Barclay* v. *Messenger*, 43 L. J., Ch. 449; 30 L. T. 350; 22 W. R. 522.

Purchase-money payable by instalments. Instalment due on 31st July, and time for payment extended to 26th August:—Held, not absolute waiver, but merely substituted the latter date for the original one. *Ib.*

Agreement that part of purchase-money was payable at once, and the remainder on 1st January, 1839, on a good title being made out. Before January, 1839, purchaser requested vendor not to press the contract, as he (the purchaser) could not pay the balance, and this the vendor agreed to:—Held, that though time was originally of the essence of the contract, it was waived by the conduct of the parties. *Gordon* v. *Mahony*, 13 Ir. Eq. R. 383.

Time of Valuation.]—The time of valuation is of the essence of the contract; but the defendant cannot take advantage of it if he has improperly occasioned the delay. *Morse* v. *Merest*, 6 Madd. 26; 22 R. R. 226.

4. Options and Pre-emptions.

a. Who may Exercise.

Mortgagee.]—Equity will not, after a sale, enforce a covenant for pre-emption against mortgagor in favour of mortgagee. *Orby* v. *Trigg*, 9 Mod. 2.

Assignee.]—Certain lands were demised for three lives, renewable for ever, subject to a condition for pre-emption, by the lessor, his heirs, or assigns, in case the tenant, his heirs, or assigns, should dispose thereof; and if such preference should not be given, then the lease to cease. The lessor assigned his interest, and the assignee purchased a portion of the tenant's interest:—Held, that the condition could not be taken advantage of by the assignee of the reversion. *Sparrow* v. *Cooper*, Hay. & J. 404.

Administrator.]—A lease contained a covenant by the lessor with the lessee, his executors, administrators, and assigns, giving a right of option on certain conditions. The lessee died intestate, and nearly twenty years after his death, his heir, who was also administrator of his personal estate, exercised the option. The heir afterwards contracted to sell part of the property:—Held, that the option to purchase was attached to the lease and passed as part of the lessee's personal estate, and that the administrator could not make a good title unless the next of kin of the lessee would concur. *Adams and Kensington Vestry, In re*, 54 L. J., Ch. 87; 27 Ch. D. 394; 51 L. T. 382; 32 W. R. 883.

Company to take Land when required for Railway.]—In 1883 an agreement was entered into between the plaintiff and the predecessors of the defendant company, which, after reciting that the company had power to take certain lands of the plaintiff, provided that the company should pay for the purchase of such lands, "or for such portions or portion thereof as the company may require," at the rates therein mentioned; that the purchase should be completed on or before the 1st January, 1885, and that, if not completed by that date, the company should thenceforth pay to the vendor interest on the purchase-money. The plaintiff brought an action claiming specific performance of the agreement. The defendant company who had succeeded the old company insisted that they were not under any obligation to purchase any of the lands except as and when they required them for the construction of their railway which they were not at present in a position to make:—Held, that, unless the company had stated that they required certain of the plaintiff's lands, the agreement could not now be enforced against them, the company having an option to say what lands they required; and that the time within which such option was to be exercised was the 1st January, 1885:—Held, therefore, that the action failed. *Wentworth* v. *Hull and N. W. Junction Ry.*, 64 L. T. 190.

Voidable Agreement.]—A person who contracts to sell an agreement for a lease must, in the absence of anything to show a contrary intention at the time of the contract, show that the agreement is valid. A contract was entered into for the sale of an agreement for a lease. The agreement was at that time voidable at the will of a third person, and on discovering this the purchaser repudiated the contract. The third person had not avoided the agreement, but offered to renew it conditionally on the vendor's doing a certain thing:—Held, that the purchaser was entitled to repudiate the contract, and was not obliged to wait and see whether the condition would be performed. *Brewer* v. *Broadwood*, 52 L. J., Ch. 136; 22 Ch. D. 105; 47 L. T. 508; 31 W. R. 115.

Invalid Lease.]—Trustees with power to grant building leases for 99 years and ordinary leases for 21 years with an option to purchase, granted an ordinary lease for 35 years with an option to C. In exercise of this option, C. purchased the leasehold portion of the land.

Doubts having afterwards arisen as to the validity of the lease, a notice was endorsed upon it, pursuant to 12 & 13 Vict. c. 26, and signed by C. and the trustees, declaring that the lease should be considered in equity as a contract to grant a valid lease under the power to grant ordinary leases. Upon the sale by C. of the leasehold land :—Held, that the lease was invalid; that the defect could not be remedied under 12 & 13 Vict. c. 26, by turning that which was a lease of one kind into a contract for the lease of another kind. *Hallett and Martin, In re*, 52 L. J., Ch. 804; 48 L. T. 894.

Held, also, that the lease being bad, the option of purchase was ineffectual and could not be exercised. *Ib.*

Right to Good Title.]—An agreement for a lease contained an option on the part of the plaintiff to purchase the premises within three years. The plaintiff having elected to purchase, the defendant refused to produce his title to the premises :—Held, that the right of the plaintiff was that of an ordinary purchaser, who was entitled to have a good title produced, in the absence of any condition to the contrary, and that the onus was upon the defendant to show that that right had been waived. *Welshman* v. *Spinks*, 5 L. T. 385—L. C.

Time when of the Essence.]—See *Pegg* v. *Wisden*, infra, col. 1156.

b. Time for and Delay.

Life of Owner.]—A right of pre-emption held limited to the life of the owner of the property. *Stocker* v. *Dean*, 16 Beav. 161.

Semble, that a right of pre-emption "at all times thereafter" cannot be enforced after the death of the owner of the property. *Ib.*

Condition as to Purchase Money.]—A lessor covenanted with the lessee that he should have an option of purchasing the fee by giving notice and paying 2,000*l.*, and also all arrears of rent. The expense of preparing an abstract was to be borne by the lessee :—Held, that the payment of purchase-money was a precedent condition to the delivery of the abstract of title, and that as the lessee had not performed the condition, the contract was not binding on the lessor. *Weston* v. *Collins*, 5 N. R. 345; 34 L. J., Ch. 353; 11 Jur. (N.S.) 190; 13 W. R. 510.

Articles of agreement for a lease contained an option to purchase by giving three months' notice, and at the expiration of such notice paying unto the lessor 210*l.* Notice to purchase was given, but the three months elapsed without payment of the money :—Held, that "at the expiration" meant the precise day on which the notice expired, and that the money not being paid at the fixed time, the lessee lost his right to purchase. *Ranelagh (Lord)* v. *Melton*, 2 Dr. & Sm. 278; 5 N. R. 101; 34 L. J., Ch. 227; 10 Jur. (N.S.) 1141; 11 L. T. 409; 13 W. R. 150.

And see *Wentworth* v. *Hull and N. W. Junction Ry.*, supra, col. 1154.

Property Destroyed.]—By a clause the lessee had the option of purchasing the fee simple of the premises comprised in the lease. The term was under the lease determined absolutely by a fire which occurred before the exercise of the option :—Held, that the option to purchase was independent of the duration of the term. *Edwards* v. *West*, 47 L. J., Ch. 463; 7 Ch. D. 858; 38 L. T. 481; 26 W. R. 507.

Sub-lessee—Bankruptcy.]—A person entitled to leasehold premises for a long term of years agreed to underlet them to a tenant for three years, and, whenever called upon to do so by the tenant, to grant him a lease, such lease to contain all the usual covenants for protecting the interests of the grantor. The tenant after the three years continued in possession until he became bankrupt, and his interest in the premises was sold by his assignee to a purchaser, who entered into possession :—Held, first, that the option might be exercised at any time during the tenancy. *Buckland* v. *Papillon*, 36 L. J., Ch. 81; L. R. 2 Ch. 67; 12 Jur. (N.S.) 992; 15 L. T. 378; 15 W. R. 92.

Held, secondly, that the bankrupt had such an interest in lands as passed to his assignee either under 12 & 13 Vict. c. 106, s. 142, or under s. 145. *Ib.*

Held, thirdly, that such interest was not prevented from so passing by the absence of the word "assigns" in the agreement. *Ib.*

Delay.]—An option to purchase in these terms : "M. to have the option at any time during the term to purchase the premises for 3,500*l.*" M. entered into possession, and gave written notice to A. that he elected to purchase. No purchase money was paid as G., a mortgagee, claimed it, and a correspondence went on till March, 1868. In November, 1872, A. became bankrupt. On the 13th May, 1873, M.'s solicitor wrote insisting on M.'s right :—Held, that the option in the agreement of 1861 and the notice of July, 1867, made a binding contract, although the purchase-money was not paid within the term. *Mills* v. *Haywood*, 6 Ch. D. 196.

Held, that M.'s right to specific performance was lost by the delay from March, 1868, to May, 1873, which was not excused by his having been in possession. *Ib.*

A tenant was to have a purchasing clause, at any time within nine years, by giving three months' notice. He gave the notice, and delays occurring, the three months elapsed. Afterwards the landlord gave notice that unless the purchase should be completed within six weeks, he should treat the notice as void, and the right of purchasing as forfeited. The purchase was not completed within the six weeks :—Held, first, time was not of the essence of the contract; secondly, that if it had been, it was waived by the landlord; thirdly, that time was not made of the essence by the notice; and, fourthly, that six weeks was not a reasonable time. *Pegg* v. *Wisden*, 16 Beav. 239; 16 Jur. 1105; 1 W. R. 43.

—— **Accounts.**]—Where a vendor is entitled to repurchase on payment by a given day, and such sum can only be ascertained by accounts to be rendered by the purchaser in possession, such purchaser cannot by rendering such account so late as to preclude the possibility of a settlement within the time, deprive the vendor of his right to repurchase. *Ponsford* v. *Hackney*, 2 Giff. 604; 7 Jur. (N.S.) 929; 5 L. T. 226; 9 W. R. 510.

Death of Lessor—Infant Heir.]—Option to purchase by giving notice to the lessor, his heirs or assigns. The lessor died, having devised all

his real estate to trustees, who disclaimed, and leaving an infant heir. The lessees having served on the infant and his guardian notice of their election to purchase:—Held, that such notice was effectually served, and constituted a valid and binding contract. *Woods* v. *Hyde*, 31 L. J., Ch. 295; 6 L. T. 317; 10 W. R. 339.

—— **Costs.**]—B. leased lands to H., giving him an option to purchase the fee, having previously devised the land so leased. After B.'s decease, H. desired to exercise the option, for which purpose a suit was necessary:—Held, that the decree must be without costs. *Hall* v. *Bushill*, 14 L. T. 246; 14 W. R. 495.

Breach of Covenant—Agreement to Insure.]—The defendant agreed, in consideration of the plaintiff erecting a house, to grant a lease of the same when completed; and the plaintiff agreed to insure in a named office in the joint names of the plaintiff and the defendant; and the defendant further agreed that the plaintiff should, within two years from the date of the agreement, have the option to purchase for a stipulated sum. The plaintiff erected the house, but insured in another office, and in his own name only. The plaintiff within the time limited signified his intention to purchase. The defendant refused to sell on the ground of the breach of covenant, and commenced an ejectment against the plaintiff:—Held, that the contract to sell was a distinct and separate part of the agreement; and a decree was made restraining the ejectment, and for the specific performance of the agreement. *Green* v. *Low*, 2 Jur. (N.S.) 848; 4 W. R. 669.

Non-compliance with Condition.]—By deed, dated January, 1857, it was agreed that if Company A. should "on or before any 25th December, after having given to Company B. six months' previous notice of their desire to avail themselves of the option thereby given, pay unto Company B." the amount of their share capital, the party so paying should become absolutely entitled to the works. In June, 1870, the corporation, who had acquired the interest of Company A., gave notice to Company B. of their intention to pay this sum on the 25th December following, but they were unable from want of funds to carry out the purchase. In June, 1871, they again gave notice that they would pay the money on the 25th December, 1871:—Held, that the corporation, by giving the first notice and failing to act upon it, had not lost the right given to them by the deed. *Ward* v. *Wolverhampton Waterworks Co.*, 41 L. J., Ch. 308; L. R. 13 Eq. 243.

Ejectment—Injunction.]—A yearly tenant with the option of purchasing, having filed his bill for a specific performance against the landlord, the latter, after notice to quit, brought an action of ejectment against him, whereupon the tenant applied for an injunction to restrain the action, which the court only granted upon the terms of the tenant continuing to pay the rent without prejudice. *Pyke* v. *Northwood*, 1 Beav. 152.

5. Sale at a Valuation.

General Rule.]—Where on a sale of property the parties have stipulated that the price shall be ascertained in a particular way, and it is not so ascertained, the court cannot, in the absence of special circumstances, interfere to aid the carrying out of the contract by having the price ascertained in some different mode. *Morgan* v. *Milman*, 3 De G. M. & G. 24; 22 L. J., Ch. 897; 17 Jur. 193; 1 W. R. 143.

A purchaser having agreed to buy land and works for 7,700*l.*, and to take the plant and machinery at a valuation:—Held, that the necessity of a valuation was no reason for refusing specific performance at the suit of the vendor. *Jackson* v. *Jackson*, 1 Sm. & G. 184; 22 L. J. Ch. 873; 17 Jur. 293; 1 W. R. 264.

Goodwill.]—An agreement for the sale of leasehold premises and the goodwill of a trade and fixtures, to be taken at a valuation to be made by two gaugers, to be named, or their umpire:—Held, that a court of equity could not decree a specific performance of an agreement, one part of which was left to be determined by arbitration. *Darbey* v. *Whitaker*, 4 Drew. 134; 5 W. R. 772.

Semble, the court will not decree payment of a valuation to be made, but will enforce a contract for purchase of a goodwill where it is annexed to the premises. *Ib.*

Arbitration or Valuation.]—Difference between a contract to sell at a price, to be determined by arbitration, and a contract which is only to be valid provided the price fixed be not less than the value determined by arbitration. *Baker* v. *Metropolitan Ry.*, 31 Beav. 504; 1 N. R. 8; 32 L. J., Ch. 7; 9 Jur. (N.S.), 61; 7 L. T. 494; 11 W. R. 18.

Where Valuation not made.]—The price is of the essence of a contract of sale; if therefore to be fixed by arbitrators, and they do not fix it, there is no contract, but the court determining that an agreement ought to be executed, does not require foreign aid to carry the details into execution. *Gourlay* v. *Somerset*, 19 Ves. 431.

A specific performance cannot be decreed of an agreement to sell at a price to be settled by arbitrators named by the parties, if no award has been made; but if the parties agree to pay the amount of a valuation, but have not appointed any persons to make it, the court will interfere so as to ascertain the value, and direct a specific performance of the agreement. *Daly* v. *Duggan*, 1 Ir. Eq. R. 312.

By the terms of the agreement the land was to be valued, and the purchase money was not to be less than 400*l.* Quære, whether this agreement could be enforced, no valuation having been made. *Potts* v. *Thames Haven Dock and Ry.*, 15 Jur. 1004.

A contract for the sale of land provided that one party was to be consulted on any houses proposed to be built thereon by the other, and in case of difference, that A. and B., or their nominees, should have power to decide any such question. There having been no decision:—Held, that the court could not specifically perform the contract. *Tillett* v. *Charing Cross Bridge Co.*, 26 Beav. 419; 28 L. J., Ch. 863; 5 Jur. (N.S.) 994.

Party not permitting Valuation.]—Where there is a contract to sell at a valuation by A., B. and C., the court will compel the vendor to permit the valuation. *Morse* v. *Merest*, 6 Madd. 26; 22 R. R. 226.

When an agreement has been entered into

for the sale of a house at a fixed price, and of the fixtures and furniture therein, at a valuation by a person named by both parties, and he is refused permission by the vendor to enter the premises for that purpose, the court will compel the vendor to allow the valuation to proceed. *Smith* v. *Peters*, 44 L. J., Ch. 613; L. R. 20 Eq. 511; 23 W. R. 783.

By the contract for the sale of an estate it was agreed that the price should be 24,000*l.*, and that certain furniture and other articles on the estate should be valued by valuers mutually agreed upon. The vendor refused to appoint a valuer, and refused to complete. A decree made at the suit of the purchaser for specific performance of the contract, except so far as it related to the furniture and articles. *Richardson* v. *Smith*, 39 L. J., Ch. 877; L. R. 5 Ch. 648; 19 W. R. 81.

Specific performance cannot be decreed of an agreement to sell at a price to be fixed by arbitrators (already appointed), where the vendor had refused to execute the arbitration bond, and it was therefore uncertain that any award would ever be made. *Wilks* v. *Davis*, 3 Mer. 507.

—— **Contract when Completed.**]—Agreement for sale, according to the valuation of two persons, one chosen by each party, or of an umpire, to be appointed by those two, in case of disagreement. Bill for a specific performance that the court will appoint a person to make the valuation, or otherwise ascertain it, dismissed. *Milnes* v. *Gery*, 14 Ves. 400.

A contract that does not settle the price is valid and complete only when and if the party to whom it is referred shall fix it, and is otherwise totally inoperative. *Ib.*, 408.

A. and B., being in partnership, came to an agreement whereby B. was to buy out A., and it was agreed that if B. should, during A.'s life, be desirous of retiring, he should give notice, and A. should then have an option of repurchase, on the terms that within six months after notice by A. the premises, goodwill, and stock-in-trade, should be valued in the "usual way" by two valuers, one to be named by A., the other by B., or by the umpire of the two valuers. B. gave notice of his intention to retire, whereupon A. gave notice of his intention to repurchase, and two valuers were appointed; but after the appointment B. refused to allow his valuer to proceed with the valuation:—Held, on the authority of *Milnes* v. *Gery* (supra) and *Wilks* v. *Davis* (supra) that there was no contract between the parties which the court could specifically enforce. *Vickers* v. *Vickers*, 36 L. J., Ch. 946; L. R. 4 Eq. 529.

When two partners made an agreement, containing a provision that on the determination of the partnership, one partner should purchase the share of the other at a valuation to be made by two persons, one to be appointed by each partner, and the partnership was carried on for some time under the agreement:—Held, that though the valuation could not be so made, because no umpire was provided, a court of equity would carry the partnership agreement into effect by ascertaining the value of the share. *Dinham* v. *Bradford*, L. R. 5 Ch. 519.

Where the fixing a value by arbitrators is not of the essence of an agreement, the court will carry the agreement into effect, and will itself, if necessary, ascertain the value. *Ib.*

Death of Party.]—Under a contract for sale at a price to be fixed by an award within a limited time during the lives of the parties, the death of one is not an accident against which the court will relieve. *Blundell* v. *Brettarch*, 17 Ves. 241. And see *Pulteney* v. *Warren*, 6 Ves. 88.

Agreement between vendor and purchaser of a copyhold estate, in which they covenant for themselves and their representatives to fulfil the cnotract, and to refer the question of value. One of the parties dying, the representatives cannot annul the decision of the referee, by showing an error in his estimate. *Belchier* v. *Reynolds*, 2 Ken. 87.

A landowner and a railway company who took part of his land agreed that an estimate should be made by the company's engineer of the costs of completing a certain road, and submitted to A., the landowner's agent, "for approval: in case of difference the amount to be determined by B.," the amount, when agreed or determined, to be paid to the landowner, in discharge of all obligations as to the road; and the purchase to be completed forthwith. A. died; and afterwards the company sent in an estimate for the cost of completing the road. B. was living:—Held, that the submission of the estimate to A. for approval was of the essence of the agreement; and that, inasmuch as by his death the agreement was incapable of being performed in the manner and form therein specified, the court could not enforce performance of it. *Firth* v. *Midland Ry.*, 44 L. J., Ch. 313; L. R. 20 Eq. 100; 32 L. T. 219; 23 W. R. 509.

Contract with Party under Disability.]—Though a person may agree to sell at a price to be fixed by arbitration, and the award can be impeached only upon the grounds affecting all awards, as fraud or gross mistake: yet upon such an agreement, where some of the persons to be bound were married women, of whom also one had not executed, the court refused a specific performance. *Emery* v. *Wase*, 5 Ves. 846.

Where a railway company agreed for the purchase of lands from persons under disability, and the certificate of two surveyors, as to the adequacy of price, had not been obtained, the court refused to decree specific performance at the instance of the company. *Wycombe Ry.* v. *Donnington Hospital*, L. R. 1 Ch. 268; 12 Jur. (N.S.) 347; 14 L. T. 179; 14 W. R. 359.

Upon a bill for specific performance, an issue was directed whether the defendant was lunatic at the time of executing the contract, which was for the sale of lands at a price to be fixed by persons to be nominated. *Hall* v. *Warren*, 9 Ves. 608.

Valuation how made.]—Option to purchase at a valuation; valuation must be fair and adequate. Option must be declared before valuation. *Edwards* v. *Edwards*, 1 Jur. 654.

—— **Price.**]—The defendant agreed to purchase a property at a valuation to be made by A. The court, though it considered A.'s valuation very high, "and perhaps exorbitant," decreed specific performance, there appearing neither "fraud, mistake, nor miscarriage." *Collier* v. *Mason*, 25 Beav. 200.

A. entered into a contract with B. for the sale of property to him at a price to be fixed by two

valuers, named in the contract, who afterwards valued the property at an inadequate price:—Held, nevertheless, that B. was entitled to a decree for specific performance, there being no proof of fraud or collusion. *Weekes* v. *Gallard*, 21 L. T., 655; 18 W. R. 331.

Specific performance will not be decreed of an agreement to sell certain property at a price to be settled by two persons who are named, if the court sees reason to believe that the price subsequently fixed by these persons is considerably below the real value of the property. *Parken* v. *Whitby*, Turn. & R. 366.

—— **Evidence.**]—Upon a reference to surveyors or other persons of skill, to fix the value of property, they are not necessarily to examine witnesses, but may judge from their own experience and observation; their not having examined witnesses is, therefore, not an objection to their award, provided they bonâ fide mean to say that they know enough of the subject to decide properly without doing so. Semble, it would not be a good ground of objection to an award, that the referees consulted with the umpire simply. But where a referee consulted with the umpire, and then concurred in an award fixing the value of the matter in question at the amount mentioned to him by the umpire, although he himself did not think it worth half of that amount, but because he thought it of no use differing:—Held, that the award was bad. *Eads* v. *Williams*, 4 De G. M. & G. 674; 3 Eq. R. 244; 1 Jur. (N.S.) 193; 3 W. R. 98.

6. Sale by Agent.

a. Authority.

i. *In General.*

Of Estate Agent.]—Upon a written request by an owner of freehold property to an estate agent to procure a purchaser for it and to advertise it at a certain price:—Held, that the estate agent had no authority to enter into an open contract for sale; and, semble, that he had no authority to enter into any contract for sale. *Hamer* v. *Sharp*, 44 L. J., Ch. 53; L. R. 19 Eq. 108; 31 L. T. 643; 23 W. R. 158.

When an owner of property employs an estate agent to procure a purchaser or tenant at a specified price, the agent has no implied authority to conclude a contract for sale; his duty is simply to find a purchaser or tenant, and to communicate his offer to the owner. *Wilde* v. *Watson*, 1 L. R. Ir. 402.

Evidence of.]—Where an agent contracts it may be proved by parol evidence who is his principal. *Morris* v. *Wilson*, 5 Jur. (N.S.) 168.

How Pleaded.—The former practice, which, in a suit for specific performance, required the authority of an agent to enter into a binding contract on behalf of his principal to be specially pleaded, still prevails. *Vale of Neath Colliery Co.* v. *Furness*, 45 L. J., Ch. 276; 34 L. T. 231; 24 W. R. 631.

—— **Insanity.**]—In an action for specific performance of an agreement made by an agent, the statement of defence, after alleging unsoundness of mind of the principal, denied that any agreement had been entered into by a person lawfully authorised, and claimed the benefit of the statute of frauds:—Held, that the defendant had not put in issue the question of authority of the agent, and was only entitled to adduce evidence with respect to the unsoundness of mind. *Byrd* v. *Nunn*, 47 L. J., Ch. 1; 7 Ch. D. 284; 37 L. T. 585; 26 W. R. 101.

—— **Breach of Trust.**]—To a claim for specific performance of an agreement to sell lands, the defendant pleaded, first, that the agreement was entered into by a house agent, who was not authorised by the defendant to sell: secondly, that since the contract the defendant had notice that the purchasers were trustees of a marriage settlement, and that the property might be an improper investment of the trust funds. Interrogatories by the defendant, directed to establish that the investment was a breach of trust, were struck out as irrelevant. *Mansfield* v. *Childerhouse*, 46 L. J., Ch. 30; 2 Ch. D. 82.

Action for Specific Performance by Agent.]—The owner of a colliery placed it in the hands of an agent to sell at a minimum price of 12,000*l.*, on the understanding that he should be entitled to the difference between 12,000*l.* and any greater sum which the colliery might fetch. The agent treated with R., who agreed to purchase the colliery for 12,000*l.*, and pay the agent 2,000*l.* for his expenses and commission. R. afterwards declined to purchase the colliery, and the agent filed a bill against him and the owner for specific performance of the agreement:—Held, that the bill was not maintainable. *Glashrook* v. *Richardson*, 23 W. R. 51.

ii. *Sufficiency and Proof of.*

General Rule.]—If an agent for a purchaser, having general authority, contracts to purchase such title as the vendor has, the court will compel specific performance of the contract. *St. John* v. *Stirling*, 1 Tam. 23; 7 L. J. (O.S.) Ch. 189.

Where the authority of the agent of the vendor was not sufficiently shown, a specific performance at the suit of the purchaser was refused, but, under the circumstances, without costs. *Wilkinson* v. *Stringer*, 9 Hare (App.) xxiii.; 16 Jur. 1033; 1 W. R. 30.

Acceptance within Fixed Time.]—A. was authorised by the defendant to make a proposal of sale of land to the plaintiff, but to be accepted within a week. The plaintiff wrote to A. within that time accepting the offer, but A. did not communicate the acceptance to the defendant until long after:—Held, that there was a valid contract, which was not destroyed by the neglect of A. to communicate the acceptance to the defendant. *Wright* v. *Bigg*, 15 Beav. 592.

Misleading Particulars.]—Purchaser, under particulars giving a false description, not bound at law or in equity, or by any act of his agent, without a fresh authority. *Deverell* v. *Bolton* (*Lord*), 18 Ves. 509.

Misstatements by Agent.]—Where an agent, commissioned by a vendor to find a purchaser, makes a false statement as to the description or value (though not instructed so to do), which the purchaser is led to believe, and upon which he relies, the vendor cannot recover in an action for specific performance. A surveyor was employed by the owner of a leasehold house to find a purchaser. He represented to the

defendant that H. was ready to buy the property for 700*l.*, and that if the defendant were to give 50*l.* more he would make a clear profit of 7 per cent.; that H. had further offered to rent the property at 300*l.*, or the ground floor only at 200*l.* The defendant, relying on the above representations, contracted to purchase for 750*l.*, but refused to complete. The vendor himself also made a misleading statement to the purchaser:—Held, that the false statements made by the agent, being within his authority, were sufficient to vitiate the contract; and specific performance refused. *Mullens* v. *Miller*, 52 L. J., Ch. 380; 22 Ch. D. 194; 48 L. T. 103; 31 W. R. 559.

Receipt of Deposit by Agent.]—A. and B. having entered into a verbal treaty for the purchase of certain premises belonging to A., and not being able to agree as to the amount of the purchase money, A. addressed a letter to C., a third person, stating that he would take a certain sum from B. for the premises. B. subsequently lodged the sum named by A. with C., of which lodgment C. made a memorandum on A.'s letter, with the remark that it was "a great price":—Held, that C. must be considered the agent of A., and that, as he had signed the contract acknowledging the receipt of the purchase money, A. was bound to perform the agreement. *Field* v. *Boland*, 1 Dr. & Wal. 37.

Extent of Authority.]—The owner of an estate, in answer to an inquiry from an intending lessee, said, "A. manages all my affairs, and you are to treat with him." This does not imply that A. had authority to enter into a binding agreement. Semble. *Ridgway* v. *Wharton*, 3 De G. M. & G. 677. Affirmed, 6 H. L. Cas. 238: 2 Eq. R. 839; 27 L. J., Ch. 46; 4 Jur. (N.S.) 173; 5 W. R. 804.

Solicitor Agent to both Parties.]—Where the same solicitor acting for both parties in a sale and purchase, submitted conditions which he represented to be "usual conditions," and the purchaser afterwards refused to complete, on the ground that some of them were unusual:—Held, that the purchaser must be considered to have acted under the advice of his own solicitor, and that specific performance must be decreed. *Minton* v. *Kirwood*, 35 L. J., Ch. 393; L. R. 1 Eq. 449; 13 L. T. 743. Affirmed 12 Jur. (N.S.) 970; 15 W. R. 116.

B., in writing, authorised his solicitor, M., to sell all the property mentioned, and to sign an agreement for such sale on his behalf. M. offered the property to H., another client of his, and he entered into a contract for the purchase. The contract was signed by M. for B., and by H. as acting on his own behalf:—Held, that the authority given to M. was sufficient to enable him to enter into the contract; that it was properly used, and that the contract must be specifically performed by B. *Hesse* v. *Briant*, 2 Jur. (N.S.) 922.

Held, also, that the rule which will not permit a person in a confidential relation to act on behalf of both vendor and purchaser did not apply. *Ib.*

Agent or Puffer.]—A purchaser alleged, by his answer to a suit for specific performance, that he acted as a puffer in bidding for one lot, and also as puffer in bidding for another lot, which was knocked down to him; and that he therefore purchased the lot, and signed the agreement for the purchase, as the agent of the vendor; but the statement in his depositions of the circumstances attending the signature was somewhat different from that in his answer, and he had signed an order on his attorney for payment of the deposit money:—Held, that there was not sufficient evidence of agency, and the defendant was held to have purchased on his own account. *Bennett* v. *Smith*, 16 Jur. 421.

Signature of Agent.]—B. became the purchaser of premises at an auction, declaring himself the agent of C. in C.'s presence; but the vendor's solicitor required B. to sign the agreement, and declined to substitute the name of C. Communications afterwards took place between the vendor's solicitor and C., with reference to the title:—Held, that, supposing B. to be the agent of C., yet the signature of B. to the contract made him personally liable to perform it. That the communication between the vendor's solicitors and the solicitor of C. with reference to the title was not an adoption of C. as the purchaser in the place of B., but should be assumed to be made in furtherance of the original contract, in which, according to B.'s representation, he was (as between himself and C.) only a formal party. That the acceptance of the title by C. in such communications would not be binding upon B., for such acceptance would be regarded as having been made in C.'s own right, as claiming through B., and not as agent for B. *Chadwick* v. *Maden*, 9 Hare, 188; 21 L. J., Ch. 876.

Secretary of Company.]—An agreement to sell property was signed for a company by the secretary, who was alleged to be its authorised agent. The agreement was made subject to conditions of sale, and it was alleged that the vendors therein described referred to the company:—Held, that the allegations in the bill were sufficient to show that the secretary was the authorised agent. *Beer* v. *London & Paris Hotel Co.*, L. R. 20 Eq. 412; 32 L. T. 715.

Several Principals.]—Baron and feme having joint power to sell an estate of the wife's, give authority to an agent to sell by auction; he sells by private contract for more than the price they required; the buyer cannot compel specific performance. Husband delivering his wife's compliments in a letter to the agent, is no proof of her joining in giving authority to agent. *Daniel* v. *Adams*, Amb. 495.

E. entered into an agreement, for himself and brothers and sisters, to sell to the plaintiff fields, forming part of an estate, for 1,000*l.*, and the plaintiff was to have possession on the 25th March. The agreement was signed by A. and B. only; but the bill alleged that E., and his four brothers and sisters, who were tenants in common of the equity of redemption, agreed to sell the property to the plaintiff, and that A. and B., or at least one of them, signed the agreement as agents or agent of their brothers and sister. The plaintiff, with the privity of the five tenants in common, paid the purchase money to the mortgagee in part satisfaction of the mortgage, and he was let into possession. An abstract of the title was furnished, and accepted. E. and A. and B. admitted that they agreed to sell to the plaintiff, and that they believed their brothers

and sister would concur in the agreement, but that they had no authority from them to sell, of which the plaintiff was aware. A. and B. denied that they signed on behalf of anyone. C. and D. denied that they had ratified the agreement, and submitted that they were not bound; but, in fact, D. was with E. and A. and B. present when the purchase money was paid to the mortgagee:—Held, that there was not enough to show that C. was bound by the agreement; but that D., the other tenant in common, was bound, having been present when the money was paid to the mortgagee. *Davies* v. *Davies*, 6 Jur. (N.S.), 1320; 3 L. T. 233.

——**Proprietors.**]—Several persons interested in a piece of land, authorised, by agreement, one of their number, W., to dispose of it. The land was divided into lots, and a plan of the lots made, and conditions, on which the land might be let or sold, were printed on the plan. M., an intending purchaser, made inquiries of W. as to certain lots. W. expressly informed him that he must purchase subject to the conditions stated on the plan. One of these conditions required that a purchaser should execute a contract embodying the conditions. M. offered to purchase these lots at a price which he named. W. promised to lay his offer before "the proprietors" (without naming or describing them), and wrote to M. that he had done so, and that the proprietors had accepted his offer; adding, that in reducing the price they had taken into consideration his intention of soon building on the land, an intention which of course they wished to encourage. There was nothing in the conditions which bound a purchaser to build, though there were provisions which assumed that he might do so, and which, in such a case, regulated the mode of proceeding. M. wrote, in answer, that he could not be bound to build at any given time, or at all. W. replied that the acceptance of the offer was without condition, and that M. was free to do what he might think best:—Held, that the dealings between the parties sufficiently showed the authority of W. to enter into the contract; and, farther, that the description of "the proprietors" for whom he acted was sufficient. *Rossiter* v. *Miller*, 48 L. J., Ch. 10; 3 App. Cas. 1124; 39 L. T. 173; 26 W. R. 865—H. L. (E.)

Parol Authority.]—Authority of agent may be by parol; the agreement must be by writing. *Mortlock* v. *Buller*, 10 Ves. 311.

A contract for the purchase of land made by an agent will be enforced, although the agent was appointed merely by parol. *Heard* v. *Pilley*, 38 L. J., Ch. 718; L. R. 4 Ch. 548; 21 L. T. 68; 17 W. R. 750.

——**In Ireland.**]—An agent to contract for the sale, &c., of land, under the second section of the statute of frauds (Irish statute), need not to be authorised by writing. *Clinan* v. *Cooke*, 1 Sch. & Lef. 22.

——**Vesting of Estate in Equity.**]—A contract for the purchase of land made by an agent in his own name vests the equitable estate in the principal, and may be established by him against the agent and persons claiming under him, although the agent is appointed merely by parol. *Cave* v. *Mackenzie*, 46 L. J., Ch. 564; 37 L. T. 218.

b. Personal Liability of Agent.

Verbal Contract.]—When a person assumes, without authority, to act as agent for the sale of real estate, and the contract is merely verbal, the person injured by relying on his representations has no remedy in equity against him for damages; and there is nothing in the judicature acts to alter this rule. *Warr* v. *Jones*, 24 W. R. 695.

Where Remedy at Law.]—B., an attorney, representing himself to be authorised by the owners, entered into an agreement on their behalf to sell a house to the plaintiff, and he received a deposit. The plaintiff filed a bill against the owners and B. praying a specific performance. It appeared at the hearing that B. had not authority to sell:—Held, that the remedy of the plaintiff against B. being altogether at law, could not be had in this suit. *Sainsbury* v. *Jones*, 5 Myl. & Cr. 1; 4 Jur. 499. Affirming 2 Beav. 462.

Signature when Personally Binding.]—B became the purchaser of premises at an auction declaring himself the agent of C. in C.'s presence, but the vendor's solicitor required B. to sign the agreement, and declined to substitute the name of C. Communications afterwards took place between the vendors' solicitor and C. with reference to the title:—Held, that supposing B. to be the agent of C., yet the signature of B. to the contract made him personally liable to perform it; that the acceptance of the title by C. would not be binding upon B., for such acceptance would be regarded as having been made in C.'s own right as claiming through B., and not as agent for B. *Chadwick* v. *Maden*, 9 Hare, 188; 21 L. J., Ch. 876. And see *Bennett* v. *Smith*, 16 Jur. 421; supra, col. 1164.

Extent of Liability.]—If a party executes a deed as principal, he at once takes the property and makes himself liable for the purchase money, and he will not be heard to say that no contract existed with the vendor, or that his execution was obtained upon the representation of a third party that the purchase-money was paid, and that he took the property in the character of trustee only. *Wilson* v. *Keating*, 28 L. J., Ch. 895; 5 Jur. (N.S.) 815. Affirmed, 7 W. R. 635—L.JJ.

For Concealment of Incumbrance.]—Attorney, as agent, on sale of an estate, not disclosing to the buyer an incumbrance, and leading him to suppose the title good:—Held, liable to make satisfaction in default of the vendor. *Arnot* v. *Biscoe*, 1 Ves. sen. 95.

7. SALE BY AUCTION.

See AUCTION AND AUCTIONEER.

8. PARTICULARS AND CONDITIONS OF SALE.

a. Particulars in General.

Misdescription.]—Purchaser under particular giving a false description, not bound at law or in equity, nor by any act of his agent without a fresh authority. *Deverell* v. *Bolton* (*Lord*), 18 Ves. 509.

Vagueness.]—Specific performance decreed against a purchaser at a public auction, where

representation in the particulars of sale was so vague and indefinite that it ought to have put the purchaser on making previous inquiry. *Trower* v *Newcome*, 3 Mer. 704; 17 R. R. 171.

Small Error.]—Agreements for sale of an estate, especially if by auction, depend on the bona fides of the transaction; therefore trifling errors in the description are not material. *Calcraft* v. *Roebuck*, 1 Ves. J. 221; 1 R. R. 126.

Preparing Particulars.]—Observations upon the duty of a vendor in preparing particulars of the estate to be sold. *Martin* v. *Cotter*, 3 Jo. & Lat. 496; 9 Ir. Eq. R. 351.

Property put up for sale at public auctions should be most accurately described; and not merely so described as that a purchaser may, by drawing the proper deductions from the particulars and conditions of sale, ascertain what is intended to be sold. *Swaisland* v. *Dearsley*, 29 Beav. 430; 30 L. J., Ch. 652; 4 L. T. 432; 9 W. R. 526.

When the property is sold by auction it is the office of particulars to give an accurate description of the property. *Torrance* v. *Bolton*, 42 L. J., Ch. 177; L. R. 8 Ch. 118; 27 L. T. 738; 21 W. R. 134.

Suppression of Fact.]—A fund of 500*l.* which was indemnity for costs in a pending suit was put up for sale by the owner, the defendant, under a particular, which stated the above fact, and further, that there was a considerable sum applicable for payment of costs, and that such costs would be paid thereout; also, that the fund of 500*l.* might be looked upon as a secure and sound investment. The plaintiff purchased, and then alleged that the owner knew all the fund would be required for the indemnity. The court, being of opinion that the defendant had knowledge of this fact:—Held, that he could not be heard to say it was not present to his mind when he put the property up for sale. *Mathias* v. *Yetts*, 46 L. T. 497.

Conveyance of Less than in Particular.]—Where a particular, the only written evidence of the contract, contains more than the words of the conveyance will in strictness carry, the purchaser cannot compel specific execution of the residue on the particular. *Cass* v. *Waterhouse*, Pre. Ch. 29.

Occupation.]—Particulars stated cottages to be in the occupation of the owners of an adjoining colliery. It turned out that the cottages paid no rent:—Held, that the vendor must state all the truth on the particulars, and inform himself of it when he sells, and the purchaser must be held to have notice of all contained in the particulars and conditions. But these particulars did not lead to the fact of the existence of the deed under which the cottages were held, and therefore there must be inquiries as to the tenure of the cottages. *Brandling* v. *Plummer*, 2 Drew. 427; 2 Eq. R. 1260; 23 L. J., Ch. 960; 2 W. R. 662.

Sale in Lots.]—Where the vendor of lands in lots for the purpose of buildings, accompanies his description, particulars, and conditions of sale with a map delineating the intended divisions of the property by new roads, he must be understood to hold out expectations that the lots will be so divided, and it would not be competent to him to divide the land in a different manner, so as to attract an occupancy and population entirely different from that which would have been produced by acting on the plan proposed and held out at the sale. *Peacock* v. *Penson*, 11 Beav. 355; 18 L. J., Ch. 57; 14 Jur. 518.

The actual designation in the particulars of the property offered for sale of the number of acres contained in a lot:—Held, to negative the presumption of any intention, on the part of the vendor, to sell the estate in a lump. *Leslie* v. *Tompson*, 9 Hare, 273; 20 L. J., Ch. 561; 15 Jur. 717.

When property is sold in lots, described in particulars of sale, a vendee is only affected with notice of what concerns the lots which he purchases, and is not to be taken as having read all the particulars of all the lots. *Curtis* v. *Thomas*, 33 L. T. 664.

—— **One Lease.**]—Where leasehold property which is sold in separate lots is held under one lease, it is incumbent on the vendor to state that fact in plain and distinct terms. *Sheard* v. *Venables*, 36 L. J., Ch. 922; 17 L. T. 10; 15 W. R. 1166.

Purchase after Attempted Sale.]—A. and his agent attended an auction for the sale of a house, at which certain conditions of sale were exhibited, and with which they became acquainted. A. afterwards, through his agent and the agent of the vendor, purchased the same house:—Held, that the particulars of sale were not incorporated with the purchase. *Cowley* v. *Watts*, 22 L. J., Ch. 591; 17 Jur. 172; 1 W. R. 218, 484.

Lease, "such as it is."]—When a purchaser buys a house and has it conveyed to him without any reservation, he takes the lease, not "such as it is," but such as it is described in the particulars of sale, and conveyed by the deed. *Suffield* v. *Brown*, 4 De G. J. & S. 185; 3 N. R. 340; 33 L. J., Ch. 249; 10 Jur. (N.S.) 111; 9 L. T. 827; 12 W. R. 356.

Alteration of Particulars.]—Printed particulars were varied in writing by the reservation of a right of way, and this alteration was read out by the auctioneer. The contract was signed by the auctioneer by mistake on a copy not containing the reservation. Bill by purchaser for specific performance without the reservation, dismissed without costs. *Manser* v. *Back*, 6 Hare, 443.

Mistake in Lots.]—Particulars stated that lot 5 contained a yard and stable, whereas this was comprised in the lease of lot 6. H. bought lot 5 and took an assignment of the property in lot 5. L. purchased lot 6 and took an assignment of all the property comprised in the lease of lot 6:—Held, that H. was entitled to an assignment from L. of the yard and stable, for according to the true construction of the particulars, H. had contracted to buy them and L. had not. *Leuty* v. *Hillas*, 2 De G. & J. 110; 27 L. J., Ch. 534; 4 Jur. (N.S.) 1166; 6 W. R. 217. And see *Ellis* v. *Hills*, 67 L. T. 287.

Warranty.]—Where there is a warranty in the particulars relating to a matter not immediately in question, in an action by a vendor for not completing, it must be shown to have been complied with. *Thompson* v. *Miles*, 1 Esp. 184.

Plan annexed to Particulars—No Reference to Plan in Particulars or Conditions.]—To particulars of sale a plan was annexed entitled, "Plan of four plots of land to be submitted by auction," and upon the plan was printed a note, "This plan is simply prepared as a guide to intending purchasers, and its accuracy in regard to area, measurement, abuttals, or otherwise, is in no way guaranteed." The particulars stated, "A right of way will be granted to each purchaser over the path at the back." The plan showed four lots extending from N. road to a line representing the boundary wall of the vendor's property, with figures showing depth of frontage as stated in the particulars. A cross line was drawn across the lots 4 ft. from the wall, but the space between this line and the wall was coloured with the rest of the lots, and the division lines of the lots were carried through this space to the wall. There was no express reference to the plan in the particulars or conditions. There was no actual path in existence, and nothing to show what the references to a path in the particulars and conditions meant, except the cross line on the plan:—Held, that the plan formed part of the contract by which the vendor was bound. *Lindsay and Forder's Contract, In re*, 72 L. T. 832.

b. Conditions in General.

General Rule.]—When property is sold by auction it is the office of the conditions to state the terms on which the sale is made. *Torrance* v. *Bolton*, 42 L. J., Ch. 177; L. R. 8 Ch. 118; 27 L. T. 73; 21 W. R. 134.

Condition Objected to before Sale.]—A condition of sale was objected to by the solicitor of B., a likely purchaser, and also by another person at the sale. The property was not sold, and on the following day the owner persuaded B. to buy at an exorbitant price, with a reference to the objected condition:—Held, that specific performance could not be enforced. *Lee* v. *Dawson*, 4 L. T. 464.

Constructive Notice of Covenants.]—Conditions of sale referred to certain letters patent:—Held, that the purchaser had constructive notice of the covenants in the letters patent, under which the property was held. *Stewart* v. *Conyngham* (*Marquis*), 1 Ir. Ch. R. 534.

Auctioneer, Power of.]—Quære, whether on a sale by auction the auctioneer has authority to frame conditions of sale and to do all things necessary to carry the sale into effect. *Pike* v. *Wilson*, 1 Jur. (N.S.) 59.

Catching Conditions.]—Facts stated in the conditions of sale as the grounds of such conditions, must be proved, though it appeared to be the object of the conditions to exclude inquiry into those facts. *Symons* v. *James*, 1 Y. & C. C. C. 487; 6 Jur. 452.

Purchaser discharged from purchase against catching conditions of sale. *Adams* v. *Lambert*, 2 Jur. 1078.

Where conditions of sale are not drawn bonâ fide, but are intended to cover difficulties arising from facts uncommunicated, they will not preclude the purchaser from taking the objection. *Jackson* v. *Whitehead*, 28 Beav. 154.

—— **How Construed.**]—Conditions of sale must be construed strictly against the person who forms them. *Greaves* v. *Wilson*, 25 Beav. 290; 27 L. J., Ch. 546; 4 Jur. (N.S.) 271; 5 W. R. 482.

The conditions of sale, were (inter alia) (8) that the purchaser shall not object to the title in connection with the sale of the premises to R., to whom the assignment of them, dated the 29th January, 1870, was made, but should assume that R. acquired under and by virtue of the deed a valid title to the premises by the deed expressed to be assigned to him; (9) that the purchaser should not object to the title because L., in 1858, as a trustee for B., purchased from the trustees of the then owners, B. being one of the last-mentioned trustees. The title was bad on the ground that R., the assignee of the deed of 1870, had purchased the premises sold for X. and others, X. being one of the trustees for sale of the property so bought, and also on the ground that L., the assignee in the deed of 1858, had purchased for B., who was also a trustee for sale:—Held, in a suit for specific performance by the vendor, that whatever opinion might be entertained as to the ninth condition, the eighth condition was so framed as to deceive the purchaser, and entirely throw him off his guard by unwarrantably suppressing and masking a fatal defect in the title. *Boyd* v. *Dickson*, Ir. R. 10 Eq. 239.

—— **Annuity.**]—On sale of reversion to freehold estate subject to a term for an annuity, one of the conditions of sale was, that certain evidence that "a life annuity granted to" A. B. had not been paid or claimed for twenty years, should be conclusive evidence that the annuity and term had determined:—Held, that the condition was not binding, as it was so worded as to lead a purchaser to a definite conclusion contrary to the real facts of the case. *Drysdale* v. *Mace*, 5 De G. M. & G. 103; 2 Eq. R. 386; 23 L. J., Ch. 518; 2 W. R. 341.

Ambiguous Conditions.]—Vendors, having put forth ambiguous conditions of sale:—Held, to be bound strictly by those conditions. *Seaton* v. *Mapp*, 2 Coll. C. C. 556.

Where conditions of sale are so obscurely worded, that, taken in connection with the particulars of sale, they are likely to mislead an ordinary purchaser as to the nature of the property offered for sale, semble, that the court will discharge the purchaser from his bargain. *Taylor* v. *Martindale*, 1 Y. & C. C. C. 658; 10 L. J., Ch. 339; 5 Jur. 648.

Depreciatory Conditions.]—Observations on the effect of stringent conditions of sale on the value of property. *Hoy* v. *Smythies*, 2 Jur. (N.S.) 1011.

—— **Sale by Trustees.**]—Trustees with discretionary trust for sale sold by auction in Nov. 1882, subject to conditions of sale which provided that the abstract should commence with the conveyance to the testator, dated the 2nd of Oct., 1872, and that every recital or statement in any abstracted document should be deemed conclusive evidence of the fact or matter recited or stated therein, or to be assumed or implied therefrom:—Held, that the conditions of sale were depreciatory, and rendered the sale liable to

be impeached by the cestui que trust. *Dunn* v. *Flood*, 49 L. T. 670; 32 W. R. 197. S. P., *Dance* v. *Goldingham*, 42 L. J., Ch. 777; L. R. 8 Ch. 902; 29 L. T. 166; 21 W. R. 761.

Unreasonable Conditions.]—On a sale of a public house the contract tendered contained stipulations that the purchaser should pay the expenses of the investigation of the vendor's title, and that, if the purchaser should insist on any objection or requisition as to title which the vendor should be unable or unwilling to remove or comply with, the vendor might annul the sale and return the deposit, but without any interest or costs of investigating the title; and that if the purchaser shall fail to comply with the conditions, his deposit should thereupon be forfeited to the vendor, who should be at liberty to resell the property:—Held, these conditions were unreasonable. *Moeser* v. *Wisker*, 40 L. J., C. P. 94; L. R. 6 C. P. 120; 24 L. T. 134; 19 W. R. 351.

c. When Misleading.

i. *Description of Property.*

What are Misleading Conditions.]—A condition of sale is bad as misleading—(1) if it requires the purchaser to assume what the vendor knows to be false; (2) if it states that the state of the title is not accurately known when in fact it is known to the vendor. *Banister, In re, Broad* v. *Munton*, 48 L. J., Ch. 837; 13 Ch. D. 131; 40 L. T. 828; 27 W. R. 826.

One of the conditions of sale was, that the title to the beneficial ownership to the property should commence with the will of C., dated in 1829, and the purchaser should assume that C. was at his death beneficially entitled to the property in fee simple, free from incumbrances. On an investigation it appeared that C. had in 1824 contracted for the purchase of the estate, but the vendor not at that time being able to make a good title, C. took possession and invested the purchase money, and it was not till long after the death of C. that the title was made out and the purchase money paid:—Held, that the statement in the conditions of sale was erroneous and misleading, and was consequently not binding on the purchaser. *Harnett* v. *Baker*, 45 L. J., Ch. 64; L. R. 20 Eq. 50; 32 L. T. 382; 23 W. R. 559.

—— **Wilful Misdescription.**]—A provision in conditions of sale, that any misstatement in the particulars shall not vitiate the sale, does not extend to a misdescription of the situation, wilfully introduced to increase its apparent value. *Norfolk (Duke)* v. *Worthy*, 1 Camp. 340; 10 R. R. 749.

—— **Nondisclosure of Property in Wall.**]—The vendor contracted to sell a freehold villa and garden, between which and a certain road there was a wall. The wall, as the vendor knew, did not belong to him, but he did not disclose that fact to the purchaser. There was in the wall a tablet bearing the name of the villa, as well as a tradesmen's side entrance. The vendor knew that the purchaser intended to build cottages upon the property with access to the road:—Held, that the vendor could not avail himself of the condition providing for compensation, and that the purchaser was entitled to rescind the contract. *Brewer* v. *Brown*, 54 L. J., Ch. 605; 28 Ch. D. 309.

—— **Commencement of Title.**]—Real property was put up for sale under conditions which stated that the title was to commence with an indenture of settlement dated in 1848, and required the purchaser to assume the death of J. B. intestate and without an heir before 1870. The vendor believed the assumption to be true. The title was derived from R. B., who, as trustee under the deed of 1848 of J. B., the owner in fee, claimed to be absolutely entitled on the principle of *Burgess* v. *Wheate* (1 Eden, 177). The purchaser required the vendor to furnish evidence of the death of J. B. intestate and without an heir:—Held, that the conditions were binding on the purchaser. *Sandbach and Edmondson, In re*, 60 L. J., Ch. 60; [1891] 1 Ch. 99; 63 L. T. 797; 39 W. R. 193—C. A.

Knowledge of Purchaser of Defective Title.]—A railway company agreed to demise to E. for building purposes certain lands which they had acquired under their compulsory powers. E. was restrained from assigning without licence. The property had formerly belonged to a building society, which had sold it in lots, each purchaser entering into restrictive covenants for the benefit of the owners of the other lots, and the conveyance to the company was expressly made subject to these covenants. E. agreed to sell his interest under the contract to R. R. at the time of the contract knew of the restrictive covenants, but believed that the compulsory purchase by the railway company had extinguished them. E. did not know of their existence. R.'s solicitors having discovered the existence of the covenants, objected to the title:—Held, that R. was entitled to object to the title on the ground of the restrictive covenants, for that in order to take a case out of the general rule that a purchaser is entitled to require a good title, it must be shown that at the time of the contract he knew that a good title could not be made, and that here such knowledge was not shown, as R. believed that the covenants had been extinguished. *Ellis* v. *Rogers*, 29 Ch. D. 661; 53 L. T. 377—C. A.

Where the particulars of sale of certain leasehold property contained a misstatement, of which misstatement the vendors asserted that the purchaser had knowledge at the time of the sale, and the conditions of sale provided that any error or misstatement in the particulars should not annul the sale, but compensation should be made to or by the purchaser, as the case might be:—Held, that, even if the purchaser were aware of the misstatement in the particulars, the vendors were not thereby relieved from the liability to make him compensation. *Lett* v. *Randall*, 49 L. T. 71.

Compensation.]—M. & Co. bought the benefit of a contract for purchase of certain property which was sold in an administration action, and, in investigating the title, discovered a misdescription in the particulars, in respect of which they claimed compensation in accordance with the terms of the contract. After an order had been made (but not drawn up) on a summons taken out by M. & Co. for liberty to pay the whole of the purchase-money into court, a correspondence took place with the vendors' solicitors, in which the latter, in reply to inquiry as to whether they intended to take advantage of the order in meeting the question of compensation, stated that personally they intended to take no advantage, but that, since they were

acting for an infant, the matter must proceed strictly. The purchase-money was paid into court, and the conveyance executed, the property being therein correctly described:—Held, that the vendees were not estopped from prosecuting their claim for compensation. *Perriam, In re, Perriam* v. *Perriam*, 49 L. T. 710; 32 W. R. 369.

Land was sold under a condition that in case of misdescription compensation should be paid. A road over the land was described in the particulars as "made up." There was a misdescription as to the extent to which the road was made up:—Held, that the measure of compensation was not the sum it would cost to make up the road to the extent represented; but the difference between the value of the property as it existed at the time of purchase and the value it would have had if the road had been "made up." *Chifferiel, In re, Chifferiel* v. *Watson*, 58 L. J., Ch. 263; 40 Ch. D. 45; 60 L. T. 99; 37 W. R. 120.

Where it is provided by the conditions of sale by auction that, "if any mistake be made in the description of the premises, or any other material error shall appear in the particulars of sale, such mistake or error shall not annul the sale, but a compensation shall be made," the vendee is not released from his contract by reason of a misdescription in the particulars of sale obvious on inspection of the premises, unless such misdescription was wilful and designed. *Wright* v. *Wilson*, 1 M. & Rob. 207.

Condition as to Receipt for Rent.]—A leasehold public-house was sold subject to a condition that the production of the last receipt for rent paid should be taken as conclusive evidence of the due performance of the lessee's covenants or the waiver of any breaches up to the time of completion, whether the lessor should be cognizant of such breaches or not. The lease contained a covenant to use the premises for the business of a public-house only, and not to permit any other trade to be carried on on any part of the premises without the lessor's written consent. The particulars on which the contract of purchase was indorsed showed that parts of the premises were underlet to persons who carried on other trades there. From the answers to objections to title, it appeared that the lessors had received rent with knowledge of the underlettings, and the last receipt for rent was produced. Specific performance of the contract having been decreed, and a reference as to title directed by an order which was not appealed from:—Held, that whether the breach of covenant was or was not a continuing breach such as to render the purchaser liable to be ejected after the completion of the purchase, the vendor had made a good title in accordance with the contract which the purchaser was bound to accept. *Lawrie* v. *Lees*, 51 L. J., Ch. 209; 7 App. Cas. 19; 46 L. T. 210; 30 W. R. 185—H. L. (E.)

State of Repair.]—Upon an open contract for the sale of a lease of a house, the vendor, in answer to a requisition by the purchaser as to the performance of repairing covenants in the lease, produced a receipt for rent down to a year previously, but could not produce the last receipt, the lessor having refused to receive his rent on the ground of alleged breaches of covenant:—Held, that, notwithstanding the failure to produce the receipt for rent, there was such primâ facie evidence of the performance of the covenants as to constitute a sufficient answer to the requisition in that behalf. *Ringer* to *Thompson*, 51 L. J., Ch. 42; 45 L. T. 580.

An auctioneer selling a lease, must state the notice given by the landlord of his intention to enter unless the premises are put in repair within three months, or the vendee may recover his deposit from the auctioneer, although he knew of the ruinous state of the buildings. *Stevens* v. *Adamson*, 2 Stark. 422; 20 R. R. 707.

Where leasehold premises are sold by auction, and the lease containing the usual covenant to repair is produced and read to the bidders, if any of the buildings demised and described in the lease have been pulled down before the sale, the purchaser is not bound to complete the purchase, and may recover back his deposit, although the building pulled down is not described in the particulars of sale. *Granger* v. *Worms*, 4 Camp. 83.

Restrictive Covenants—Silence equivalent to Representation.]—The vendor of a leasehold interest is bound to know what covenants are in his lease; and if an intending purchaser state the object which he has in purchasing, the vendor is bound to communicate such knowledge to him, provided such covenants can be reasonably interpreted as affecting the object which the purchaser has in view; and if the vendor is silent as to a covenant interfering with that object, his silence is equivalent to a representation that there is no such covenant, even though he is not aware of its extent or operation. *Flight* v. *Barton* (3 Myl. & K. 282) followed and applied. *Power* v. *Barrett*, 19 L. R. Ir. 450.

——**Constructive Notice.**]—When an agreement has been entered into for the purchase of a lease, the purchaser is not affected with constructive notice of the covenants contained in the lease, and is not bound to complete the contract if the lease is subject to onerous covenants of an unusual character, unless before the agreement was made he had a fair opportunity of ascertaining for himself the terms of such covenants.—The principle of the decision in *Hyde* v. *Warden*, (3 Ex. D. 72) applies to an agreement to purchase an existing lease, as well as to an agreement to take an underlease. *Reeve* v. *Berridge*, 57 L. J., Q. B. 265; 20 Q. B. D. 523; 58 L. T. 836; 36 W. R. 517; 52 J. P. 549—C. A.

—— **Non-disclosure.**]—On the sale of a bankrupt's life interest in property, non-disclosure by trustee in bankruptcy of a restrictive covenant as to building held a fatal objection to the title. *Ebsworth and Tidy, In re*, 58 L. J., Ch. 665; 42 Ch. D. 23; 60 L. T. 841; 37 W. R. 657; 54 J. P. 199—C. A.

——**Return of Deposit.**—The owner of land sold it in lots each subject to restrictive covenants. The defendant purchased a lot, but his conveyance did not contain the restrictive covenants. He agreed to sell to the plaintiffs, and the contract did not mention the restrictive covenants:—Held, that the plaintiffs, if their contract with the defendant were carried out, would be bound by the restrictive covenants, and that the owners of the other lots purchased

from the original vendor would be entitled to enforce those covenants, and that the plaintiffs were therefore entitled to recover the amount of the deposit. *Nottingham Patent Brick and Tile Co.* v. *Butler*, 55 L. J., Q. B. 280; 16 Q. B. D. 778; 54 L. T. 444; 34 W. R. 405—C. A.

And see cases infra, col. 1228.

—— **Open Contract.**]—Upon delivery of the abstract by a vendor who had contracted to deduce a good title in fee simple, it appeared that one of his predecessors had covenanted in his purchase deed not to use the property for the purpose of gasworks or a public-house:—Held, that this was such a restriction upon the user and enjoyment of the property as to constitute a fatal objection to the title. *Higgins and Hitchman's Contract, In re*, 51 L. J., Ch. 772; 21 Ch. D. 95; 30 W. R. 700; 46 J. P. 805.

—— **Business Premises.**]—Property described in the particulars as "leasehold business premises" was put up for sale under conditions providing that no objection should be made in respect of anything contained in the lease. Nothing was said in the particulars or conditions as to the contents of the lease; no opportunity was given to intending purchasers to inspect the lease, and the property was bought by a purchaser who had not in fact inspected it. After the sale the purchaser discovered that the lease contained covenants restricting him from carrying on upon the premises any trade or business:—Held, that as the covenant imposed serious restrictions upon the use of the premises as business premises, the purchaser was entitled to a declaration that the title was not such as he could be compelled to accept. *Davis and Covey, In re*, 58 L. J., Ch. 143; 40 Ch. D. 601; 60 L. T. 100; 37 W. R. 217; 53 J. P. 407.

—— **Shop, not including "Tavern."**]—The defendant was the owner of land, subject to a covenant not to use any house to be erected on the land for any other purpose than that of a private dwelling-house, "with the exception of shops which might be built fronting the L. road." The defendant sold to the plaintiff a lot described in the particulars as "a valuable tavern lot":—Held, that the word "shop" did not include "tavern," and that the plaintiff was entitled to recover his deposit with interest and costs. *Coombs* v. *Cook*, 1 Cab. & E. 75.

—— **"Free Public-House."**]—In the conditions of sale of a lease it was described as "a free public-house," the lease containing a covenant that the lessee and his assigns should take their beer from a particular brewer; this lease was all read over by the auctioneer at the time of the sale, who said mistakenly that it was a free public-house, and the covenant about the beer had been decided to be bad:—Held, that a purchaser who heard the lease read over was not bound under these circumstances to complete the purchase, but was entitled to recover back the deposit. *Jones* v. *Edney*, 3 Camp. 285; 13 R. R. 803.

Offensive Trade.]—The particulars of sale of leasehold premises stated that, under the original lease, "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter." The original lease, when produced, appeared to prohibit the businesses of brewer, baker, sugar-baker, vintner, victualler, butcher, tripe seller, poulterer, fishmonger, cheese seller, fruiterer, herb seller, coffee-house keeper, working hatter, and many others, and the sale of potatoes, or any provisions:—Held, that there was such a discrepancy between the particulars and the lease, as to entitle a purchaser to rescind his contract. *Flight* v. *Booth*, 1 Scott, 190; 1 Bing. (N.C.) 370; 4 L. J., C. P. 66.

Where an original lessee of land, subject to a covenant against certain obnoxious trades, with a proviso for re-entry for a breach of such covenant, granted underleases of houses erected on the land, not containing a similar covenant and proviso:—Held, that a purchaser by auction of houses erected on part of this land, and of the improved ground rents of the houses so underlet, might recover back his deposit money from the auctioneer, the omission of the proviso in the underleases not having been specified in the conditions or mentioned at the time of the sale. *Waring* v. *Hoggart*, Ry. & M. 39; 27 R. R. 728.

Sufficiency of Notice.]—Two adjacent houses were held on lease by M. The leases prohibited the trade of a publican, but one of the houses had been so used since 1860 without the owner objecting. M. put the entire premises up for sale in 1880, and the plaintiff, accompanied by K. (a local agent for the sale of public houses) was shown by the vendor's solicitors a condition referring to the restrictive covenant, but requiring a purchaser to be satisfied by the fact of the long-continued user of the premises. The plaintiff then purchased:—Held, that the condition was designedly misleading and had misled the plaintiff. *Stanley* v. *McGauran*, 11 L. R. Ir. 314—C.A.

ii. *Value.*

"Annual Rental"—Rates and Taxes Payable by Vendor.]—The particulars of sale of certain leasehold property described the same as being occupied at an "annual rental," but omitted to state that the vendor as landlord paid the rates and taxes on the property, the tenancy being a monthly one:—Held, that evidence was admissible to prove that in the auction-room a question was raised by a person present at the sale on the words "annual rental," and that in reply it was stated by the auctioneer that the landlord paid the rates and taxes, and that the tenancy was a monthly tenancy, and that accordingly the purchasers must be taken to have had knowledge of the facts, and, therefore, were not entitled to compensation. *Edwards and Sykes, In re*, 62 L. T. 445.

Value of Rental.]—The particulars of sale erroneously stated the value of the rental, in consequence of which the plantiff gave more for the property than he otherwise would have done. The conditions of sale contained a provision that if any error should be discovered in the particulars the purchaser should be entitled to compensation. The plaintiff did not find out the error until after he accepted the conveyance:—Held, that the acceptance of the conveyance did not bar the right of the plaintiff to recover compensation. *Palmer* v. *Johnson*, 53 L. J., Q. B. 348; 13 Q. B. D. 351; 51 L. T. 211; 33 W. R. 36—C. A. Affirming 48 J. P. 87.

"**Estimated Annual Value.**"]—Property was described in the particulars of sale as "of the estimated annual value of 400*l.*" There was a condition entitling the purchaser to compensation, if any error or misstatement should appear to have been made in the particulars. The purchaser adduced evidence to show that the property was only worth 200*l.* a year:—Held, that, as the property was of the "estimated" value stated, and the estimate was admitted not to be a dishonest one, the condition did not apply. *Hurlbalt and Chaytor, In re*, 57 L. J., Ch. 421.

Profits of Manor.]—Trustees for sale of a manor described it in particulars and conditions of sale as a manor in which the fines were arbitrary; adding that the clear profits, on an average of the last eight years, had been 150*l.* a year; and there was a condition as to compensation. After the sale, it was found that, by the custom of the manor, arbitrary fines were payable only on alienation, and that, on the death of a tenant, his customary heir paid upon admittance a small fixed sum, and the widow was admitted to her freebench without any payment. The clear profits exceeded 200*l.* a year:—Held, that there was no such misdirection of the property as would entitle the purchaser to compensation. *White* v. *Cuddon*, 8 Cl. & F. 766; 6 Jur. 471.

Amount of Rent.]—The particulars of sale described a farm as late in the occupation of A. at the rent of 290*l.* A. had occupied the farm as yearly tenant at 290*l.*, but went in at Midsummer, paying only 1*l.* for the first quarter, and quitted at Michaelmas in the next year, thus paying 291*l.* for a year and a quarter. Since this the plaintiff had agreed to let the farm at 225*l.*; but the agreement had been rescinded before taking possession, and the farm would not let for nearly so much as 290*l.*:—Held, that there was such substantial misrepresentation as entitled the purchaser to be discharged. *Dimmock* v. *Hallett*, 36 L. J., Ch. 146; L. R. 2 Ch. 21; 12 Jur. (N.S.) 953; 15 L. T. 374; 15 W. R. 93.

iii. *Quantity and Acreage.*

Substantial Part Non-existent.]—A condition, "that if any mistake shall be made in the description of the premises, or any other error whatsoever shall appear in the particulars of the property, such mistake or error shall not annul the sale, but a compensation shall be given," does not apply when any substantial part of the property turns out to have no existence, or cannot be found; or where a vendor has malâ fide given a very exaggerated description of the property. *Robinson* v. *Musgrove*, 2 M. & Rob. 92; 8 Car. & P. 469.

Particulars of sale by auction of a public-house, described the premises as comprising, amongst other things, a yard. By the conditions any error or mistake in the description of the property was to be matter of compensation, to be fixed by arbitration. In fact, the yard was not held under the lease, but under a tenancy from year to year, at a further rent of 10*l.* The vendors, however, procured a lease for the same term of the yard, at an additional rent of 8*l.* The yard was essential to the enjoyment of the premises:—Held, that this defect was not matter of compensation under the condition, but such a defect in the title as justified the vendee in vacating the contract. *Dobell* v. *Hutchinson*, 5 N. & M. 251; 3 A. & E. 355; 1 H. & W. 394; 4 L. J., K. B. 201.

Customary or Statute Acres.]—Misdescription of the quantity of land in regard to the acres being statute acres or customary, is not matter of compensation, but a ground for setting aside the sale. *Price* v. *North*, 2 Y. & C. 620; 7 L. J., Ex. Eq. 9.

A contract for the purchase of a farm described it as containing "349 acres, or thereabout, be the same more or less." In fact, the farm consisted of only 349 customary acres, which was less than the same number of statute acres by about 100 acres. On a bill being filed for specific performance, the purchaser, admitting that he had been for several months in possession of the property, and had exercised acts of ownership over it, on the faith that a good title to 349 acres would be shown, insisted that in the contract "acres" meant "statute acres," and that he was not bound to perform the contract, unless 349 statute acres were conveyed to him:—Held, that in such case a reference of title would not be directed on motion. *Portman* v. *Mill*, 2 Russ. 570; 26 R. R. 175.

Material Part Wanting.]—On a sale by the court a parcel was described as "490a, Bottlesey Green, containing 7a. 1r. 27p." The conditions provided that any error, misstatement, or omission in the particulars should not annul the sale, nor should any compensation be allowed except such (if any) as the judge in chambers should direct. G. bought the property in his own name, and was certified as purchaser. He in fact bought as agent for B., who was the owner of immediately adjoining property. The vendors were only entitled to four undivided sevenths of 490a, but arranged with the owners of the other three sevenths to exchange them for another part of the property. B. alleged that it was of great importance to the enjoyment of his property that he should have the whole of 490a, and G., by his directions, refused to complete:—Held, that G., having only purchased as agent for B., could take any objection which B., had he been the nominal as well as the real purchaser, could have taken; that the purchaser was entitled to say that he bought the farm as shown on the plan; that, as the possession of 490a was important to the enjoyment of B.'s property, completion could not be compelled unless he could get the whole of it, and that he was not bound to accept the arrangement by which he would obtain the whole of it by giving up another part of the purchased property. *Arnold, In re, Arnold* v. *Arnold*, 14 Ch. D. 270; 42 L. T. 705; 28 W. R. 635—C.A.

A purchaser who has contracted for the entirety of an estate will not be compelled to take six undivided seventh parts of it. *Dalby* v. *Pullen*, 3 Sim. 29.

Owner of estate represented to contain 1,530 acres, agreed to sell it. The purchaser agreed to sell it to a company, who paid a deposit to him. The purchaser found that there were only 1,100 acres, and refused to complete, the vendor then rescinded the contract:—Held, that the company were entitled to rescind, as the purchaser was unable to complete with them. *Aberaman*

Iron Works v. *Wickens*, L. R. 4 Ch. 101; 20 L. T. 89; 17 W. R. 211.

One of the articles of the contract provided that the estate as to extent of acreage should be taken to be conclusively shown by certain deeds:—Held, that this was merely a conveyancing condition as to identity, and that, coupled with the representation as to the acreage, it did not estop the company from rescinding on the ground of deficiency in acreage. *Ib.*

A person agreed to purchase an estate which, on the written contract, was, by mistake, stated to contain 21,750 acres; it turned out that it contained only 11,814 acres:—Held, that the purchaser was not entitled to specific performance, with a proportionate abatement for the deficiency of acreage, but that he could only enforce the contract on payment of the full price, or rescind the contract. *Durham (Earl)* v. *Legard*, 34 Beav. 611; 34 L. J., Ch. 589; 11 Jur. (N.S.) 706; 13 W. R. 959.

When Matter of Compensation.]—Property was put up for sale as containing 1,372 square yards. There was a condition that errors of description should not annul the sale, but that if they were pointed out before completion compensation should be allowed for them. The property contained only 1,033 square yards:—Held, that the purchaser had got substantially what he had contracted to buy, that the deficiency of quantity, though considerable, did not so affect the substance of what he had bargained for as to take the case out of the condition, and that he must complete with compensation. The rule laid down by Tindal, C. J., in *Flight* v. *Booth* (supra. col. 1176), as to the nature of the misdescription which will entitle a purchaser to rescind notwithstanding a condition for compensation, approved and applied. *Fawcett and Holmes, In re*, 58 L. J., Ch. 763; 42 Ch. D. 150; 61 L. T. 105—C. A.

Valuation by vendor described the property as containing about 1,244 square yards, and valued at 1,200*l.* The particulars stated that the premises contained about 1,200 square yards, and provided that in case of error or mistake in the description compensation should be given or allowed. The premises contained only 935 square yards:—Held, that the purchasers were entitled to a reference as to what deduction should be made from the contract price. *Aspinalls and Powell, In re*, 60 L. T. 595.

—— **After Conveyance.**]—After the purchaser has taken a conveyance, and the purchase-money has been paid, no action can be maintained for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless such errors amount to breach of some contract or warranty contained in the conveyance itself, or unless some fraud or deceit has been practised upon the purchaser. *Jolliffe* v. *Baker*, 52 L. J., Q. B., 609; 11 Q. B. D. 255; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.

Conveyance described two parcels as each "containing by estimation one and a half acres or thereabouts." The two parcels together amounted to only 2a. 1r. 12p.:—Held, that this did not amount to a breach of any warranty, so as to entitle a purchaser to maintain an action for damages against the vendor. *Ib.*

Particulars stated a lot to contain 348 square yards with a road frontage of 39 feet 3 inches. The purchaser bought to build. There was a condition to the effect that "any error, misstatement, or omission should not annul the sale, but compensation should be allowed, the amount of such compensation to be settled by the auctioneer." Subsequent to the conveyance the lot was found to contain only 135 square yards, and a frontage of 18 feet:—Held, that the purchaser was entitled to compensation at the rate of 22*s.* 6*d.* per square yard for every square yard of the deficiency (that being the rate per yard at which the land was purchased by him), and to damages for the actual loss sustained by him in the preparation of plans and specifications for building, on the footing that he was getting the larger area. *Flewitt* v. *Walker*, 53 L. T. 287; 33 W. R. 894.

Condition against Compensation.]—Upon the sale of real estate one of the conditions was as follows:—"The admeasurements are presumed to be correct, but if any error be discovered therein, no allowance shall be made or required either way." The property stated to contain 7,683 square yards only contained 4,350:—Held, that the purchaser was not entitled to compensation. *Cordingley* v. *Cheesebrough*, 3 Giff. 496; 31 L. J., Ch. 617; 8 Jur. (N.S.), 755; 6 L. T. 642.

Right to Rescind.]—The following conditions of sale were material:—3. Each lot is believed and shall be taken to be correctly described as to quantity and otherwise . . . . and the respective purchasers . . . . shall be deemed to buy with full knowledge of the state and condition of the property as to repairs and otherwise, and no error, misstatement, or misdescription shall annul the sale, nor shall any compensation be allowed in respect thereof. 7. If any purchaser shall insist on any objection or requisition which the respective vendors shall be unable, or on the ground of expense or otherwise unwilling to answer, comply with, or remove, the respective vendors may . . . . at any time, and notwithstanding any intermediate or pending negotiations, proceedings or litigation, annul the sale. Lot 3 was stated to contain 4a. 3r. 37p., and to be let at annual rents amounting to 27*l.* The rental was rightly stated but the real acreage was only 3a. 1r. 37p. The purchaser claimed that the contract should be carried out with compensation; the vendor refused any compensation, but offered to annul the sale:—Held, that the vendor might lawfully annul the sale by virtue of the seventh condition. By Lord Esher, M.R., and Lindley, L.J. (Lopes, L.J., dissentiente):—That the purchaser would have been prevented by the third condition from obtaining specific performance with compensation. *Whittemore* v. *Whittemore*, (L. R. 8 Eq. 603), and *Cordingley* v. *Cheesebrough* (supra) commented on. *Terry* to *White, In re*, 55 L. J., Ch. 345; 32 Ch. D. 14; 54 L. T. 353; 34 W. R. 379—C. A.

Notice in Conditions.]—A contract of sale by auction described the property as "the freehold cottage and copyhold paddock, comprising 1a. 2r. 8p. situate, &c., described in the particulars attached hereto as lot 1." In the annexed particulars, lot 1 was thus described: "The property comprises 1a. 2r. 8p., situate, &c." The sixth condition was as follows:—The several

properties comprised in the foregoing particulars are presumed to be correctly described, and the quantities of the land shall be taken as stated, whether more or less (although the title-deeds and court-rolls state such quantities to be less), without any equivalent or compensation on either side. The abstract of title delivered showed a title only to 3r. 24p. in the whole :—Held, that the purchaser, having distinct notice by the condition that the deeds would show a less quantity than that mentioned in the particulars and contract of sale, was bound to take the title as offered. *Nicholl* v. *Chambers*, 11 C. B. 996 ; 21 L. J., C. P. 54.

Excessive Quantity.]—Vendors agreed to sell a parcel of land "containing forty acres or thereabouts, be the same more or less." The agreement provided that "if any mistake or omission be made in the description of the property the same shall not vitiate or annul the sale, but a compensation or an allowance shall be made." The purchaser had taken conveyances of part of the land ; but the vendors having discovered that the acreage was 41 acres, 1 rood, 10 perches, instead of 40 acres, refused to convey the residue without compensation :—Held, that the vendors were not entitled to any compensation. *Orange* to *Wright*, 54 L. J., Ch. 590 ; 52 L. T. 606.

Condition of sale that any mistake or error in the description, or any other error in the particulars should not annul the sale, but compensation should be given or taken. One lot contained 20 acres more and another 10 acres less than described :—Held, that the excess in one lot, and the deficiency in the other, were both subjects of compensation within the condition. Equity would not in a case like this enforce the contract against the vendor unless the purchaser should submit to compensation to the vendor. *Leslie* v. *Thompson*, 9 Hare 268 ; 20 L. J., Ch. 561 ; 15 Jur. 717.

iv. *Matters Material to Enjoyment of the Property.*

Position.]—It is a misdescription in particulars of sale to describe a house as No. 58, Pall Mall, opposite Marlborough House ; where the house was, in fact, not in Pall Mall, but was situate behind No. 57, Pall Mall having an entrance with a door, which for many years bore the designation of No. 58, and a separate passage, about sixty-five feet long and three feet eight inches wide, across the ground floor of No. 57, between the basement and upper stories of No. 57. *Stanton* v. *Tattersall*, 1 Sm. & G. 529 ; 17 Jur. 967 ; 1 W. R. 502.

At the auction mart in London, B. purchased a house at Brighton, simply described as "Lot 1, No. 39, Regency-square." He afterwards discovered that the house was not actually in the square, but in a side street communicating with the square, but it was always named 39, Regency-square :—Held, that there was no misdescription. *White* v. *Bradshaw*, 16 Jur. 738.

Condition and Occupation.]—The particulars of sale described two houses as Nos. 3 and 4, and stated that the taxes of No. 3 were paid by the tenant. The houses ought to have been described as Nos. 2 and 3, but the names of the occupiers were correct, and it should have been stated that the taxes of No. 3 were farmed by the landlord. The houses Nos. 2 and 4 were of the same rate, but No. 4 was in the best state of repair :—Held, that these misdescriptions were not cured by a condition which provided that if any error or mis-statement should be found in the particulars, it should not vitiate the sale, but an allowance should be made on account of it. *Leach* v. *Mullett*, 3 Car. & P. 115.

Boundaries.]—Specific performance of a contract for the sale of property, partly freehold and partly leasehold, will not be refused on the ground that the boundaries of the two portions are not distinctly defined, semble. *Monro* v. *Taylor*, 3 Mac. & G. 713 ; 8 Hare, 51 ; 21 L. J., Ch. 525.

Water-Meadow.]—If land, generally reputed to be water-meadow, is sold as uncommonly rich water-meadow, whereas it is very imperfectly watered ; this is not such a misrepresentation as will avoid the sale. *Scott* v. *Hanson*, 1 Russ. & M. 128 ; 27 R. R. 141. Affirming 1 Sim. 13 ; 5 L. J. (O.S.) Ch. 67.

Easement.]—A dwelling-house and offices were put up for sale by auction, under a condition that the lot was sold subject to any existing rights and easements of whatever nature—and the printed particulars made no mention of any easement, or of any claim to an easement. The house was subject to easement by owner of neighbouring house, and the vendor's solicitor knew of the rumoured existence of this easement but made no enquiries, and the auctioneer, on being questioned, told the audience that they might dismiss the subject of the rumoured claims from their minds, as nobody would probably ever hear of them again :—Held, that the conditions were misleading, and the statements in the auction-room insufficient. *Heywood* v. *Mallalieu*, 53 L. J., Ch. 492 ; 25 Ch. D. 357 ; 49 L. T. 658 ; 32 W. R. 538.

Right of Way.]—A contract was entered into for the sale of a piece of land described as arable land, not stating anything as to the existence of a right of way to it. It turned out that it was extremely doubtful whether there was any right of cartway to it :—Held, that specific performance ought not to be decreed at the suit of the vendor. *Denne* v. *Light*, 26 L. J., Ch. 459 ; 3 Jur. (N.S.) 627 ; 5 W. R. 430—L.JJ.

An agreement for the sale of the fee-simple in possession of a house and land contained a clause that the description of the property in the schedule was believed to be correct, but if any error should be found therein, the same should not annul the sale, but compensation should be allowed in respect thereof ; and also a clause that if the purchaser should insist on any objection or requisition in respect of the title which the vendor should be unable or unwilling to remedy or comply with, the vendor should be at liberty to rescind the agreement. Upon investigating the title it appeared that there was a right of way across the property, of which, at the date of the agreement, both vendor and purchaser were ignorant :—Held, that the objection was an objection to title, and that the vendor was entitled to rescind. *Ashburner* v. *Sewell*, 60 L. J., Ch. 784 ; [1891] 3 Ch. 405 ; 65 L. T. 524 ; 40 W. R. 169.

On the sale by auction, the auctioneer bonâ fide stated there was a right of way. This was not the fact, and neither the conditions nor the draft lease produced at the sale, had any reference to a right of way:—Held, that the evidence of what passed at the time of the sale was admissible as against the vendor; but that no action could, after the completion of the purchase, be maintained against him to recover compensation for this innocent misrepresentation by the auctioneer. *Brett* v. *Clowser*, 5 C. P. D. 376.

The particulars of a lot stated a reservation of a carriage way contained in a lease, but did not state that the lease also reserved a different footway over the lot. It was stated that the lease might be inspected at the vendor's office. A. purchased the lot in question and an adjoining lot:—Held, that the misdescription was such as to entitle him to rescind the contract. *Dykes* v. *Blake*, 4 Bing. (N.C.) 463; 6 Scott, 320; 1 Arn. 209.

Upon a sale by auction in lots, the particulars and conditions of sale referred to a plan on which several roads were marked out, so as to provide frontages for all the lots; but there was no indication that any lot was to have rights of way beyond the road adjoining it and directly leading into the public highway:—Held, that the court could only act on the footing of the contract, and that the purchaser could only claim a right of way over the road adjoining the lots, and directly thence into the public highway. *Randall* v. *Hall*, 4 De G & Sm. 343. And see *Bolton* v. *Bolton*, supra, col. 1106.

Objections by a purchaser by auction, that a way round and across a meadow was not specified; a specific performance was decreed with costs. *Bowles* v. *Round*, 5 Ves. 508; 5 R. R. 107.

Water Supply.]—A property situate in a town, and comprising a warehouse, was described in particulars of sale under a decree as "well supplied with water." The property was well supplied with water, but only from the waterworks, there being no natural supply. The manufactories in the town were generally supplied with water from wells upon the properties themselves:—Held, that there was a misdescription. *Leyland* v. *Illingworth*, 2 De G. F. & J. 248; 2 L. T. 587; 8 W. R. 695.

A certain lot was described in the particulars as being sold with a certain reservoir and waterworks, yielding a yearly rental of 60*l.*, exclusively of the land and buildings. This rent arose from supplying with water certain houses separated from the reservoir by the property of strangers, over which the vendor had no right to carry it, beyond a permissive right from year to year by payment of a rent:—Held, that the description contained such a misrepresentation as to preclude the vendor from enforcing a specific performance. *Price* v. *Macaulay*, 2 De G. M. & G. 339.

A. purchased by auction a house, which was described in the particulars as "Lot 1 in the sale plan." Upon one of the lots not purchased by A. was a well; upon another a reservoir; and, on the sale plan annexed to the particulars, a line, denoting a stone drain, was drawn from the well to the reservoir; and from the reservoir to the kitchen of the house another line was drawn representing a leaden pipe. The vendor conveyed the other lots to the respective purchasers, without reserving to A. any right of water:—Held, that the vendor merely undertook to sell part of the property to A., as it stood at the time of the sale, with notice that the rest of it would no longer remain in his hands. *Fewster* v. *Turner*, 11 L. J., Ch. 161; 6 Jur. 144.

"Substantial Dwelling-house."]—Particulars of a sale of a messuage described it as "a substantial and convenient dwelling-house," and as having "five bedrooms." The purchaser alleged that the house was neither conveniently nor substantially built, and also that two of the so-called bedrooms were too small to be fit for that purpose:—Held, that the two rooms were not improperly described as bedrooms; that there had been no misrepresentation in stating that the house was substantial and convenient. *Johnson* v. *Smart*, 2 Giff. 151; 6 Jur. (N.S.), 815; 2 L. T. 307.

Liability to Compulsory Alienation.]—A vendee of land, on discovering that at the time of the contract of sale it was and continued liable to be taken, under a private act of parliament, for the use of a company, is entitled to rescind the contract and to recover back the deposit. *Ballard* v. *Way*, 1 M. & W. 529; 2 Gale, 61; 1 Tyrw. & G. 851; 5 L. J., Ex. 207.

Ground Rent.]—Leaseholds in Liverpool were put up for sale in lots, under a condition that the purchasers should enter into the usual covenant for paying and observing the rents and covenants of the leases, and indemnifying the vendors therefrom. As to one of the lots, the particulars stated the amount of a mortgage on it; but, owing to a slip, did not mention that it was subject to any ground-rent. It was, in fact, subject to a ground-rent of 43*l.* The other lots were leaseholds held under the corporation of Liverpool, which usually reserves only a nominal rent on its leases:—Held, that the purchaser of this lot was entitled to be discharged. *Jones* v. *Rimmer*, 49 L. J., Ch. 775; 14 Ch. D. 588; 43 L. T. 111; 29 W. R. 165.

Rent-Charge.]—Devise of freehold estates subject to the payment of 20*l.* yearly and every year for ever to A., her executors, administrators, and assigns, and the testator made chargeable his said freehold estates with the payment of the said sum. A. died, and her devisees contracted to sell the rent-charge, which was stated to have been given to A., her executors, administrators, and assigns:—Held, that the rent-charge might be legally distrained for, and that the thing contracted to be sold was within the words of the contract. *Ramsay* v. *Thorngate*, 16 Sim. 575; 18 L. J., Ch. 238.

Sum charged on several Properties—Notice.]—A vendor put up for sale by auction a certain sum or redeemed land tax, which he described in the particulars as charged on three houses. The particulars referred to the contract with the commissioners for the redemption of the tax as part of the vendor's title, but did not further state, as appeared from the schedule to the contract, that the gross sum was charged in separate sums upon each of the houses:—Held, that 42 Geo. 3, c. 116, did not operate to consolidate the several charges into one assessment, and to make the whole amount leviable on each part of the property redeemed. *Cox* v. *Coventon*, 8 Jur. (N. S.), 1142; 7 L. T. 78; 10 W. R. 829.

Held, also, that the reference to the contract for redemption did not give the purchaser notice of the contents of the schedule, so as to affect him with the consequences. *Ib.*

Held, also, that there was a material misdescription of the property sold; and that specific performance of the contract could not be enforced against the purchaser. *Ib.*

Interest of no Value.]—Particulars of sale described the subject of the sale as the interest, if any, of F. The vendor knew at the time that the interest sold was of no value, and he made no representation as to the value. A purchaser bought, with notice that the subject of sale might be of no value, but without any means of ascertaining whether it was of any or no value. The court ordered the sale to be set aside, and the purchase-money refunded, with interest and costs. *Smith* v. *Harrison*, 26 L. J., Ch. 412; 3 Jur. (N.S.) 287; 5 W. R. 408.

Trusts Incorrectly Stated.]—Where conditions of sale incorrectly state the effect of the trusts of a reversionary interest, the purchaser of that interest is not bound to accept the title. *Hadley* v. *Robins*, 14 L. T. 100; 14 W. R. 387.

Lease—Covenants not Enforceable.]—The court may not decree specific performance of a contract for the sale of a reversion if the vendor had misled the purchaser by stating that it was subject to a lease containing all the usual covenants, the vendor knowing that there was no person against whom the covenant could be enforced; but where property is sold subject to a lease so described, and the vendor is not aware of any difficulty in enforcing the covenants, the court will not refuse to decree specific performance on the ground that the vendor cannot show upon whom the liability of the covenants in the lease has devolved, and the vendor is not bound to find out and acquaint the purchaser with the name of the party who may be liable to such covenants. *Flint* v. *Woodin*, 9 Hare, 618; 22 L. J., Ch. 92; 16 Jur. 719.

Plan—Common Ground.]—W., by agreement endorsed on printed particulars of sale, sold to B. a house, in front of which a piece of common ground was railed in, but divided from the house by a road, to which common W. had a possessory title only. A., alleging that on the plan he considered the common land part of the purchase, refused to complete:—Held, that inasmuch as the plan might have misled B., no decree for specific performance could be made. *Weston* v. *Bird*, 2 W. R. 145.

v. *Tenure and Interest of Vendor.*

Equitable or Legal Term.]—The plaintiff advertised to be sold by auction lands and houses, stated as "held for the remainder of a term of fifty-four years if C. T. should so long live," and the conditions of sale were similar. The plaintiff had only an equitable title:—Held, in an action for not completing the purchase, that the advertisement and conditions of sale were calculated to mislead the defendant into believing that what was to be sold was the residue of a legal term created by lease; that the defendant therefore bid for that which the plaintiff had not to sell, and that, consequently there was no contract. *Gardiner* v. *Tate*, Ir R. 10 C. L. 460.

A person contracted to sell property, and showed only an equitable title, and the purchaser required the vendor to get in the legal estate:—Held, that such requisition was as to a matter of conveyance only, and the vendor could not rescind the contract under a condition empowering him to rescind if any objection to the title were made which he was unable or unwilling to remove. *Kitchen* v. *Palmer*, 46 L. J., Ch. 611.

Agreement for Lease.]—A purchaser was discharged from his purchase on the ground of misrepresentation, lands having been sold as held under written agreements for leases, which appeared upon inquiry to be mere parol agreements. *Bessonet* v. *Robins*, Sau. & Sc. 142.

New Lease Described as Residue of Old Term.]—Under a contract for the purchase of the residue of an old term, a purchaser is not bound to accept a similar new lease; for the former differs in value from the latter, the residue of an old term being in several respects more advantageous. *Mason* v. *Corder*, 7 Taunt. 9; 2 Marshall, 332; 17 R. R. 427.

Notice to Quit.]—Particular describing a lease as subject to notice to quit, not inconsistent with a covenant that the tenant shall hold over for a certain time "after the end of the term," that being upon the context distinguished from the "other sooner determination," and time generally not being of the essence of the contract. *Hall* v. *Smith*, 14 Ves. 426; 9 R. R. 313.

Length of Term.]—A purchaser cannot refuse to perform an agreement for the sale of "the unexpired term of eight years' lease and goodwill," on the ground that only seven years and seven months of the term remained. *Belworth* v. *Hassell*, 4 Camp. 140; 16 R. R. 761.

A slight and immaterial misdescription of the term in the agreement for the sale of a lease will not relieve a purchaser from the obligation of completing his purchase. *Jennings* v. *Brunt*, 19 L. T. 705.

—— **Term of Fifty Years.**]—Agreement for sale of houses contained a statement that the property was held on a term of fifty years, less ten days, and also a condition that the title should commence with two underleases by which the vendor held, and that the purchaser should make no requisition or objection in respect of the prior title or the right to grant the said underleases. Four years after completion, the underleases being invalid, the purchaser brought an action to set aside the conveyance:—Held, that the purchaser had a right to rely on the statement that the property was held for a term of fifty years, and that the condition could not prevail against it and that the purchaser was entitled to have the conveyance set aside. Method of determining the right damages in such a case. *Nash* v. *Woodcrson*, 52 L. T. 49; 33 W. R. 301.

—— **Term of Seventeen Years.**]—The particulars described the public-house as let to a responsible tenant for a term of which seventeen years were unexpired. It appeared that only fifteen years of the term were unexpired, and it was determinable in 1881 or 1888, at the option of the tenant:—Held, that neither of these statements was such misrepresentation as to entitle the purchaser to resist specific performance of his contract. *Goddard* v. *Jeffreys*, 51 L. J., Ch. 57; 45 L. T. 674; 30 W. R. 269.

—— **Lease for Lives.**]—The rental described lands as held by lease for three lives and thirty-one years, the lease being for three lives and the survivor, and, in case all the lives should die before the expiration of thirty-one years, for so much of such term of thirty-one years from that period as should be to come upon the decease of the survivor :—Held, that the rental was substantially correct. *Vignolles* v. *Bowen*, 12 Ir. Eq. R. 184.

A purchaser of lands, sold under the decree, and described in the rental as held under a lease that would expire on the 1st June then next, discharged from his purchase, it subsequently appearing that the tenant of part of the lands was entitled, under an equitable article, to a reversionary lease for four lives. *Linehan* v. *Cotter*, 7 Ir. Eq. R. 176.

Leaseholds Renewable by Custom.]—Premises sold at auction were described in the particulars as being customary leaseholds, renewable every twenty-one years, at the customary rent of 10*s.*, on payment of the customary fine. The sixth condition stipulated that errors of description, or any errors inserted in the particulars, should not vacate the sale, but should be subject of abatement or compensation. It turned out that there was no custom to renew, but that the premises were held for an absolute term of twenty-one years :—Held, first, that the fact of the property being sold as leaseholds renewable by custom, when there was no such custom, was an error of description, not a defect of title. *Newby* v. *Paynter*, 22 L. J., Ch. 871 ; 17 Jur. 483.

Held, secondly, that under the sixth condition the purchaser was entitled to specific performance, with a deduction from the price. *Ib.*

Ground Rent—Sum in Gross.]—The defendant put up for sale by public auction property described in the particulars as follows : "Four freehold ground rents of 19*l.* 4*s.* each ; viz., 15*l.* ground rent, and 4*l.* 4*s.* garden rent." The vendors, in making out their title, produced four counterparts of leases from B. to Reynolds. By each of these leases, B., in consideration of the yearly rents thereinafter reserved, demised to Reynolds land with a messuage thereon for the term of ninety-five years (wanting ten days) at the yearly rent of 15*l.* ; and for the considerations aforesaid, and also in consideration of the further rent thereinafter reserved, and of the covenants of Reynolds, B. covenanted with Reynolds that it should be lawful for him and the tenants of the messuage, at all times during the continuance of the term, to enter upon, and use and enjoy as a garden, a piece of land particularly described, jointly with B., and B. covenanted that he would at his own expense keep in order the garden. There was also a covenant by Reynolds to pay B. the yearly rent of 15*l.*, and also the further yearly rent of 4*l.* 4*s.* in respect of the right of user of the garden or pleasure ground, such rent to be payable in the same manner as the rent of 15*l.* :—Held, that the rent of 4*l.* 4*s.* was a sum in gross, payable under a covenant, and not a rent issuing out of the land ; and therefore the purchaser was entitled to rescind. *Evans* v. *Robins*, 2 H. & C. 410 ; 33 L. J., Ex. 68 ; 10 Jur. (N.S.) 473 ; 11 L. T. 211 ; 12 W. R. 604—Ex. Ch.

—— **Underlease.**]—In 1805 two pieces of land in W. were demised to A. for seventy-nine years. A. built several houses, and in 1811 demised the premises for seventy years to R., reserving a rent of 43*l.* In 1815 A., reciting the indentures of 1805 and 1811, and that C. had contracted for the purchase of the ground rent issuing out of the two pieces of land, houses, &c., conveyed "the two pieces of land and houses, and also the yearly rent of 43*l.*, and all powers and remedies for receiving the same, and all the estate," &c., to C., to hold the same "for all the residue then to come of the term of seventy years granted by the indenture of 1811." In 1855 the representatives of C. contracted to sell "a leasehold ground rent of 43*l.*, payable during the remainder of a term of years created by way of underlease, which will expire in 1881, issuing out of two pieces of land in W., with the reversion" :—Held, as between a purchaser and the vendors seeking to enforce the contract, that this was no misdescription and that the puchaser was bound to complete. *Lecoy* v. *Mogford*, 2 Jur. (N.S.) 1084 ; 4 W. R. 805.

Trustees without Impeachment of Waste.]—A. devised lands to trustees for a term of ninety-nine years, without impeachment of waste, and subject thereto, to his son, W., for life, without impeachment of waste, remainder to his granddaughter, C., for life, without impeachment of waste, remainders over. The will provided that no part of the timber growing upon the premises should, upon any pretence whatever, except for necessary repairs, be cut until his granddaughter, C., should attain the age of twenty-one years, at which time it should be lawful for his said trustees to cut down such of the timber as they should think fit, and to sell the same, and to pay the money to arise therefrom to his granddaughter, C., to whom he gave and bequeathed the same. W. died in 1835, and C. attained twenty-one in 1836, but none of the timber was cut by the trustees. In 1843 the term of years was sold ; and one of the conditions of sale, after reciting the above clause as to cutting timber, stated that the property was put up for sale "subject to any rights under such provision" :—Held, that the purchaser was entitled to the timber. *Watlington* v. *Waldron*, 23 L. J., Ch. 713 ; 18 Jur. 317 ; 2 W. R. 120.

Fee Farm Rent.]—A party become the purchaser at a public auction of a lot comprehending a freehold messuage and a fee farm rent of 21*s.* By the conditions of sale, no evidence was to be required of the receipt or payment or existence of the fee farm rent other than that disclosed by a certain conveyance ; "nor should any objection be taken to the title in consequence of the nonpayment or nonreceipt" of the fee farm rent. The rent had not been paid or received for twenty years before the sale ; and the purchaser contended that it was therefore extinguished under 3 & 4 Will. 4, c. 27, s. 34, and had ceased to exist at the time of the sale :—Held, that he was not entitle to repudiate the contract on this ground, but must be considered to have purchased, under the conditions of sale, the chance of the rent being obtainable. *Hanks* v. *Palling*, 6 El. & Bl. 659 ; 25 L. J., Q. B. 375 ; 2 Jur. (N.S.) 688 ; 4 W. R. 607.

Freehold Ground Rent.]—L., having a term of ninety-nine years, with a covenant that he might, within twenty years, purchase the fee, demised to F. for ninety-nine years and a half, at

a ground rent, and then acquired the fee. The ground rent was put up for sale described as "a freehold ground rent issuing out of lands on lease, which will expire in December, 1922," being the expiration of the ninety-nine years and a half term :—Held, that the title was too doubtful, in reference to the remedies which the purchaser would have for enforcing the rent, to be forced on an unwilling purchaser. *Langford* v. *Selmes*, 3 K. & J. 220 ; 3 Jur. (N.S.) 859.

Under such a description the purchaser has a right to expect a power of entry and distress in case of nonpayment. *Ib.*

Mortgage — Freehold Property.]—A person contracted to purchase a house described as a freehold residence, being lot 2 referred to in the particulars, subject to conditions of sale, of which this was one : "The abstract of title to lots 1, 2 and 3 (being the freehold portion of the property), will commence with a conveyance of the 17th April, 1860, and no purchaser shall investigate, or take any objection in respect of the title prior to the commencement of the abstract. If any error or misstatement shall appear to have been made in the particulars of sale, it is not to annul the sale, but shall entitle the purchaser to compensation." The abstract of the deed of April, 1860, recited an indenture of March, 1850, whereby E. assigned to R. in fee, and another deed whereby R. assigned to trustees in fee, and the trustees conveyed to the vendor's testator in fee, subject to the covenants and conditions on the part of the grantee, his heirs and assigns, in the indenture of March, 1850 :—Held, that the property having been sold as freehold, the purchaser was entitled to have an unincumbered freehold title under the deed of April, 1860, and the conditions of sale did not protect the vendor, and the purchaser was entitled to rescind. *Phillips* v. *Caldcleugh*, 38 L. J., Q. B. 68 ; L. R. 4 Q. B. 159 ; 20 L. T. 80 ; 17 W. R. 575.

——**Sale under Order of Court—Conveyancing Act, 1881, s. 70.**]—Land was directed by an order of the court to be sold. The conditions of sale gave notice that it was subject to mortgages to a large amount, that the first mortgagees would join in the conveyance with the purchaser and release their mortgage, but that no subsequent incumbrances would be released. The conveyance tendered on behalf of the vendors to the purchaser was to him in fee discharged from the first mortgage, but (with these words added by the first mortgagees) "subject to such equity of redemption as is not by these presents released." The first mortgagees were not before the court :—Held, that, under the conditions, the purchaser had contracted for an estate in fee simple free from incumbrances ; that the subsequent incumbrancers were, by virtue of section 70 of the Conveyancing Act, 1881, bound by the order for sale ; and that the purchaser was entitled to a conveyance free from incumbrances, or, in default, to refuse to complete. *Hall Dare's Contract, In re* (infra, col. 1376) followed. *Mostyn* v. *Mostyn*, 62 L. J., Ch. 959 ; [1893] 3 Ch. 376 ; 2 R. 587 ; 69 L. T. 741 ; 42 W. R. 17—C. A.

——**"Immediate Reversion."**]—A person purchased at a sale by auction for 2,500*l.* property which was described in the particulars of sale as "an immediate reversion in fee simple." By the conditions of sale the purchaser was to take the property subject to the obligation of paying off mortgages for 2,500*l.*, the gross value of the reversion being under 5,000*l.* :—Held, that the description in the particulars of sale was an improper description, and the reading of the conditions of sale in the auction room was not sufficient to convey to the purchaser a knowledge of the real facts ; and that he was therefore entitled to have the contract rescinded. *Torrance* v. *Bolton*, 42 L. J., Ch. 177 ; L. R. 8 Ch. 118 ; 27 L. T. 738 ; 21 W. R. 134.

Good Marketable Title.]—T. agreed to sell to C. certain freehold houses, and to make a good marketable title. The jury found that C. knew of restrictive covenants when he purchased :—Held, that this evidence could not be admitted to modify the terms of the express contract, and that the plaintiff was entitled to recover his deposit. *Farebrother* v. *Gibson* (infra) and *Leyland* v. *Illingworth* (2 De G. F. & J. 248) distinguished. *Cato* v. *Thompson*, 9 Q. B. D., 616 ; 47 L. T. 491—C. A.

Outstanding Leases.]—A tenant for life contracted to sell parts of a settled estate to a railway company, and to give immediate possession. It appeared that the land was subject to a mining lease, to a surface lease, and to tenancies from year to year, which had been overlooked by the vendor, and for which the company had to pay compensation :—Held, that "possession" meant actual occupation ; but the leases having expired before the death of the first tenant for life, and the remaindermen not being bound by the tenancies from year to year, the company had no equity after the death of the first tenant for life, as against a tenant for life in remainder, to deduct the compensation paid by them from the purchase-money of the land. *North Staffordshire Ry.* v. *Lawton*, 3 N. R. 31.

A statement in the rental that the tenants had taken renewals from the receiver, and the landlord would have a power of distress for renewal fines :—Held, not to amount to a misrepresentation importing that the legal estate in reversion would be assigned to the purchaser. *Vaughan* v. *Magill*, 12 Ir. Eq. R. 207.

Where particulars and conditions of sale purport to offer an estate in fee simple or possession, the existence of leases for lives over a part of the estate will entitle a purchaser either to rescind the contract or to compensation. *Hughes* v. *Jones*, 5 L. T. 408 ; 10 W. R. 139.

It is the duty of a vendor to qualify, upon the face of particulars, the interest which he intends to sell, if he does not intend to sell an unqualified estate in fee. *Ib.*

And see cases supra, col. 1140.

Occupation.]—A house was stated in particulars of sale "in the occupation of the C. Co. under a lease." The company was in occupation by virtue of a lease, which, however, had been granted to A. B. and C., their trustees. The vendor's solicitor, before the sale, told the purchaser that he did not remember the names of the lessees, but believed that A. and B. were two of them :—Held, that, the purchaser having bought with the above information, must be held to his bargain. *Farebrother* v. *Gibson*, 1 De G. & J. 602.

The particulars of sale stated that a certain farm was lately in the occupation of A., at the yearly rent of 290*l.* 15*s.* The facts were, that

A. had held a farm for three months previously for a rent of 11*l.*, and the evidence showed that the farm would not let for nearly so much as 290*l.* :—Held, that this was a misrepresentation of fact, amounting to fraud, and did not come within the ordinary condition providing for compensation in the event of a mistake or an error. *Dimmock* v. *Hallett*, 36 L. J., Ch. 146; L. R. 2 Ch. 21; 12 Jur. (N.S.) 953; 15 L. T. 374; 15 W. R. 92.

In a sale by the direction of the court, the particulars of sale stated that lot 12 comprised a house "at present in the occupation of C., at a rental of per annum 42*l.*" The purchaser afterwards discovered that C. was not tenant to the vendors, but to some person who claimed by an adverse title :—Held, that the description in the particulars of sale must mean that C. was tenant to the vendors, and the purchaser was entitled to be discharged. *Lachlan* v. *Reynolds*, 1 Kay, 52; 23 L. J., Ch. 8; 2 W. R. 49.

A vendor, in his particulars of sale, described certain cottages as in the occupation of the owners of a colliery. It turned out that the owners of the colliery had obtained a right to build and use the cottages without paying rent :—Held, that the particulars did not, on the face of them, convey such information as the vendor ought to have given; but inquiries were directed as to the circumstances under which the cottages were occupied. *Brandling* v. *Plummer*, 2 Drew. 427; 2 Eq. R. 1260; 23 L. J., Ch. 960; 2 W. R. 662.

—— **"Most desirable Tenant."**]—The plaintiffs put up an hotel for sale on the 4th of August, 1882, stating in the particulars that it was let to "F. (a most desirable tenant), at a rental of 400*l.* for an unexpired term of 27½ years." It was proved that on the 1st of May, 1882, the Lady Day quarter's rent wholly unpaid; that a distress was then threatened, and that F. paid 30*l.* on the 6th of May, 40*l.* on the 13th of June, and the remaining 30*l.* shortly before the auction, and that no part of the quarter's rent due at Midsummer had been paid: —Held, that the description of F. as a most desirable tenant was not a mere expression of opinion, but contained an implied assertion that the vendors knew of no facts leading to the conclusion that he was not; that the circumstances relating to the Lady Day rent showed that he was not a desirable tenant; and that there was a misrepresentation. *Smith* v. *Land and House Property Corporation*, 28 Ch. D. 7; 51 L. T. 718; 49 J. P. 182—C. A.

—— **Subject to Existing Tenancies.**]—A public-house and premises were described in the particulars as in the occupation of certain persons at certain rents. The conditions stated that the property was sold "subject to existing tenancies." Certain brewers became the purchasers. Shortly afterwards they discovered that the property was in lease to another brewer for a term of years, of which about nine remained unexpired :—Held, that there was a misdescription of the property, which precluded the vendor from enforcing the agreement, and that the purchasers had not constructive notice of the lease. *Caballero* v. *Henty*, 43 L. J., Ch. 635; L. R. 9 Ch. 447; 30 L. T. 314; 22 W. R. 446.

—— **Notice to Quit by Tenant.**]—An agreement was entered into for the purchase of a freehold estate upon the terms of certain particulars and conditions of sale. In the particulars it was stated that the Y. farm on the estate was in the occupation of H. on a yearly tenancy. H. had before the sale written to the vendor informing him that he intended to give up the farm at the end of the current year, but this was written before the proper time for giving notice to determine the tenancy. No mention of this was made in the particulars, or at the time of sale. After the sale H. gave formal notice to quit :—Held, that the nondisclosure of the intimation of the tenant that he intended to leave at the end of the year did not make the statement in the particulars false or misleading. *Davenport* v. *Charsley*, 54 L. T. 372; 34 W. R. 391.

Warranty on Sale.]—Articles of roup of certain lands expressly stipulated that the purchaser was to take the property with all risks of error in the particulars. A. agreed by missives attached to the articles of roup to buy the estate, and a conveyance was executed containing a clause of warrandice in the usual general terms. Neither the disposition nor the articles of roup contained any information as to the tenure of the lands. The particulars of sale contained this statement: "The lands hold of the Crown," and in answer to an inquiry made before the sale on behalf of A. as to the nature of the holding, the seller's agents referred A. to the note of particulars, adding: "The proprietors are not entered with the Crown, but you are aware the Crown never asks for an entry." A claim was subsequently set up by the disponee of the last superior, and a decree of forfeiture against A. was reduced. In an action raised by A. against the proprietors :—Held, that there had been no breach of warrandice; and that the representation was perfectly true according to the knowledge and belief of those who made it, and, that being so, any error therein was covered by the express contract of the purchaser to take the property with the risks of errors in the particulars. *Brownlie* v. *Campbell*, 5 App. Cas. 925—H. L. (Sc.)

Copyhold Sold for Freehold.]—A. articles with B. for the purchase of an estate of 180*l.* per annum, but, discovering that 30*l.* per annum of the lands were copyhold, refused to go on. Equity will not decree a specific execution of this agreement. *Hick* v. *Phillips*, Pre. Ch. 575.

The mere fact that land for a lease of which an agreement has been made is copyhold is not a bar to specific performance. *Paxton* v. *Newton*, 2 Sm. & Gif. 437.

Conditions of sale had described the property to be sold as freehold. Subsequently, before completion, it turned out to be copyhold :—Held, that the purchaser was entitled to have his contract for purchase rescinded, and money repaid with interest. *Turner* v. *West Bromwich Union*, 3 L. T. 662; 9 W. R. 155.

When a vendor, having reason to believe that part at least of his property was copyhold, sold and conveyed the same to a purchaser as freehold, there being nothing on the abstract to show that any part was copyhold, and the

property turned out to be all copyhold:—Held, that the purchaser was entitled to have the sale set aside and the purchase-money repaid, with interest after the rate of 4*l.* per cent. per annum, with the costs attending his purchase. *Hart* v. *Swaine*, 47 L. J., Ch. 5; 7 Ch. D. 42; 37 L. T. 376; 26 W. R. 30.

And see *Hopcraft* v. *Hopcraft*, infra, col. 1339.

Land was advertised to be sold as freehold, subject to conditions, one of which provided that any misstatement of the quality, tenure, outgoings, or other particulars, should be the subject of compensation. An objection to the title of one lot was taken that it was of copyhold tenure. It, however, appeared that, under a composition with the lord, the rights of the copyhold were such as to render the tenure hardly different from that of freehold:—Held, that the misdescription did not form a ground for resisting a specific performance. *Price* v. *Macaulay*, 2 De G. M. & G. 339.

An estate was described in particulars of sale as containing 227 acres, and as being freehold with the exception of fifty acres copyhold of a forest. The tenure being doubtful, a clause was inserted in the contract for sale to the effect that the estate was sold as being about fifty acres copyhold, but no abatement or compensation was to be made in favour of the purchaser in case the quantity of pure copyhold should exceed fifty acres, and the rest of the estate was sold as being partly of freehold and partly of copyhold tenure. The purchaser afterwards discovered that the 227 acres consisted of about 178 acres of copyhold and forty-nine of freehold, and that all minerals except stone were reserved to the crown:—Held, that there had been a misdescription of the property. *Turquand* v. *Rhodes*, 37 L. J., Ch. 830; 18 L. T. 844; 16 W. R. 1074.

Freehold Sold for Copyhold.]—Property sold as copyhold, turned out to be partly freehold:—Held, that the vendor could not compel a specific performance, and that special conditions, providing that errors in the description should not invalidate the sale, and for a compensation, did not alter the case. *Ayles* v. *Cox*, 16 Beav. 23.

Covenant to Surrender Freeholds—"Assurance."]—An indenture dated in 1892 deduced by recitals the title to freehold property comprised therein, from which recitals it appeared that on payment off in 1868 of a mortgage on the property no reconveyance had been executed, and that by a voluntary settlement of the latter date the settlor covenanted to surrender the property to the lord of the manor of which it formed part to the use of the trustees of the settlement, and it was declared that the trustees should stand possessed thereof on trust for sale. The person entitled to the property under the indenture, who had purchased it in 1892 from the surviving trustee of the settlement, put it up for sale by auction. The conditions of sale provided that the abstract of title should commence with the said indenture, and after mentioning the absence of the reconveyance, and that the property "was assured to the vendor at the sale in 1892 by a form of assurance applicable only to copyholds," provided that the purchaser should raise no objection in respect of these matters:—Held, that the purchaser was informed by the conditions of sale that he would not get the legal estate; that on the subsequent sale of the property in 1892 value attached to the settlement; that though the settlement did not pass the legal estate, such estate could not be asserted against the purchaser, by reason of the covenant to surrender and declaration of trust contained in the settlement; that in any action in ejectment to recover the legal estate the equitable title of the purchaser would be a sufficient defence; and, consequently, that the purchaser got a good title according to the contract. *Williams and Parry's Contract, In re*, 13 R. 574; 72 L. T. 869.

Leasehold Sold for Freehold.]—If a person possessed of a term, contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel him to convey the term, and this court will arrange the equities between the parties. *Wood* v. *Griffith*, 1 Swanst. 54; 1 Wils. Ch. 34; 18 R. R. 18. See also *Mortlock* v. *Buller*, 10 Ves. 316; 7 R. R. 417. *And see* infra, col. 1320.

Purchaser will not be compelled to take, under contract for freehold, a long leasehold, though for a very long term, upon principle of compensation. *Drewe* v. *Corp*, 9 Ves. 368.

A party purchasing an estate under the impression that it is an estate in fee-simple, said to be subject to a perpetual rent-charge, without requiring the production of the last receipt of the rent, from which the nature of the tenure would appear, must take the consequences, if it turn out that the estate is not a fee-simple, but only a tenancy from year to year. *Att.-Gen.* v. *Stephens*, 1 K. & J. 724; 3 Eq. R. 1072: 24 L. J., Ch. 694; 1 Jur. (N.S.) 1039; 6 W. R. 649.

Effect of an indefinite representation by a vendor; as that a leasehold estate was nearly equal to freehold, being renewable upon a small fine; putting the purchaser upon inquiry; though, connected with certain circumstances, such representation may be fraudulent, and form a ground for rescinding the contract. *Fenton* v. *Browne*, 14 Ves. 144; 9 R. R. 255.

A vendor, being a lessee of a house with a right of purchase, agreed to sell the fee-simple and inheritance for 2,500*l.*, and assigned his lease and contract to purchase to the purchaser, who by mistake covenanted to perform the covenants in the lease. One-fourth of the property was leasehold, and the court set aside the contract. *Price* v. *Ley*, 4 Giff. 235; 32 L. J., Ch. 530; 9 Jur. (N.S.) 295; 7 L. T. 845; 11 W. R. 475.

Specific performance of agreement to buy fee-simple of lands and right, &c., refused, where part of subjects of contract only leasehold, and the right is qualified. *Wright* v. *Howard*, 1 Sim. & S. 190; 1 L. J. (O.S.) Ch. 94; 24 R. R. 169.

Injunction granted to stay action against the auctioneer for the deposit, although the estate sold was represented as freehold with leasehold adjoining, and turned out to be almost all leasehold, and although there had been great delay in making out the plaintiff's title. *Fordyce* v. *Ford*, 4 Bro. C. C. 494.

—— **Boundaries Not Defined.**]—Held, under the circumstances of the case, that a party, having agreed to purchase premises stated to be partly freehold and partly leasehold, could not, in the absence of concealment or misrepresentation on the part of the vendor, resist a specific performance of his contract, merely on the

ground that the exact position of the boundary line between the freehold and leasehold portions could not be ascertained. *Munro* v. *Taylor*, 8 Hare, 51. Affirmed, 3 Mac. & G. 713; 21 L. J., Ch. 525.

—— **Sale in Lots.**]—Premises were put up for sale by auction. Lot 1 was described as all freehold, and in the occupation of R. Lot 2 was described as leasehold. In fact, part of the premises in the occupation of R. was leasehold, and held under the same lease as those comprised in lot 2. A., with a knowledge of this fact, became the purchaser of lot 2, in the belief that it comprised all the leaseholds. He filed a bill, claiming to have the whole of the leaseholds included in his assignment, and the bill was dismissed with costs *Fairhead* v. *Southee*, 9 Jur. (N.S.) 764; 11 W. R. 739.

Underlease for Lease.]—An underlease, described in the conditions of a sale by auction as a lease, is a fatal misdescription. *Henderson* v. *Hudson*, 15 W. R. 860.

The purchaser was aware that a short time before the sale the vendor only had the underlease:—Held, that the knowledge prevented his setting up the misdescription as an objection to the title. *Ib.* S. P., *Flood* v. *Pritchard*, 40 L. T. 873.

Property was stated to be held for the residue of a term of ninety-nine years, and there was a condition that no errors should vitiate the sale. The title proved to be an underlease three days short of the original term. A bill filed for specific performance was dismissed notwithstanding an offer of compensation made by the plaintiff. *Madeley* v. *Booth*, 2 De G. & Sm. 718.

A vendor who contracts for the sale of leasehold property described as held under a lease, cannot, if nothing further is said, make a good title unless it is held under an original lease, yet in a case where the particulars and conditions of sale of property so described contained enough to give notice to a purchaser that the property was held under a derivative lease:—Held, that the purchaser could not on that account refuse to complete, or claim compensation. *Madeley* v. *Booth* (supra) commented on. *Camberwell and South London Building Society* v. *Holloway*, 49 L. J. Ch. 361; 13 Ch. D. 754; 41 L. T. 752; 28 W. R. 222.

Houses were stated in the particulars to be held for ninety-nine years from the 24th of June, 1844, at a ground rent of 21*l.* There was a condition that error in description of the property should not annul the sale. The vendor was in fact entitled to an underlease for the residue of the term of ninety-nine years less two days at a peppercorn rent, and the owner of the two days could not be found:—Held, that the representation that the property was held by lease, when it was in fact held by underlease, was a fatal misdescription, and that the condition did not apply, for that "error in description of the property" meant a misdescription of the corporeal property, not a mistake in the description of the vendor's title. Dictum of Jessel, M. R., in *Camberwell and South London Building Society* v. *Holloway* (supra) disapproved. *Beyfus and Masters, In re*, 39 Ch. D. 110; 59 L. T. 740; 37 W. R. 261; 53 J. P. 293—C. A.

Under a contract of sale a vendor agreed to sell two messuages described as held by an indenture of lease dated the 1st August, 1872, for the unexpired residue of the term of eighty years computed from the 15th March, 1866. The title was to commence with the lease; and the purchaser was to be deemed to buy with full notice thereof. The lease contained covenants referring to the lessor and superior landlord. The lease was in fact an underlease:—Held, that, as the purchaser could not be considered to have had notice that the property she was intending to purchase was in fact held by an underlease, the representation that it was held by a lease was a fatal misdescription, and that a good title had not therefore been shown. *Broom* v. *Phillips*, 74 L. T. 459.

The advertisement out of which the contract arose was of the sale of six houses; total rental 131*l.* 6*s.* per annum; lease about seventy-five years, at a moderate ground-rent of 50*l.* a year; but what the plaintiff, who agreed to give 420*l.* for the property, found himself liable to take was an underlease of the houses at a rent of 50*l.*:—Held, that though there was a misdescription of the property, there was no such substantial misrepresentation as called upon the court to exercise its jurisdiction. *Bartlett* v. *Salmon*, 6 De G. M. & G. 33; 1 Jur. (N.S.) 277.

B., by memorandum of agreement, agreed to assign to D. messuages, for the residue of two several terms of sixty years and twenty-one years, for which B. held the same under leases, of which terms thirty-eight years and eight years, or thereabouts, were unexpired, subject to the yearly rents of 15*s.* and 50*l.*, "and to the covenants in such lease contained, and free from all incumbrances." B.'s interest was an interest under an underlease in the residue of two terms of sixty years and twenty-one years, less seven days. The rent subject to which B. held the property comprised in the former lease, also, was 150*l.* and not 15*s.*:—Held, that there not being on the face of the agreement a distinct description that the property was subject to the risk of eviction by no default of the purchaser, he was entitled to take advantage of the omission. *Brumfit* v. *Morton*, 3 Jur. (N.S.) 1198.

A. writes a letter to her solicitor, saying that she has agreed to give B. the lease of certain premises in consideration of 400*l.* A. subsequently agrees to surrender the same premises to C., the owner of the fee, in consideration of 550*l.*, and afterwards grants an underlease for all the rest of her term, less one day, to B., in consideration of 1,000*l.* and a bond of indemnity:—Held, that the underlease is no execution of the agreement to assign, the consideration and the subject matter being different; and specific performance of the agreement with C. decreed, and the deed granting the underlease set aside. *Goodwin* v. *Fielding*, 1 W. R. 255, 343.

If a lessee for a term of years underlet for a less term, and the underlessee sell by auction the lesser term, describing it as a lease, and one of the conditions of sale is that the lessor's title shall not be inquired into, the vendor's title being good, quære, whether the purchaser can refuse to complete, because there is a term imposed between the vendor's interest and the freehold. *Darlington* v. *Hamilton*, Kay, 550; 2 Eq. R. 906; 23 L. J., Ch. 1000. And see *National Provincial Bank of England and Marsh, In re*, infra, col. 1485.

Conditions as to Title.]—*See* TITLE, infra, col. 1482.

9. COVENANTS FOR TITLE.

And see COVENANTS, infra, col. 1216.

a. In General.

Effect of.]—Covenants for title are merely a bargain by the covenantor to pay damages if he has no such title. *General Finance, Mortgage, and Discount Co.* v. *Liberator Permanent Building Society*, 10 Ch. D. 15; 39 L. T. 600; 27 W. R. 210.

Implied.]—Implied covenant by vendor of a freehold estate for the title, though an assignee in bankruptcy, selling by a general description, not restrained to his actual interest. *Deverell* v. *Bolton* (*Lord*), 18 Ves. 512.

Rule in Conveyancing.]—It was said in this case to be a rule among conveyancers, that where an estate had been long in a family, the vendor's covenant must go as far back as the first purchaser of the estate; but where the vendor claims immediately under the person who first bought the estate, there he need not covenant any further back than from that person, because whoever buys the estate has the benefit of the covenants in the deed to the vendor's purchaser. Lord Hardwicke said he never heard of such a rule; yet, where conveyances are to be made by a decree of the court, they should be settled by such rule as learned conveyancers would direct. *Lloyd* v. *Griffith*, 3 Atk. 267.

By Beneficiaries.]—A testator devised real estate upon trust for sale, and to divide the proceeds among his children equally. A sale of such real estate having been made under a decree for the division of the proceeds among the parties beneficially entitled thereto:—Held, that the purchaser was not entitled to covenants for title from those parties. *Cottrell* v. *Cottrell*, 35 L. J., Ch. 466; L. R. 2 Eq. 330; 12 Jur. (N.S.) 285; 14 L. T. 220; 14 W. R. 572.

Settled Estates—Tenant for Life.]—Estates were devised to A. for life, remainder to his sons successively in tail male. A. and B., during the infancy of B.'s eldest son, obtained an act of parliament vesting the estates in trustees in trust to sell:—Held, that A. and B. must covenant with the purchaser for the title. If settled estates are sold under a power to sell them, with the consent of the tenant for life, he must covenant for the title. *London Bridge Acts, In re*, 13 Sim. 176.

An estate was sold by trustees of a settlement to raise a sum to which the tenant for life was entitled:—Held, that the tenant for life must enter into covenants for title. *Poulett* v. *Hood*, 37 L. J., Ch. 224; L. R. 5 Eq. 115; 17 L. T. 486; 16 W. R. 323.

—— **Sale by Trustees—Equitable Tenant for Life.**]—Certain property having been sold under a condition that "the vendors, being trustees, are to be required only to give the statutory covenant against incumbrances implied by reason of their being expressed to convey as trustees":—Held, that the purchasers were entitled to require the equitable tenant for life to enter into the usual limited covenants for title, and that the conditions of sale did not deprive them of this right. *Sawyer and Baring's Contract, In re*, 53 L. J., Ch. 1104; 51 L. T. 356; 33 W. R. 26.

—— **Statutory Declaration—Notice.**]—A land company was in possession of part of settled estates under building agreements. The tenant for life waived the completion of these agreements within the specified time. A railway company knowing these facts entered without making a deposit or giving a bond to the land company, and the railway company took a conveyance in fee, the tenant for life joining as beneficial owner, and he and his land agent giving statutory declarations that they knew of no negotiation of any kind with the land company having reference to any extension of time under the building agreements. The conveyance was expressed to the subject, so far as the premises were affected thereby, to the building agreements. The land company subsequently obtained compensation from the railway company in respect of the interest in the lands taken:—Held, that neither under the statutory declarations nor under the covenant for title supplied by the Conveyancing Act, 1881, were the railway company entitled to be recouped the compensation they had paid the land company. *L. & N. W. Ry.* v. *Boulton*, 63 L. T. 727—C. A.

Sale of Copyholds.]—A. sold copyholds in fee simple to B., and covenanted to surrender, which he did the next day, and entered into the usual covenants for title. Shortly afterwards, the copyholds were again sold:—Held, that the covenants for title either ran with the land for the benefit of the second purchaser, or that he was entitled to sue on them in the name of the first. *Riddell* v. *Riddell*, 7 Sim. 529; 5 L. J., Ch. 102.

Quære, whether covenants for the title of copyholds run with land. *Ib.*

Prior acknowledgment of Encroachment.]—By a covenant in a conveyance in fee, from A. to B., of a house and premises, "together with all rights, liberties, privileges, easements and appurtenances to the premises belonging or in anywise appertaining or actually held or enjoyed therewith, or deemed or taken to be part, parcel, or member thereof," A. covenanted that, notwithstanding any act, deed, matter or thing whatsoever made, done or permitted by him, or any person claiming through him, he hath now good title to convey the messuage and premises with the appurtenances. Previous to this A. had in writing acknowledged that certain parts of his premises were encroachments on a neighbouring property, and agreed to pay a yearly rent for leave to use such encroachments:—Held, that there was no breach of the covenant, for that A. had neither done nor permitted any act, deed, matter, or thing, to the contrary of his right to convey all that he was ever entitled to convey, and that he had not derogated from any estate which he had ever possessed by an agreement, the effect of which was simply to keep matters in statu quo. *Thacheray* v. *Wood*, 6 B. & S. 776; 34 L. J., Q. B. 226; 10 Jur. (N.S.) 877; 10 L. T. 645; 13 W. R. 996—Ex. Ch.

Absence of Covenants for Title.]—It is no objection to title that some of the deeds do not contain covenants for title if a good legal estate passed, and there is a covenant against incumbrances. *Scott* v. *Alvarez*, 64 L. J., Ch. 821;

[1895] 2 Ch. 603 ; 12 R. 474 ; 73 L. T. 43 ; 43 W. R. 694—C. A.

b. For Quiet Enjoyment.

Express Covenant.] — An agreement was entered into to grant a lease, by indenture, for a term, and that covenants should be inserted by the lessor for quiet enjoyment. The lessees were in possession under the agreement, but damage having accrued from mining operations, they filed a bill for specific performance. No title could be shown to the minerals :—Held, that the lessees were entitled to the execution of a lease by deed containing an absolute covenant for quiet enjoyment. *Onions* v. *Cohen*, 2 H. & M. 354 ; 34 L. J., Ch., 338 ; 11 Jur. (N.S.) 198 ; 12 L. T. 15 ; 13 W. R. 426.

Secus, if the case had been that of an agreement to sell an estate in fee simple. *Ib.*

—— **Building Land.**]—A. sold some building land to B., and covenanted for title. After some houses had been built on the land, the purchaser was evicted :—Held, that the purchaser was entitled to recover upon the covenants, not only the value of the land, but also that of the houses subsequently built thereon. *Bunny* v. *Hopkinson*, 27 Beav. 565 ; 29 L. J., Ch. 93 ; 6 Jur. (N.S.) 187 ; 1 L. T. 53.

——**Mortgage.**]—N., the mother of A., was seised in tail, ex provisione viri, reversion in fee to her husband. A. and W., her husband, created a mortgage term on this estate, and joined in levying a fine to the mortgagee ; remainder to such uses as W. should appoint. W., before levying the fine, on sale of an estate, covenanted with I., the purchaser, for quiet enjoyment, and afterwards made an appointment to trustees for paying off the mortgage. I., being evicted, brought his bill against A. and her children, to subject her estate to his demand, under the covenant of W. It being doubtful whether plaintiff's debt accrued by breach of covenant till after the appointment of W., the bill was dismissed. *White* v. *Sansum*, 3 Atk. 410.

The plaintiff purchased of the defendant a freehold property, and took a conveyance thereof, in which there were no covenants for title, but which contained a covenant for quiet enjoyment by the vendor. In the same month the plaintiff mortgaged the property, and in 1846, after defending an action of ejectment, was evicted by the verdict of the jury. The plaintiff then brought an action for damages upon the covenant against the defendant, but was stopped by a plea that at the date of the eviction the legal estate was in the mortgagee. Shortly afterwards the defendant paid off the mortgagee, taking from him the mortgage deed, and an acknowledgement in full satisfaction and discharge of the mortgage debt, and of all right of action or demand on the part of the mortgagee against the defendant, under the covenant contained in the deed of conveyance to the plaintiff. Upon a bill filed by the plaintiff against the defendant, the court held that the plaintiff had clearly a right to damages, and gave him leave to bring an action upon the covenant within a time limited in the order, at the same time restraining the defendant from setting up the mortgage deed, or the indorsement thereon, by way of defence to such action. *Thornton* v. *Court*, 22 L. J., Ch. 361 ; 17 Jur. 151.

Covenant against Incumbrances restricting Covenant for Quiet Enjoyment.]—A father—seised of lands under a lease for three lives—by a deed reciting that he was seised in fee, or of some other sufficient estate of inheritance, conveyed them, upon the marriage of his son, in strict settlement, by words applicable to lands held in fee simple ; and the father and son covenanted that the lands should continue, remain, and be for ever thereafter to the uses of the settlement, and that free from all former gifts, grants, titles, and incumbrances made or suffered by the father and son, or either of them :—Held, that these two covenants—for quiet enjoyment and freedom from incumbrances—were so connected, that the general words of the former were limited and contracted by the restrictive expressions in the latter, and that in the absence of evidence of fraudulent intention on the part of the settlor, the error in the recital did not amount to such misrepresentation as would entitle the eldest son of the marriage to compensation out of his grandfather's assets. *Thompson* v. *Thompson*, Ir. R. 6 Eq. 113.

Defect appearing by Recital.]—Covenants for title and quiet enjoyment do not extend to protect a purchaser against defects of title, which the recitals in his own purchase deed are sufficient to disclose. *Hunt* v. *White*, 37 L. J., Ch. 326 ; 19 L. T. 141 ; 16 W. R. 478.

Covenants for title are to be construed literally. Consequently, covenants which on their literal construction are wide enough to apply to a defect in title disclosed by a recital in the conveyance itself, do in law so operate. *Hunt* v. *White* (supra) overruled. *Page* v. *Midland Ry.*, 63 L. J., Ch. 126 ; [1894] 1 Ch. 11 ; 7 R. 24 ; 70 L. T. 14 ; 42 W. R. 116—C. A.

Contemporaneous Deed of Indemnity.]—A deed contained a covenant for quiet enjoyment, free from quit rent and crown rent ; and, by a contemporaneous deed of indemnity, lands were conveyed to a trustee and his heirs, upon trust, to permit and suffer the vendors and their heirs to take the rents and profits until the purchaser and his heirs, or any person claiming under him, should be disturbed by reason of any judgment or incumbrance affecting the lands ; and immediately after any such disturbance by sale of the indemnity lands, to discharge such incumbrance or judgment. Quit rent and crown rent were claimed and paid out of the purchased lands. A report was made omitting the sums paid for quit rent and crown rent, and stating there were no incumbrances other than those named in the report on the indemnity lands. An order was made giving leave to the owner of the purchased lands to file a charge for the quit rent and crown rent accrued since the date of the report and decree :—Held, that the claimant was not precluded by the finding in the report and decree from proving his demand. *Massy* v. *O'Dell*, 10 Ir. Ch. R. 22.

Breach—No Disturbance in Possession.]—The defendant covenanted for title and quiet enjoyment, notwithstanding any act or thing done or suffered by him or any of his predecessors in title. After the conveyance, decree made against

a class of persons, of whom plaintiff was one, that the land was subject to a right of common:—Held, that the decree alone, without any entry or actual disturbance of the plaintiff in his possession, was no breach. *Howard* v. *Maitland*, 53 L. J., Q. B. 42; 11 Q. B. D. 695; 48 J. P. 164—C. A.

And see *Howes* v. *Brushfield*, infra, col. 1218.

—— **Measure of Damages.**]—A conveyed to C. an undivided moiety of land as trustee. B. conveyed to C. the other moiety as beneficial owner. In an action by C. against B. for damages for breach of covenant for quiet enjoyment by reason of the existence of rights of way:—Held, that B. was liable only to the extent of one-half of any damages sustained by C.:—That the measure of damages was—(1) the difference in value of the land free from and fettered with the rights of way; (2) the costs incurred by C. in defending an action and an appeal therefrom. *Sutton* v. *Baillie*, 65 L. T. 528.

Implied Covenant.]—Covenant by A. with B. not to permit trade of beerseller on the land. A. demises a shop on the land, and lessee covenants not to carry on certain trades not including the trade of beerseller, and A. covenants with lessee for quiet enjoyment. Lease assigned to D., who, without notice of A.'s covenant to B., sells beer, and is restrained by injunction at suit of B. Action by D. against A. for breach of the express or implied covenant in the demise:—Held, that the express covenant for quiet enjoyment excluded any implied covenant; and that that covenant did not amount to a warranty to the lessee that he might use the premises for any purpose not mentioned in the restrictive covenant. *Dennett* v. *Atherton*, 41 L. J., Q. B. 165; L. R. 7 Q. B. 316; 20 W. R. 442—Ex. Ch.

—— **Conveyance as Beneficial Owner.**]—The defendant granted to B. a lease for years. B. executed three mortgages, by way of subdemise, of the land so leased, and then, as beneficial owner, surrendered the term to the defendant for valuable consideration without disclosing the mortgages. The defendant subsequently, as "beneficial owner," conveyed the land to B. in fee. B. then, as beneficial owner, conveyed to the plaintiff in fee for valuable consideration, without disclosing the existence of the mortgages. In an action for breach of the covenant for title implied by virtue of s. 7, sub-s. 1 (A) of the Conveyancing Act, 1881:—Held, that the existence of the mortgages created by B. arose from an act done by the defendant to which his implied covenant extended, and that he had, therefore, committed a breach of such covenant; and that, inasmuch as the covenant was one which ran with the land, and the plaintiff sued as assignee of the land in respect of privity of estate as distinguished from privity of contract, the defendant could not successfully set up the fraud of B. as an answer to the plaintiff's claim. *David* v. *Sabin*, 62 L. J., Ch. 347; [1893] 1 Ch. 523; 2 R. 342; 68 L. T. 237; 41 W. R. 398—C. A.

Act of Government.]—A covenant in a conveyance of lands in America, during the time of the rebellion, that the grantor had a legal title, and that the grantee might peaceably enjoy, is not broken by the States of America seizing the lands as forfeited for an act done previously to the conveyance: notwithstanding the subsequent acknowledgment of their independence by this country. *Dudley* v. *Folliatt*, 3 Term Rep. 584; 1 R. R. 772.

c. For Freedom from Incumbrances.

Remedy on Ejectment.]—J. bought an estate of A., who gave him a bond to suffer a recovery within three years, or to return him his money upon a reconveyance. A. tendered a recovery, but, before it was suffered, a third person made a title to the land, whereupon J. brought his bill for the purchase money; but the court could not relieve him, for having consented to take the bond, he must resort to A.'s covenant against incumbrances. *Maynard's Case*, 2 Free. C. C. 42.

Discovery of Incumbrance before Completion.]—In articles, there was to be a covenant in the conveyance that certain lands were free from incumbrances. Lord Chancellor said, this is not a covenant that the lands are free; and if any incumbrance is discovered between the execution of the articles and sealing the conveyance, whereof the party had no notice, that incumbrance shall be discharged before the sealing of the conveyance. *Vane* v. *Bernard* (*Lord*), Gilb. Eq. R. 6.

Mistake in Conveyance.]—By mistake in the conveyance property was conveyed which the defendant was obliged to reconvey to the right owner. The defendant brought an action for damages against the vendor under his covenant against incumbrances, and an injunction to restrain this action was refused the vendor. *Wild* v. *Hillas*, 28 L. J., Ch. 170; 7 W. R. 82.

Charges Exceeding Powers.]—A., with power to charge estates, charges in excess of the power and assigns to the plaintiff 5,000*l.* also in excess of his power, and covenants for quiet enjoyment of the premises assigned against "any person or persons then or thereafter having or possessing any title or interest in, out of, or respecting the same":—Held, that the right of the owners of the estate not to have the 5,000*l.* raised was a right respecting it, and that A.'s estate was liable on the covenant to make good the plaintiff's purchase money. *Henty* v. *Wrey*, 21 Ch. D. 332; 47 L. T. 231; 30 W. R. 850—C. A.

Covenant by Mortgagee.] — Conveyance by mortgagee and mortgagor of part of estate to A. by deed which empowered A. to erect a porte cochère or projection over the pavement of a road. Afterwards mortgagee and mortgagor conveyed another part of the same estate to the plaintiff, and granted plaintiff right to pass along road on which the porte cochère was built, and the mortgagee covenanted with the plaintiff that he "had not done, omitted, or knowingly suffered, or been party or privy to anything whereby the premises were or might be impeached, affected, or incumbered":—Held, that upon the construction of the deeds the covenant of non-incumbrance was not broken by the mortgagee having been party to the deed with A. *Clifford* v. *Hoare*, 43 L. J., C. P. 225; L. R. 9 C. P. 362; 30 L. T. 465; 22 W. R. 828. And see *Thompson* v. *Thompson*, supra, col. 1200.

d. For Further Assurance.

Crown Lands.]—A purchaser of crown lands, sold part to plaintiff, with a covenant for further assurance: on the restoration he obtained a lease from the crown. He shall assign to the plaintiff his term in the part he sold him. *Taylor* v. *Debar*, 2 Ch. Ca. 212.

Covenant to Produce Deeds.]—If vendor retains title deeds, and covenants for further assurance only, the purchaser may, under that covenant, compel him to enter into a covenant for production of deeds. *Fain* v. *Ayers*, 2 Sim. & S. 533; 4 L. J. (O.S.) Ch. 166; 25 R. R. 264.

Seisin.]—S. purchased church lands in fee, under the usurper's title, and sold them, covenanting that he was lawfully seised. The church being restored, S. was relieved from his covenant, upon proof that at the time of the sale he undertook for his own acts only. *Caldecot* v. *Hill*, 1 Ch. Ca. 13.

Right to Assign.]—A. agreed to assign a lease to B., and to deliver possession, and undertook that he had lawful right to assign. A. had no lawful title to assign at the time of the agreement, as he had covenanted with his lessor not to assign without his lessor's consent in writing, and had not got such consent:—Held, that this was no breach, for, till the agreement with the intended purchaser was completed, it could not be known in what name the licence should be made out. *Stowell* v. *Robinson*, 3 Bing. (N.C.) 928; 5 Scott, 196; 3 Hodges, 197; 6 L. J., C. P. 326.

10. Conveyance.

a. Form and Execution of.

Duty of Vendee to Prepare.]—In a contract for the sale of land, it is the duty of the vendee to prepare the conveyance, unless there is an express stipulation to the contrary; therefore, in an action for non-payment of the purchase-money, the declaration need not allege a tender or offer to convey: it is sufficient to state that the vendor was ready and willing to convey. *Poole* v. *Hill*, 6 M. & W. 835; 9 D. P. C. 300; 10 L. J. Ex. 81.

A declaration stated that by a deed B. agreed to sell and the company to buy premises, and that B. would on payment of the purchase-money by the company, at the costs and charges of the company, execute a proper conveyance:—Held, that the breach alleged that the company had not prepared a proper conveyance, was good, since, as the deed provided that the conveyance was to be at the costs and charges of the company, it lay on them to prepare it. *Thames Dock & Ry.* v. *Brymer*, 5 Ex. 696; 19 L. J., Ex. 321—Ex. Ch.

Stamps.—A 10*s.* deed stamp on a mortgage deed is insufficient; therefore, a purchaser is entitled on a contract for sale with a mortgagor to require the mortgage deed, where so stamped, to be stamped before completion to the full ad valorem duty at the vendor's expense, notwithstanding that the mortgagee may have consented to join in the conveyance. *Whiting* to *Loomes*, 50 L. J., Ch. 463; 17 Ch. D. 10; 44 L. T. 721; 29 W. R. 435—C. A.

A land society, after the passing of the Epping Forest Act, 1878, repurchased from its allottees the lands in Epping Forest, and the allottees reconveyed to the trustees by indorsement on the original conveyances, but the reconveyances were not stamped. Compensation was payable to the society by the conservators, who contended that the reconveyances ought to be stamped at the cost of the society. The society refused, but offered that the allottees should join with the society in a conveyance to the conservators. The conservators refused, and paid the compensation into court, under s. 75 of the Lands Clauses Act, 1845 (incorporated in the Epping Forest Act). On petition for payment out by the society:—Held, that it was not necessary that the reconveyances should be stamped: that the conservators ought to have been satisfied with the conveyance offered them by the society; and that the conservators must pay the costs. *Whiting* to *Loomes* (supra) distinguished. *Birkbeck Freehold Land Society, Ex parte*, 52 L. J., Ch. 777; 24 Ch. D. 119; 49 L. T. 265; 31 W. R. 716.

Presence on Completion.]—Upon a sale of real property, the purchaser has not an absolute right in all cases to require the vendor's presence at the completion of the purchase. *Essex* v. *Daniell*, L. R. 10 C. P. 538; 38 L. T. 476.

The fact of the vendor having been confined in a lunatic asylum is not a reasonable ground for insisting upon a departure from the ordinary course, when it is duly certified and sworn that he was competent at the time of executing the conveyance. *Ib.*

There is no rule that the purchaser may in all cases require the purchase-deed to be executed in the presence of himself or his agent, and the purchase-money paid directly to the vendor, but that he may so require in the absence of special circumstances rendering a different course proper. *Viney* v. *Chaplin*, 2 De G. & J. 468; 27 L. J., Ch. 434; 4 Jur. (N.S.) 619; 6 W. R. 563.

Execution by Agent.]—A purchaser may refuse to accept a conveyance executed under a power of attorney. *Coore* v. *Callaway*, 1 Esp. 115. S. P., *Richards* v. *Barton*, 1 Esp. 268.

—— **Trustee.**]—A trustee can execute a deed by an attorney, and can empower the attorney to receive or join in receiving trust-money, and s. 2 of the Trustee Act, 1888, will protect a purchaser paying money to a person so authorised to act; but the solicitor to receive the money under that section must be a solicitor appointed by the trustee himself, and permitted by the trustee himself to produce the deed by a proper receipt clause. *Hetling and Merton's Contract, In re*, 62 L. J., Ch. 783; [1893] 3 Ch. 269; 2 R. 543; 69 L. T. 266; 42 W. R. 19—C. A.

Compulsory Purchase.]—When the price of land taken compulsorily under the Lands Clauses Act has been settled by arbitration the execution of the conveyance is, as in ordinary cases, a condition precedent to the right of action for the purchase-money. *East London Union (Guardians)* v. *Metropolitan Ry.*, 38 L. J., Ex. 225; L. R. 4 Ex. 309. See also *Dicker* v. *Jackson*, infra, col. 1306.

Conveyance not Tendered.]—A. agreed, in consideration of 7,000*l.*, to present the nominee of B., and to furnish an abstract of title to and execute a conveyance of the next presentation to B.; afterwards A., by consent of B., agreed to

sell the next presentation to C. for 7,500*l.*, on having such title as A. had received, C. paying to B. absolutely, on a day certain, the odd 500*l.* A. furnished an abstract of such title as he had received, which C. refused to accept, and no conveyance was tendered to him. B. sued C. for the 500*l.*:—Held, that A. having done all that his contract required, it was no answer that no conveyance was tendered to C. *Wilmot* v. *Wilkinson*, 9 D. & R. 620; 6 B. & C. 506; 5 L. J. (O.S.) K. B. 196; 30 R. R. 405.

Covenant to Convey.]—If A. covenants that he will, on or before a certain day, convey to B., by such conveyance as B.'s counsel should advise, all the grounds before conveyed to him by C.; in consideration of which B. covenants to pay a certain sum, and reserve certain rents to A., and to lay out a certain sum on the premises:—Held, that A. cannot maintain an action against B., without averring such a conveyance, or a readiness to convey, to B. on or before the day all the land, but that B. prevented him by some act or neglect of his. *Heard* v. *Wadham*, 1 East, 619.

Effect of Error.]—A deed which incorrectly recites the consideration of a contract on which a conveyance was executed, does not thereby warrant a suit in equity to set aside the contract, but only to reform the conveyance. *Harrison* v. *Guest*, 8 H. L. Cas. 481.

Form—Right of Purchaser.]—In a suit where the only question related to the form of the conveyance:—Held, that the purchaser had a right to choose the form of the conveyance, but no costs given. *Clark* v. *May*, 16 Beav. 273; 22 L. J., Ch. 302; 1 W. R. 69.

—— **General Words—Conveyancing Act, 1881, s. 6.**]—Under an open contract for the sale of land with the appurtenances, the purchaser is only entitled to have such general words expressed or implied in his conveyance as he would have been entitled to before the Conveyancing Act, 1881, came into operation; and if the general words implied by s. 6 of that Act are more extensive, the vendor is entitled to limit them accordingly. Sect. 6 of the Conveyancing Act, 1881, does not apply to contracts, but only shows what general words are to be taken as included in a conveyance where the conveyance is otherwise silent. *Peck and the London School Board, In re*, 62 L. J., Ch. 598; [1893] 2 Ch. 315; 3 R. 511; 68 L. T. 847; 41 W. R. 388.

—— **Insertion in habendum of Servitudes.**]—A condition that freehold property "is sold, and will be conveyed subject to all" particularised servitudes "(if any)," gives the vendor a right to have the words "subject," &c., inserted in the habendum of the conveyance though no such servitude is shown to exist. *Gale* v. *Squire*, 46 L. J., Ch. 672; 5 Ch. D. 625; 36 L. T. 632; 25 W. R. 226—C. A.

Right to Separate Conveyances.]—A vendor may be required by the purchaser to convey the land in parcels by separate conveyances at the same time, on tender of the entire purchase-money and the additional costs thereby occasioned, but not at intervals of time, without an express stipulation. *Egmont (Earl)* v. *Smith*, 46 L. J., Ch. 356; 6 Ch. D. 469.

Purchaser Retaining Draft.]—Form of order in a suit for specific performance where the draft conveyance had been approved of by the vendor and purchaser, but retained by the latter. *Hirst* v. *Stokehill*, 1 W. R. 479.

Conveyance Suspended.]—Conveyance of an estate to which defendant is entitled in equity suspended till an account of the rest of the estate should be taken in the original suit, from the danger of the plaintiff's losing his demand. *Shish* v. *Foster*, 1 Ves. sen. 88.

Building Lands.]—Where, on a conveyance of building land, in lots, the vendor takes a separate deed of covenant, the object of so doing is not to keep the notice of the covenant off the face of the title, but to obviate the necessity of executing the conveyance in duplicate. *Sydney* v. *Clarkson*, 13 L. T. 659.

Execution by Person Named.]—Proof that a conveyance was executed by a person named by the defendant, will support an averment in a declaration that he himself "became the purchaser." *Seaman* v. *Price*, 1 Car. & P. 586; 2 Bing. 437; 10 Moore, 34; Ry. & M. 195; 3 L. J. (O.S.) C. P. 58; 27 R. R. 684.

Execution Presumed.]—D. agreed with S. for the purchase of an estate, and that the purchase deed should contain a covenant by D. that he, his heirs, and assigns would pay to S., his executors, administrators, and assigns for coals gotten. The purchase deed was executed by S., but not by D. D., however entered:—Held, that the execution by D. of a counterpart of the deed containing the covenant could not be presumed, and there was no liability in D. or his representative under the covenant. *Witham* v. *Vane*, 44 L. T. 718.

Sale in Lots.]—A leasehold, subject to the yearly rent of 12*l.* 10*s.*, was put up for sale by auction in five lots, under conditions of sale, that each lot would be sold subject to the entire rent, but "with right of indemnity against the other lots, save as to 12*l.* 10*s.*," and another, that the original lease would be handed to "the purchaser of the largest lot in amount." At the auction only two lots were sold, one to O. for 200*l.*, and the other to S. at the same price. A few days afterwards, O. sent in a proposal to purchase another lot for 160*l.*, subject to the same conditions, which was accepted. S. subsequently, executed an agreement with O., surrendering in his favour a claim which he (S.) might have to the original lease. The two other lots remained unsold:—Held, O. was entitled to custody of the original lease, but not to have inserted in his conveyance a clause creating a rent-charge upon the other lots for their share in the rent reserved by the lease. *Doherty's Contract, In re*, 15 L. R., Ir. 247—C. A.

Order to Convey.]—In a decree for specific performance, a direction that the vendor shall convey has the same effect as a direction that the vendor and all other necessary parties shall convey. *Minton* v. *Kirkwood*, 37 L. J., Ch. 606; L. R. 3 Ch. 614; 18 L. T. 781; 16 W. R. 991.

Condition as to Parties.]—It being one of the terms of a contract, that certain parties were to join in the conveyance, the court would not con-

sider whether they were necessary or proper parties. *Benson* v. *Lamb*, 9 Beav. 502 ; 15 L. J., Ch. 218.

Conditions of sale stated that the purchaser should not require the persons beneficially interested in the premises or the purchase-money to concur in the sale. A suit in respect of the property had been compromised, and the compromise signed by the solicitors of all parties, and all parties except R. (a defendant to the suit) signed a power of sale to I. R. refused to concur in the sale agreed on in pursuance of the compromise :—Held, R. was not a necessary party to the conveyance. *Thompson* v. *Raine*, 28 L. T. 362—Ex. Ch.

R., sole acting executrix, sold, in 1885, leasehold, bequeathed in 1868 upon trust to pay debts :—Held, that as one of the conditions of sale provided that the purchaser should not require any of the legatees to be parties to the conveyance, the purchaser could not require the concurrence of the legatees or the executor who had not proved. *Ryan and Cavanagh, In re*, 17 L. R. Ir. 42.

Necessary Parties—Sale of Share.]—A. devised the residue of his property to his wife, in trust to divide it among their children in such manner as they should deserve : one of the seven children sold her share, and covenanted to make it up a full seventh ; this is good, and on a specific performance she can make a good conveyance without the mother joining. *Musprat* v. *Gordon*, 1 Anstr. 34 ; 3 R. R. 541.

—— **Sale by Administrator.**]—*See* ante, col. 1105.

—— **Sale by Tenant for Life.**]—Where property was devised to trustees for A. for life, for her sole and separate use, and after her decease for such person as she should appoint ; and A. conveyed to B. :—Held, on a conveyance to a third person, C. (A. being still living), that the trustees were necessary parties. *Hall* v. *L. C. & D. Ry.*, 14 L. T. 351.

—— **"Bare Trustees."**]—A testator devised his real estate to trustees for sale, who were married women, one of them having married before and the other after the Married Women's Property Act, 1882. Both of them also took beneficial interests in the proceeds of sale. Under the judgment in an action for the administration of the testator's estate, part of the real estate was sold by the trustees, the purchaser paying his purchase-money into court :—Held, that the married women were "bare trustees" within s. 6 of the Vendor and Purchaser Act, 1874, and that the conveyance to the purchaser did not require the concurrence of the husbands, or acknowledgment under the Fines and Recoveries Act. *Doewra, In re, Doewra* v. *Faith*, 54 L. J., Ch. 1121 ; 29 Ch. D. 693 ; 53 L. T. 288 ; 33 W. R. 574. And see *Morgan* v. *Swansea Urban Sanitary Authority*, supra, col. 1101.

—— **Copyhold Trustees.**]—A copyhold was devised to trustees for certain persons, who sold it, and the purchaser was admitted on the surrender of the customary heir :—Held, that although the purchaser had thus obtained both the legal and equitable title, to make a good title there must be a release from the trustees of their bare right to be admitted. *Steele* v. *Waller*, 28 Beav. 466.

—— **Dower Trustee.**]—A vendor being entitled under a limitation to uses to bar dower without a power of appointment, the purchaser insisted on the concurrence of the dower trustee :—Held, that the objection was frivolous and vexatious, and that costs ought not to be given to the purchaser. *Collard* v. *Roe*, 4 De G. & J. 525 ; 28 L. J., Ch. 560 ; 7 W. R. 623.

—— **Party unable to Execute through Infirmity.**]—On a bill for specific performance, stating a contract made with the sanction of the mortgagee, who was unable, through infirmity, to execute the conveyance, the court overruled with costs a demurrer, that the plaintiff had stated in his bill his inability to procure the execution of the deed by a necessary party. *Beaufort (Duke)* v. *Glynn*, 1 Jur. (N.S.) 888 ; 3 W. R. 463, 502.

—— **Tenant by the Curtesy.**]—R. took the benefit of the Insolvent Debtors Act in 1850, and a vesting order was made. In 1853 a remainder in fee became vested in possession in R.'s wife, and in 1854 R. and his wife made an equitable mortgage to C. with notice of R.'s insolvency. In 1855 R. became tenant by the curtesy :—Held, in a suit by the assignees for specific performance, that the question whether C. had not a valid charge on the estate by the curtesy was sufficiently doubtful to entitle the purchaser to require C.'s concurrence. *Murrell* v. *Goodyear*, 1 De G. F. & J. 432.

—— **Bankruptcy.**]—Where trustee is a beneficiary, and has a power of sale, the concurrence of his assignee in insolvency is necessary. *Young* v. *Tregear*, 21 W. R. 215.

—— **Heir-at-Law.**]—A purchaser of real property, the title to which is derived under a will, is not entitled to have the will established, or to have the concurrence of the testator's heir in the conveyance to him, unless some reasonable ground exists for doubting the validity of the will. *M'Culloch* v. *Gregory*, 3 K. & J. 12 ; 2 Jur. (N.S.) 1134.

Specific performance of contract for purchase of lands will not be refused where the heir-at-law has no reasonable claim to any beneficial interest, and his concurrence is matter merely of conveyance, not of title. *Minton* v. *Kirwood*, 37 L. J., Ch. 606 ; L. R. 3 Ch. 614 ; 18 L. T. 781 ; 16 W. R. 991.

A., having made a will devising all his property, and having contracted to sell the land, and afterwards died :—Held, that the heir-at-law of A. was not a necessary party to the conveyance. *Fowler* v. *Lightburn*, 11 Ir. Ch. R. 495.

A. articles to sell lands, and dies before a conveyance made ; the heir decreed to convey, and the purchase-money to be paid to the executors. *Baden* v. *Pembroke (Countess)*, 2 Vern. 215. S.P., *Daly* v. *Nalder*, 35 L. J., Ch. 52 ; 11 Jur. (N.S.), 921 ; 14 W. R. 45.

—— **Infant Heir.**]—Where confirmed purchaser of estate under a decree died before conveyance made, having in meantime devised his interests therein to trustees, court ordered conveyance to be made to them without consent of testator's heir-at-law, he being an infant. *King* v. *Gregory*, 4 Price, 380.

Defendant being in possession, and having exercised acts of ownership, payment of the money ordered, although an infant heir was a necessary party to the conveyance. *Bradshaw* v. *Bradshaw*, 2 Mer. 492.

The vendor dying intestate, and leaving an infant heir, the purchase-money being paid into court in a suit for a specific performance instituted after his death, will be retained till the heir attains twenty-one, and conveys. *Bullock* v. *Bullock*, 1 J. & W. 603.

—— **Infant Beneficiary.**]—No objection to sale in court under a will, that infants interested in will cannot join in conveyance. *Powell* v. *Powell*, 6 Madd. 53.

In a suit for partition, the estate was vested as to one moiety in A. in fee and as to the other moiety in B. in fee, in trust for infants:—Held, that a conveyance from B., and a decree of the court, would give A. a good title, and, therefore, that it was not necessary to order the infants to convey when they came of age. *Cole* v. *Sewell*, 17 Sim. 40.

—— **Judgment Creditors.**]—A. devised an estate which on death of devisee descended to N. Pending a suit instituted by A.'s creditors, judgments were entered up against N., which remained unsatisfied when the estate, together with the testator's other estates, was sold under the decree in the suit:—Held, that N.'s judgment creditors were necessary parties to the conveyance of the estate, and, as they could not be compelled to join in the conveyance, because they were not parties to the suit, that a good title could not be made. *Craddock* v. *Piper*, 14 Sim. 310.

A judgment was obtained against a party under a warrant of attorney. He afterwards took the benefit of the Insolvent Debtors Act:—Held, that the judgment creditor was a necessary party to the conveyance of the insolvent's real estate to a purchaser, notwithstanding the 1 & 2 Vict. c. 110, s. 61. *Hotham* v. *Somerville*, 9 Beav. 63; 14 L. J., Ch. 385; 9 Jur. 702.

Judgment registered in 1843. A mortgagee in 1844, made no searches; and in 1846, sold under his power of sale. The judgment was not re-registered till 1850:—Held, that, at the hearing on further direction, in 1853, the purchaser could not be compelled to complete without the concurrence of the judgment creditor. And, semble, that a title of vendor, a purchaser, without notice of a registered judgment, cannot be forced upon a purchaser. *Freer* v. *Hesse*, 4 De G. M. & G. 495; 23 L. J., Ch. 338; 17 Jur. 703; 1 W. R. 242, 487.

Held, also, that though the question was one of conveyance, yet, as it had occasioned the suit, the vendor, submitting to obtain the concurrence required, must pay the costs. *Ib.*

A. agreed to sell land to B., who accepted the title, paid part of his purchase-money, and was let into possession, but took no conveyance. A. subsequently obtained a decree against B. for sale of the property, and payment of the balance of purchase-money out of the proceeds:—Held, that a purchaser, under the decree, could not be compelled to complete without the concurrence of the registered judgment creditors of B., whose judgments were prior to the decree, and who were not parties to the suit. *Grey Coat Hospital* v. *Westminster Improvement Commissioners*, 1 De G. & J. 531; 26 L. J., Ch. 843; 3 Jur. (N.S.) 188; 5 W. R. 855.

Mortgage—Transfer.]—Sect. 4 of the Vendor and Purchaser Act, 1874, does not apply to a transfer of a mortgage, and therefore the legal personal representative of a mortgagee of freeholds cannot convey the estate to a transferee. *Spradbery's Mortgage, In re*, 49 L. J., Ch. 623; 14 Ch. D. 514; 43 L. T. 82; 28 W. R. 822.

Where Successive Mortgagees have assented to Sale.]—See *Wallis* v. *Woodyear*, 2 Jur. (N.S.) 179.

b. What passes by.

Mortgage by Testator—Conveyance by Trustees for Purposes of the Will—All the Estate Clause.]—The general rule that where a party conveys all his estate in a property to a purchaser, every estate vested in him will pass by the conveyance, although not vested in him in the character in which he is made a party, may be rebutted by the circumstances. A trustee in whom the legal estate was vested under a mortgage created by the testator, joined with his co-trustee in a conveyance in fee for the purposes of the will:—Held, that, having regard to the intention of the parties and the circumstances of the case, the legal estate did not pass. *Cooke and Bletcher's Contract, In re*, 13 R. 264.

General Words—"Yards."]—The parcels in a conveyance were described by reference to coloured parts of a plan. A yard, delineated, but not coloured in the plan, was held to pass under the general word "yards." *Willis* v. *Watney*, 51 L. J., Ch. 181; 45 L. T. 739; 30 W. R. 424.

——**Appurtenances.**]—It is settled by the earliest authority, repeated without contradiction to the latest, that land cannot be appurtenant to land, and the word "appurtenances" only includes incorporeal hereditaments attached to the land granted or demised, such as rights of way, of common, piscary, and the like, but it does not include additional lands. *Lister* v. *Pickford*, 34 Beav. 576.

M., possessed of two contiguous plots of ground, assigned one of them to T., "together with the right to use the walls on the north side" (i.e. on the adjoining plot) for building purposes. T. afterwards assigned the plot to the defendant by deed, the granting part of which was silent as to "rights, members and appurtenances," habendum "with the rights, members and appurtenances thereto belonging:" and, subsequently, M. assigned the adjoining plot of ground to the plaintiff:—Held, that the right to use the walls for building purposes passed with the plot of ground to the defendant. *Renwick* v. *Daly*, Ir. R. 11 C. L. 126. And see *Bolton* v. *Bolton*, ante, col. 1106.

Excess when Rectified.]—Words of conveyance passing more than was intended, relieved in chancery. *Beversham's case*, 2 Vent. 345.

A conveyance which passes too much may be rectified, and the excess deducted. Where a deed affects by its recital to carry an agreement into execution, and goes beyond the agreement, the court will rectify it. *Beaumont* v. *Bramley*, Turn. & R. 41.

Where there was a variation between the particulars for sale and a plan which was used at the sale, and the vendors executed a conveyance of the property according to the plan, and then applied for rectification:—Held, that the conveyance having been executed, primâ facie governed the relations between the parties and

evidenced their contract, but that if for the purpose of showing a mistake in the conveyance the prior written contract was to be looked at, then all the prior relevant transactions ought to be looked at also, and not the contract alone. *Ellis* v. *Hills*, 67 L. T. 287.

Parcels—Overhanging Buildings.]—A portion of premises as occupied overhung adjoining premises. The owner in fee of both premises demised them as occupied to separate persons. He subsequently conveyed the overhung premises by reference to a ground-floor plan, subject to the lease of those premises, but not expressly subject to the lease of the overhanging premises:—Held, that the overhanging part of the adjoining premises passed by the conveyance. *Layhourn* v. *Gridley*, 61 L. J., Ch. 352; [1892] 2 Ch. 53; 40 W. R. 474.

"Rights of Way and Water."]—Where an owner in fee of two adjoining houses, let to A. and B. as yearly tenants, allowed A.'s house to have a waterpipe running into the well of B.'s house, and at a subsequent sale of the houses by auction each tenant purchased his own house, such privilege of water supply does not pass as against B. under an ordinary reservation in the conditions of sale of "rights of way and water and other easements." *Russell* v. *Harford*, L. R. 2 Eq. 507; 15 L. T. 171; 14 W. R. 982.

Reservation.]—In June, 1870, an agreement was entered into by the secretary of a railway company for the purchase of land for the purpose of carrying a road over the line, and the agreement contained a proviso that the vendor, &c., should have a right of access to other lands belonging to him by and over any of the slopes which the company might arrange on their intended works. This agreement was not under seal. Possession was taken by the company, and a bridge was constructed over the line. In April, 1871, the land was, in consideration of the price named in the agreement, conveyed to the company without reserving any right of access to the vendor or in any way referring to the proviso contained in the agreement:—Held, that as the vendor by the terms of the conveyance had absolutely conveyed to the company every interest which he possessed in the land, any right of access previously stipulated for was thereby absolutely extinguished. *Teebay* v. *Manchester, Sheffield and Lincolnshire Ry.*, 52 L. J., Ch. 613; 24 Ch. D. 572; 48 L. T. 808; 31 W. R. 739. See also *Sumner* v. *Scholfield*, 43 L. T. 763.

——**Easement of Necessity.**]—There is no need to expressly reserve an easement of necessity in a conveyance, such reservation is a matter of legal presumption to be implied from the nature of the transaction between the grantor and grantee. *Shubrook* v. *Tuffnell*, 46 L. T. 886; 46 J. P. 694.

Without Impeachment of Waste.]—Trustees for a term without impeachment of waste sold the term, and in the deed of conveyance the words "without impeachment of waste" were omitted:—Held that the estate of the purchaser was unimpeachable of waste. *Beaumont* v. *Salisbury* (*Marquis*), 19 Beav. 198; 3 Eq. R. 369; 24 L. J., Ch. 94; 1 Jur. (N.S.) 458.

Easement—Knowledge of Purchaser.]—Mere knowledge of the manner in which property conveyed was used by a vendor for the convenience of an adjoining tenement will not affect the purchaser, if the property is conveyed without reservation. He was not entitled to an injunction. *Suffield* v. *Brown*, 4 De G. J. & S. 185; 3 N. R. 240; 33 L. J., Ch. 249; 10 Jur. (N.S.) 111; 9 L. T. 627; 12 W. R. 356.

A grantor cannot claim rights over property absolutely granted, even if such rights were, at the time of the grant, continuous and apparent easements enjoyed in respect of an adjoining tenement which remains the property of the grantor. *Ib.*

If an owner of two adjoining tenements conveys one of them to a purchaser absolutely, the tenement so sold is discharged from any quasi-servitudes to which it was subjected by the vendor during his ownership of both properties, and the purchaser is not bound to take notice of the manner in which the tenement purchased has been used for the convenience of the adjoining and unsold tenement. *Ib.*

The owner of land by deeds at different dates sold portions of the lower land with easements to enter the unsold upper lands, to fetch water and make gutters, &c., to convey a spring to the lower lands, and to build a reservoir and watercourse on the unsold upper land. Several years afterwards the upper land was sold, according to a particular, describing it as fit for building, and subject to conditions of sale, providing that if any mistake were made in the description of the premises, or if any other error should appear in the particulars, such error or omission should not annul the sale, but compensation should be given or taken. The existence of the easements was not stated in the particulars or conditions:—Held, first, that the circumstances of the purchaser living in the neighbourhood and being acquainted with the property, did not affect him with notice of the easements; secondly, that the existence of the easements constituted a material defect in the title to the upper land; thirdly, that the purchaser could not be compelled to take the title, with compensation as to lands prejudicially affected. *Shackleton* v. *Sutcliffe*, 1 De G. & Sm. 609; 12 Jur. 199.

A deed of conveyance purported to grant the whole of the demised premises without exception or qualification, and the covenants for title corresponded with the granting part; the vendor had previously assigned a portion of the premises to a railway company by a deed which had not been disclosed to the purchaser, but the works constructed by the company were apparent to any one, and the purchaser was aware of them before he purchased:—Held, that the condition of the premises being known to both parties at the time of the contract, they should be taken to have contracted as to them in that condition, and that the deed of conveyance should be rectified so as to carry out the real contract between the parties. *Young* v. *Hahahan*, Ir. R. 9 Eq. 70.

A. buys a house and finds 12 flues in it, but 14 chimney-pots on the wall:—Held, that he has constructive notice of an agreement under which the owner of the adjoining house uses the two remaining flues. *Herrey* v. *Smith*, 22 Beav. 299.

In 1864, B., in possession of lands under an agreement for a lease, obtained the consent of the board of works to stop up a public foot-path and substitute a new one, and this he did, but the

owners in fee never consented, and there was no actual dedication to the public. In May, 1866, a lease to B. was executed, describing the land by reference to a plan on which the new road was shown but marked "private road." The habendum was "subject to the existing rights of way." There were other rights of way. The lease became vested in W., who purchased by a sale plan in which the road was marked "private road." W.'s tenants stopped up the road:—Held, that W. was a purchaser without notice, there not being enough on the sale plans to affect him with notice that there was a public right of way; and that, therefore, assuming the existence of an agreement which could have been enforced against B., it could not be enforced against the defendants, W.'s tenants. *Att.-Gen.* v. *Biphosphated Guano Co.*, 49 L. J., Ch. 68; 11 Ch. D. 327; 40 L. T. 201; 27 W. R. 621. And see *Leigh* v. *Jack*, infra.

—— **Possession of Legal Estate.**]—Sale by direction of the court. S. purchased a lot with right of footway over another lot, but by the conveyance, a right of way for carts and carriages was granted. S. sold to C. with the right which had been conveyed to him. The owner of the servient lot, T., refused to allow the passage of carriages. T. had not completed his purchase:—Held, that C., being in possession of the legal estate, was entitled to an injunction against T., who was only an equitable owner, although T. purchased subject to the limited right only, and had no notice of the larger right actually conveyed. *Curtis* v. *Thomas*, 33 L. T. 664.

Land intended for Highway—No Dedication.]—The presumption that the soil of a highway belongs to the owner of the adjoining land, usque ad medium filum viæ, does not apply to ground which was intended to be used as a highway, but had never been dedicated to the public; and if the owner of the soil of the intended highway disposes of the adjoining land by conveyances in which it is described as bounded by the intended highway, the grantees do not acquire by presumption of law the ownership of the soil of the intended highway. Acts of user committed upon land, which do not interfere and are consistent with the purpose to which the owner intends to devote it, do not amount to a "dispossession" of him, and are not evidence of "discontinuance of possession" by him within the meaning of 3 & 4 Will. 4, c. 27, s. 3. *Leigh* v. *Jack*, 49 L. J., Ex. 220; 5 Ex. D. 264; 42 L. T. 463; 28 W. R. 452; 44 J. P. 483—C.A.

"Exclusive use of Gateway."]—M. and others were owners in fee of a house, fronting a street, and also of a yard and premises in rear of the house. A covered passage or gateway led from the street through the house to the premises in the rear. They conveyed the premises in the rear, "together with the exclusive use of the gateway," which was described by its dimensions, to W. in fee:—Held, that W. was entitled not merely to a right of way through the gateway, but to the use of the gateway for all lawful purposes. Semble, such a right amounted to the ownership of the space within the gateway. *Reilly* v. *Booth*, 44 Ch. D. 12; 62 L. T. 378; 38 W. R. 484—C.A.

"Ingress, Egress, and Regress."]—A grant of a right of "ingress, egress, and regress," is a grant of a right of way from the locus a quo to the locus ad quem, and from the locus ad quem forth to any other spot to which the grantee may lawfully go, or back to the locus a quo. By a deed of conveyance from a railway company of a close of land the grantee was given the right of free "ingress, egress, and regress," to and from certain private roads which bounded the close and led to the railway station and on to the public highways:—Held, that the grantee was entitled to pass from the close to the private roads, and thence to the public highways, or in the reverse direction, and was not limited to passing from the close to the railway station, or vice versâ. *Somerset* v. *G. W. Ry.*, 46 L. T. 883.

Rights of Third Parties—Renters' Stalls in Theatre burnt.]—Trustees acting for the shareholders or rentallers of a theatre granted in 1858 a disposition of the ground and buildings to one J. B., subject, inter alia, to the real burden of a perpetual annuity to each rentaller of the said theatre, and to the successors or assignees of them; and it was further declared that each of the said rentallers, or the assignee or successors of such, should at all times be entitled, inter alia, to free admission to the auditorium of the said theatre. There was no stipulation as to insurance of the theatre or as to the rebuilding of it in case of destruction by fire or otherwise. The theatre was two or three times burnt down and rebuilt by another name and twice sold, but in each case the conveyance was granted subject to the "real burdens, conditions, provisions, declarations, and others," specified in the original disposition of 1858, and especially under the burden of payment of the annuities to the rentallers, and of allowing "these parties the privileges to which they are entitled." The privilege of free admission was enjoyed by the rentallers for fourteen years after the destruction of the first theatre:—Held, that the privileges conferred on the rentallers by the original dispositions, other than the payment of the annuities, rested only on the personal obligation of the original disponee, and were confined to the theatre then in existence. *Scott* v. *Howard*, 6 App. Cas. 285.

Title to Approaches.]—On the sale of a house or stables in a cul de sac, the vendor is not bound to show a title to the roadway. *Curling* v. *Austin*, 2 Dr. & Sm. 129; 10 W. R. 682.

Sea Walls.]—The purchaser of lands situate below the level of the sea is bound to inquire how all walls necessary for the protection of his property against the encroachments of the sea are maintained. *Morland* v. *Cook*, 37 L. J., Ch. 825; L. R. 6 Eq. 252; 18 L. T. 496; 16 W. R. 777.

c. Costs and Stamps.

General Rule.]—Expense of conveyance falls on the purchaser if no particular stipulation. *Bolton (Duke)* v. *Williams*, 2 Ves. J. 155; 4 Bro. C. C. 297; *see* 7 R. R. 285.

Costs of Perusal.]—The conditions of sale requiring purchaser to pay the expenses of all assignments and surrenders of terms, &c.:—Held, that the purchaser must pay the expenses of perusal and execution. *Johnson* v. *George*, 2 Jur. 886.

Where Stipulation.]—Construction of a contract, that a reference of the expenses was confined to the expense of the conveyance; but evidence was admitted to prove the intention of both parties, that the purchaser should also pay the expense of making out the title. *Ramsbottom* v. *Gosden*, 1 V. & B. 165; 12 R. R. 207.

—— **Surrender.**]—A vendor agreed to surrender, or procure some person to surrender, and the costs of the surrender were to be paid by the purchaser. It was found necessary to procure a surrender under the Trustres Act:—Held, that the costs of the proceedings ought to be paid by the vendor. *Bradley* v. *Munton*, 16 Beav. 294.

—— **Admission to Copyholds.**]—A condition of sale, that "the purchasers should have proper surrenders, conveyances, and assignments of the premises at their own expense," did not bind them to bear the expense of procuring the concurrence of all proper parties. Where, therefore, it was necessary for the heir of a trustee to be admitted, the fine and fees on that admission were ordered to be paid by the vendors. *Paramore* v. *Greenslade*, 23 L. J., Ch. 34; 17 Jur. 1064.

—— **Getting in Outstanding Estate.**]—On the sale of an estate, one of the conditions provided, that if the purchaser should require a conveyance of any outstanding term, all the expenses attending the getting in and conveyance, of such estate should be borne by the purchaser. The estate was in 1823 conveyed to trustees for a term of 1,000 years, to secure the payment of a sum of money, the payment of which was under orders of court provided for:—Held, that the purchaser was entitled to an assignment of the term, the costs of which, not having been provided for by the conditions of sale, must be borne by the vendors. *Stronge* v. *Hawkes*, 2 Jur. (N.S.) 388.

—— **Reinvestment.**]—Sale of settled estates, upon the condition that C. bear all the expenses incident to and consequent on his proposal to purchase, and the negotiations consequent thereon and the obtaining the act of parliament, &c., "and all other expenses whatsoever of A. and B., in consequence of the sale, or arising out of or in anywise relating thereto." The act of parliament was obtained, directing that the purchase money should be invested in stock until it could be invested in real estate, to be held upon the original trusts:—Held, that the expenses of reinvesting the purchase money in real estates were not such expenses as C. was, under the agreement, bound to pay, as being incidental, &c., to the sale. *Witts, Ex parte*, 6 Jur. 936. And see *London Bridge Acts, In re*, 13 Sim. 180.

Sale by a Company.]—On a sale by official manager of a company being wound up, a condition of sale provided, that if the purchaser should consider the legal state to be outstanding, and should require a conveyance thereof, he should bear the expense of obtaining such conveyance, and all other expenses incidental thereto:—Held, that under the condition, it was incumbent upon the purchaser, and not the official manager, to find out and specify the person in whom the legal estate was outstanding, and that then the official manager was, at the expense of the purchaser, to get such conveyance or conveyances of the legal estate as the purchaser should require and the official manager could obtain. *Sheerness Waterworks Co. Official Manager* v. *Polson*, 3 De G. F. & J. 36; 29 Beav. 70; 30 L. J. Ch. 326; 7 Jur. (N.S.), 12; 4 L. T., 568; 9 W. R. 113.

Stamps.]—Contract to sell a freehold groundrent of 20*l*., arising from a wharf, "subject to an agreement for a lease for a term" of years. The agreement mentioned was unstamped. On a bill for specific performance by the purchaser:—Held, that the agreement was part of the subject of the contract, and that the vendor was bound to perfect it by having it properly stamped. *Smith* v. *Wyley*, 16 Jur. 1136.

—— **Mortgage.**]—A ten-shilling deed stamp on a mortgage deed is insufficient, therefore a purchaser is entitled on a contract for sale with a mortgagor to require the mortgage deed, when so stamped, to be stamped before completion to the full ad valorem duty at the vendor's expense, notwithstanding the mortgagee may have consented to join in the conveyance. *Whiting* to *Loomes*, 50 L. J., Ch. 463; 17 Ch. D., 10; 44 L. T. 721; 29 W. R. 435.

—— **Land Society—Reconveyances.**]—A land society conveyed allotments to members and subsequently repurchased them from the members, repaying them the purchase-money; the reconveyances were indorsed on the original conveyances but were not stamped:—Held, that it was not necessary that the reconveyances should be stamped. *Whiting* to *Loomes* (supra) distinguished. *Birkbeck Freehold Land Society, Ex parte*, 52 L. J., Ch. 777; 24 Ch. D. 119; 49 L. T. 265; 31 W. R. 716.

11. COVENANTS.

a. In General.

Implied—Conveyance subject to Mortgage.]—On a conveyance for value of lands subject to a mortgage, and expressed to be so conveyed, there is, in the absence of express agreement, an undertaking implied by law on the part of the purchaser to indemnify the vendor against personal liability on foot of mortgage. *Adair* v. *Carden*, 29 L. R., Ir. 469.

Not to Sell Water.]—Covenant upon a conveyance in fee with the grantors, lessees of the waterworks, not to sell or dispose of water to the injury of the proprietors of the said waterworks, their heirs, executors, administrators, and assigns. Whether the covenant runs with the land, whether it is contrary to the policy of the law, and as to the effect of a renewal of the lease, quære. *Collins* v. *Plumb*, 16 Ves. 454; 10 R. R. 214.

To build Wall—Damages.]—Covenant to enclose lands with a brick wall. It appeared that, in the events that had happened, the value of the adjoining land was not decreased by the nonerection of the wall to anything like the amount which it would have cost to build the wall:—Held, that the true measure of damages being the pecuniary amount of the difference between the position of the plaintiffs upon the breach of covenant and what it would have

been if the covenant had been performed, under the circumstances of the case the amount that it would cost to build the wall was not the correct measure of the damages. *Wigsell* v. *School for Indigent Blind*, 51 L. J., Q. B. 330; 8 Q. B. D. 357; 46 L. T. 422; 30 W. R. 474.

Building Covenants—As to Roads.]—A covenant for "the free use of the newly intended road whenever the same may be made," will not apply to a road which, when the parties contracted, was newly intended to be made, but was executed and complete before the sealing of the deed. *Crisp* v. *Price*, 5 Taunt. 548.

A messuage, consisting of two parts, separated by intervening reserved land, subject only to a specific right of way for the lessee to a third building for a specific purpose, was demised; the reservation, strictly interpreted, would preclude him from all access to the one part, which was accessible only by crossing the reserved land in one of two directions, the one by entering it from the residue of the demised premises; the other, and far the more convenient, by entering it from a public street:—Held, that the lessee was entitled to a way across the reserved land from the public street to that part. *Morris* v. *Elgington*, 3 Taunt. 24.

By a deed reciting that the defendants had appropriated and laid out certain meadows as building ground, they demised a piece of the land to the plaintiff, who covenanted to build thereon two houses, and the defendants covenanted "that on such buildings being covered in, they would cut good and sufficient roads in, through and over the meadows, and construct a good and sufficient sewer under the intended roads, for the common use of the plaintiff, and all other lessees or tenants of the other portion of the meadows":—Held, that the defendants' covenant was not satisfied by their making a road up to the plaintiff's houses, but that, as soon as those houses were covered in, the defendants were bound to make good and sufficient roads over the whole meadows as contemplated by the building scheme, although no other houses than the plaintiff's had been built. *Mason* v. *Cole*, 4 Ex. 375; 18 L. J., Ex. 478.

Parties to Sue for Breach.]—Persons who have no title in their own persons to raise an action, cannot have the right to sue, where nil, validated by the consent and concurrence of the party to whom alone such right of action belongs. B. and C., owners of an adjoining feu, raised an action with "consent and concurrence" of the common superior to enforce building restrictions contained in A.'s feu contract:—Held, that B. and C. were strangers to the action, and therefore had no title to sue. *Hislop* v. *Leckie*, 6 App. Cas. 560—H. L. (Sc.)

Where no Damage.]—It is no defence to an application for an injunction to restrain a breach of covenant to say that the covenantee sustains no damage from the breach, for if the covenantor derives any benefit therefrom, the covenantee may reasonably demand a share of it as the price of his consent. *Wells* v. *Attenborough*, 24 L. T. 312; 19 W. R. 465.

Where there is a clear breach of covenant the covenantees are entitled to an injunction and no damage need be shown. *Manners (Lord)* v. *Johnson*, 45 L. J., Ch. 404; 1 Ch. D. 673; 24 W. R. 481.

Land Sold subject to.]—A purchaser contracted to purchase a piece of land. On the abstract it appeared that the land was subject to covenants. The purchaser tendered a draft conveyance, to which the vendors added similar covenants on the part of the purchaser:—Held, that the purchaser could elect either to take a conveyance with the covenants or to rescind the contract. *Lukey* v. *Higgs*, 3 Eq. R. 510; 24 L. J., Ch. 495; 1 Jur. (N.S.) 200; 3 W. R. 306.

In a sale by the court the particulars of sale contained certain reservations and stipulations as to the property, and one of the conditions of sale provided that the conveyances should contain covenants by the purchasers for securing the liabilities and rights under such reservations and stipulations, the form of such covenants, in case of dispute, to be settled by the judge. A dispute having arisen between a purchaser and the vendor, the judge settled the covenant, adding a proviso that if the purchaser assigned his purchase, and the assignee entered into a similar covenant, the purchaser should be freed from further liability:—Held, that the vendor was entitled to an unqualified covenant, and that the proviso must be struck out. *Pollock* v. *Rabbits*, 21 Ch. D. 466; 47 L. T. 637; 31 W. R. 150.

The order of a judge settling the form of a conveyance is subject to appeal. *Ib.*

Charge—Covenant by Purchaser.]—Where, by a memorandum of agreement, the defendant agreed to sell certain cottages and gardens lately purchased by him to the plaintiff, for an annuity payable to the defendant during his life, which was to be charged on the premises, and the defendant was empowered to sell for the purpose of raising any arrears:—Held, that the vendor was entitled not only to the security of the charge, but also of the covenant of the purchaser, for payment. *Bower* v. *Cooper*, 2 Hare, 408; 11 L. J., Ch. 287; 6 Jur. 681.

Against Alienation.]—To a suit for specific performance, by the purchaser against the vendor of a leasehold interest, it is not a defence that the lease contains a covenant against alienation without the consent of the landlord, and that it does not appear that the consent of the landlord has been obtained. *Leitch* v. *Simpson*, Ir. R. 5 Eq. 613.

In Lease.]—Where property put up for sale is described merely as held by the vendor as assignee under a lease, the purchaser cannot object to complete on the ground that the lease contains a covenant not to carry on obnoxious trades. *Grosvenor* v. *Green*, 28 L. J., Ch. 173; 5 Jur. (N.S.) 117; 7 W. R. 140.

Constructive Notice.]—Where property was sold by private contract, under conditions of sale, one of which alluded to letters patent:—Held, that the purchaser had constructive notice of the covenants contained in the letters patent (Temp. Car. 1.) under which the lands were held. *Stewart* v. *Conyngham (Marquis)*, 1 Ir. Ch. R. 534.

Sale of Quit Rents including Arrears.]—A seller covenanted with a purchaser of an estate, that he should enjoy and receive the rents, without any action or interruption by the seller, or those claiming from him, or by, through, or with

his or their acts, means or default :—Held, that a breach was well assigned in respect of certain quit rents in arrear before and at the time of the conveyance, though not stated to have accrued while the seller was tenant of the premises. *Howes* v. *Brushfield*, 3 East, 491.

Running with Land.]—A covenant relating to but not running with land is binding on an assign with notice. *Luker* v. *Dennis*, 47 L. J., Ch. 174 ; 7 Ch. D. 227 ; 37 L. T. 827 ; 26 W. R. 167.

A proviso in a lease of a seam of coal under lands empowered the lessor to distrain for rent the chattels, effects, goods, &c., employed upon or under the lands, in connection with the working of the coal, as well within the limits of the lands, as also in, or under or about any other lands in which there should be any pits or openings, through which the coal demised should be for the time being in course of working by the lessees, their executors, administrators and assigns, and for that purpose to enter into and upon such other lands : — Held, that such a proviso or covenant could not attach to land in which the lessor had no interest, and that he could not by virtue of it distrain on any "such other lands" after an assignment of the lessees' interest therein. *Daniel* v. *Stepney*, 41 L. J., Ex. 208 ; L. R. 9 Ex. 185 ; 27 L. T. 380 ; 22 W. R. 662—Ex. Ch.

—— **To Maintain Walls.**]—Lands situated below the level of the sea were partitioned by a deed containing a covenant that the expense of keeping and maintaining the walls and gutts of and belonging to the lands thereby divided, should be borne by the owners, and should be payable out of the lands by an acre-scot. Semble, that the covenant was one which would run with the land although the assigns of the covenantors were not named. *Morland* v. *Cook*, 37 L. J., Ch. 825 ; L. R. 6 Eq. 252 ; 18 L. T. 496 ; 16 W. R. 777.

—— **As to Mines.**]—A covenant by the purchaser to the vendor of copyhold land, that the vendor shall be able to work mines underneath the land sold without incurring any liability for injury to the surface, does not run with the land. *Richards* v. *Harper*, 4 H. & C. 55 ; 35 L. J., Ex. 130 ; L. R. 1 Ex. 199 ; 12 Jur. (N.S.) 770 ; 14 W. R. 643.

Novel Rights.]—A vendor cannot create rights not connected with the enjoyment of the land and annex them to it, nor can the owner of land render it subject to a new species of burden, so as to bind it in the hands of an assignee. *Ackroyd* v. *Smith*, 10 C. B. 164 ; 19 L. J., C. P. 315 ; 14 Jur. 1047.

And see infra, col. 1223.

Covenant for Production.]—If a vendor retains title deeds and covenants for further assurance only, the purchaser may compel him to enter into a covenant for production under that covenant. *Fain* v. *Ayers*, 2 Sim. & St. 533 ; 4 L. J. (O.S.) Ch. 166 ; 25 R. R. 264.

Covenants for Title.]—*See* supra, col. 1197.

Non-performance of Covenants.]—*See* infra, col. 1476.

b. Restrictive.

i. *In General.*

Personal to Vendor.]—G., a lessee, contracted with the trustees of his lessor, to purchase the reversion. Prior to the contract, the trustees had sold the adjoining house to W., and had covenanted with W. that they, the vendors, "would not, either alone or jointly with any other person or persons take proceedings to prevent the said house, or any other house or erections that might thereafter be constructed on the said premises, being used or occupied by convalescent fever or other patients" :—Held, that the covenant was a mere personal covenant binding the vendors only and did not in any way bind G. *Groves* v. *Loomes*, 55 L. J., Ch. 52 ; 53 L. T. 592 ; 34 W. R. 94.

Building Covenants — Sale of Lot subject to Existing Covenants.]—K. purchased one lot at a sale of building land, intended to be laid out according to a general building scheme, and entered into covenants with the vendor and with the purchasers of other lots to observe a building line. K. made an equitable mortgage of half his lot to F., and F. obtained a foreclosure order absolute against K., and K. having refused to convey the property, an order was made vesting the property in F. F. had entered into no covenant with K., but it was admitted that he had notice of and took his mortgage subject to the existing covenants :—Held, that at the date of the mortgage, the land was subject only to covenants enforceable by the original vendor and the adjoining owners, and that K. not having taken any fresh covenant from F. had no power to enforce these existing covenants. *King* v. *Dickeson*, 58 L. J., Ch. 464 ; 40 Ch. D. 596 ; 60 L. T. 785 ; 37 W. R. 553.

——**Personal to Builder.**]—F., a builder, bought one lot of an estate laid out for building, and covenanted with the vendors that "he, his heirs, executors, administrators, and assigns," would do certain acts in respect of the property purchased, and "the said F. erecting any building on the said land shall only erect" buildings of a certain description :—Held, that the restrictive covenant was only a personal covenant binding on F., and that a purchaser from F.'s devisees could not object to the title on the ground that this covenant had not been disclosed. *Fawcett and Holmes, In re*, 58 L. J., Ch. 763 ; 42 Ch. D. 150 ; 61 L. T. 105—C.A.

Usual Covenant.]—A. deed of grant contained a covenant to build houses on the land, the rent of which should be double the value of the rent reserved by the deed, without limiting any time within which such building was to be required : —Held, that such covenant was unusually restrictive. *Andrew* v. *Aitken*, 52 L. J., Ch. 294 ; 22 Ch. D. 218 ; 48 L. T. 148 ; 31 W. R. 425.

Semble, that although the assignee of the grantee of the land was not liable affirmatively on such covenant, he might be called on to allow the house to be built in accordance with the covenant. *Ib.*

Indemnity.]—A vendor liable on a restrictive covenant which prohibited building on the land, put it up for sale, pursuant to particulars and conditions, noticing the existence of the covenant, but not stipulating that the purchaser should enter into any covenant on the subject. On a bill for specific performance, filed by the purchaser :—Held, that the plaintiff was not entitled to a conveyance, unless on the terms of

giving or providing for the vendor a sufficient indemnity against any breach of the covenant on the part of the plaintiff, his heirs, appointees, or assigns. *Mœhay* v. *Inderwick*, 1 De G. & Sm. 708.

Held, also, that a covenant on the part of the plaintiff, his heirs, executors, administrators, appointees, and assigns, with the defendant, his heirs, executors, and administrators, to the same effect, mutatis mutandis, as the covenant entered into by the vendor on his own purchase, ought to be considered as a sufficient indemnity. *Ib.*

Between Purchasers.]—Building land was sold in a number of lots, subject to certain conditions as to fencing, repairing the roads, and to restrictions as to the class of houses to be built. The conditions also provided, that statements to this effect should be inserted in the conveyances. By the 15th condition the vendor reserved the right of selling the unsold lots under different arrangements, "and either subject to or not subject to the stipulations as to fencing and other stipulations contained in the particulars or the conditions":—Held, first, that as to the unsold lots the vendor was subject to none of the restrictions; secondly, that the purchasers were bound to have not only the restrictive conditions stated on their conveyances, but also the 15th in favour of the vendor; and thirdly, that a separate deed of covenant by a purchaser as to the restrictions was a sufficient compliance with the provision as to the statement on the conveyances. *Sidney* v. *Clarkson*, 35 Beav. 118.

—— **Withdrawal of One Lot.**]—Two lots of land were put up for sale under conditions which provided that each purchaser should enter into a covenant with the vendor and the purchaser of the other lot not to use any building on his lot as a public-house. No provision was made for the case of a lot remaining unsold. Lot 2 was purchased at the sale, and the purchaser signed a contract embodying the conditions. Lot 1 remained unsold:—Held, that the purchaser was bound to enter into the restrictive covenant with the vendor. *Mordy and Cowman, In re*, 51 L. T. 721—C. A.

Power of Entry.]—In a contract for a purchase of land, there is a stipulation that the conveyance shall be made subject to certain conditions and restrictions as to building upon the land, and to a covenant for their observance, and proper provisions for securing the due performance thereof:—Held, that this contract entitled the vendor to have a power of entry inserted in the conveyance in case of a breach of the covenant, but not to have a term of years or a rentcharge limited to a trustee. *Ralph, Ex parte, Dobbs, In re*, 1 De G. 219.

Sale by Auction—Onerous and unusual Covenants in Lease—Nondisclosure by Vendor—Constructive Notice—Duty to Inquire.]—It is established by the the decision in *Reeve* v. *Berridge* (supra, col. 1174) that it is primâ facie the duty of the vendor on a sale of property to disclose all that is necessary to protect himself, and not the duty of the purchaser to make inquiry before entering into a contract; and that is so whether the sale is by public auction or private contract. *White and Smith's Contract, In re*, 65 L. J., Ch. 481; [1896] 1 Ch. 637; 74 L. T. 377; 44 W. R. 424.

Accordingly, where on a sale of leasehold property the purchaser's attention is not called, either by the particulars or otherwise, to the possible existence of onerous and unusual covenants in the lease, and he is not informed that he will be allowed, if he desires it, to examine the lease before the sale, he will not be acting otherwise than as a business man of ordinary caution if he abstains from examining the lease, and will not under such circumstances be affected with constructive notice of the contents of the lease, or, if the lease contains onerous and unusual covenants, be compelled to complete. *Ib.*

Whether Running with Land.]—A covenant relating to but not running with land is binding on an assign with notice. *Luker* v. *Dennis*, 47 L. J., Ch. 174; 7 Ch. D. 227; 37 L. T. 827; 26 W. R. 167. *And see* infra, col. 1225.

A purchaser of a piece of land with a well upon it covenanted with the vendor, who retained land adjoining, to erect a pump and reservoir, and to supply water from the well to all houses built on the vendor's land:—Held, that both the benefit and the burden of the covenant ran with the land, and that the case was not within the second resolution in *Spencer's Case* (5 Rep. 16, a; 1 Sm. L. C. 60), but if not, a subpurchaser with notice of the covenant was bound by it. *Cooke* v. *Chilcott*, 3 Ch. D. 694; 24 L. T. 207.

A covenant, by a purchaser of land not naming assigns, that no building on the land should be used for the sale of beer, does not run with the land. *Wilson* v. *Hart*, 2 H. & M. 551. Affirmed L. R. 1 Ch. 463; 11 Jur. (N.S.) 735; 12 L. T. 798; 13 W. R. 988. And see *Patman* v. *Harland*, infra, col. 1225.

The owners of a freehold property, on a sale of a plot of land to the plaintiff, covenanted with him not to allow any house built on the adjoining land to be used for the sale of liquor:—Held, that an assign with notice was in the same position as a party to the covenant, and that, therefore, the court will not require substantial damages to be shown before granting an injunction to restrain a breach. *Richards* v. *Revett*, 47 L. J., Ch. 472; 7 Ch. D. 224; 37 L. T. 632; 26 W. R. 166.

An assignee of land with notice of a covenant is subject in the same measure of relief as if he had been party to the covenant, and the covenantee suing on breach of the covenant is no more bound to prove substantial damage in one case than in the other. *Ib.*

——**User of Land.**]—A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding on subsequent purchasers at law. *Tulk* v. *Moxhay*, 2 Ph. 774; 1 Hall & Tw. 105; 18 L. J., Ch. 83; 13 Jur. 89.

According to *Tulk* v. *Moxhay* (supra), if parties purchase land with notice of a covenant concerning it, but which does not run with the land so as to bind them at law, equity will not permit them to do anything contrary to the true meaning of that covenant. *Patching* v. *Dubbins*, 1 Kay, 1; 17 Jur. 1113; 2 W. R. 2. Affirmed, 2 Eq. R. 71; 23 L. J., Ch. 45.

Land was granted to J. in fee subject to a rentcharge. The grantee covenanted for himself, his heirs, executors, and administrators, that he, his heirs and assigns, would pay the rent, would erect buildings on the land, and would thereafter keep them in repair. The grantor afterwards assigned the rentcharge with the benefit of all covenants to the plaintiff, and the land and the buildings which had been erected came by assignment to A., who mortgaged them, subject to the covenants, to the defendants, who afterwards entered into possession. In an action on the covenant to repair :—Held, that the defendants were not liable, that the covenant did not run with the land, that it was a collateral affirmative covenant, and did not impose a burden on the land, so that the defendants could not, as assignees with notice, be compelled to perform it. *Haywood* v. *Brunswick Permanent Benefit Building Society*, 51 L. J., Q. B. 73 ; 8 Q. B. D. 403 ; 45 L. T. 699 ; 30 W. R. 299.

Cooke v. *Chilcott* (supra), questioned. *Tulk* v. *Moxhay* (supra), explained. *Ib.*

Whether Appurtenant.]—A. conveyed Whiteacre to B., his heirs, and assigns, together with all ways, paths, and passages, particularly the right and privilege to and for the owners and occupiers for the time being of Whiteacre, and all persons having occasion to resort thereto, of passing and repassing, with or without horses or carriages, for all purposes, in, over, along, and through Blackacre. B. conveyed Whiteacre, with the appurtenance to C. :—Held, that the right and privilege exercisable over Blackacre granted by A. to B. were not confined to purposes connected with the occupation and enjoyment of Whiteacre, but that the right and privilege, as granted, did not run with the land, not being of such a nature as to inhere in the land, or to concern the premises conveyed, or the mode of occupying them. *Ackroyd* v. *Smith*, 10 C. B. 164 ; 19 L. J., C. P. 315 ; 14 Jur. 1047.

Undertaking to Construct Roadway and Footpath.]—In an action to recover from the defendant certain expenses paid to a highway authority for paving, &c., a new street prior to its being taken to by the parish, it was proved that the defendant had constructed the roadway and footpath in pursuance of an undertaking given by him to the plaintiff upon an assignment by him to the plaintiff of his interest in premises adjoining the street :—Held, that the fact of the parish authority having paved, &c., the roadway and footpath, prior to taking to it, was not evidence of the defendant not having fulfilled his undertaking ; and that the defendant was not bound by his undertaking to construct the roadway and footpath to the satisfaction of the highway authority, and keep it in repair until it became a street repairable by the inhabitants at large. *Read* v. *Bullen*, 46 J. P. 359.

Whether Tending to a Perpetuity.]—Certain persons having formed themselves into a company for the establishment of a railroad called the Trevil, E. & J., who held certain ironworks under a long lease, covenanted with the proprietors of the railroad and their assigns, that they, their executors, administrators and assigns would procure all the limestone wanted for the ironworks from the Trevil quarry, and carry it along the Trevil railroad, paying a certain toll. E. & J. assigned their lease of the ironworks to the defendants, who began to construct a railroad to other lime quarries situated eastward of the Trevil quarry. On a bill for an injunction to restrain them from using that or any other new road :—Held, that the covenant was valid and did not tend to create a perpetuity. *Keppel* v. *Bayley*, 2 Myl. & K. 517.

—— **Land Never to be Sold.**]—A deed of conveyance contained an agreement that certain land, described in the deed, should "never be hereafter sold, but should be left for the common benefit of both parties and their successors" :—Held, that the agreement was good as being an agreement on the part of the grantor to leave the land in the state in which it was at the time of the conveyance : and because the agreement contemplated, not an uncertain and indefinite use of the land by the parties, but that the land should be left open for the advantage of the parties as adjoining proprietors. *McLean* v. *McKay*, L. R. 5 P. C. 327 ; 29 L. T. 352 ; 21 W. R. 798—P. C. *And see* next case.

By his will a testator devised his property to trustees upon trust for his eldest son for life, with remainder in trust for his first and other sons in tail male, with remainder in trust for the testator's second and third sons successively for life with the like limitations to their first and other sons respectively, with remainder in trust for his grandson for life, with remainder to his first and other sons in tail male, with remainders over. In accordance with a power to that effect in the will, the trustees sold a portion of the settled land to a tenant for life, and by a separate deed he covenanted with the trustees that he would not, "during the continuance of the strict settlement," sell or dispose of the land otherwise than as therein mentioned :—Held, that the covenant was void as tending to a perpetuity. *Trevelyan* v. *Trevelyan*, 33 L. T. 853.

—— **Reservation of Minerals.**]—Covenant on conveyance of land (reserving minerals) by vendor, that if vendor should at any time thereafter sell mines under adjoining lands the vendor would at the same time offer to the purchaser the mines thereby reserved upon certain terms : —Held, that this covenant was not obnoxious to the rule against perpetuities. *Birmingham Canal Co.* v. *Cartwright*, 48 L. J., Ch. 552 ; 11 Ch. D. 421 ; 40 L. T. 784 ; 27 W. R. 597.

—— **Rent to arise at any Time.**]—Where it was agreed between a covenantor and covenantee that a rent was to arise at any time thereafter when the mortgagees should enter into possession :—Held, that though no rent can be created which violates the law against remoteness, as a rent in fee simple may be granted to a man and his heirs to continue for ever, so also one may be granted to commence at any time, however remote. *Gilbertson* v. *Richards*, 5 H. & N. 459 ; 29 L. J., Ex. 213 ; 6 Jur. (N.S.) 672.

—— **To Reconvey.**]—By a deed which recited that the plaintiff company were seised in fee of certain land not required for the purposes of their railway, the company conveyed the land to P. in fee, and P. covenanted that he, his heirs, and assigns would at any time thereafter, whenever the land might be required for the railway

and whenever thereunto requested by the company on a six months' notice, reconvey on receiving the same sum as that paid by P. :—Held, that an executory interest in property to arise on a future event which may not happen within the limits of the rule against perpetuities is void, though it be limited to an ascertained person who can release it at any time. The dictum in *Gilbertson* v. *Richards* (supra) dissented from. Held also, that as the covenant gave to the company an executory interest in land to arise on an event which might occur after the period allowed by the rules as to remoteness, it was invalid on the ground of remoteness. *Birmingham Canal Co.* v. *Cartwright* (supra) overruled. The doctrine of *Tulk* v. *Moxhay* (supra) only applies to restrictive covenants and not to covenants to do acts relating to the land. *L. & S. W. Ry.* v. *Gomm*, 51 L. J., Ch. 530; 20 Ch. D. 562; 46 L. T. 449; 30 W. R. 620—C. A.

Liability of Assignee.]—The purchaser of a plot of ground agreed that no building erected on it should be used as a public-house during twelve years and a half. The agreement did not appear on the conveyance. The purchaser's assignee built a public-house on the plot, and let it to a yearly tenant. The assignee had notice, but the tenant had not. On a bill against the assignee and his tenant, an injunction was granted to restrain the assignee from allowing the premises to be used as a public-house; the injunction to be suspended during the existing tenancy. *Carter* v. *Williams*, 39 L. J., Ch. 560: L. R. 9 Eq. 678; 23 L. T. 183; 18 W. R. 593.

A sub-tenant is liable to a restrictive covenant entered into by the purchaser of the freehold for himself and his assigns, though neither the sub-tenant nor his lessor has actual notice of it, and in spite of the provision of s. 2 of the Vendor and Purchaser Act, 1874, preventing the examination of the title to the freehold. *Thornewell* v. *Johnson*, 50 L. J., Ch. 641; 44 L. T. 768; 29 W. R. 677.

Each of the original owners of houses entered into covenants with the original owner of all the land on which they stood :—Held, that whether the covenants did or did not run with the land, a purchaser of one of the houses, with notice of the covenants, was bound by them in equity. *Western* v. *Macdermott*, L. R. 2 Ch. 72; 12 Jur. (N.S.) 366; 15 L. T. 641; 15 W. R. 265.

Constructive Notice.]—A lessee having notice of a deed forming part of the title of his lessor, has constructive notice of the contents of such deed, and is not protected from the consequences of not looking at the deed, even by the most express representation on the part of the lessor that it contains no restrictive covenants. The rule that a lessee has constructive notice of his lessor's title has not been altered by s. 2, sub-s. 1, of the Vendor and Purchaser Act, 1874, but a lessee is now in the same position with regard to notice as if he had, before the act, stipulated not to inquire into his lessor's title. *Wilson* v. *Hart* (supra, col. 1222) observed upon. *Patman* v. *Harland*, 50 L. J., Ch. 642; 17 Ch. D. 353; 44 L. T. 728; 29 W. R. 707. And see *White's Mortgage, In re*, infra, col. 1504.

Who May Sue on.]—Covenant by vendors of part of estate to be laid out for building with A. "not to erect thereon, or use or permit to be used any building to be erected thereon as a tavern, public-house, or beershop." Part was subsequently sold to G., subject to this covenant, who sold to H., also subject to this covenant: I., a yearly tenant under H., obtained an "off licence":—Held, that B., an assign of A., was entitled to an injunction and damages against H. and I., in respect of the breach of covenant in selling beer under an "off licence." *Nicoll* v. *Fenning*, 51 L. J., Ch. 166; 19 Ch. D. 258; 45 L. T. 738; 30 W. R. 95.

Where there are mutual covenants by owners of land, their heirs and assigns, with the owners of adjoining land, their heirs and assigns, to comply with certain stipulations, the subsequent lessee of one of the owners is entitled to the benefit of the covenants as an assign, and can sue to restrain a breach. *Taite* v. *Gosling*, 48 L. J., Ch. 397; 11 Ch. D. 273; 40 L. T. 251; 27 W. R. 394.

Covenant by purchaser that he would not do, or suffer to be done, on the premises anything which would be a nuisance to the vendor or his tenants, or the occupiers or owners of the adjoining property, or the houses to be built thereon. The purchaser sold under an exactly similar covenant :—Held, that by the word "adjoining" in the last-mentioned covenant was meant the property adjoining each lot, and not merely the property adjoining the whole piece of land originally sold; and that the owner of any lot was entitled to enforce the covenant against the owner of any other lot. *Harrison* v. *Good*, 40 L. J., Ch. 294; L. R. 11 Eq. 338; 24 L. T. 263; 19 W. R. 346.

A covenant by A., a lessee, that he, his executors, administrators, or assigns, would not during the term do on the premises anything which should be an annoyance to the neighbourhood or to the lessor or his tenants, or diminish the value of the adjoining property, nor build, nor allow to be built, on the ground any building or erection without first submitting the plans to the lessor and obtaining his approval. The landlord afterwards granted a lease of an adjoining plot to B., who entered into a similar restrictive covenant. Within twenty years A. commenced, with the approval of the lessor, to build upon his ground so as to darken the windows of B.'s house. On a bill by B. to restrain A. from erecting and the lessor from approving the building objected to :—Held, that B. was not entitled to relief either on the principle that the lessor could not derogate from his grant, or on the ground that the restrictive covenants in A.'s lease enured for B.'s benefit. *Master* v. *Hansard*, 46 L. J., Ch. 505; 4 Ch. D. 718; 36 L. T. 535; 25 W. R. 570—C. A.

The owners in fee of a residential estate and adjoining lands sold part of the adjoining lands to the defendants' predecessors in title, who entered into covenants with their vendors, their heirs and assigns, restricting their right to build on and use the purchased land. The same vendors afterwards sold the residential estate to the plaintiffs' predecessors in title. The conveyance contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers were to have the benefit of them :—Held, that the plaintiffs were not entitled to restrain the defendants from building in contravention of the restrictive covenants entered into by their predecessors in title. *Renals* v. *Cowlishaw*, 48 L. J., Ch. 830; 11 Ch. D. 866; 41 L. T. 116; 28 W. R. 9—C. A.

As to Part of Divided Estate—Repurchase.]—A. sold part of an estate to B., who entered into restrictive covenants for himself, his heirs and assigns, with A., his heirs, executors and administrators, as to buildings on the purchased property; but A. did not enter into any covenants as to the land retained. After this A. sold to other persons various lots of the part retained, but nothing appeared as to the contents of their conveyances, nor was there any evidence that they were informed of the covenants entered into by B. After this A. bought back from B. what he had sold to him:—Held, that the benefit of B.'s covenants did not in equity pass to the subsequent purchasers of other parts of the estate from A., and that A., after the repurchase, could make a title to the repurchased land discharged from the covenants. *Keates* v. *Lyon*, 38 L. J., Ch. 357; L. R. 4 Ch. 218; 20 L. T. 255; 17 W. R. 338.

—— **Injury to Adjoining Property.**]—G., the owner of some land, sold it in lots, subject to conditions, by which the purchaser of lot 6 was required to covenant to build according to a certain elevation. The purchaser of lot 6 excavated the land, as required, according to the conditions:—Held, that the purchaser of lot 7 could not sue for the injury he had sustained. *Murchie* v. *Black*, 19 C. B. (N.S.) 190; 34 L. J., C. P. 337; 11 Jur. (N.S.) 608; 12 L. T. 735; 13 W. R. 896.

Mistake—Omission.]—Covenant not to build within —— feet of H. Street:—Held, on the evidence, that the omission of the number was accidental, not intentional, and that the covenantees might have had the covenant reformed on a bill. *Child* v. *Douglas*, 2 Jur. (N.S.) 950. And see *S. C.*, 1 Kay, 560; 5 De G. M. & G. 739; 2 W. R. 701.

Building Estate.]—On the sale of two lots the parties covenanted that none of the proprietors for the time being should ever use as an hotel a house erected on any of the lots. The purchasers of two other lots afterwards executed the deed, and then sold their lots, the one to A., the other to B., neither of whom executed the deed, but both had notice of it; B. and his tenant were restrained by injunction from using the house built on B.'s lot as an hotel. *Whatman* v. *Gibson*, 9 Sim. 196; 7 L. J., Ch. 160; 2 Jur. 273.

When the owner of some of a number of houses purchased for the same owner for building purposes conveyed them to separate alienees in such manner that the benefit of a covenant (entered into originally with the grantor) passed to each alienee; upon a breach injurious to one only of these alienees:—Held, that the party injured might sue alone, without joining the others. *Western* v. *Macdermott* (supra).

Sites of a row of houses in a town were conveyed by the same vendors to various persons, all about the same time, and the conveyances were substantially in the same form:—Held, that it was a question of fact in each case whether the restrictions were merely matters of agreement between the vendor and the several purchasers for the protection of the vendor, or were intended to be for the common advantage of the several purchasers. *Western* v. *Macdermott* (supra) discussed. *Sheppard* v. *Gilmore*, 57 L. J., Ch. 6; 57 L. T. 614.

—— **Scheme.**]—Where a large building estate has been offered for sale in plots, under a common form of agreement containing a provision that the purchaser would not, without the consent in writing of the "vendor, his heirs or assigns," alter the building on the purchased plot, but there is no general building scheme governing the whole estate, the purchaser of a plot, although he has entered into a covenant in the terms provided by the form of agreement, is not bound to obtain the consent of the purchaser of another plot, which has been subsequently sold and conveyed, before he can alter the buildings on his own plot. The only consent which has to be obtained in such a case is the consent of the owner of the unsold portions of the building estate. *Everett* v. *Remington*, 61 L. J., Ch. 574; [1892] 3 Ch. 148; 67 L. T. 80.

When plots forming part of a building estate are purchased, having been selected by reference to a plan showing a number of building plots with a house on each, and a printed form of contract for sale containing restrictive covenants is used, but with written variations in the purchaser's particular case, the purchaser is not, upon these facts, justified in assuming the existence of a building scheme with restrictive covenants like his own binding on all the other plots. *Tucker* v. *Vowles*, 62 L. J., Ch. 172; [1893] 1 Ch. 195; 3 R. 107; 67 L. T. 763; 41 W. R. 156.

Parts of estates sold on three occasions; on all the plans a house was marked "Lodge." A purchaser of this house, with notice of the plans, commenced to build cottages:—Held, that the estate plans were put forward as part of a general building scheme, and that as the defendant had notice thereof he was bound thereby. *Tindall* v. *Castle*, 62 L. J., Ch. 555; 3 R. 418.

An estate was sold in plots for building purposes, according to a scheme. The conveyances contained restrictive covenants as to the buildings to be erected, entered into by the several purchasers with the vendors, their heirs and assigns:—Held, that the successor in title of the purchaser of one of such plots was entitled to enforce such restrictive covenants against the successor in title of an earlier purchaser of an adjoining plot. *Brown* v. *Inskip*, 1 Cab. & E. 231.

An estate was laid out for building, and a great part of it had been sold. In 1882 some of the unsold part was put up for sale by auction, with a condition that the purchaser of certain lots was to covenant to expend on each of the dwelling-houses built not less than 1,200*l*. As to some lots there were other restrictions; and some were free from restriction. One of the plaintiffs bought one of the free lots, and also a restricted lot. Next year the unsold lots, together with another piece of land forming together the whole of the unsold parts of the estate, were put up for sale, with similar conditions as to the first-named lots; but as to other lots free from restrictions. All the lots were then sold, except the first-named lots, both plaintiffs being purchasers of free lots. The first-named lots were in the following year sold to the defendant, who entered into a covenant with the vendors not to build houses of less value than 1,200*l*. He now proposed to build houses of less value:—Held, that the doctrine of *Nottingham Patent Brick and Tile Co.* v. *Butler* (supra, col. 1174), ought to be extended to cover the present case, and that the plaintiffs were entitled to restrain the defendant

from building houses of less value. The plaintiff in such a case is not obliged to prove damage in order to obtain an injunction. *Collins* v. *Castle*, 57 L. J., Ch. 76 ; 36 Ch. D. 243 ; 57 L. T. 764 ; 36 W. R. 300.

Where a vendor selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold without putting himself under any corresponding obligation, it is a question of fact, to be deduced from all the circumstances of the case, whether the restrictions are merely matters of agreement between the vendor and his vendees, for his own benefit, or are meant by him or understood by the buyers to be for the common advantage of the several purchasers. *Birmingham and District Land Co. and Allday, In re*, 62 L. J., Ch. 90 ; [1893] 1 Ch. 342 ; 3 R. 84 ; 67 L. T. 850 ; 41 W. R. 189.

Particulars of sale by auction contained restrictive conditions that the houses to be erected were to be private houses only, of a fixed minimum value, and in accordance with a building-line already existing as regards buildings on other land of the vendors :—Held, to be an invitation to the public to come in and purchase on the footing that the whole of the property offered for sale was to be bound by one general rule, and that the vendors would not be allowed to depart from it. *Nottingham Patent Brick Co.* v. *Butler* (supra, col. 1174) approved. *Ib.*

Where an estate is vested in trustees, who sell plots for building subject to restrictive covenants, each purchaser has an equity against the other purchasers to compel the observance of the covenants. *Eastwood* v. *Lever*, 33 L. J., Ch. 355 ; 9 L. T. 615 ; 12 W. R. 195.

In a suit to enforce such an equity, the trustees are necessary parties, and the remaining purchasers ought to be represented on the record. *Ib.*

The plaintiffs, in 1867, bought part of a building estate from trustees for sale, subject to certain restrictive conditions contained in a deedpoll which had been executed by the trustees and the plaintiffs, and some sixty-six purchasers in all from time to time down to 1889 :—Held, that the trustees were bound either by actual covenant or by implied agreement not to deal with the land in violation of the scheme, and an injunction was granted restraining them from authorising any purchaser from them to build contrary to the terms of the scheme. *Mackenzie* v. *Childers*, 59 L. J., Ch. 188 ; 43 Ch. D. 265 ; 62 L. T. 98 ; 38 W. R. 243.

Agreements to sell to A., B. and C., subject to restrictions as to building. Before the contracts were completed the vendor sold other land to J., and covenanted that the conveyance to the other purchasers should contain covenants with J. similar to the agreements. J. covenanted to observe similar restrictions as to building. Subsequently the land purchased by A. was conveyed to him by deed, in which A. entered into the same covenants as he had entered into in the deed of agreement. The land purchased by J. became vested in the defendants, with notice of the agreements and of J.'s covenants in his purchase deed, and the land of A. came in like manner to the plaintiff :—Held, that, whether the covenants run with the land or not, as the defendants had notice of them, the plaintiff might have an injunction to restrain the defendants from building in a manner contrary to the general scheme for the benefit of all the original parties. *Coles* v. *Sims*, 1 Kay, 56. Affirmed, 6 De G. M. & G. 1 ; 2 Eq. R. 951 ; 23 L. J., Ch. 258 ; 18 Jur. 683 ; 2 W. R. 151.

—— **Corporation.**]—Although, in ordinary cases, where the conditions of sale subject to which a sale, whether by auction or by private contract, is made, state that every purchaser shall enter into certain restrictive covenants limiting, for the benefit of the adjoining land, his right of user of the land conveyed to him, such conditions constitute a scheme enforceable by any purchaser against the vendor and any other purchaser with notice ; yet, if the vendor be a municipal corporation, sections 108, 109 of the Municipal Corporations Act, 1882, make it necessary that the approval of the Treasury (or, since the Local Government Act, 1888, of the Local Government Board) should be obtained not only to the conveyance to the purchaser, but also to the restrictive covenants on the vendor's part which are to be implied from the conditions. If, therefore, the Treasury has consented only to the conveyance and not to the implied covenants, such covenants cannot be enforced against the corporation, or against other purchasers from them even with notice. *Davis* v. *Leicester Corporation*, 63 L. J., Ch. 440 ; [1894] 2 Ch. 208 ; 7 R. 609 ; 70 L. T. 599 ; 42 W. R. 610—C. A.

ii. *Breach of.*

What amounts to—Bay Windows.]—Covenant by purchaser not to erect any building on his plot nearer to the road in which it was situate than the line of frontage of the then present houses in that road. He then erected two houses on his plot, each of which had a bay window projecting three feet beyond the line of the existing houses, and carried from the foundation up to the roof : — Held, that the bay windows were buildings within the meaning of the covenant and the erection of them a violation of it, and that the invasion of privacy constituted damage. *Manners (Lord)* v. *Johnson*, 45 L. J., Ch. 404 ; 1 Ch. D. 673 ; 24 W. R. 481.

—— **"House" of Certain Value.**]—The defendants were the assignees of a piece of land which was subject to a covenant that no house should be erected upon the land of less value than 400*l.* The defendants commenced to build two houses or shops, but, on an objection of the local board, the two houses were thrown together by making a communication between them on the ground floor. As altered, the houses had two separate doors opening to the road, and two separate shop windows fronting to the road. They had separate staircases, but one of them had no kitchen, and in the yard behind, which was common to the two houses, there was only one water closet and ashpit :—Held, that the building formed two houses, and that a breach of the covenant had been committed. *Snow* v. *Whitehead*, 51 L. T. 253.

A. purchased a building plot, and covenanted to build a dwelling house of the value of 250*l.* at least, under the inspection and to the satisfaction of C.'s architect, in twelve months. The twelve months expired, and A. proceeded to build a house of the required value, but as to situation contrary to the opinion of the architect :—Held, that it was a breach of the covenant, and an injunction was granted. *Goolden* v. *Anstee*, 18 L. T. 898. And see *Collins* v. *Castle*, supra, col. 1228.

—— **Wall instead of House.**] — Land was sold, subject to a covenant entered into with a neighbouring landowner, that "no buildings, except dwelling houses," to front a certain road, should be built thereon. The purchaser threw the land into his garden, and enclosed it, by erecting thereon, along the side of the road, a wall, and raising its height to form the back of vineries:—Held, that the boundary garden wall was no breach of covenant, but the raising it for the purpose of the vineries was; but no substantial injury being caused, the court awarded damages instead of granting an injunction. *Bowes* v. *Law*, 39 L. J., Ch. 483; L. R. 9 Eq. 636; 22 L. T. 267; 18 W. R. 640.

—— **Stable instead of Houses.**]—A covenant to the effect that private houses only, of a certain minimum value, are to be built on certain plots of land, is not broken by the erection on one of them of a stable with a bedroom over it, of such dimensions and in such a position that it would still be possible to build a house of the stipulated value upon the plot. *Russell* v. *Baber*, 18 W. R. 1021.

—— **"Building"—Erection of Hoarding.**]—The grantee of two plots of freehold land, forming part of a residential estate, covenanted that any building erected thereon should be of a certain height, should have a cement or stucco front and a slated roof, and that such buildings should be used only as dwelling houses:—Held, that the erection of a substantial hoarding used for advertising purposes was not a breach of the covenant. *Foster* v. *Fraser*, 63 L. J., Ch. 91; [1893] 3 Ch. 158; 3 R. 635; 69 L. T. 136; 42 W. R. 11; 57 J. P. 646.

—— **"Operative Machinery"—Hut, Tent, "or other chattel"—"Switchback Railway."**]—A restrictive covenant by a vendee, that no operative machinery shall be fixed, and that no hut, tent, shed, caravan, house on wheels, or other chattel should be erected, made, placed, or allowed to remain on the land conveyed, is broken if the vendee erect a "switchback railway" on the land—upon piles driven into the ground—inasmuch as such railway is both "operative machinery" and a "chattel" within the meaning of the covenant. *Chamberlayne* v. *Collins*, 9 R. 311; 70 L. T. 217—C. A.

—— **Height of Building.**]—Covenant that there should be no trees or any building whatever in the garden that should exceed the level of the parlour floor:—Held, that it was a breach of the covenant to erect any building above the prescribed height extending beyond the back of the house, though the ground upon which such building was erected had never been used as a garden. *Western* v. *Macdermott*, 36 L. J., Ch. 76; L. R. 2 Ch. 72; 12 Jur. (N.S.) 366; 15 L. T. 641; 15 W. R. 265.

Upon a covenant not to build or allow trees to grow above a certain height, the object of which was to prevent obstruction of the view from certain houses:—Held, that substantial injury was not requisite in order to enable the court to interfere and restrain a breach of covenant. *Ib.*

A railway company, in purchasing land, covenanted with the owner not to build upon it above a certain height. They afterwards obtained an Act of Parliament empowering them to widen their line:—Held, first, that it would prevent them from building so as to widen the line. *Lloyd* v. *L. C. & D. Ry.*, 34 L. J., Ch. 401; 11 Jur. (N.S.) 380; 12 L. T. 363; 13 W. R. 698.

Held, secondly, that if the covenant was not invalid at law, as being against public policy, the court would not be prevented from interfering on that ground, and that when the court refuses to enforce a covenant, because the damage would be inappreciable, the case must be perfectly clear. *Ib.*

Covenant by defendant with the vendors that he would not erect any building on the same plot within the distance of six feet from the intended streets:—Held, that the erection of a wall fifteen feet high at right angles to the principal street, and extending quite up to it, was an infringement of this covenant, but that it was not broken by the projection a few inches too far of the lower part of the wall of a house, nor by a brick porch which came forward one foot within the limit. *Child* v. *Douglas*, 1 Kay, 575; 5 De G. M. & G. 739; 2 Jur. (N.S.) 950; 2 W. R. 701.

A covenant by a purchaser of land not to build above a certain height does not amount to a reservation to the vendors of a right to use the upper surface of light and air for their own purposes, as for building, or throwing any covering thereover. *Pinchin* v. *London & Blackwall Ry.*, 2 Eq. R. 1172; 24 L. J. Ch. 417; 1 Jur. (N.S.) 241; 2 W. R. 696.

—— **Covenant not to build on certain part.**]—Covenant that a piece of land belonging to the vendor which adjoined the property conveyed to the purchaser "should for ever thereafter be kept open and unbuilt upon" by the vendor. The vendor subsequently excavated part of this piece of land and constructed therein a covered urinal, the roof of which projected very slightly above the adjoining surface:—Held, that this was not a breach of the covenant. *Graham* v. *Newcastle-upon-Tyne Corporation*, 2 R. 254; 67 L. T. 790—C. A.

Where a purchaser in fee covenanted that no building whatever should at any time thereafter be erected on a certain portion, which latter afterwards vested in the defendant, who before the conveyance to him had notice of the covenant, the court restrained the defendant from continuing a building begun by him. *Mann* v. *Stephens*, 15 Sim. 377; 10 Jur. 650.

Covenant by vendor that no building, excepting monuments and tombs, should be erected on any part of the land belonging to the vendor "lying on the east side of the said terrace, and opposite to the plot of land thereby conveyed":—Held, that the covenant applied only to that part of the vendor's land which was opposite to and of the same width as the piece conveyed. *Patching* v. *Dubbings*, 2 Eq. R. 71; 23 L. J., Ch. 45. Affirming 1 Kay, 1; 17 Jur. 1113; 2 W. R. 2.

Injunction to Prevent Breach—Threatened User.]—A person who has covenanted not to use a building for certain purposes will not be restrained from erecting a building seemingly adapted only for such purposes. *Worsley* v. *Swann*, 51 L. J., Ch. 576—C. A.

Mandatory Injunction—Erecting Porch.]—A defendant having, after express notice, erected a porch in breach of a covenant entered into by

him, was upon interlocutory motion ordered to remove the erection, although the same had been completed before the filing of the bill. *Morris* v. *Grant*, 24 W. R. 55.

—— **Delay.**]—Covenant not to erect building beyond certain lines. A building erected beyond the line and no objection for five years. Then on renewed building the plaintiff commenced an action for an injunction to restrain the defendant from allowing any buildings to continue on his land beyond the line:—Held, that a mandatory injunction ought to be confined to buildings erected since the defendant acquired his title. *Gaskin* v. *Balls*, 13 Ch. D. 324; 28 W. R. 552.

As to User of Premises.]—A conveyance of an estate to a purchaser and his heirs, to the use that certain trades should not be carried on upon the premises, is a stipulation in the nature of a covenant running with the land. *Hodgson* v. *Coppard*, 29 Beav. 4; 30 L. J., Ch. 20; 9 W. R. 9.

—— **National Schools—Nuisance.**] — Held, that the word "nuisance" in the covenant must be restricted to its technical meaning; that the establishment of a national school is not a legal nuisance: and that the establishment of such a school on one of several lots could not be restrained by the owner of a dwelling-house built on an adjoining lot, though his property would be depreciated thereby. *Harrison* v. *Good*, 40 L. J., Ch. 294; L. R. 11 Eq. 338; 24 L. T. 263; 19 W. R. 346.

—— **Girls' School.**]—The owner of an estate covered it with houses, and sold some of them subject to a covenant not to carry on any trade, business, or calling therein, or to otherwise use, or suffer the same to be used, to the annoyance, nuisance, or injury of any of the houses on the estate:—Held, that the carrying on of a girls' school in one of the houses was a breach of the covenant. *Kemp* v. *Sober*, 1 Sim. (N.S.), 517; 20 L. J., Ch. 602; 15 Jur. 458.

—— **Charitable Institution.**]—The erection of a building, for the education and lodging of 100 girls in connection with a charitable institution for the daughters of missionaries, supported by voluntary contributions:—Held, to be a breach of a covenant entered into by the purchaser that "no house or other building to be erected or built upon the land shall be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade." *German* v. *Chapman*, 47 L. J., Ch. 250; 7 Ch. D. 271; 37 L. T. 685; 26 W. R. 149—C. A.

—— **Public House.**]—On a sale of an estate as building land in plots each purchaser executed a covenant with trustees to observe conditions that certain plots were reserved for two taverns; that "no houses, other than detached or semi-detached," were to be erected except on the portion on which shops were permitted to be built; and that shops would be allowed to be built on specified plots. A purchaser of one of the plots set apart for shops was restrained from building a public-house on it. *Hall* v. *Box*, 18 W. R. 820.

A deed contained a covenant by the grantee of a piece of land that no building to be erected on the land should be used as a public-house, tavern, or beer-shop:—Held, that an off-licence was a breach of the covenant. *St. Albans (Bishop)* v. *Battersby* (3 Q. B. D. 359) approved. *London and Suburban Land and Building Co.* v. *Field*, 50 L. J., Ch. 549; 16 Ch. D. 645; 44 L. T. 444. And see *Nicholl* v. *Fenning*, supra, col. 1226.

Covenant that the piece of land should not be used "as a site for any hotel, tavern, public-house, or beer-house," nor should "the trade or calling of an hotel or tavern keeper, publican, beer-shop keeper, or seller by retail of wine, beer, spirits, or spirituous liquors, be used, exercised, or carried on, at or upon" the same:—Held, that the sale of wine and spirits in bottle by a grocer in the course of his trade was not such a breach of the covenant as the court would restrain. *Jones* v. *Bone*, 39 L. J., Ch. 405; L. R. 9 Eq. 674; 23 L. T. 304; 18 W. R. 489.

Demise of land for erection of a hotel, with a covenant not to let any house for the erection of a hotel within a quarter of a mile. An assignee of another plot, with notice of the covenant, was restrained from building a hotel thereon during the continuance of the demise. *Jay* v. *Richardson*, 30 Beav. 563; 31 L. J., Ch. 398; 8 Jur. (N.S.) 689; 6 L. T. 177; 10 W. R. 412.

A purchaser in fee of a piece of land cannot, by the purchase of a lease granted of the same land, avoid covenants which his vendor had taken from his tenants over a wide area, in aid of covenants which he had entered into with third parties. *Ib.*

User of Roads.]—By a deed of partition of a freehold estate between S. and P., portions of the estate, which were laid out for roads, were conveyed to S. in fee, and he covenanted with P., his heirs and assigns, that P., his heirs and assigns, and all owners and occupiers for the time being of all or any parts of the lands limited to P., and of the house to be built thereon, should at all times for ever thereafter have right of passage over the roads, which was given in the most ample terms, and also the full use and enjoyment of the roads in as full, free, complete, and absolute manner to all intents and purposes whatsoever, as if they were public roads:—Held, that the occupiers of the lands had the same right to use the roads as if they had been public roads. *Selby* v. *Crystal Palace Gas Co.*, 4 De G. F. & J. 246; 31 L. J., Ch. 595; 8 Jur. (N.S.) 830; 6 L. T. 790; 10 W. R. 636. Affirming 30 Beav. 606.

—— **Purchaser for Value without Notice.**]—In 1864 B., in possession of lands under an agreement for a lease, obtained the consent of the board of works to stop up a public footpath and substitute a new one, and this he did; but the owners in fee never consented, and there was no actual dedication to the public. In May, 1866, a lease to B. was executed, describing the land by reference to a plan on which the new road was shown, but marked "Private road." The habendum was "subject to the existing rights of way." There were other rights of way. The lease became vested in W., who purchased by a sale plan in which the road was marked "Private road." W.'s tenants stopped up the road:—Held, that the defence that W. was a purchaser without notice was sustained, there not being enough on the sale plans to affect him with notice that there was a public right of way;

and that, therefore, assuming the existence of an agreement which could have been enforced against B., it could not be enforced against the defendants, W.'s tenants. *Att.-Gen.* v. *Biphosphated Guano Co.*, 49 L. J., Ch. 68 ; 11 Ch. D. 327 ; 40 L. T. 201 ; 27 W. R. 621—C. A.

Effect of Merger.]—A., being possessed of a piece of land for a term, laid it out in plots, and underleased one plot to the defendant for the residue of the term, less three days, the defendant covenanting as to building. A. underleased another plot to the plaintiffs. On A.'s death, the estate was sold under conditions which provided that the purchaser of the largest lot in value should take an assignment of the whole, and grant fresh underleases to the various under lessees, for the residue of the term less two days. The defendant purchased his own plot, and the plaintiffs purchased their plot, which was the largest in value. The plaintiffs took an assignment of the whole, and granted a fresh underlease to the defendant of his lot for the residue of the term less two days :—Held, that though the defendant's original underlease was merged at law, he was still bound in equity to observe his building covenant. *Birmingham Joint Stock Co.* v. *Lea*, 36 L. T. 843.

iii. *Waiver of.*

Acquiescence in Trivial Breach.]—Acquiescence in a trivial breach of covenant does not preclude a plaintiff from relief in respect of a breach of an important character. *Richards* v. *Revett*, 47 L. J., Ch. 472 ; 7 Ch. D. 224 ; 37 L. T. 632 ; 26 W. R. 166.

When the vendors of land have covenanted with the purchaser against the carrying on of certain trades upon other parts of the land, the purchaser is not prevented from obtaining an injunction against an assignee of other part of the land because he has not attempted to prevent previous unimportant breaches of the covenant. *Ib.*

On the sale of an estate in building plots, purchasers were required to enter into covenants not to build without the vendor's approval of plans. In an action to restrain a purchaser from building without submitting a plan :—Held, that the erection of a temporary hovel on another part of the estate, which had not been interfered with by the plaintiffs, was not a waiver of the covenant. *Kilbey* v. *Haviland*, 24 L. T. 353 ; 19 W. R. 698.

Estate sold in plots for building, with restrictive covenants by all the purchasers. In an action by a purchaser :—Held, that breaches of the covenant allowed by the vendors in relation to other portions of the estate, not affecting the plaintiff's enjoyment of his lot, could not be set up against him, and that a deviation of two feet from the building line with regard to the plaintiff's house was too trifling to affect his right. *Jackson* v. *Winnifrith*, 47 L. T. 243.

Restrictive covenants intended to preserve the character of land to be laid out and used in a particular way will not be enforced in equity if such land has already been so laid out or used that its preservation, as intended, is no longer possible, and the object of the covenants cannot be attained ; but the fact that such covenants have not been enforced in the case of some trivial breaches does not prevent them from being enforced in the case of other subsequent breaches. *Knight* v. *Simmonds*, 65 L. J., Ch. 583 ; [1896] 2 Ch. 294 ; 74 L. T. 563 ; 44 W. R. 580—C. A. And see *Bedford* (*Duke*) v. *British Museum Trustees*, infra.

On the sale of an estate under a general scheme, the conveyances contained a stipulation that "nothing is to be erected within fifteen feet of the high road, or within ten feet from any other road, except fences, and those not more than six feet high, and no house or part of a house is to be erected at a greater distance than fifty feet from the front building line." The plaintiffs had erected a chapel and building more than fifty feet from the front building line, and claimed to restrain the defendant who had erected a shop only eight feet from the high road :—Held, that the two covenants were essentially different (the one to observe the line of frontage being of a more important, and the other, as to building in the rear, being of a less important, character), and could be treated as separate covenants ; that the plaintiffs were not prevented in equity from enforcing the covenant as to the frontage line, which they themselves had substantially observed ; and that the injunction claimed must be granted, and the defendant's building removed. *Chitty* v. *Bray*, 48 L. T. 860 ; 47 J. P. 695.

—— **Injunction.**]—Acquiescence in the violation of a covenant to a certain extent :—Held, a sufficient objection to an interlocutory application for an injunction. *Child* v. *Douglas*, 5 De G. M. & G. 739 ; 1 Kay 560, 575 ; 2 Jur. (N.S.) 950 ; 2 W. R. 701.

Where, on a motion for an injunction to restrain an alleged breach of covenant the question in dispute appeared doubtful :— Held, that the burden of proof was on the plaintiff to show that the balance of convenience was in favour of granting the injunction. *Ib.*

Distinction between the hearing of a cause and of interlocutory applications, as to the amount of acquiescence which will preclude a plaintiff from obtaining the assistance of the court. Distinction between the effect of a single waiver of a restrictive covenant by a landlord in favour of one of several tenants, as against the others, and a prior waiver of a right under such a covenant by the tenant as against himself. *Patching* v. *Dubbings*, 1 Kay, 1 ; 17 Jur. 1113 ; 2 W. R. 2. Affirmed, 2 Eq. R. 71 ; 23 L. J., Ch. 45.

A party was entitled to the benefit of a covenant not to build more than eight feet high in the garden next door to his house, and not to allow trees or buildings over that height upon land lying in view of his house. In process of time tall trees were allowed to grow up, and cottages were built upon the latter land, and he, or those through whom he claimed, never interfered :— Held, that this non-interference could not operate to prevent his enforcing the covenant to restrain a building in the garden. *Western* v. *Macdermott*, 36 L. J., Ch. 76 ; L. R. 2 Ch. 72 ; 12 Jur. (N.S.) 366 ; 15 L. T. 641 ; 15 W. R. 265.

What is Sufficient Acquiescence.]—Where all the purchasers of an estate were bound by restrictive covenants not to use their houses otherwise than as private residences, and the vendor had given permission to one of the purchasers to open a school in his house, this was held not

to be a waiver of the covenant as to another purchaser whose house was at some distance. *German* v. *Chapman*, 47 L. J., Ch. 250; 7 Ch. D. 271; 37 L. T. 685; 26 W. R. 149—C. A.

Covenant that no building on any lot should be erected or used as a shop, workshop, warehouse, or factory, nor should any trade or manufacture be carried on on any lot. Since 1886, W. carried on the business of a laundryman on one of the lots. In July, 1893, he commenced to build on a lot of which he was the owner, a building adapted solely for the purposes of his business. In an action to restrain the erection of the building, evidence showed that trades had for some time openly been carried on on several lots, and that the plaintiff had carried on the trade of milkman, and subsequently allowed a mason to work on his lot:—Held, that the defendant had committed a breach of the covenant greater and more serious than any previously committed; that the plaintiff was entitled to relief, and that an injunction ought to be granted. *Meredith* v. *Wilson*, 69 L. T. 336.

—— **Nuisance.**]—Houses sold subject to a covenant not to carry on any trade, business, or calling therein, or to otherwise use, or suffer the same to be used, to the annoyance, nuisance, or injury of any of the houses on the estate:—Held, that the carrying on of a girls' school in one of the houses was a breach of the covenant, and that the covenantee had not waived the benefit of the covenant, though he had permitted other houses, held under the like covenant, to be used as schools. *Kemp* v. *Sober*, 1 Sim (N.S.) 517; 20 L. J., Ch. 602; 15 Jur. 458.

—— **Public House.**]—Covenants by purchasers of lots that the premises should not be used as a public-house, beer-shop, temperance hotel, &c.:—Held, that the vendors had not waived their right by forbearing for six and nine months respectively from taking proceedings against two purchasers who sold beer, but in such a way that the sale was not visible to the occupiers of the other houses. *Mitchell* v. *Steward*, 35 L. J., Ch. 393; L. R. 1 Eq. 541; 14 W. R. 453.

Covenant by T. with S. not to carry on the trade of beer-shop keeper on the premises. From 1852 to 1853, T. carried on the business of beer-shop keeper with knowledge of S., and then sold to H. In 1854 S. filed a bill to restrain T. and H:—Held, that T. having before bill filed parted with her interest, no injunction could be granted against her; and delay and acquiescence having taken place, no injunction would be granted against H. as to the trade of beer-shop keeper. *Searisbrick* v. *Tunbridge*, 3 Eq. R. 240.

Covenant by purchasers with vendors, "their and each of their heirs and assigns, and also separately with the owners and owner, lessors and lessees, for the time being, or other the persons or person for the time being entitled to the receipt of the rents and profits of any part of" the C. estate, against (inter alia) keeping a beer-shop on any part of the premises sold. In an action by subsequent purchasers of the C. estate:—Held, on the evidence adduced, that they had lost their right to bring an action by long-continued acquiescence in breaches of the covenant both by the defendant and other similar covenantors. *Kelsey* v. *Dodd*, 52 L. J., Ch. 34.

Semble, also, that they were not entitled to sue on the covenant at law, even for nominal damages. *Ib.*

—— **Sale in Plots.**]—Where an estate is vested in trustees, who sell plots for building subject to restrictive covenants, each purchaser has an equity against the other purchaser to compel the observance of the covenants. *Eastwood* v. *Levers*, 33 L. J., Ch. 355; 9 L. T. 615; 12 W. R. 195.

Such equity may be lost by acquiescence. *Ib.*

Where vendor of plots has permitted material breaches by some purchasers he cannot compel another purchaser to observe the same covenant; and there is no difference where the covenant is not only a covenant by each purchaser with the vendor, but also a covenant by each purchaser with all the others, nor in the case where the breaches have been committed before the defendant became a purchaser, and executed the deed of covenant. *Peek* v. *Matthews*, L. R. 3 Eq. 515; 16 L. T. 991; 15 W. R. 689.

Ignorance of Breach.]—In 1867 the plaintiffs conveyed in fee certain hereditaments adjoining their railway, and the purchaser covenanted "for himself, his heirs, executors, administrators, and assigns, that he (the said purchaser) would not erect or build any erection or buildings of any kind whatsoever within ten feet of the roadway or viaduct of the plaintiffs without their permission in writing first had and obtained." The purchaser conveyed to the testator of B., who took without notice of the covenant other than such constructive notice (if any), as he had by reason of the deed of 1867, being a title deed. In 1869 the testator erected a hotel, part of which stood within ten feet of the roadway or viaduct of the plaintiffs, and he demised to a woman, who assigned the lease to the second defendant F. Neither the lessee nor the defendants had any notice of the covenant in the conveyance of 1867 other than constructive notice. In 1881 the defendant F. increased the height of that part of the erection, which was within ten feet of the plaintiffs' roadway or viaduct. The plaintiffs had no knowledge of this erection by the defendant B., or the alteration by the defendant F., until they were both completed in 1881:—Held, upon a special case, that the plaintiffs were entitled to an injunction to both the defendants requiring them to pull down the said erections; and that the defendant F. was not entitled to be indemnified by the defendant B. *L. C. & D. Ry* v. *Bull*, 47 L. T. 413.

Alteration of Character of Property.]—Where land is conveyed in fee by deed of feoffment, subject to a perpetual ground-rent, and the feoffee covenants for himself, his heirs, and assigns with the feoffor, the owner of adjoining lands, his heirs, executors, administrators, and assigns, not to use the land in a particular manner, with a view to the more ample enjoyment by the feoffor of such adjoining lands, and the subsequent acts of the feoffor, or of those claiming under him, have so altered the character and condition of the adjoining lands, that, with reference to the land conveyed the restriction in the covenant ceases to be applicable according to the intent and spirit of the contract, a court of equity will not interpose to enforce the covenant, but will leave the parties to law. Whether upon such a covenant there could be any remedy at law against the assignees of the covenantor, quære. *Bedford (Duke)* v. *British Museum Trustees*, 2 Myl. & K. 525; 2 L. J., Ch. 129.

The plaintiff and defendant were owners in fee of two houses, situate in one block, forming part of a property which was laid out as a building estate, and sold with restrictive covenants as to the user of the houses as shops. The defendant had purchased with full notice of the existence of the restrictive covenant. The defendant immediately commenced to sell, and had ever since sold, beer in his house under an "off" licence. The plaintiff, who had purchased before the defendant, also with full notice of the covenants, was aware of the fact of the defendant's so trading, and he bought beer himself at the defendant's house. The character of the property had completely changed, several houses situate in the block in which the plaintiff's and defendant's houses stood, having been for a considerable time, and still being, used as shops and places of business. Held, that the plaintiff had been guilty of such an amount of acquiescence as made it inequitable in him to enforce the covenant. *Sayers* v. *Collyer*, 54 L. J., Ch. 1; 28 Ch. D. 103; 51 L. T. 723; 33 W. R. 91; 49 J. P. 244—C. A.

—— **Variations from Plan.**]—A., by indenture, covenanted to lay out and preserve land in an ornamental manner, according to a certain plan, subject to such alteration as should be made or approved of by him, his heirs, or assigns, and as should not destroy the general beauty of the design, and upon selling any part thereof, to require purchasers to enter into a covenant not to erect any messuage thereon so as to lessen the value of those already erected. B. agreed to purchase and build certain messuages on a line with each other on part of the land. After B. had built and taken a conveyance of two of such messuages, the agreement as to the remainder was cancelled, and the rest of the land conveyed to A., who had sold part of it to C., who commenced building several feet in advance of the line in which B. had built:—Held, that A. had power to vary the details of the plan, and that a purchaser from B. of one of the messuages built by him was not entitled to relief by injunction restraining C. from building in such manner. *Schreiber* v. *Creed*, 10 Sim. 9; 8 L. J., Ch., 346; 3 Jur. 625.

12. Rescission and Abandonment.

a. In General.

Sale of Reversion.]—Upon sale of a reversion, part of the terms was that the money be paid by a certain time; not being so by default of the vendee, vendor discharged from his contract. *Newman* v. *Rogers*, 4 Bro. C. C. 391.

Notice.]—Party declaring, that unless contract was performed by such a day, he should consider it as a refusal by the other party to perform it, and would act accordingly, does not amount to a notice of abandonment of the contract. *Reynolds* v. *Nelson*, 6 Madd. 26; 22 R. R. 225.

Vendor gave notice that unless purchaser agreed to complete within five days he would resell. The purchaser brought an action for his deposit:—Held, that the notice by the vendor of an intention to resell, was equivalent to a declaration that he would not seek specific performance of the contract, and that the purchaser's action to rescind was effectual. *Royou* v. *Paul*, 28 L. J., Ch. 555.

Though time may not be of the essence of the contract, yet, upon unreasonable delay on the part of a vendor in completing, the purchaser, upon giving notice, may rescind the contract. *Benson* v. *Lamb*, 9 Beav. 502; 15 L. J., Ch. 218.

Reasonable Notice.]—Where there is an undue delay on the part of the vendor in making out his title, the purchaser, on reasonable notice, may put an end to the contract. *Nott* v. *Riccard*, 22 Beav. 307; 25 L. J., Ch. 618; 2 Jur. (N.S.) 1038; 4 W. R. 269.

The plaintiffs agreed to sell some property to the defendant. By the conditions the vendors were bound to furnish a certain declaration as to seisin free from incumbrances. The vendors furnished an insufficient declaration, and positively refused to furnish any other:—Held, that the purchaser was justified in putting an end to the contract, and a bill afterwards filed by the vendors for specific performance was dismissed, with costs. *Ib.*

Semble, the purchaser was empowered to put an end to the contract without giving notice to rescind. *Ib.*

A purchaser cannot, owing merely to the delay of the vendor in complying with his requisitions, determine the contract without notice, or bring an action for his deposit before the termination of his notice, where time was not originally of the essence of the contract. Whether he can do so after the expiration of the notice, where time has not been made of the essence of the contract, or being of the essence of the contract, has been waived, depends upon the conduct of the vendor after notice. *Wood* v. *Machu*, 5 Hare, 158; 16 L. J., Ch. 21.

Agreement for sale to be completed on 29th October. An abstract was delivered to the purchasers' solicitor on the 6th of September. On the 22nd of September objections and requisitions were delivered to the vendors' solicitor. On the 4th of November (which was six days after the time mentioned in the contract for completion), the vendors' solicitor forwarded to the purchasers' solicitor replies to the requisitions on title. Nothing further was done until the 29th of November, when the plaintiffs issued a writ against the vendors' solicitor to recover back the 285*l.* deposited with him. The deposit was thereupon returned: and on the 11th of December the vendors gave notice to rescind the contract:—Held, that the vendors were not bound to exercise their option to rescind immediately on receiving the objections and requisitions, and that, under the circumstances (which the court was to deal with as a jury ought), their notice was given within a reasonable time. *St. Leonard's, Shoreditch, Vestry* v. *Hughes*, 17 C. B. (N.S.) 137; 33 L. J., C. P. 349; 10 L. T. 723; 12 W. R. 1106. S. P., *Ker* v. *Crowe*, Ir. R. 7 C. L. 181.

By a contract made on the 25th of August, for the sale of a farm, it was stipulated that the purchaser should have possession by the beginning of October, and that the vendor should deduce a good title. The vendor failed to deliver a complete abstract until the 28th of November, more than six weeks after a notice delivered by the purchaser that, in default of delivery of a proper abstract within fourteen days from the date of the notice, he should rescind the contract. Shortly after the expiration of the fourteen days the purchaser gave notice of rescission:—Held, that in the circumstances the limit of fourteen days was reasonable, and the purchaser was entitled to rescind and to

a return of the deposit with interest, and to be paid the expense of investigating the title by way of damages. *Compton* v. *Bagley*, 61 L. J., Ch. 113 ; [1892] 1 Ch. 313 ; 65 L. T. 706. And see *Smith* v. *Batsford*, 76 L. T. 179 (ante, col. 1151).

When a requisition is made by a purchaser, the vendor must be allowed a reasonable time to comply with it. Thus a requisition was made at the end of June, which involved the necessity of instituting a suit, and obtaining a decree. On the 1st August the vendor consented to comply with the requisition, and obtained a decree in Michaelmas term ; but on the 9th August the purchaser gave notice to rescind the contract :—Held, that it was ineffectual. *Nicholls* v. *Corbett*, 22 Beav. 376.

Where Time is of the Essence.]—*See cases*, ante, cols. 1145 et seq.

After Possession Taken.]—Where the purchaser has been let into possession and the parties cannot be placed in statu quo ante, the purchaser cannot give notice to rescind. *Blackburn* v. *Smith*, 2 Ex. 783 ; 18 L. J., Ex. 187. See also *Rosenberg* v. *Cook*, 51 L. J., Q. B. 170 ; 8 Q. B. D. 162 ; 30 W. R. 444—C. A. Infra, col. 1270.

"Usual Covenant."]—A covenant in a lease that the lessee was not to assign or part with possession without the consent of the lessee, is not a "usual covenant," and an intended purchaser to whom this was not disclosed can repudiate the contract. *Hampshire* v. *Wickens*, (7 Ch. D. 555) followed. *Bishop* v. *Taylor*, 60 L. J., Q. B. 556 ; 64 L. T. 529 ; 39 W. R. 542 ; 55 J. P. 695. S.P., *Strangways* v. *Bishop*, 29 L. T. 120.

Who can bring Action.]—Semble, a bill to set aside a purchase may be maintained by some partners of a company, including the actual purchasers, withut making all the partners parties against a vendor who is not a partner. *Attwood* v. *Small*, 6 Cl. & F. 232 ; 2 Jur. 246. And see *Edinburgh United Breweries* v. *Molleson*, [1894] A. C. 96 ; 58 J. P. 364.

Delay in Application.]—The defence of laches applies with peculiar force to a bill seeking to set aside a sale or lease of mineral property after a considerable lapse of time. *Ernest* v. *Vivian*, 33 L. J. Ch. 513 ; 9 L. T. 785 ; 12 W. R. 295.

An estate was sold, the purchase to be completed in two months according to the conditions of sale. The buyer died soon afterwards, and suits were instituted, both in the spiritual court and chancery, which prevented the completion of the contract. Four or five years after the sale, the vendor filed his bill to have the contract rescinded, and the affairs of the buyer still remaining unsettled, the court rescinded the contract, and gave the plaintiff his costs out of the deposit. *Macbreth* v. *Marlar*, 1 Cox, 258.

Delay of seven months in taking proceedings to set aside a sale, during which the purchaser was improving the property :—Held, no bar to the plaintiff's right to relief. *Pearson* v. *Benson*, 28 Beav. 598.

A conveyance made twenty years ago shall not be set aside on a suggestion that the party making it was non compos. *Winchcomb* v. *Hall*, 1 Ch. Rep. 40.

Where a cestui que trust objected to a sale of lands made by a trustee without the requisite consents, and after the lapse of about fourteen months, took steps to set it aside :—Held, that the purchaser not having been induced to change his position by the plaintiff's delay, the latter was entitled to have such sale set aside, notwithstanding his delay. *Pepperell, In re, Pepperell* v. *Chamberlain*, 27 W. R. 410.

Voluntary Conveyance—Death of Donor.]—The fact that the title of a vendor (who was himself a purchaser for value) is derived through a voluntary deed is not of itself sufficient to enable a purchaser from him to repudiate his contract. *Noyes* v. *Paterson*, 63 L. J., Ch. 748 ; [1894] 3 Ch. 267 ; 8 R. 323 ; 71 L. T. 228 ; 43 W. R. 377.

b. For Mistake.

As to Party.]—Where personal considerations enter into a contract, error as to the person with whom the contract is made annuls the contract ; not so where the person sought to be bound would have been equally willing to make the same contract with any other person. *Smith* v. *Wheatcroft*, 47 L. J., Ch. 745 ; 9 Ch. D. 223 ; 39 L. T. 103 ; 27 W. R. 42.

As to Interest.]—Where vendor in ignorance and mistake agrees to sell that in which he has no interest at time of sale, equity will rescind the contract, and will order bond given for purchase money to be cancelled, and interest paid on it to be refunded, without costs on either side. *Hitchcock* v. *Giddings*, 4 Price, 135 ; Daniell, 1 ; Wils. Ex. Eq. 32 ; 18 R. R. 725.

By Purchase Alone.]—The purchaser may escape from his bargain on the ground of mistake, if it was a mistake which the vendors contributed to—that is, in other words, if he was misled by any act of the vendors. If the mistake was entirely his own, then the court ought not to let him off his bargain on the ground of a mistake made by himself solely, unless the case is one of considerable harshness and hardship. *Goddard* v. *Jeffreys*, 51 L. J., Ch. 57 ; 45 L. T. 675 ; 30 W. R. 270.

By both Parties.]—Where, by the mutual mistake of vendor and purchaser as to the duration of a leasehold interest, it had been sold at a price considerably below its value, and the conveyance had been executed, and the purchaser let into possession :—Held, upon a bill filed some years afterwards, that the vendor was not entitled to be relieved against the mistake. *Okill* v. *Whittaker*, 1 De G. & Sm. 83. Affirmed, 2 Ph. 338 ; 16 L. J., Ch. 454 ; 11 Jur. 681.

As to Part of Property.]—Purchaser not entitled to a conveyance of part, though answering the general description in the advertisement of sale, as it was not in the contemplation of either party at the time of the purchase or conveyance ; purchaser being referred to a more particular description which did not include that part, and the surrender having been made according to that, and from his own instructions. If one party thought he had purchased bonâ fide part of an estate which the other thought he had not sold, it is a ground to set aside the contract. *Calverley* v. *Williams*, 1 Ves. J. 210 ; 1 R. R. 118.

Small variation in general description of land not material. *Ib.*

Where a contract is entered into for the sale of an estate, and, under the general words, property passes, which the vendor insists he did not mean to sell, but the purchaser by his answer denies, or does not admit that it was not in his contemplation at the time of the purchase. Semble, that the vendor cannot sustain a bill against the purchaser to have the contract rectified, on the ground of mistake, and carried into execution. Quære, whether, consistently with the statute of frauds, the court can entertain a bill for rectifying an executory contract for the sale of lands, and carrying it, when rectified, into execution, even where the mistake is admitted by the answer. *Att.-Gen.* v. *Sitwell*, 1 Y. & C. 559; 5 L. J., Ex. Eq. 86.

As to Extent of Property.]—A contract for the sale of a plantation of larches was entered into by a vendor in ignorance of the number of trees contained in it. The purchaser knew the exact number, but was not aware of the mistake made by the vendor. He was, however, prior to signing the contract, told by the vendor's woodman that his master must have made some mistake in reference to the matter:—Held, that the contract ought to be set aside. *Hamilton* v. *Board*, 2 N. R. 13.

P. agreed to purchase a house and premises of L., supposing that he was seised in fee, but he subsequently discovered that L. possessed only an agreement from B. for a lease for a short term, with an option of purchase. P. agreed to purchase, for 2,500*l.*, "the benefit of L.'s agreement with his lessor," and he covenanted to perform all L.'s covenants in the agreement for a lease. L. admitted that this contract was erroneous, that 2,500*l.* was inserted by mistake for 500*l.* It was subsequently discovered that B. had not a freehold title to more than three-fourths of the property, and P. consequently refused to complete his purchase:—Held, that the mistake in the agreement rendered it null and void, and the court ordered it to be delivered up to be cancelled, and the defendant to pay the costs of the suit and of the action. *Price* v. *Ley*, 9 Jur. (N.S.) 295. Affirmed, 32 L. J., Ch. 530; 7 L. T. 845; 11 W. R. 475.

Where purchaser has given full value for estate, mistake of some party to conveyance of their claim thereto, under a marriage settlement, shall not turn to the prejudice of the purchaser without notice. *Malden* v. *Menill*, 2 Atk. 8.

As to Succession Duty.]—B. being entitled to a sum of 2,916*l.* stock in reversion expectant on the death of lady aged eighty-two, obtained through the defendant E., who acted as solicitor for both parties, a loan of 1,650*l.* upon mortgage. The mortgage contained a power of sale upon three months' notice, or on interest being one month in arrear. The interest being in arrear, the stock was sold, under the power, for 1,950*l.*, as subject to succession duty at 3 per cent. It was found that only 7*l.* was payable for succession duty. There was evidence that, having regard to the age and health of the tenant for life, from 100*l.* to 200*l.* might have been obtained for the reversion:—Held, that the sale could not be set aside on the ground of the mistake as to succession duty, that being merely a matter for compensation. *Bettyes* v. *Maynard*, 49 L. T. 389; 31 W. R. 461.

Agreement not Disclosed.]—A. being jointly interested with M. and G. in a foreign mine, agreed to sell his share to them upon certain terms not to be fulfilled immediately. Under an arrangement negotiated between M. and B. the whole property was conveyed to B. upon trust to secure him an annuity. A. concurred in this conveyance under an impression that B. was at the same time to execute a mortgage securing the fulfilment of the terms upon which A. sold. B. in fact executed this mortgage, but without knowing what it was, and without having been informed by A. of the terms upon which he had sold:—Held, that A. ought to have communicated directly with B., and that the court was justified in setting aside the second instrument alone, in a suit to which M. and G. were not parties. *Leader* v. *McEwen*, 1 N. R. 251.

Will incorrectly stated.]—In a sale under a decree, the will devising the property had been incorrectly abstracted in the abstract furnished to the purchaser, although the document next appearing upon the abstract recited the will correctly. The conveyancer acting on behalf of the purchaser had not called attention to this discrepancy, although he had directed an examination of the probate for other purposes. The will had been admitted to probate in facsimile, but neither the will nor the probate copy had been examined:—Held, that as the conveyancer had been clearly misled by the abstract, the purchaser was entitled to be relieved from his purchase, but on paying the costs of the application, as he had been negligent. *McCulloch* v. *Gregory*, 3 Eq. R. 495; 1 K. & J. 286; 24 L. J., Ch. 246; 3 W. R. 231.

Reservation of Minerals.]—The conveyance on a sale of land contained a reservation of the minerals to the vendor, which was not intended by either the vendor or the purchaser. Five years afterwards the purchaser discovered the mistake, and filed a bill to have the conveyance rectified. The vendor, after putting in an answer, died:—Held, having regard to the lapse of time and other circumstances, that if the defendant did not consent to have the conveyance rectified, the whole transaction must be set aside, in which event the plaintiff would be fixed with an occupation rent, while the defendant would have to repay the purchase money with interest, and also all sums expended by the plaintiff in permanent improvements. *Blommer* v. *Spittle*, 41 L. J., Ch. 369; L. R. 13 Eq. 427; 26 L. T. 272; 20 W. R. 435.

Mortgage.]—A person purchased by auction, for 2,500*l.*, property which was described in the particulars as an "immediate reversion in fee simple." Shortly after signing the contract he discovered that, by the conditions of sale, which were produced for the first time and read aloud by the vendor's agent at the commencement of the sale, but which the purchaser was prevented by deafness from hearing, the purchaser was to take the property, subject to mortgages for 2,500*l.*, in addition to his purchase money, the real value of the reversion being considerably under 5,000*l.*:—Held, that the purchaser was entitled to have the contract rescinded on the ground of common mistake, and of misdescrip-

tion in the particulars. *Torrance* v. *Bolton*, 42 L. J., Ch. 177 ; L. R. 8 Ch. 118 ; 27 L. T. 738 ; 21 W. R. 134.

Costs.]—In an ordinary case where the purchaser's carelessness has contributed to the mistake, he is not entitled to the costs of his suit, but where before suit, he had offered to pay the costs of the sale on having the contract rescinded, he was held to be entitled to them. *Ib.*

c. For Fraud and Misrepresentation.

General Effect of.]—In the absence of fraud, the court will not entertain an application for the rescission or cancellation of an agreement in writing relating to land, although incapable of being performed. *Noble* v. *Edwardes*, 5 Ch. D. 378 ; 36 L. T. 312—C. A.

There is no general rule that actual fraud is necessary to induce a court of equity to rescind a contract for sale. The court acts on the same principle in rescinding contracts for sale as in setting aside other contracts and dealings which it considers unconscientious. *Torrance* v. *Bolton*, 42 L. J., Ch. 177 ; L. R. 8 Ch. 118 ; 27 L. T. 738 ; 21 W. R. 134.

Misrepresentation, though in a slight degree, is an objection to specific performance. Distinction upon a bill to rescind the contract. *Cadman* v. *Horner*, 18 Ves. 10 ; 11 R. R. 135.

—— **Completed Contract.**]—Semble, that the court will, even in the case of a completed contract, give relief against a common mistake on the ground of fraud. *Jones* v. *Clifford*, 45 L. J., Ch. 809 ; 3 Ch. D. 779 ; 35 L. T. 937 ; 24 W. R. 979.

Representations of Vendee.]—When a vendor, ignorant of the real value of an estate, sells it at a loss on the faith of what the purchaser represents to him that it is worth, the sale will be set aside, and that irrespective of any fiduciary relation, fraud or other concealment in the transaction between the parties. *Haggarth* v. *Wearing*, 40 L. J. Ch. 577 ; L. R. 12 Eq. 520 ; 24 L. T. 825 ; 20 W. R. 11. And see *Walters* v. *Morgan*, 3 De G. F. & J. 718 ; 4 L. T. 758.

Defect to be Made Good—Laches—Rescission.]—When a purchaser discovers that a representation made to him by a vendor is untrue, if the vendor suggests that if time be given him, the representation may be cured, and the purchaser put in as good a position as if the representation had been true ; the purchaser, by giving the vendor time, does not lose his right to rely on the misrepresentation and determine the contract, if, at the end of the time, the vendor fails to make good his suggestion. *Tibbatts* v. *Boulter*, 73 L. T. 534.

Inquiry by Plaintiff.]—In a case where some delay arose in completing a purchase of mines from difficulties connected with the title, it was agreed that, if the vendor could verify certain statements he had made as to the capabilities and value of the property, the purchaser would complete the contract. The purchasers, after inquiries instituted by themselves, being satisfied of the correctness of those statements, completed the contract ; but after six months' possession, having discovered that they were not in fact correct, filed a bill to rescind the contract for fraud :—Held, that the contract could not be rescinded, because the purchasers did not rely on the vendor's statements but tested their accuracy, and, after having knowledge, or the means of knowledge, declared that they were satisfied of their correctness. *Attwood* v. *Small*, 6 Cl. & F. 232 ; 2 Jur. 200.

If, on the treaty for the sale of property, the vendor makes representations which he knows to be false, the falsehood of which the purchaser had no means of knowing, but he relies on them, a court of equity will rescind a contract so entered into, although it may not contain the representations ; but it will not rescind without the clearest proof of fraudulent misrepresentations, and that they were made under such circumstances as show that the contract was based on them. *Ib.*

If a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations, the rule being caveat emptor ; and the knowledge of his agents being as binding on him as his own knowledge. *Ib.*

Where representations are made of the nature and character of property offered for sale affecting its value, and those representations turn out to be false to the knowledge of the party making them, a foundation is laid for an action at law for damages for the deceit, and for a suit in equity to set aside the contract. *S. C.*, 6 Cl. & F. 395.

It is no defence to an action for rescission of a contract on the ground of fraud, that the plaintiff inquired to a certain extent whether the representation made to him was true, but did it so carelessly and inefficiently as not to observe the fraud. *Redgrave* v. *Hurd*, 51 L. J., Ch. 113 ; 20 Ch. D. 1 ; 45 L. T. 485 ; 30 W. R. 251—C. A.

If a defendant has made a material misrepresentation to induce a person to enter into a contract, and the plaintiff has entered into the contract, it is not sufficient, in order to uphold the contract against the plaintiff in an action for rescission, that he does not prove that he entered into it relying on the representation, but the defendant must show that the plaintiff abandoned such reliance, either by having knowledge contrary to the representation, or by his explicit statement that he did not rely on such representation. In the absence of such evidence the inference remains that the plaintiff did rely on the representation. *Attwood* v. *Small* (supra) explained. *Ib.*

Knowledge of Falsity of Representation at Time of Making.]—Misrepresentations, to constitute sufficient grounds for setting aside a purchase, must be material, as being of such a nature as, if true, to add to the value, must not be evidently merely conjectural statements, and must be made without a belief in their truth or without reasonable grounds for such a belief. *Jennings* v. *Broughton*, 5 De G. M. & G. 126 ; 23 L. J., Ch. 999.

Where advertisements for the sale of shares in a mine had been issued containing unfounded statements, but the purchaser had not relied upon them, and had had opportunities of judging of their accuracy :—Held, that he was not entitled by reason of them to have the contract rescinded. *Ib.*

In suits to rescind contracts for fraud, particularly where the subject is of variable value, it is the duty of the plaintiff to put forward his complaint at the earliest possible period. *Ib.*

It is not now necessary, in order to set aside a contract, to prove that the person who obtained it by material false representation knew at the time the representation was made, that it was false, or even made it recklessly and without care.—Judgment of Lord Cairns, L.J., in *Reese River Silver Mining Co., In re* (L. R. 2 Ch. 604) approved. *Redgrave* v. *Hurd*, supra.

Contradictory Evidence.]—On a bill to set aside a sale, the parties having contradicted each other, the evidence of the one was to be taken as neutralising that of the other, and the court decided according as the case set up by either was more consistent with and was corroborated by admitted facts and documents connected with the transaction. *Wentworth* v. *Lloyd*, 10 H. L. Cas. 589; 33 L. J., Ch. 688; 10 Jur. (N.S.) 961; 10 L. T. 767.

Admission of Evidence.]—T. agreed to sell to C. certain freehold houses, and to make a good marketable title. On investigation of the title it appeared that the houses were subject to stringent restrictive covenants, admitted to make the title not a marketable one. T. adduced evidence that C. knew of the restrictions at the time of the contract, and the jury found that he did:—Held, that this evidence could not be admitted to modify the terms of the express contract, and that the plaintiff was entitled to recover. *Farebrother* v. *Gibson* (1 De G. & J. 602) and *Leyland* v. *Illingworth* (2 De G., F. & J. 248) distinguished. *Cato* v. *Thompson*, 9 Q. B. D. 616; 47 L. T. 491—C. A.

Defect in Title Concealed.]—The purchaser of an estate cannot recover back his purchase-money on the ground of a concealment of a defect in the title by the vendor, without proving that such concealment was fraudulent; and the question of fraud is properly one for the jury. *Early* v. *Garrett*, 4 Man. & Ry. 687; 9 B. & C. 928; 8 L. J. (O.S.) K. B. 76.

—— **Assertion of Good Title.**]—The mere assertion by a vendor that he has a good title, on the faith of which the purchaser relies without investigating the title, is not necessarily such a misrepresentation as will preclude the vendor from enforcing the contract. *Hume* v. *Pocock*, 35 L. J., Ch. 731; L. R. 1 Ch. 379; 12 Jur. (N.S.) 445; 14 L. T. 386; 14 W. R. 681.

—— **Misrepresentation by Agent.**]—To set aside a purchase, perfected by conveyance and payment of the purchase-money, for fraudulent concealment by the vendor of a defect in the title, where there was no warranty or statement that there was no defect, proof of concealment by the vendor's agent is not sufficient; there must be proof of a direct personal knowledge and concealment by the principal. *Wilde* v. *Gibson*, 1 H. L. Cas. 605; 12 Jur. 527.

A purchaser of an estate, having made no inquiry respecting the title from an agent for the sale, is not entitled to any relief for non-communication of any defect by him. *Ib.*

Constructive knowledge of an agent, or knowledge acquired by him otherwise than as an agent for the sale, of a fact, the non-communication of which is made the ground of relief against the purchase, does not at all affect the contract. *Ib.*

Representations which a purchaser has chosen to accept from the vendor's agent on the subject of the vendor's title, and which turn out, in fact, but not when made, to have been known by the agent to be untrue, do not amount to such fraud as absolves a purchaser from his contract. *Ib.*

—— **Title Subject to Approval of Solicitor.**]—A sale of a leasehold house was subject to approval of the purchaser's solicitor. The house and another were included in one lease, at one rent, and subject to restrictive covenants as to the whole:—Held, that (the vendor not having proved that he could obtain an apportionment of the rent and covenants) the purchaser could rescind. *Hudson* v. *Buck*, 47 L. J., Ch. 247; 7 Ch. D. 683; 38 L. T. 56; 26 W. R. 190.

Leasehold Nearly Equal to Freehold.]—Effect or an indefinite representation by a vendor; as that a leasehold estate was nearly equal to freehold, being renewable upon a small fine; putting the purchaser upon inquiry; though, connected with certain circumstances, such representation may be fraudulent, and form a ground for rescinding the contract. *Fenton* v. *Browne*, 14 Ves. 144; 9 R. R. 255.

Rent Overstated.]—In an action upon a contract to purchase leasehold premises sold by auction on the terms of a prospectus overstating the rental, such false statement will vitiate the contract, either under a plea of fraud or a traverse of readiness and willingness, and the latter plea, if necessary, will be allowed at the trial. *Wood* v. *Keep*, 1 F. & F. 331.

Copyhold for Freehold.]—A vendor sold land as freehold, received the purchase-money, and conveyed the land as freehold. Afterwards the purchaser discovered that the property was really copyhold:—Held, that, assuming that he had made the representation bonâ fide, the vendor had committed a legal fraud; that the sale must be set aside and the purchase-money repaid with interest; and that the vendor must pay all the expenses which the purchaser had incurred in consequence of the purchase. *Hart* v. *Swaine*, 47 L. J., Ch. 5; 7 Ch. D. 42; 37 L. T. 376; 26 W. R. 30.

The purchaser in this case is not entitled to damages in respect of expenses to which he had gone with the view of selling the property again. *Ib.*

And see cases, supra, col. 1192.

As to Occupation.]—The plaintiffs advertised for sale by auction an hotel, stated in the particulars to be held by a "most desirable tenant." The defendants sent their secretary down to inspect the property and report thereon. The secretary reported very unfavourably, stating that the tenant could scarcely pay the rent (400*l.*), rates and taxes. It appeared subsequently that the quarter's rent previous to the sale had not been paid; the previous quarter had been paid by instalments, and six weeks after the sale the tenant filed his petition. The plaintiffs brought an action for specific performance, relying on the fact that the defendants had made their own inquiries:—Held, that the statement that the property was held by a "most desirable tenant," could not be treated as "simplex commendatio," and that the defendants, having re-

lied thereon, were entitled to rescission of the contract, on the authority of *Redgrave* v. *Hurd* (supra). *Smith* v. *Land and House Property Corporation*, 28 Ch. D. 7 ; 51 L. T. 718 ; 49 J. P. 182—C. A.

And see cases, supra, col. 1190.

Action at Law—Injunction.] — Where misrepresentations had been made in a contract for sale, and the vendor accepted an I. O. U. for the purchase money, and the purchaser filed a bill to set aside the contract, and the vendor brought an action on the I. O. U. The court granted an ex parte injunction, and subsequently continued an injunction to restrain such action, and ordered the contract to be cancelled. *Bartlett* v. *Salmon*, 1 Jur. (N.S.) 277.

Sale of Agreement for Lease Voidable at Will of Third Party.]—A vendor contracted to sell and a purchaser to purchase an agreement for a lease. The purchaser afterwards repudiated the contract. At the date of the agreement and of the repudiation, the agreement to lease was voidable at the will of the third party, but the third party took no steps to avoid the agreement, but was willing to confirm it on certain conditions : — Held, that the purchaser was entitled to repudiate the contract. *Brewer* v. *Broadwood*, 52 L. J., Ch. 136 ; 22 Ch. D. 105 ; 47 L. T. 508 ; 31 W. R. 115.

Purchase Money Obtained by Fraud.] — A vendor and his solicitor fraudulently, and in the absence of the purchasers' solicitor, obtained from a purchaser (who had entered into possession) the purchase money and covenants for the production of title deeds, while the title as to part was still under investigation. On a bill filed by the purchaser :—Held, that the plaintiff was entitled to have the contract rescinded, and his purchase money, together with all costs, charges, and expenses, repaid to him, and to have the deeds of covenant executed by him delivered up to be cancelled. *Berry* v. *Armistead*, 2 Keen, 221.

Concealment.]—A firm had become insolvent. One of the members was separately insolvent and non compos ; another was separately adjudicated bankrupt. In order to procure a title to the separate interest of the non compos partner (whose separate creditors would not enter into an arrangement for releasing it), one of the creditors, who was also a separate creditor of the bankrupt partner, obtained an execution against the non compos partner, and sold by the sheriff at auction, expecting and intending to purchase himself, and sent a clerk to bid up to 150*l*. A. purchased at 151*l*., the property being quite worthless :—Held, such a concealment of circumstances as to justify the sale being set aside, with costs on A.'s application. *Smith* v. *Harrison*, 26 L. J., Ch. 412 ; 3 Jur. (N.S.) 287 ; 5 W. R. 508.

—— **Of Vendor's Interest.**]—A., having two parcels, and B. one parcel of land, supposed to contain petroleum, it was agreed between them and C. that C. should pay them 10,000 dollars for the land if he succeeded in forming a company for the purpose of working the oil springs, and in inducing such company to pay him 13,750 dollars, out of which he was to keep for himself 3,750 dollars. B. accordingly, assuming the character of owner, gave to C. a conditional promise to sell all the land to him for 13,750 dollars. A. wrote a letter, meant to be shown to, and which was shown to, persons intending to become members of the new company, and was proved to have influenced them, in which letter he recommended the purchase, not disclosing that he had any interest therein. A. and B. actively co-operated with C. throughout the whole transaction. The company, in ignorance of the combination, accepted the proposal, but having discovered the fraud, sued for a rescission of the contract :—Held, that the contract must be wholly rescinded, the price repaid, and the land reconveyed. *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221 ; 22 W. R. 492.

—— **Purchase by the Solicitors.**]—Purchase of a reversionary interest by the solicitors for sale, set aside on the ground of concealment. *Bloye's Trust, In re*, 1 Mac. & G. 488 ; 2 Hall & Tw. 140 ; 19 L. J., Ch. 89 ; 14 Jur. 49.

Consideration inadequate.] — A party who, under a misapprehension of his legal rights, parts with his property for a bonâ fide and valuable, but not an adequate, consideration, cannot have the transaction set aside on the mere ground of mistake. *Marshall* v. *Collett*, 1 Y. & C. 232.

Inadequacy of value is not in itself sufficient to set aside a contract. *Griffith* v. *Spratley*, 1 Cox, 383.

—— **Reversionary Interest.**]—A purchase of a contingent reversionary interest was set aside chiefly on the ground of inadequacy of value, the consideration being an annuity for the life of vendor, whose life was a bad life, and was better known to the purchaser than to the vendor to be such. *Davies* v. *Cooper*, 5 Myl. & Cr. 270.

A sale of a reversionary interest by a young man of full age for a substantial purpose stands on the same footing as other contracts, and cannot be set aside on the ground of mere inadequacy of consideration. *Judd* v. *Green*, 45 L. J., Ch. 108 ; 33 L. T. 597.

The plaintiff was entitled on the death of his father, who was sixty-one years old, to 500*l*., to be raised by a charge upon an estate which had been purchased by the defendant. The plaintiff, who was without any funds, assigned his reversion to the defendant about three weeks after attaining his majority. The price was, considering the father's state of health, inadequate, and the plaintiff had no independent advice :—Held, by Lords Blackburn and Gordon, that, in the absence of evidence of fraud, and having regard to the circumstances of the case, the transaction could not be impeached ; by Lord Hatherley (dissentiente), that, although there was no evidence of fraud, the plaintiff ought to have had an independent adviser, and therefore was entitled to relief in equity. *O'Rorke* v. *Bolingbroke*, 2 App. Cas. 814 ; 26 W. R. 239—H. L.

—— **Resale—Action for Difference of Price.**] —By a contract, E. agreed to purchase freehold farms from N. for 33,000*l*., subject to the title being accepted by his solicitor. The purchase money was to be paid on the 29th of September, on which day it was presumed that the contract would be completed and possession given. When the title was produced, it appeared that

N. was not the legal owner of the land, but had agreed to purchase the same from the trustees of a settlement for 21,000*l.*, by a contract which was not completed till after the 29th of September. E. took the objection that it appeared on the face of the title that the trustees had sold the estate to N. for a grossly inadequate price. N. proved that the trustees had had a fair valuation made of the land before offering it to him, but, notwithstanding, on the 29th of September, E. wrote to N., rescinding the contract. N. then obtained a conveyance from the trustees, and resold the estate for 25,000*l.*, and brought an action against E. to recover the difference of price by way of damages for breach of the contract. E. filed a bill against N. to restrain the action, and to obtain a declaration that the contract was rescinded:—Held, first, that the bill to obtain a declaration of the rescission of the contract could not be maintained, and that E.'s bill must therefore be dismissed. *Noble* v. *Edwardes*, 5 Ch. D. 378; 37 L. T. 7—C. A.

Held, secondly, that the apparently inadequate price was not a fatal objection to the title, and, therefore, that E. had no right to rescind the contract. *Ib.*

Held, thirdly, that N. had a right to resell the estate and claim the difference by way of damages against E. *Ib.*

See also Cases, TIME WHEN OF THE ESSENCE, supra, col. 1145.

B. RIGHTS AND LIABILITIES ARISING FROM CONTRACT.

1. OF VENDOR AND PURCHASER.

a. General Rights.

Property in the Estate.]—From the execution of the contract, the estate is in equity the property of the vendee, will descend, and is devisable as such. *Seton* v. *Slade*, 7 Ves. 274; 6 R. R. 124.

Equitable Title.]—Where the equitable title is complete, a legal conveyance will be decreed, though the property may have been much enhanced or depreciated in value. Subsequent events will not in equity vary a contract fairly entered into. *Revell* v. *Hussey*, 2 Ball & B. 287; 12 R. R. 87.

Purchaser with Paramount Title.]—The purchaser, being in possession of part of the property under the arrangement, and being advised to rescind and assert his paramount title, was not bound to give up possession before he could assert such paramount title, by making a formal entry on the property. *Southcomb* v. *Exeter (Bishop)*, 6 Hare, 213; 16 L. J., Ch. 378; 11 Jur. 725.

Vendor Trustee.]—If a purchaser for a valuable consideration has not the legal estate properly conveyed to him, though the consideration cannot create a use by way of covenant to stand seised, yet the vendor will be considered a trustee for the purchaser. *Pollexfen* v. *Griffith*, 3 Atk. 273.

When Title First Shown.]—In the absence of express contract on the subject a person is to be treated as purchaser from the time at which, acting prudently, he could have taken possession, that is (usually though not universally) the time at which a good title was first shown. Up to the time at which the purchaser is to be treated as purchaser expenses and outgoings must be borne by the vendor, from that time by the purchaser. *Carrodus* v. *Sharp*, 20 Beav. 56.

Notice of Sub-Contract.]—A vendor of land may receive the balance of the purchase money, and convey the estate to the purchaser, without regard to the receipt of a notice that the purchaser had agreed to assign the contract. *Shaw* v. *Foster*, 42 L. J., Ch. 9; L. R. 5 H. L. 321; 27 L. T. 281; 20 W. R. 907—C. A.

Charge of Debts — Sale under Power.]—Unless twenty years have elapsed since the death of a testator who has charged his real estate with the payment of his debts, the vendor selling under the power given by the charge is not bound to answer the purchaser's inquiry whether any of the debts of the testator still remain unpaid, and the purchaser ought not to make the inquiry, as he will get a good title, even if there are no debts. *Tunqueray-Willaume and Landau, In re*, 51 L. J., Ch. 434; 20 Ch. D. 465; 46 L. T. 452; 30 W. R. 801—C. A.

And see cases, supra, col. 1106.

Disclosure by Purchaser.]—It is not generally the duty of a purchaser to inform a vendor of any of the circumstances which may make it desirable for him to purchase. *Dolman* v. *Nokes*, 22 Beav. 402.

Conveyance by Two out of Six Liquidators.]—Property mortgaged to the trustees of a building society who on default were to sell when required by the directors. The society was ordered to be wound up, and an order was made appointing six of the directors of the society official liquidators, and declaring that all the acts required or authorised by the Companies Act, 1862, to be done by the official liquidators might be done by any two of them. By a subsequent order all the real and personal property was vested in the official liquidators. The order followed in terms s. 203 of the Companies Act, 1862. Two of the liquidators then sold and purported to convey the property comprised in the mortgage:—Held (Lord Esher, M.R., dissentiente), that the two official liquidators had no power to convey the legal estate which was vested in the six. *Graham* v. *Edge* (20 Q. B. D. 683) approved. *Ebsworth and Tidy, In re*, 58 L. J., Ch. 665; 42 Ch. D. 23; 60 L. T. 841; 37 W. R. 657—C. A.

Mortgage by Deposit by Vendor before Completion but after Sale—Priority.]—P. entered into an agreement in writing with W. G. for the sale to him of a copyhold hotel and premises for 3,000*l.*, subject to a lease to the occupier. On the same day W. G. bought up the leasehold interest, and entered into possession. The completion of the purchase was fixed for the 1st May, but on that day P. had not completed his own title to the property. On the 4th August P. was admitted tenant of the property on the court rolls. On the 25th August P. deposited the deeds of the property with Messrs. F., bankers, to secure his current account. The abstract of title was delivered to W. G., on the 13th August, and he accepted the title. Two years later Messrs. F.

transferred their equitable mortgage to J. F. J. F. took out a summons, to which P. and W. G. were made defendants, asking that his equitable mortgage might be enforced by foreclosure or sale as against both defendants. There was evidence that W. G. had been ready to complete the purchase :—Held, that W. G. had originally a right to have the property conveyed to him on payment of 3,000*l.*, which was paramount to J. F.'s right under the equitable mortgage ; that W. G. had been guilty of no default by which such right could be forfeited ; that J. F. not having acquired the legal estate, the question whether he had notice of W. G.'s contract did not arise ; that J. F.'s position was not improved by the possession of the title deeds, for W. G. had never any control over the deeds and had been guilty of no negligence in respect thereof. *Flinn* v. *Fountain*, 58 L. J., Ch. 389 ; 60 L. T. 484 ; 37 W. R. 443.

Sale Pendente Lite.]—A person who acquires the legal estate pendente lite, is a necessary party in the cause. *L'Estrange* v. *Robinson*, 1 Hog. 202.

If land is aliened pendente lite, though not prejudicial to plaintiff, yet alienee ought to be brought before the court. *Daly* v. *Kelly*, 4 Dow, 435.

Unless some act is required to be done by them it is not necessary to bring purchasers pendente lite before the court. *Higgins* v. *Shaw*, 2 Dr. & War. 356 ; 1 Con. & L. 400.

Personal Judgment against Mortgagor transferred to Third Person on Redemption.]—In a foreclosure action personal judgment for the mortgage debt being given against the mortgagor, and a foreclosure judgment against the mortgagor and a purchaser from him :—Held, that the purchaser, in the event of his redeeming the mortgage, would be entitled to have transferred to him the personal judgment against the mortgagor, as being one of the securities held by the mortgagee for the debt. *Greenough* v. *Littler*, 15 Ch. D. 93 ; 42 L. T. 144 ; 28 W. R. 318.

Discharge of Incumbrance.]—A vendor who contracts to sell only such right or interest, if any, as he has, is bound to convey such right or interest free from an existing incumbrance. *Goold* v. *Birmingham, Dudley and District Bank*, 58 L. T. 560.

—— **Conveyancing Act, 1881, s. 5.**]—Where, in a chancery suit, lands charged with legacies were ordered to be sold in court, and it was impracticable to procure a release from the persons entitled to the legacies, and the purchase-money exceeded by a large amount all the incumbrances on the lands, the court made an order, under s. 5 of the Conveyancing and Law of Property Act, 1881, declaring that, on payment of the purchase-money in court, the said lands should be freed from such charge. *Archdale* v. *Anderson*, 21 L. R. Ir. 527.

The court has jurisdiction, under s. 5 of the Conveyancing Act, 1881, to discharge an incumbrance on land sold notwithstanding that in doing so it may be deciding as to future interests in such incumbrance. *Freme's Estate, In re*, *Freme* v. *Hall*, 64 L. J., Ch. 862 ; [1895] 2 Ch. 778 ; 13 R. 474, n. ; 73 L. T. 366 ; 44 W. R. 164 —C. A.

The court will not, under the power given to it by s. 5 of the Conveyancing Act, 1881, compel a vendor to pay money into court for the purpose of discharging an incumbrance upon the land, when the result of so doing would be to inflict a great hardship on him, as, for instance, if the incumbrance is a perpetual rent-charge, and the sum necessary to procure the discharge would far exceed the amount of the purchase money payable to the vendor. *G. N. Ry. and Sanderson, In re*, 53 L. J., Ch. 445 ; 25 Ch. D. 788 ; 50 L. T. 87 ; 32 W. R. 519.

Enlargement of Long Term into Fee—"Rent having no Money Value."]—Land was demised for a term of 500 years from 1646, at the yearly rent of "one silver penny, if lawfully demanded" : —Held, that this rent was a "rent having no money value," within the meaning of s. 65 of the Conveyancing Act, 1881, and that the owner of the term in 1884 had power under that section to enlarge the term into a fee. *Chapman* to *Hobbs, In re*, 54 L. J., Ch. 810 ; 29 Ch. D. 1007 ; 52 L. T. 805 ; 33 W. R. 703. S. P., *Smith and Stott, In re*, 29 Ch. D. 1009, n. ; 48 L. T. 512 ; 31 W. R. 411.

Renewal of Lease.]—The vendor of leaseholds held under an ecclesiastical corporation, previously to his contract for sale, was in treaty with the lessors for a renewal of the lease, and continued such treaty after the contract :—Held, that this did not throw upon him the obligation of procuring such renewal for the benefit of the purchaser. *Monro* v. *Taylor*, 3 Mac. & G. 713 ; 21 L. J., Ch. 525. Affirming 8 Hare, 51.

Purchase from Agent.]—A party who takes an assignment of a lease from the agent of the lessor, with notice of the assignor's character as agent, has the same liability of sustaining the lease cast upon him that the agent has, and if the lease cannot be upheld by the agent neither can it be supported by the purchaser from the agent. *Molony* v. *Kernan*, 2 Dr. & War. 31.

Copyholds—Injunction against Surrender.]—Injunction to restrain the vendor of copyhold premises, after delivery of possession and receipt of part of the purchase money, from surrendering them to persons other than the purchasers. *Spiller* v. *Spiller*, 3 Swanst. 556 ; 19 R. R. 276.

Licence to Assign.]—Premises held under a demise, containing a proviso, that lessees shall not assign without the licence of landlord in writing, are sold under a decree to a purchaser, who pays his purchase money into court, and is let into possession ; the landlord having refused to concur in the assignment, the representatives of the lessee filed a bill against him, alleging that his conduct with respect to the sale had been such as to deprive him in equity of any right to act on the legal construction of the proviso, and praying that he might be decreed to give his licence in writing. The purchasers are necessary parties to such a bill. *Maule* v. *Beaufort (Duke)*, 1 Russ. 349.

Tenant after Purchase.]—After a purchase, the tenant holds of the purchaser on the same terms as he previously held of the vendor, and

the holding continues until the tenancy has been regularly determined, either by the landlord or tenant. *Greenwood* v. *Bairstow*, 5 L. J., Ch. 179.

b. Possession and Receipt of Rents and Profits.

Right to Possession on Deposit of Purchase Money.]—A contract for sale of a house provided that the purchaser should be entitled to immediate possession upon depositing the purchase money, but the purchaser was not to be considered as accepting the vendor's title:—Held, that this clause had the same operation as s. 85 of the Lands Clauses Act (8 & 9 Vict. c. 18), and the purchaser was entitled, upon depositing the purchase money, not only to take possession, but to pull down the house, that being the object for which the purchase was effected. *Bolton* v. *London School Board*, 47 L. J., Ch. 461; 7 Ch. D. 766; 26 W. R. 549.

Under Condition.]—Condition that the purchaser should be entitled "to the possession or the receipt of the rents and profits" of the land from a specified date:—Held, that the vendor was bound to give possession to the purchaser on the date specified, and that no effect could be given to the words referring in the alternative to the receipt of the rents and profits. *Anker* v. *Franklin*, 53 L. T. 317; 44 J. P. 830.

By conditions of sale, the purchase money was to be paid in May, and, if not paid, from any cause whatever, interest was to be paid till the purchase was completed, and the purchaser to be let into possession from the quarter-day next preceding the day of payment. Payment was made in December:—Held, that the purchaser, paying interest from May, was entitled to the rents from the 25th March. *Nicholson* v. *Nicholson*, 5 L. J., Ch. 51.

Fines.]—A vendor of a manor is entitled to the fines paid for the admission of any new tenants in the room of the tenants described in the particulars of sale who may happen to die after the contract, but before the day fixed for the completion of the purchase, although the fines are not in fact paid till after that date. *Cuddon* v. *Tite*, 1 Giff. 395; 4 Jur. (N.S.) 579; 6 W. R. 606.

A manor was sold under the decree of the court, and an order was made on the 13th March that the purchaser should, on or before the 17th May, pay his purchase money into court, and be let into possession of the profits from lady day; several deaths and admissions took place prior to Lady day, but the fines had not been paid until after that time; these fines belong to the vendors. *Garrick* v. *Camden (Earl)*, 2 Cox, 231; 2 R. R. 37.

Mortgagee.]—A mortgagee purchased part of the mortgaged estate. His principal and interest, calculated up to the 24th March, exceeded the purchase money. He was let into possession from the preceding Christmas. *Bates* v. *Bonnor*, 7 Sim. 427.

Receipt of Rents.]—A statement in conditions of sale that a purchaser is to be let into the receipt of the rents and profits from a certain day, must be construed to mean ordinary rents and profits, and not rents reserved on leases for lives. *Hughes* v. *Jones*, 31 L. J., Ch. 83; 8 Jur. (N.S.) 399; 5 L. T. 408; 10 W. R. 139.

A purchaser is entitled to the rents of tenancies terminable at the date of the conveyance from the gale day previous to the purchase, and the Apportionment Act does not apply to such rents. *Dawson's Estate, In re*, 21 L. R. Ir. 441.

—— **Sale of Colliery.**]—The rule that a purchaser shall have possession as from the quarter day preceding the sale, does not apply to a colliery, which is an article of trade, the profits accruing daily; the proper period is the month or week in which the purchase takes place, according to the usual course of taking the account. *Wren* v. *Kirton*, 8 Ves. 502: 8 R. R. 174.

Agreement that purchase be completed by a certain date, and if not completed on that date, the vendor should receive the "rents and profits" of the premises until completion in lieu of interest on the balance of the purchase money. There was a stone quarry on the land which had been worked under a lease. Part of the purchase money was paid, but the remainder was not paid on the date fixed:—Held, that "rents and profits" included whatever was payable under the lease of the quarry, and that the vendor was entitled to such amounts from the date of the agreement to the date of the completion. *Leppington* v. *Freeman*, 66 L. T. 357; 40 W. R. 348—C. A.

—— **Deposit and Interest.**] — Purchaser is entitled to interest on his deposit, and to costs at law and in equity until the vendor has made his title good; but vendor is entitled to subsequent costs. The rents belong to the vendor till his title is made good, and afterwards the purchaser must take to the rents, and pay interest on his purchase-money till the principal is discharged. *Pincke* v. *Curteis*, 4 Bro. C. C. 329. And see *Id.* 333, n.

Where, in consideration of sale, there is no stipulation as to interest, and purchaser completes his part, he pays 4 per cent. interest, and takes rents and profits; but if rents and profits value under that rate, he pays no interest, and vendor takes them. *Esdaile* v. *Stephenson*, 1 Sim. & S. 122; 24 R. R. 151.

On motion by vendor against purchaser in possession for reference to set occupation rent, title not being completed, order was accordingly made, and that interest at 5 per cent. on deposit should, under circumstances, be deducted from rent. *Smith* v. *Jackson*, 1 Madd. 618; 16 R. R. 279. *And see cases*, infra, col. 1295.

—— **Rent Paid in Advance.**] — Purchasers bought a lessee's interest in a term of years, the rent for the last year of the term having been paid at the commencement of the letting:—Held, that the vendor was not entitled to the year's rent which had been paid in advance in addition to the purchase-money. *Dublin Corporation* v. *Barry*, [1897] 1 Ir. R. 65.

Account of Rents—By Purchaser.] — Where a party had contracted to purchase, and had been eight years in possession of premises to which the vendor was unable to make a good title, and refused either to abandon the agreement or accept such title as the vendor could give, having paid no part of the purchase money and no rent; the court, upon a bill by the vendor, directed the agreement to be delivered up to be cancelled, and the rents and profits received by the purchaser to be accounted for,

and ordered the purchaser to pay the costs of the suit. *King* v. *King*, 1 Myl. & K. 442.

On a bill by a vendor for specific performance, where the purchaser had entered into possession under the agreement, and, pending the suit, continued in possession, the plaintiff failing in his attempt to compel the performance of the contract, the court refused to decree an account of rents and profits against the purchaser, though he had stated, by his answer, that he was willing to pay a fair rent. *Williams* v. *Shaw*, 3 Russ. 178; 3 L. J. (o.s.), Ch. 157.

An admission by a defendant, in his answer, that he alone has been in the possession or receipt of the rents and profits of an estate since a time therein specified, will not, under a decree directing him to account for the rents received by him since that time, preclude him from showing, in the master's office, that a part of such rents was not received by him, but was paid by the tenants to other parties. *Howell* v. *Howell*, 2 Myl. & Cr. 478; 1 Jur. 492.

The account of rents given against a purchaser for value, who, after being in possession, is evicted by a party having better title, ought not to extend to such rents as, without his default or neglect, might have been received, if no special case of fraud is made against him. *Ib.*

The decree for such an account ought to contain a direction for just allowance. *Ib.*

—— **By Vendor.**]—The title not being satisfactory, and the purchaser, for that reason, not having taken possession, the vendor to account for the rents received, or which, without his wilful default, might have been received. *Wilson* v. *Clapham*, 1 J. & W. 36; 20 R. R. 213.

An agreement provided that the purchaser should be entitled to the possession or rents from the 25th March, and in the event of the purchase not being completed on that day, the purchaser should pay interest on the unpaid balance till completion. Disputes having arisen the purchase was not completed for several years, and the vendor refused to allow the purchaser to take possession, but suffered the estate to fall into decay:—Held, that the purchaser was entitled to charge the vendor with rents and profits which, without wilful default, he might have received, and also with deterioration, and to set off what might be found due against his purchase money and interest. *Phillips* v. *Silvester*, 42 L. J., Ch. 225; L. R. 8 Ch. 173; 27 L. T. 840; 21 W. R. 179.

An agreement for the purchase of land provided a certain day for completion, and that the purchasers were to receive the rents and profits and pay interest on the purchase money if unpaid after that date. The vendors demurred to a statement of claim alleging a delay in completing the purchase, and claiming rents and profits from the vendors, who had remained in possession at the rate of 150*l.* per annum:—Held, that the demurrer must be overruled, and that the defendants by demurring had admitted 150*l.* to be the fair annual value of the rents and profits. *Metropolitan Ry.* v. *Defries*, 2 Q. B. D. 387; 36 L. T. 494; 25 W. R. 841—C. A.

When the purchase is completed, the purchaser is entitled to the rents and profits till possession given, and vendor to purchase money with interest; and if by neglect of vendor no rents, &c., have been received, he will be liable for what he might have received while purchaser was out of possession. *Ackland* v. *Cuming*, 2 Madd. 28; 17 R. R. 177.

On a bill by a purchaser for specific performance of a contract, a vendor, who, during fifteen years, had retained possession of the whole estate and of one-third of the purchase money was, under the circumstances, charged with interest on one-third of the rents and profits. *Burton* v. *Todd*, 1 Swanst. 255.

In a decree for specific performance directing an account of rents against a vendor who has remained in possession, and directing an occupation rent to be fixed, it is irregular to insert, as a matter of course, a direction that he shall be allowed for the expenses of needful repairs, or for income tax, in fixing the occupation rent. *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517; 2 Eq. R. 957; 23 L. J., Ch. 893; 18 Jur. 843; 2 W. R. 668.

—— **Occupation Rent.**]—By an agreement with executors for the purchase of a leasehold public-house, the stock in trade, and other effects upon the premises, were to be taken by the purchaser at a valuation, and possession was to be delivered up to him on the 29th September. The valuation was made, but on the 29th September the purchaser, alleging that there was a defect in the title, refused to perform his contract; the executors filed a bill for specific performance, but in the meantime remained in possession of the house, and carried on the business:—Held, that the purchaser could not be made answerable for the trade which had been carried on since September: that he could not be compelled to take that portion of the stock in trade on the premises at the time of the decree, which was not there at the time of the agreement; that the purchaser ought to be charged with rent and taxes, and other outgoings paid by the executors since September, and with interest on the same so paid by them: and that the purchaser was not entitled to any occupation rent, or other allowance, for the use of the house by the executors. *Dakin* v. *Cope*, 2 Russ. 170; 26 R. R. 37.

In 1867, L. sold to a company a house in which he was carrying on the business of a victualler, the purchase money to be paid on the 25th March, 1869, or at such earlier time as the company should choose, possession to be given on payment, they paying 5 per cent. interest in the meantime; and he was to be their tenant at a given rent, the tenancy to be determinable on the 25th March, 1869, by a week's notice. The interest and rent were paid up to the 25th March, 1869. L. gave due notice to determine the tenancy on that day; but the company not having the purchase money ready, he refused to give up possession, and in April filed a bill for specific performance. In November, 1869, a decree for specific performance, with an order for payment of the purchase money, with interest from March 25th, 1869, was made:—Held, that the company was not entitled to any allowance by way of occupation rent. *Leggott* v. *Metropolitan Ry.*, L. R. 5 Ch. 716; 18 W. R. 1060.

Agreement to let Plaintiff into a Trade.]—Though the court decreed specific performance of an agreement to let the plaintiff into a trade (contrà 9 Ves. 357), it refused to direct an account of the profits from the time the plaintiff ought to have been admitted; his remedy for that having been at law. *Anon.*, 2 Ves. sen. 630.

Agreement to Sell Business.]—The vendor of a share of a co-partnership business filed a bill against the purchaser, who had taken possession, charging that he had grossly mismanaged the property, and destroyed its value. The court was of opinion that the title had not been accepted; and as a good title was not shown, a specific performance could not be decreed:—Held, that, upon a record so framed, no accounts or inquiries could be directed as to the defendant's possession and management of the property. *Stevens* v. *Guppy*, 3 Russ. 171; 6 L. J. (o.s.) Ch. 164; 27 R. R. 59.

Possession under Agreement by Lunatic.]—A bill to set aside, on the ground of lunacy and fraud, a conveyance of an estate by a party claiming the fee simple. The lunacy was established, but it appeared that the plaintiff was only entitled to a life estate:—Held, that the plaintiff was entitled to an account of the rents and profits during the life of the plaintiff, as against the parties in possession under the conveyance. *Price* v. *Berrington*, 7 Hare, 394.

Receiver and Manager.]—A., who was the owner of leasehold premises (on which the business of a private hotel was carried on) and furniture, entered into a contract for sale to B. A portion of the purchase money remained unpaid, and a draft assignment of the lease and mortgage to secure the unpaid purchase money were prepared, but never executed. In an action for specific performance of the contract:—Held, that a receiver and manager might be appointed with power to take possession and carry on the business, but not to include any chattels other than those which would pass by an assignment of the lease. *Poole* v. *Downes*, 76 L. T. 110.

—— **Purchaser in Possession—Payment or Delivery of Possession.**]—A vendor who claims rescission of a contract for sale of land against a purchaser in possession under that contract cannot obtain on motion an immediate order for delivery of possession in default of payment by the purchaser of sums due under the contract sought to be rescinded. Where, however, the subject-matter of the contract is imperilled by the acts of the purchaser, a receiver will be appointed. *Cook* v. *Andrews*, 66 L. J., Ch. 137; [1897] 1 Ch. 266; 76 L. T. 16.

Sale of Crops.]—In May a person agreed to purchase an estate, including hay and growing crops. The purchase was to be completed in June. By a subsequent agreement, November was substituted for June. The contract was not completed until the following February, and in the meantime the vendors sold the hay and used the garden produce:—Held, that under the altered contract, the purchaser was not entitled to this hay or produce. *Webster* v. *Donaldson*, 34 Beav. 451; 11 Jur. (N.S.) 404; 12 L. T. 69; 13 W. R. 515.

Held, also, that if he was entitled to the produce of the crops, his remedy was by action. *Ib.*

Laches.]—Sale in 1808. The present suit was instituted in 1822, and in 1823 the principal defendant answered the bill. No further proceedings in the cause were had until 1839, when the suit was revived:—Held, that the plaintiff was entitled to relief, notwithstanding the lapse of time. But costs were refused to both parties in consequence of the great delay; and an account of the rent was directed only from 1839. *Thornhill* v. *Glover*, 3 Dr. & War. 195.

Repairs.]—There is no consideration between the purchaser and the vendor's creditor to entitle the latter to recover from the former the amount of the repairs done to the subject matter of the purchase. *Rattenbury* v. *Fenton*, 3 Myl. & K. 505; 3 L. J., Ch. 203.

Sale of Reversion.]—A. agreed to purchase a reversionary estate. B., the vendor, agreed to make out a good title by the 1st May next, from which time A. was to be entitled to the rents and profits. A. further agreeing to pay all such further sums as should be awarded by indifferent persons in respect of any increase in the value of the estate, by deaths. The purchase was not completed for a considerable period:—Held, that the vendor was not entitled to the benefit of any increase in the value of the estate from the wearing of lives. *Brooke* v. *Champernowne*, 4 Cl. & F. 589; 9 Bligh. (N.S.) 199.

Quære, on what principle the increased value of an estate arising from the dropping of lives, between the commencement and completion of the contract, is to be calculated. *Townsend* v. *Champernowne*, 3 Y. & C. 505.

Sale of Public-house—Transfer of Licence—Licence "affected."]—A stipulation in an agreement for a sale of a public-house that the agreement is to be void at the purchaser's option if the licence shall be indorsed or otherwise affected prior to completion, merely imposes on the vendor the obligation of having at the date fixed a valid and existing licence upon which the purchaser can apply at once to the magistrates for interim protection and transfer, and of joining with the purchaser or authorising him to use the vendor's name upon such applications. *Tadcaster Brewery Co.* v. *Wilson*, 66 L. J., Ch. 402; [1897] 1 Ch. 705; 76 L. T. 459; 45 W. R. 428; 61 J. P. 360.

If the magistrate should refuse such applications on any ground other than that the licence is not clean or valid, the vendor is still entitled to specific performance. *Ib.*

Improvements.]—A purchaser who has laid out money in bonâ fide improvements on lands purchased by him upon a sale which was invalid but not fraudulent, is entitled to an allowance for sums so expended by him. *Stepney* v. *Biddulph*, 12 L. T. 176; 13 W. R. 576.

There may be a degree of unfairness in obtaining articles for the purchase of an estate, for which this court will not set them aside, but will refuse its aid to carry them into execution; and if the party who obtained such articles had been in possession, and made lasting improvements, he shall be allowed for them on consenting to deliver up the articles, and account for the profits. *Savage* v. *Taylor*, Cas. t. Talb. 234.

Where the title is fraudulent, equity, in giving relief, will reimburse the party in possession for permanent improvements. *Shine* v. *Gough*, 1 Ball & B. 444.

In an action against an agent for reconveyance of an estate purchased of his principal, a decree was made, and on a supplemental bill against the purchasers a decree was made for repayment to them of the purchase-money by the agent and

for an allowance to them for substantial repairs and improvements. *Trevelyan* v. *White*, 1 Beav. 588.

If an assignee purchase part of the bankrupt's estate, and improve, the estate must be resold, and put up at the price given by the assignee, adding the sum laid out in improvements. *Hewitt, Ex parte, Johnston, In re*, 2 Mont. & Ayr. 477.

—— **How Valued.**]—In estimating lasting improvements, old buildings pulled down, if incapable of repair, to be valued as old materials only. *Robinson* v. *Ridley*, 6 Madd. 2.

Delay—Right of Way.]—The purchaser of a piece of land agreed, as part of the consideration, to grant within a given time to the vendor a right of way, and to make a road with sewers leading to other land belonging to the vendor. The purchaser was unable to grant the right of way or to make the road and sewers until long after the time fixed, and the vendor brought an action for specific performance and for damages as the other land had remained unproductive until the road was made:—Held, that judgment for specific performance with costs must be given but no damages, as the contract was for a sale of real estate; there being no distinction between a contract to grant a right of way and make a road and sewers, and a contract to sell real estate. The principle on which in such a case damages would be assessed, discussed. *Rowe* v. *London School Board*, 57 L. J., Ch. 179; 36 Ch. D. 619; 57 L. T. 182.

c. Expenses and Deterioration.

Lease for Lives.]—Distinction between a purchase and a lease for lives; as time is not essential in a purchase, any delay may be compensated, either by receipt of the rents and profits, or, in case a title cannot be made out, by interest on the deposit; but in a lease depending on lives, where time is most essential, delay does not admit of any compensation. *Ormond* v. *Anderson*, 2 Ball & B. 370; 12 R. R. 103.

Purchase of Life Estate.]—The case of the purchase of a fee-simple is distinguishable from that of a life estate with respect to compensation for casualties. *Vesey* v. *Elwood*, 2 Con. & L. 47; 3 Dr. & War. 74; Fl. & K. 667; 5 Ir. Eq. R. 184.

Purchase Money in Court.]—The amount of deterioration of an estate, pending a suit for specific performance, having been ascertained by an issue, the purchaser was allowed it out of his purchase money which he had paid into court, under an order, with interest from the time when he paid in his money. *Ferguson* v. *Tadman*, 1 Sim. 530; 27 R. R. 236.

Delay in Completion.]—In August the plaintiff agreed to sell a property to the defendant. The contract was to be completed on the 9th October following, and the purchaser was to be entitled to possession up to that time; and if the purchase should not then be completed, the purchaser was to pay interest at 5 per cent. from that day until full payment. In November the time for completion was enlarged to the 21st February, when the purchase money was to be paid without interest, and the defendant let into possession. The defendant had not taken possession, and great dilapidation had occurred:—Held, that as a good title had been shown in August, and that the defendant should sustain the loss by dilapidation, and pay interest at 4 per cent. on his purchase money from the time of filing the bill. *Minchin* v. *Nance*, 4 Beav. 332.

Completion of contract being delayed for three years by difficulties in title, vendor is accountable for deterioration of the land during that period. *Foster* v. *Deacon*, 3 Madd. 394; 18 R. R. 251.

When the completion of a purchase is delayed through the default of the vendor in possession, and the property has diminished in value, or has been deteriorated by permissive waste, the purchaser is entitled to compensation. *Regent's Canal Co.* v. *Ware*, 23 Beav. 575. S. P., *Phillips* v. *Silvester* (supra, col. 1257); *Gedye* v. *Montrose (Duke)*, 26 Beav. 45.

Deterioration of the estate, arising from delay in completing the purchase, is not a ground for rescinding the contract, but may be the subject of an allowance to the purchaser. *Lord* v. *Stephens*, 1 Y. & C. 222.

—— **Extraordinary Expense.**]—Where, between the date of the contract and conveyance, any deterioration to the property occurs from accident, without the fault of either party, the loss falls on the purchaser. But where, without any improper neglect or delay, a purchase could not be completed for three years, and the death of a trustee for sale occasioned the expense of a fine on a new admittance, although by the contract the conveyance was to be at the expense of the purchaser:—Held, that the extraordinary expense of the fine should be borne by the trust estate. *Paramore* v. *Greenslade*, 1 Sm. & G. 541; 23 L. J., Ch. 34; 17 Jur. 1064.

Mistake by Third Party.]—Deterioration arising from the agreement between intended purchaser and tenant of vendor being misunderstood by tenant, purchaser held liable to the loss. *Harford* v. *Purrier*, 1 Madd. 532; 16 R. R. 260.

Loss by Fire.]—It is against natural justice that any one should pay for a bargain which he cannot have; as if A. articles to buy a house, and the house is burnt down before the day of payment, A. is not bound to pay the money. *Stent* v. *Bailis*, 2 P. Wms. 220.

Contract for sale of houses, which from defects in title, could not be completed on the day fixed; the treaty was proceeded in on proposal to waive objections on certain terms; the houses being burnt before conveyance, the purchaser is bound if he accepted title. *Paine* v. *Meller*, 6 Ves. 347; 5 R. R. 327.

A vendor agreed with a purchaser for the sale of a house which had been insured against fire. The contract contained no reference to the insurance. After the date of the contract but before the day fixed for completion, the house was damaged by fire and the vendor received the insurance money. The purchase was afterwards completed, and the purchase-money, without any abatement, was paid over to the vendor:—Held, that the insurance company was entitled to recover back a sum equal to the insurance money from the vendor. *Castellain* v. *Preston*, 11 Q. B. D. 380.

A house insured by the vendor was after the date of the contract for sale, but before completion, partly burnt down, and the vendor received the insurance moneys. There was no provision in the contract as to insurance :—Held, that the purchaser as against the vendor could not recover the insurance moneys either as an abatement of his purchase money or for the reinstatement of the premises. *Rayner* v. *Preston*, 50 L. J., Ch. 472 ; 18 Ch. D. 1 ; 44 L. T. 787 ; 29 W. R. 546 ; 45 J. P. 829—C. A.

Vendor allowing Premises to fall into Disrepair.]—An agreement for purchase of real estate provided that the purchaser should be entitled to the possession of rents, from a date, and in the event of the purchase not being completed on that day, the purchaser should pay interest on the unpaid balance till completion. Disputes having arisen, the purchase was not completed for several years, and the vendor refused to allow the purchaser to take possession in the meantime, but suffered the estate to remain unoccupied, and to fall into decay :—Held, that the purchaser was entitled to charge the vendor with rents and profits which, without wilful default, he might have received, and also with deterioration, and to set off what might be found due against his purchase money and interest. *Phillips* v. *Silvester*, supra, col. 1257.

Vendor's Duty to Preserve Land.]—Upon a contract of sale of real estate, the vendor remaining in possession is bound until completion to use reasonable care to keep the premises in the same condition as at the date of the contract of sale. *Clarke* v. *Ramuz*, 60 L. J., Q. B. 679 ; [1891] 2 Q. B. 456 ; 56 J. P. 5—C. A.

Dilapidations.] — Sale on 2nd March of a house "with possession," the purchaser to take the late tenant's fixtures at a valuation if he desired. B. purchased the house at the auction. It appeared from the abstract delivered to the purchaser that the house had been let upon a lease, determined by notice on the 25th March, and which contained covenants by the lessee to keep and deliver up the premises in good repair. The tenant was bankrupt in January, and the vendor carried in a proof for damages for breach of the covenant to repair :—Held, that the purchaser had contracted for the purchase of the possession of the house as it stood, and could not be entitled to the claim for damages for breach of the covenant to repair, because that claim was incident to the reversion of the lease, which he had not purchased. *Edie and Brown, In re*, 58 L. T. 307.

Vendor's Duty to Let Premises.]—When the vendor of a farm, subject to a yearly tenancy, finds that, without default on the part either of himself or the purchaser, the purchase cannot be completed on the appointed day, and that the tenancy will determine before actual completion, it is his duty as trustee for the purchaser, to relet the farm on a yearly tenancy, so as to prevent it going out of cultivation, unless he obtains an indemnity from the purchaser against all risk arising from its remaining unlet. *Egmont (Earl)* v. *Smith*, 46 L. J., Ch. 356 ; 6 Ch. D. 469.

Unpaid vendors of a property, consisting of houses let in rooms to weekly tenants, who are in a position of qualified trusteeship for a purchaser, are bound, so far as they reasonably can, to keep the premises properly tenanted, so long as they remain in their possession. When they know that the purchaser is confiding in them for the management of the property purchased, and cannot sue the tenants directly, if they employ a proper agent, they must see that he does his duty with reasonable efficiency. *Malone* v. *Henshaw*, 29 L. R. Ir. 352.

Outgoing Tenant—Distress.] — A farm was sold under the direction of the court, subject to such tenant right as the outgoing tenant should possess. The day for completion was the 29th Sept. The purchase money was paid, and the purchaser let into possession on the 13th Oct., but no conveyance had been executed. The term of the tenant in occupation expired on 29th Sept. By his tenant right he left in the barns and yards hay and straw, and as the rent had not been paid, the receiver threatened to distrain on this :—Held, that the persons who had the legal estate had a right at law to distrain, but that in equity they must be regarded as trustees for the purchaser, and could not be allowed to exercise their legal right in such a way as to prejudice the purchaser. *Powers, In re, Manisty* v. *Archdale*, 63 L. T. 626 ; 39 W. R. 185.

Continuing Old Tenancies.]—Houses described in the particulars as in the respective occupations of specified under tenants, and as let to Messrs. J., "at the very low rent of 50*l.* per annum, who have received notice to quit," at a day past, but with a subsequent written permission to occupy on the same terms as before, until the tenements are sold, were contracted to be sold, subject to a condition, that the purchaser should be entitled to the rents from a specified day :—Held, that the purchaser not having required the vendors to turn the tenant out, they were not guilty of wilful default in allowing him to remain at the lesser rent ; and specific performance was decreed, the plaintiffs accounting only for the lesser rent. *Crosse* v. *Beaufort (Duke)*, 5 De G. & Sm. 7.

Agreement to Purchase at a Valuation—Interest—Damages.]—A landlord and tenant agreed that at the expiration of the tenancy, the former should purchase certain machinery on the demised premises at a valuation. On the expiration of the tenancy the landlord refused to purchase, and an action for specific performance by the tenant, who made no claim for interest or damages, was dismissed. On appeal, the question as to interest was not raised ; but the court ordered specific performance, directed a reference to ascertain the value of the fixtures, and ordered the defendant to pay the amount :—Held, that the plaintiff was entitled to interest at 4 per cent. by way of damages from the time when the landlord took possession. *Marsh* v. *Jones*, 40 Ch. D. 563 ; 60 L. T. 610—C. A.

Purchaser in Possession—Purchase Money—Payment into Court.]—Where a purchaser is in possession, even under his contract to purchase, and has made no objection to the vendor's title, the court will not order him to pay the balance of his purchase money into court without giving him the option to retire from possession unless he

has done something which has interfered with the value of the property as a security for the balance of purchase money. *Greenwood* v. *Turner*, 60 L. J., Ch. 351; [1891] 2 Ch. 144; 64 L. T. 261; 39 W. R. 315.

B. agreed to purchase a manor from A., and to complete on or before the 24th July, 1843. It was also agreed that, on the completion of the purchase, the purchaser should be entitled to the rents and profits of such parts of the estate as were let. The day of completing the purchase was, for the convenience of the purchaser, altered from the 24th June to the 24th July. A tenant of copyhold premises, parcel of the manor, having died in 1836, the admittance of the parties entitled was postponed from time to time, at their request, and did not take place till the 1st July, 1843; and in December of the same year the fine was paid to the vendor. The conveyance to the purchaser was executed by the vendor in August, 1843, and the purchase money was paid in the following September:—Held, that the purchaser was not entitled to the fine. *Hardwicke* (*Earl*) v. *Sandys* (*Lord*), 14 M. & W. 761; 13 L. J., Ex. 233.

Reimbursement of Expense by Drainage Commissioners.]—A local drainage act provided, that the owners and proprietors of lands, their respective heirs and assigns, should be reimbursed such expenses or such share thereof as should be ascertained by certain commissioners appointed under the act; a subsequent act, imposing an additional tax on those lands, provided that such tax should not be payable until the repayment of such of the above expenses as the owners and proprietors of the lands for the time being should make appear to the satisfaction of the commissioners to have been necessarily expended in making banks. A third person, who had expended a large sum of money in making banks, afterwards sold his lands, without reserving, or noticing in the conveyance, the reimbursement above mentioned; and the commissioners having subsequently determined the amount of the reimbursement:—Held, that the purchaser, and not such third person, was entitled to receive it. *King* v. *Witham Navigation Co.*, 3 B. & Ald. 454.

Succession Duty—Sale of Expectancy.]—The heir-presumptive of an estate in fee agreed to sell his interest free from incumbrances:—Held, that as between him and the purchaser the succession duty ought to be borne by the purchaser. *Cooper* v. *Trewby* (28 Beav. 194) followed and approved. *Langham Hotel Co., In re*, 60 L. J., Ch. 110; 39 W. R. 156—C. A.

—— **Duty payable in respect of Increased Value on Determination of Leases.**]—Lands subject to leases at ground-rents were sold subject to leases, but free from incumbrances, the contract making no provision as to the payment of succession duty:—Held, that the succession duty payable in respect of the increased value of the property on the determination of the leases, payment of which had been postponed in accordance with s. 20 of the Succession Duty Act, 1853, must be borne by the vendors. *Kidd and Gibbons' Contract, In re*, 62 L. J., Ch. 436; [1893] 1 Ch. 695; 3 R. 268; 68 L. T. 647; 41 W. R. 507.

"Outgoings."]—Conditions of sale of leasehold property provided that the vendors should pay all outgoings up to the half-quarter day, when the purchase was to be completed:—Held, that under the term "outgoings," the half-quarter's rent was payable by the vendors. *Lawes* v. *Gibson*, 35 L. J., Ch. 148; L. R. 1 Eq. 135; 11 Jur. (N.S.) 873; 13 L. T. 316; 14 W. R. 25. And see *Midgley* v. *Coppock*, 48 L. J., Ex. 674; 4 Ex. D. 309; 40 L. T. 870—C. A. Supra, col. 1107.

—— **Order to Pull Down Dangerous Structures on Land.**]—By a contract for the sale of land by the defendant to the plaintiff, the defendant agreed to clear all "outgoings" up to the date fixed for completion of the purchase. Prior to that date, notices were served upon the defendant by the L. council requiring him to pull down certain buildings upon the land as being dangerous structures. The defendant failed to comply with the notices, and, a magistrate having made orders to enforce them, the buildings were, after the date fixed for completion, pulled down by the council, and the plaintiff paid them the expenses incurred in executing the work. In an action by the plaintiff to recover the amount from the defendant:—Held, that the expenses were "outgoings" within the meaning of the contract, and that the plaintiff was entitled to recover, although the work was not executed until after the date fixed for completion. *Tubbs* v. *Wynne*, 66 L. J., Q. B. 116; [1897] 1 Q. B. 74.

Fines and Heriots.]—A copyholder contracted with a company for the sale of his tenement, which was subject to a heriot and to quit-rent and fines. The heriot was supplied by severance of the copyhold:—Held, that the vendor was not entitled to have the remaining part of his copyhold discharged from the heriot; and that he could not refuse to execute the conveyance on the ground that the company had not apportioned the rents and fines, but must proceed himself under the railway consolidation act. *Parker* v. *S. E. R.*, 1 W. R. 316.

Copyholds ordered to be sold by the court were put up for sale in lots, and purchased by different purchasers. After the sale, and before the completion of the conveyance by surrender, the tenant on the court rolls, who was the surviving trustee, died, thereupon it became necessary for his heir to be admitted, and a fine and fees paid:—Held, that the fine and fees must be paid out of the fund belonging to the cestuis que trustent. *Paramore* v. *Greenslade*, 1 Sm. & Giff. 541; 23 L. J., Ch. 34; 17 Jur. 1064.

A condition of sale, which stated that "the purchasers should have proper surrender, conveyances, and assignments of the premises at their own expense, did not bind them to bear the expense of procuring the concurrence of all proper parties. *Ib.*

The purchaser of a copyhold estate (devised, subject to payment of debts, in trust for sale, and sold during the infancy of the heir, under the usual decree) is not entitled to have a portion of the purchase money retained in court, as a provision for defraying the expenses of the fine, which would become payable on the death of the heir before a conveyance. *Morris* v. *Clarkson*, 3 Swanst. 558; 19 R. R. 277.

Sale of Reversion—Timber Cut.]—A tenant in fee simple having contracted to sell the reversion of his own life, cut down ornamental timber. After his death, in a suit for the ad-

ministration of his estate, the purchaser of the reversion brought in a claim for damages. In the opinion of the court the evidence did not show that any injury had been done to the reversion :—Held, that as the purchaser had not applied for an injunction to restrain the cutting, he could not claim damages. But, semble, that if he had applied for an injunction, any timber, the loss of which would, in his opinion, have been injurious to the ornamental effect, would have been protected. *Bubb* v. *Yelverton, Hastings, Ex parte*, 40 L. J., Ch. 38 ; L. R. 10 Eq. 465 ; 18 W. R. 1127, 1146.

d. Purchase Money and Deposit.

i. *Deposit.*

a. Payment and Forfeiture of.

Relief against Forfeiture.] — Relief against forfeiture of the deposit, upon putting the other party in the same situation as if the contract had been performed at the time agreed. *Moss* v. *Matthews*, 3 Ves. 279.

Contract not Completed.]—When a purchaser by a decree in a suit for specific performance was decreed to pay the purchase money within a specified time, and failed to do so, the court, on the application of the vendor, ordered the contract to be rescinded, and stayed all proceedings in the suit, with costs to be paid by the purchaser, and refused to make an order for the return of the deposit to him. *Dunn* v. *Vere*, 23 L. T. 432 ; 19 W. R. 151.

Condition to make good Loss on Resale.]—Conditions of sale stipulated, "that if the purchaser shall fail to comply with these conditions, the deposit money shall be actually forfeited to the vendor, who shall be at full liberty to resell ; and any deficiency that may arise upon such resale, together with all expenses attending the same, shall immediately after such second sale be made good by such defaulter, and on nonpayment thereof, such amount shall be recoverable by the vendor as and for liquidated damages." The defendant did not pay the deposit, or complete. The plaintiff resold at a price below that for which the defendant had purchased, and the deficiency, with the expenses of sale, exceeded the amount of the deposit :—Held, that the plaintiff was entitled to recover from the defendant the amount of the deficiency and expenses only, and not, in addition to this, the amount of the deposit. *Ockenden* v. *Henley*, El. Bl. & El. 485 ; 27 L. J., Q. B. 361 ; 4 Jur. (N.S.) 999.

Had the deposit been paid, and the bargain completed, the deposit would have gone in part payment of the purchase money, and in case of the non-completion of the bargain, if the deficiency and expenses had together been less than the deposit, the purchaser would have been entitled to the whole deposit, but nothing more. *Ib.*

Right of Vendor to Retain.]—By the conditions of sale it was provided as follows :—"Should the purchaser neglect or fail to comply with any of the conditions, his deposit money shall be absolutely forfeited to the vendor, who shall be at liberty to resell the property." The purchaser paid a deposit, but failed to complete. There was no resale : — Held, that the vendor was entitled to retain the deposit and also to recover the auctioneers' charges for the abortive sale, and the costs incurred by him in preparing to complete the sale. *Essex* v. *Daniell*, L. R. 10 C. P. 538 ; 32 L. T. 476.

When a contract for sale goes off by default of the purchaser, the vendor is entitled to retain the deposit. *Barrell, Ex parte, Parnell, In re*, 44 L. J., Bk. 138 ; L. R. 10 Ch. 512 ; 33 L. T. 115 ; 23 W. R. 846.

By a contract for sale of real estate it was stipulated that a portion of the purchase money should be paid immediately and the residue on the completion of the contract. There was no stipulation as to the forfeiture of the deposit in case the purchase went off through the purchaser's default. After the title had been accepted the purchaser became bankrupt, and the trustee disclaimed :—Held, that the vendor was entitled to retain the deposit. *Ib.*

Where a purchaser became bankrupt after signing an agreement for the purchase of certain property sold by auction by order of the court, and his assignees refused to complete the purchase :—Held, that the assignees were not entitled to the deposit which had been paid by the bankrupt on signing the agreement, though the conditions of sale did not stipulate for the forfeiture of the deposit in the event of the purchaser making default. *Depree* v. *Bedborough*, 3 N. R. 187 ; 4 Giff. 479 ; 33 L. J., Ch. 134 ; 9 Jur. (N.S.) 1317 ; 9 L. T. 533 ; 12 W. R. 191.

Semble, where a purchaser makes default, no express stipulation is necessary to entitle the vendor to the deposit. *Ib.* *And see next Case.*

Bankruptcy.]—The lord chancellor's jurisdiction as to acts done in the bankruptcy is not determined by the superseding of the commission ; so, after the commission is superseded, a petition will lie on behalf of a purchaser of the estates put up to sale by the assignees, for the repayment of the deposit. *Fector, Ex parte*, Buck, 428.

—— **Supersession.**]—A bankrupt's assignees contracted for the sale of his copyhold lands, and received a deposit. The commission was afterwards superseded. Another commission issued, upon the petition of another creditor, and the same assignees were chosen :—Held, that the plaintiff, having abandoned his contract pending the old commission, might recover back his deposit. *Bartlett* v. *Tuchin*, 1 Marshall, 583 ; 6 Taunt. 259. And see *Roper* v. *Coombes*, 6 B. & C. 534 ; 9 D. & R. 562 ; 5 L. J. (O.S.) K. B. 200 ; 30 R. R. 417.

——**Disclaimer.**]—N. contracted to purchase an estate, and a bill was filed against him for specific performance. He then became bankrupt on his own petition, having brought an action to recover his deposit, which was restrained on the terms of the deposit being brought into court. The assignees were then made parties to the suit, and disclaimed in respect of the contract. On inquiry a good title was certified :—Held, the assignees and bankrupt appearing, that all proceedings must be stayed, and the deposit paid out to the party paying it in, without prejudice to any proceeding under the Bankrupt Act, 1849, s. 146. *Kell* v. *Nokes*, 14 L. T. 697 ; 14 W. R. 908. And see *Barrell, Ex parte*, supra.

b. Return of.

Forfeiture for Non-Completion.]—A bankrupt having disposed of his goods in fraud of his creditors, opened an account in a bank with the proceeds, and having entered into a contract for the purchase of land in an assumed name, paid a deposit to the defendant, the auctioneer, by a cheque upon the bank. The vendor and the defendant acted bonâ fide and without notice of the bankruptcy or of the fraud:—Held, that the bankrupt's trustee was not entitled to recover the deposit so as to prevent it from being forfeited to the vendor upon the non-completion of the contract. *Collins* v. *Stimson*, 52 L. J., Q. B. 440; 11 Q. B. D. 142; 48 L. T. 828; 31 W. R. 920; 47 J. P. 439.

Agreement to make "Good Marketable Title"—Purchaser's Knowledge of Defect.]—T. agreed to sell to C. certain freehold houses, and to make a good marketable title. On investigation of the title it appeared that the houses were subject to stringent restrictive covenants which were admitted to make the title not a marketable one. C. brought an action to recover back his deposit. T. adduced evidence that C. knew of the restrictions at the time of the contract, and the jury found that he did:—Held, that this evidence could not be admitted to modify the terms of the express contract, and that the plaintiff was entitled to recover. *Cato* v. *Thompson*, 9 Q. B. D. 616; 47 L. T. 491—C. A.

Defective Title.]—An intended purchaser, who by the conditions of sale is to have a good title made out, may, upon an insufficient title being offered to him, recover his deposit money and expenses, in an action against the intended vendor. *Simmons* v. *Heseltine*, 5 C. B. (N.S.) 554; 28 L. J., C. P. 129; 5 Jur. (N.S.) 270; 7 W. R. 133. And see *General Meat Supply Association* v. *Bouffler*, 41 L. T. 719, infra, col. 1341.

—— **Under Unwritten Contract.**]—Upon the abandonment of an unwritten contract for the sale of land, on defect of title, the deposit money paid to the auctioneer may be recovered. *Gosbell* v. *Archer*, 4 N. & M. 485; 2 A. & E. 500; 1 H. & W. 31: 4 L. J., K. B. 78.

But the expenses of investigating the title cannot be recovered without proof of a contract binding on the vendor, nor interest upon the deposit. *Ib.*

—— **Specific Performance Impossible.**]—Where the word "assigns" was omitted in the description of the donees of a power of sale contained in a will, the title of the devisees of the surviving donee was held to be too doubtful for a court of equity to compel specific performance of a contract of sale entered into between the plaintiff and such devisees, and he was held to be entitled to recover his deposit. *Stevens* v. *Austen*, 3 El. & El. 685; 30 L. J., Q. B. 212; 7 Jur. (N.S.) 873; 3 L. T. 810.

—— **Defect subsequently Discovered—Common Mistake.**]—The conditions provided that the purchaser should pay a deposit, and that if he failed to comply with the conditions the deposit should be forfeited and the vendors should be at liberty to resell. The purchaser paid the deposit, and accepted the title, but when the time for completion arrived he could not provide the residue of the purchase money. The vendors therefore rescinded the contract. Three years after, on a sale to another purchaser, it was decided that the title was bad, owing to a defect which appeared upon the face of the abstract delivered to the first purchaser. The first purchaser thereupon brought an action to recover his deposit on the ground of mutual mistake and failure of consideration:—Held, that the title having been accepted, and the deposit having been forfeited solely in consequence of the purchaser's default, he was not entitled to recover the deposit. *Soper* v. *Arnold*, 59 L. J., Ch. 214; 14 App. Cas. 429; 61 L. T. 702; 38 W. R. 449—H. L. (E.) Affirming 52 J. P. 374.

Delay in Sending in Objections.]—The defendant purchased from a railway company land, which, not being "superfluous," the company had no power to sell, as freehold building land. One of the conditions of sale was that the purchaser should send his objection, if any, to the title within seven days from the delivery of the abstract. The plaintiff declined to complete after the expiration of the seven days, and sued for the deposit:—Held, that the deposit could not be recovered. *Rosenberg* v. *Cook*, 51 L. J., Q. B. 170; 8 Q. B. D. 162; 30 W. R. 344—C. A.

Objections, when Made.]—In an action to recover the deposit on the purchase of an estate, on the ground of a defect in the vendor's title, specified on rescinding the contract, no objection can be insisted on at the trial which was not stated as a reason for refusing to complete the contract, if it is of such a nature that it might if then stated be removed. *Todd* v. *Hoggart*, M. & M. 128.

Non-performance — Contract under Seal.]—If A. agrees to sell an estate to B., and is afterwards disabled from doing so, B. may recover back the money deposited, although the contract for the sale is under seal. *Greville* v. *Da Costa*, Peake's Ad. Cas. 113.

—— **Copyhold.**]—A. agrees with B., lord of the manor, to purchase a copyhold for two lives, such as A. shall name. A pays 200*l.*, part of the purchase money, and was to pay the rest in three months; a court is held; three months pass; B. died suddenly, and the manor came to one who was not bound by the contract. The executor of B. to refund 200*l.* *Awbry* v. *Keen*, 1 Vern. 472.

Tenant for life of a copyhold sold his estate, and surrendered it that the lord might admit A., the purchaser; the copyholder in reversion entered and recovered at law; A. was relieved in equity. *Anon*, 2 Free. C. C. 118.

—— **Assignment of Public-house Licence.**]—Upon a contract for the sale of a public-house, the vendor agreed to make a proper assignment of the licences on the day fixed for the completion of the contract, or as soon thereafter as might be. The house had been carried on under a licence granted under 9 Geo. 4, c. 61, in the name of the vendor's son A., as servant to his father. A. went abroad, and the business had been continued under the management of B.:—Held, that the vendor, not being able to obtain the indorsement of the licence by A., was not in

a condition to perform his contract, and consequently that the purchaser might recover back his deposit and the expenses which he had incurred in and about the purchase. *Claydon* v. *Green*, 37 L. J., C. P. 226; L. R. 3 C. P. 511; 18 L. T. 607; 16 W. R. 1126.

—— **Intention.**]—By an agreement for the purchase of a public-house, 300*l.* was paid by the purchaser by way of deposit, and in part of the purchase money. The purchase was to be completed on a certain day; and it was agreed that, if either party should refuse to perform the agreement, he should pay the other 1,000*l.* liquidated damages:—Held, that on this agreement it was not intended that the 300*l.* should be forfeited on the failure of the purchaser to complete the contract. *Palmer* v. *Temple*, 1 P. & D. 379; 9 A. & E. 508; 8 L. J., Q. B. 179.

—— **When Second Action Allowed.**]—On the day for completing the purchase the purchaser threw up the contract, on the ground that the vendor was not ready to complete, and sued him for 1,000*l.* liquidated damages, and for 300*l.* The jury found for the vendor, on the ground that he was ready to complete. After the writ was sued out against the vendor, he disposed of the public-house to another party, and the purchaser again sued him for 300*l.*:—Held, that as the former action failed on the sole ground that it was prematurely brought, the judgment in it was no bar; and that, as the parties did not intend the 300*l.* to be forfeited as a deposit, the purchaser was entitled to recover it back. *Ib.*

—— **Re-sale.**]—On a sale of real estate the purchaser paid 500*l.*, "as a deposit, and in part payment of the purchase money." The contract provided that the purchase should be completed on a day named, and that if the purchaser should fail to comply with the agreement, the vendor should be at liberty to re-sell and to recover any deficiency in price as liquidated damages. The purchaser was not ready with his purchase money, and the vendor re-sold the property for the same price:—Held, that the deposit, although to be taken as part payment if the contract was completed, was also a guarantee for the performance of the contract, and that the plaintiff, having failed to perform his contract within a reasonable time, had no right to a return of the deposit. *Palmer* v. *Temple* (supra) distinguished. *Howe* v. *Smith*, 53 L. J., Ch. 1055; 27 Ch. D. 89; 50 L. T. 573; 32 W. R. 802; 48 J. P. 773—C. A.

—— **Liquidated Damages.**]—An agreement for sale contained the two following provisions:—(9) As an earnest hereof the purchaser has this day paid into the hands of S. the sum of 500*l.* as a deposit, the deposit to form part of the purchase money to be paid on the day of possession; and (10) should either vendor or purchaser refuse or neglect to carry out the above arrangement on her or his part, the one so refusing or neglecting shall pay to the other the sum of 500*l.* as or in the nature of liquidated damages. The purchaser was unable to carry out his part of the agreement:—Held, that the meaning of the agreement was that the 500*l.* should be recoverable, if, owing to the fault of either party, the agreement were not carried out at all, and that that sum could be recovered in this case as liquidated damages:—and further, that it could also be recovered if the action were looked upon as an action to enforce the forfeiture of the deposit. *Catton* v. *Bennett*, 51 L. T. 70.

Condition to Admit Title.]—A contract for sale of superfluous land of a railway company which had been conveyed by the company to the vendor contained a stipulation that the purchaser should assume and admit that everything was done by the company to enable them to sell the land as surplus land, and a further stipulation that if the purchasers should fail to comply with the terms of the agreement the deposit should be forfeited. In the investigation of the title the purchaser discovered that the prior owners had not waived their right of pre-emption. The vendor then sold the land to one of the prior owners:—Held, that the purchaser was bound by the stipulations to admit the title of the company to sell to the vendor; and could not claim a return of his deposit. *Best* v. *Hamand*, 48 L. J., Ch. 503; 12 Ch. D. 1; 27 W. R. 742. And see *Rosenberg* v. *Cook*, supra, col. 1270.

Solicitor of Vendor—Stakeholder.]—A. was employed as solicitor for the vendor of real estate. By the conditions of sale the deposit was to be paid into his hands "as agent for the vendor," and he signed the contract of sale and receipt for the deposit as such agent:—Held, that he was not a stakeholder, and was liable to pay over the deposit to the vendor on demand, and in default to pay interest from the time of such demand. *Edgell* v. *Day*, 1 H. & R. 8; 35 L. J., C. P. 7; L. R. 1 C. P. 80; 12 Jur. (N.S.) 27; 13 L. T. 328; 14 W. R. 87.

Payment by Agent.]—Where A. became the purchaser of an estate, and signed a memorandum of agreement, as the agent of S., who afterwards repudiated the contract, of which notice was given to the agent of the vendor before the payment of the deposit, which A. afterwards paid:—Held, on the title proving defective, that A. was entitled to the deposit in his own name. *Langstroth* v. *Toulmin*, 3 Stark. 145.

Payment to Agent.]—A., as agent to B., the owner of the land, entered into an agreement for sale with C., the agent of D., but who appeared to act on his account, and C. paid A. part of the purchase-money as a deposit:—Held, that D. might sue B. to recover back the deposit on a breach of the agreement. *Norfolk (Duke)* v. *Worthy*, 1 Camp. 337; 10 R. R. 749.

Where Specific Performance Refused.]—If a bill by a purchaser for specific performance be dismissed, the court cannot order the deposit to be returned; but, secus, if the bill be filed by the vendor. *Aylett* v. *Ashton*, 5 L. J., Ch. 71. See *Bennett College* v. *Cary*, 3 Bro. C. C. 390.

A bill by a vendor for specific performance being dismissed, and the purchaser not wishing for a return of the deposit unless it was ordered to be returned with interest:—Held, that the court ought not to order a return of the deposit, but to leave the purchaser to his remedy at law. *Rede* v. *Oakes*, 2 De G. J. & S. 518; 5 N. R. 391; 11 Jur. (N.S.) 229; 13 W. R. 420.

Where the vendor's bill for specific performance is dismissed, on the ground of his laches in instituting the suit, and without any decision on the question of title, the court will not order the deposit to be returned to the purchaser, but will leave both parties to their legal remedies. *Southcomb* v. *Exeter (Bishop)*, 6 Hare, 225; 16 L. J., Ch. 378; 12 Jur. 744.

Power of the court to order the return of the deposit where the vendor's bill is dismissed, he having given an undertaking. *Royou* v. *Paul*, 28 L. J., Ch. 555. S. P., *Turquand* v. *Rhodes*, 37 L. J., Ch. 830; 18 L. T. 844; 16 W. R. 1074. S. P., *Anson* v. *Hodges*, 5 Sim. 227.

Interest on.]—If a purchaser pays a deposit and the vendor is not able to make a good title, the purchaser is entitled to interest on the deposit from the time the purchase should have been completed, and may recover it from the vendor on alleging the special damage in his declaration. *Farquhar* v. *Farley*, 1 Moore, 322; 7 Taunt. 592; 18 R. R. 599.

A party recovering back a deposit paid on the purchase of real property is not entitled to interest. *Bradshaw* v. *Bennet*, 5 Car. & P. 48; 1 M. & Rob. 143.

When a vendor fails to make a good title to an estate the vendee is entitled to be paid at the rate of 5 per cent. for interest on his deposit money, though the court of chancery had ordered payment of 4 per cent. *Hodges* v. *Lichfield (Earl)*, 1 Scott, 443; 1 Bing. (N.C.) 492; 1 Hodges, 40.

Where, in a suit by a vendor for specific performance, it was certified that a good title was not deduced, the court ordered a return to defendant of his deposit money, with interest at 4 per cent., and declared the defendant entitled to a lien on the estate of the same, and also for his costs. *Turner* v. *Marriott*, L. R. 3 Eq. 744; 15 L. T. 607; 15 W. R. 420.

Agreement for sale of residue of a term of which twelve-and-a-half years were unexpired, and deposit paid. The abstract showed that the lessor had right to determine lease at the end of five years:—Held, that the purchaser was entitled to rescind and to repayment of the deposit-money with interest. *Weston* v. *Savage*, 48 L. J., Ch. 239; 10 Ch. D. 736; 27 W. R. 654.

—— **Misdescription of Vendors.**]—In the particulars of sale of leaseholds, the premises were stated to be sold "by order of the executors;" they were in fact sold by the administrator de bonis non of the testator durante absentiâ of his next of kin:—Held, that the title was not such as a purchaser was bound to accept, and the deposit with interest was ordered to be refunded. *Webb* v. *Kirby*, 7 De G. M. & G. 376; 26 L. J., Ch. 145; 3 Jur. (N.S.) 73; 5 W. R. 189.

—— **Condition as to Rescission.**]—A condition, that if any objection or requisition should be made which the vendor should be unable or unwilling to remove, it should be lawful for him to rescind the contract, and that in that case the purchaser should be entitled to a return of his deposit without interest, but should not be entitled to any costs or damages, does not entitle the vendor, after making numerous fruitless attempts to remove an objection made by a purchaser desirous of being discharged, to return him his deposit only, but the vendor must then pay interest upon the deposit and the costs of the purchaser. *M'Culloch* v. *Gregory*, 1 K. & J. 286; 3 Eq. R. 495; 24 L. J., Ch. 246; 3 W. R. 231. *And see cases*, infra, col. 1493.

A sale in chambers under a decree having been declared invalid:—Held, that the vendors could not avail themselves of a condition enabling them, if unwilling, or unable for any reasonable cause to remove or comply with any objection or requisition by the purchaser, to rescind on payment of the deposit without interest and without costs on either side; and that the discharged purchaser was entitled to the stock arising from his deposit, which had been paid into court and invested, with the dividends thereon, or the actual amount of deposit and the produce, with costs, charges, and expenses. *Powell* v. *Powell*, 44 L. J., Ch. 311; L. R. 19 Eq. 422; 32 L. T. 148; 23 W. R. 482.

—— **Misdescription.**]—A person purchased at a sale by auction, for 2,500*l.*, property which was described in the particulars of sale as an "immediate reversion in fee simple." Shortly after he discovered that by the conditions of sale, which were produced for the first time and read aloud by the vendor's agent at the sale, but which the purchaser was prevented by deafness from hearing distinctly, the purchaser was to take the property, subject to mortgages for 2,500*l.*, the real value of the reversion being considerably under 5,000*l.*:—Held, that the purchaser was entitled to have the contract rescinded, and that he was also entitled to have the deposit returned, with interest at 4 per cent., and, until payment, to a lien for the amount on the vendor's interest in the property. *Torrance* v. *Bolton*, 42 L. J., Ch. 177; L. R. 8 Ch. 118; 27 L. T. 738; 21 W. R. 134.

Payment into Court.]—The court will not compel vendor to pay deposit money into court, though he retains possession of the estate, if delay in completion of contract is caused by purchaser. *Wynne* v. *Griffith*, 1 Sim. & S. 147; 1 L. J. (O.S.) Ch. 110.

Payment by Cheque.]—The custom of auctioneers to accept, on sales of large properties, a cheque in lieu of cash for the deposit, is reasonable, and a mortgagee vendor was held to be justified in acting on it, and not to be guilty of negligence in the conduct of the sale, though the cheque was dishonoured. *Farrer* v. *Lacey*, 53 L. J., Ch. 569; 25 Ch. D. 636; 50 L. T. 121; 32 W. R. 196.

On an agreement to transfer a public house and assign the licences, a cheque upon a brewer's house is not sufficient if tendered in payment, though it is proved to be the constant practice to use cheques instead of money, in order to prevent robbery, on account of the lateness of the hour at which settlements take place in the transfer of public-houses. *Clarke* v. *King*, 2 Car. & P. 286; Ry. & M. 394.

Payment by I O U.]—A. agreed to sell and B. to buy a public house with this clause: "As earnest of this agreement, the purchaser has paid into the hands of the vendor 50*l.*, which is to be allowed in part of payment at the completion of this agreement; and if the purchaser should fail to fulfil his part of the agreement, then the deposit-money shall become forfeited." Instead

of the deposit B. gave an I O U, which he never paid, and he afterwards refused to fulfil the agreement: — Held, that A. was entitled to recover 50*l.* as a forfeited deposit. *Hinton* v. *Sparks*, 37 L. J., C. P. 81; L. R. 3 C. P. 161; 17 L. T. 600; 16 W. R. 360.

Payment by Bill.]—If a party has given a bill of exchange or a cheque for the amount of a deposit on a sale by auction, any ground on which the party could recover back his deposit, if paid in money, will be a good ground of defence in an action upon the bill or cheque. *Mills* v. *Oddy*, 6 Car. & P. 728; 2 C. M. & R. 103; 5 Tyrw. 571; 1 Gale, 92; 4 L. J., Ex. 168.

Parties to Action—Auctioneers as Co-Defendants.]—Auctioneers (as well as the vendors) held to be proper defendants to an action for rescission and costs brought by the purchaser of a property, which he alleged that he was induced to purchase by the fraudulent mock-bidding of such auctioneers.—Semble, that it would not have been open to him to make them parties for the mere purpose of discovery. *Heatly* v. *Newton*, 45 L. T. 455; 30 W. R. 72—C. A.

Auctioneer, on motion of vendor, ordered to pay deposit into court, minus his charges and expenses; and purchaser restrained by injunction from proceeding in his action against the auctioneer for the deposit, in which action he had obtained a judgment to the whole amount of the deposit. *Annesley* v. *Muggridge*, 1 Madd. 593; 16 R. R. 273.

Injunction granted to stay action against the auctioneer for the deposit, although the estate sold was represented as freehold, with leasehold adjoining, and turned out to be almost all leasehold; and although there had been great delay in making out the plaintiff's title. *Fordyce* v. *Ford*, 4 Bro. C. C. 494.

Motion for an injunction to restrain an action against the auctioneer for the deposit, refused where there had been a great delay on the part of the vendor. *Lloyd* v. *Collett*, 4 Bro. C. C. 469; and see *Stevens* v. *Adamson*, supra, col. 1174.

Set Off.]—One of the terms of an agreement was, that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by a certain time. The counsel being of that opinion, a bill by the purchaser for a specific performance with a compensation was dismissed with costs, and an application afterwards made by the plaintiff that his deposit might be set off against the defendant's costs, and the surplus (if any) paid to him, was refused with costs. *Williams* v. *Edwards*, 2 Sim. 78; 29 R. R. 61.

Loss of Deposit.]—Vendor, resisting an application by the purchaser for payment into court of the deposit in the hands of the vendor's agent, charged with a loss by the agent's failure. *Fenton* v. *Browne*, 14 Ves. 144; 9 R. R. 255.

A mortgagor contracted to sell the estate, and one of the conditions was, that the purchaser should pay a deposit to the auctioneer. The mortgagee afterwards concurred and adopted the contract. A loss having occurred by the insolvency of the auctioneer:—Held, that, as between the purchaser and mortgagee, the latter stood in the shoes of the vendor, and must bear the loss. *Rowe* v. *May*, 18 Beav. 613.

Purchase money deposited in a bank (which failed) until comp'etion:—Held, that the loss must be borne by the vendor. *St. Paul* v. *Birmingham Ry.*, infra, col. 1282.

—— **Bond.**]—On the sale of a freehold estate it was agreed that the purchase-money should be paid in railway bonds, and the purchaser deposited with and assigned to A., who alleged himself to be the solicitor of the vendor, one of such bonds. The contract turned out to be a fraud and went off, and on purchaser applying to A. for the return of the deposited bond, he was informed that A. had placed it in the hands of B. to secure a debt due from himself to B. B. had no notice of the terms upon which A. held the bond:—Held, in a suit by the purchaser against B. to restrain him from dealing with the bond, that the deposit and assignment of the bond by the purchaser to A. for the purpose mentioned did not make A., in the events which happened, a constructive trustee for the purchase, and that as B. was a bonâ fide purchaser of the bond for value without notice, he could not be restrained from dealing with it. *Ashwin* v. *Burton*, 32 L. J., Ch. 196; 9 Jur. (N.S.) 319; 7 L. T., 589; 11 W. R. 103.

—— **Liability of Solicitor.**]—On a contract for purchase, a part of the purchase-money was paid as "deposit" to the vendor's solicitor, who paid it away at the desire of the vendor, without the concurrence of the purchaser. This created a difficulty in completing the purchase, as a mortgagee of the estate would not join in the conveyance without payment to him of the deposit. In a suit by the purchaser for specific performance, the solicitors were declared liable to make good the money. *Wiggins* v. *Lord*, 4 Beav. 30; 2 Jur. 786.

Injunction against Suit for.]—There is no general rule of practice to the effect that the court will not, in a suit for specific performance by a vendor, restrain an action by the purchaser to recover the deposit. *Kell* v. *Nokes*, 32 L. J., Ch. 785; 8 L. T. 824; 11 W. R. 978.

Purchaser entering into possession, knowing of objections to abstract, but continuing to negotiate, cannot break off contract; an injunction will lie against his proceeding at law to recover back purchase-money; but otherwise if he had declared off, on delivery of abstract. *Warde* v. *Jeffery*, 4 Price, 294; 18 R. R. 716.

Injunction to stay proceedings in an action brought by a purchaser to recover the amount of his deposit, refused, the description in the printed particular of sale being calculated grossly to deceive as to the real nature and value of the estate sold. *Stewart* v. *Alliston*, 1 Mer. 26; 15 R. R. 81.

Vendor proceeding beyond the time for completing the contract, and having brought an action and withdrawn his record on finding he could not support it, and the purchaser having brought an action for his deposit and obtained a verdict; an injunction to restrain his proceeding was refused. *Wood* v. *Bernal*, 19 Ves. 220; 12 R. R. 173.

—— **Order nisi.**]—Court will not make absolute the common order nisi to dissolve injunction (granted to restrain purchaser from proceeding to recover part of the purchase-money on the ground of want of title and outstanding incumbrances) without master's report as to sufficiency

of title, although objections are fully stated in defendant's answer. *Church* v. *Legeyt*, 1 Price, 301.

ii. *Purchase Money.*

a. Payment in General.

Possession Given.]—Though, generally, a purchaser cannot be called upon for purchase money until title made, yet where he is let into possession upon mutual confidence of speedy title, and the difficulty is a mutual surprise, he cannot, without express contract, retain possession, withholding purchase money. *Gibson* v. *Clarke*, 1 V. & B. 500; 12 R. R. 282.

Receipt Given Though no Payment Made.]—Where conveyance is executed to purchaser, which expresses purchase money to have been paid, estate does not pass by the conveyance in equity till money actually paid, although receipt for same is indorsed on conveyance. *Winter* v. *Anson* (*Lord*), 1 Sim. & S. 434; 3 Russ. 488; 27 R. R. 117.

Where upon the sale of a ship to A. and B., in which A. was to be interested in one-third and B. in two thirds, and upon the execution of the bill of sale, although expressing that B. had paid two-thirds of the purchase money, only one-third was actually paid, and A.'s acceptances given for the remainder, which were, from A. becoming bankrupt, dishonoured:—Held, that B. remained liable for the payment of the unpaid purchase money, notwithstanding the form of the bills given for the amount. *Lynn* v. *Chaters*, 2 Keen, 521.

On Covenant to Pay by Notes.]—A covenant to pay D. 213*l.* 15*s*, as and for the purchase money for certain seams and beds of coal and minerals, in manner and at the times following, viz.: "21*l.* 7*s.* 6*d.* on the day of the date thereof, and the remaining 192*l.* 7*s.* 6*d.* by four several promissory notes, under the hand of the defendant, bearing date with the deed, payable to D. or order on the 1st of July in every year, until the whole of the purchase money should be paid, with interest thereon after the rate of 5 per cent. per annum until the promissory notes should be paid," is a covenant to pay the purchase money when the notes become due, and the covenant is not performed by the mere delivery of the promissory notes. *Dixon* v. *Holroyd*, 7 El. & Bl. 903; 27 L. J., Q. B. 43; 3 Jur. (N.S.) 1147; 5 W. R. 688.

Condition as to Title.]—In an action for non-payment of the residue of the purchase money, the declaration stated, that in consideration of 90*l.* paid to the plaintiff by the defendant, and of the further sum of 820*l.* to be paid to the plaintiff on the 1st November, the plaintiff agreed to sell and the defendant agreed to buy, a messuage, and to pay the plaintiff the residue of the purchase money on the 1st November; and that thereupon a conveyance of the premises, and the freehold and inheritance thereof, should be made to the defendant by all proper parties, at the expense of the plaintiff, and the plaintiff agreed to produce a good marketable title to the premises:—Held, that the defendant was not bound to pay the residue of the purchase money until a good title to the premises was made out by the plaintiff, and he was ready to convey to the defendant. *Manly* v. *Cremonini*, 6 Ex. 808; 2 L. M. & P. 550; 21 L. J., Ex. 288.

In an agreement for the purchase of an estate, the purchaser stipulated to pay the residue of the purchase money on a day specified, "upon the vendors making a good title or otherwise; if such title should not then be completed, upon his executing a bond to complete such title, and to convey the estate as soon as the estate could be completed"; till a good title is shown, the purchaser, though he had entered into possession, is not bound to pay the purchase money. *Clarke* v. *Vaux*, 3 Russ. 320; 6 L. J. (O.S.) Ch. 17.

Eviction of Purchaser.]—A. sold to B., and covenanted against himself and all claiming under him; B. secured the purchase money, and was evicted by a title paramount to A.'s title; B. was relieved from the payment of the purchase money. *Anon.*, 2 Ch. Cas. 19.

When eviction entitles a purchaser to relief. *Magnard* v. *Moseley*, 3 Swanst. 651.

Different consequence of eviction before and after payment of purchase money. *Ib.*

Payment by Instalments.]—In an action by a vendor whose purchase money was to be paid by instalments, some of which were not yet due, for specific performance of his contract and a declaration of his lien, liberty was given to apply in respect of future instalments as they accrued due. *Nives* v. *Nives*, 49 L. J., Ch. 674; 15 Ch. D. 649; 42 L. T. 832; 29 W. R. 302.

Security for.]—On sale of estate, part of the consideration was to be an annuity, but it was not settled how it should be secured; the court ordered it to be secured on the estate as well as by bond and judgment, which latter was the mode proposed by purchaser. *Remington* v. *Deverall*, 2 Anstr. 550.

Time for.]—A company agreed with a landowner to purchase a piece of land for 4,000*l.*, of which the sum of 2,000*l.* was to be paid at once, and the remaining 2,000*l.* on a day named, with a provision that if the whole of the 2,000*l.* and interest were not paid off by that day, in which respect time was to be of the essence of the contract, the vendors might repossess the land as of their former estate, without any obligation to repay any part of the purchase money:—Held, that this stipulation was in the nature of a penalty, from which the company was entitled to be relieved on payment of the balance of the purchase money, with interest. *Dagenham Thames Dock Co., In re, Hulse, Ex parte*, 43 L. J., Ch. 261; L. R. 8 Ch. 1022; 21 W. R. 898.

Proof of Payment.]—After twenty years' possession, a purchaser shall not be put to prove the payment of his bond for the purchase money. *Anon.*, Moseley, 37.

Receipt for purchase money indorsed not conclusive evidence in favour of the purchaser; and upon other evidence:—Held, that the payment was disproved. *Hawkins* v. *Gardner*, 2 Sm. & G. 441. And see *Lynn* v. *Chaters*, supra.

—— **Agreement for Work and Labour instead of Price.**]—A. assigned and sold an unexpired lease of premises, and the fee simple of a messuage, to B.; and in each instrument recited that he had received the purchase-money, and on the back of each wrote a receipt for the purchase-

money in full; after which a memorandum of agreement, not signed or stamped, was drawn up between the parties, reciting that B. had lately purchased of A. the premises in question; and that A. being indebted to B. in 100*l.* had agreed that the same should be considered as in part payment of the purchase money; but, it being understood, that, in case the dividend about to be paid by A. to his creditors should not amount to 20*s.* in the pound, then that A. was to do work for B. to the amount of such deficiency; and that B. was to retain in his hands 60*l.*, to be also considered as in part payment of the purchase money; and for which sum B. was to do and perform work for A. Indebitatus assumpsit being brought by A. to recover the money actually due to him, as the purchase money of the premises:—Held, that neither the agreement, nor parol evidence of the contents, was admissible to show that the consideration money had not been paid. *Baker* v. *Dewey*, 3 D. & R. 99; 1 B. & C. 704; 1 L. J. (o.s.) K. B. 193.

Amount of.]—On the purchase, at a specified price per acre, of land, described in the particulars as grass land, "containing by estimation twenty-three acres or thereabouts, but to be surveyed," the land when measured contained 23a. 0r. 26p., of which 1a. 0r. 3?p. was comprised within a drain:—Held, that if the land comprised within the drain was included in the conveyance, the purchaser was bound to pay for it at the specified rate. *Popple and Barrett, In re*, 25 W. R. 248—C. A.

—— **Title to Moiety of Property Sold.**]—When vendors having agreed to sell the entirety of property could make a title to one moiety only:—Held, that the purchaser was entitled to have such moiety conveyed to him on payment of one moiety of the purchase money. *Bailey* v. *Piper*, 43 L. J., Ch. 704; L. R. 18 Eq. 683; 31 L. T. 86; 22 W. R. 943.

Abatement not allowed on Purchase with Notice.]—A purchaser buying with notice of tenants in possession is bound to inquire into the nature of their interests, and is not entitled to an abatement of the purchase-money because their interet proves to be larger than he supposed when he entered into the contract. *James v. Lichfield*, 39 L. J., Ch. 248; L. R. 9 Eq. 51; 21 L. T. 521; 18 W. R. 158.

Priority of Purchaser's Costs over Mortgage after Contract.]—A vendor brought an action claiming a declaration that his contract for sale was at an end. The purchaser made a counter-claim for a specific performance of the contract. Judgment was given for the defendant, with costs, on both claim and counter-claim:—Held, that the defendant was entitled to deduct his costs from his purchase money in priority to a mortgage of the plaintiff, whose mortgage had been created after the contract for sale, but before the commencement of the action. *Green* v. *Seven*, 13 Ch. D. 589.

b. To Whom Payable.

To Vendor in Person.]—Although the purchaser has not the right in every case to insist upon the vendor being present to receive his purchase-money, yet should the requisition be made under circumstances which justify it, the vendor should comply with the request. *Viney* v. *Chaplin*, 2 De G. & J. 468; 27 L. J., Ch. 434; 4 Jur. (N.S.) 619; 6 W. R. 563.

In any case where a vendor does not attend personally to receive his money, a purchaser has the right to insist upon a written authority to pay to the solicitor. *Ib.*

A vendor's solicitor has no authority by virtue of his office to receive the purchase-money, although he may have possession of the deed of conveyance, with the receipt indorsed upon it or signed by his client. *Ib.*

Sale by Trustees.]—S. 56 of the Conveyancing Act, 1881, does not authorize vendors who are trustees with a power of sale to require the purchaser to pay the purchase-money to their solicitor on production of the deed of conveyance duly executed in cases where, before the act, they could not have required the purchaser to pay the purchase-money to their solicitor under a special authority. Trustees of real estate, with a power to sell and give receipts, sold the estate. The purchasers required that the vendors should attend in person to receive the purchase-money, or should authorize the purchasers to pay it into a bank to the joint account of the vendors:—Held, that s. 56 had no application, and that the purchasers had a right to insist on their requisition. *Bellamy and Metropolitan Board of Works, In re*, 52 L. J., Ch. 870; 24 Ch. D. 387; 48 L. T. 801; 31 W. R. 900; 47 J. P. 550—C. A.

—— **Authority to Co-trustee.**]—Where trustees are vendors a purchaser from them has, as a general rule, a right to insist upon paying the purchase-money in the presence of all the trustees, or into a bank to their joint account, and is not bound to pay the money to one of their number on a written authority from his co-trustees. On the sale by three trustees of a will the purchaser made a requisition that the trustees should attend personally, on completion of the purchase, to receive the purchase-moneys, or that they should give a written direction, signed by the trustees, for payment of the same purchase-moneys to the joint account at some bank. The trustees desired that the moneys should be paid to one of their number, to whom they proposed to give their written authority to receive it:—Held, that the principle in *Bellamy and Metropolitan Board of Works, In re* (supra), applied to the case, and that the requisition must be complied with. *Flower* v. *Metropolitan Board of Works, In re*, 53 L. J., Ch. 955; 27 Ch. D. 592; 51 L. T. 257; 32 W. R. 1011.

To Solicitor.]—It is well settled that it is not within the ordinary business of a solicitor to receive purchase-money belonging to his client, or money due to him on mortgage, nor to receive money from him for the purpose of investment generally, and one partner is not liable for the misapplication of money so received by another without his privity. *Bourdillon* v. *Roche*, 27 L. J., Ch. 681; 6 W. R. 618.

Secus, where the money is received for the purpose of being invested on a particular security. *Ib.*

—— **Sale of Ship.**]—On a sale by auction of shares in a ship, part of a bankrupt's estate, one of the conditions was that the purchase-money should be paid to the solicitor of the assignees on

or before a certain day, when the purchase was to be completed, and the purchaser to have possession and a bill of sale; the purchaser paid part of the purchase-money to the solicitor before the day appointed for the completion of the purchase, and had possession, but not a bill of sale:—Held, that the payment and the execution of the bill of sale ought, in pursuance of the condition, to have been contemporaneous; that the assignees, not having received the money from the solicitor, or executed the bill of sale, would not be restrained from taking proceedings to recover possession of the ship; and that the purchaser was not entitled to the execution of the bill of sale by the assignees, upon payment to them of the balance of the purchase-money. *Hughes* v. *Morris*, 9 Hare, 636; 21 L. J., Ch. 761; 16 Jur. 603.

—— **Agent for Both Parties.**]—A. purchased an estate from B., and on the completion one solicitor acted for both parties, and the purchase-money was paid into his hands. Afterwards the purchaser was defeated by C., who had a paramount mortgage. The purchaser presented a petition against the solicitor, asking payment by the solicitor out of the purchase-money of the losses occasioned:—Held, that the money having come to the hands of the solicitor as agent of the vendor, and not of the petitioner, the court could not interfere. *Tylee* v. *Webb*, 14 Beav. 14; 15 Jur. 1023.

Agent for Sale.]—An agent employed to sell an estate has not, as such, authority to receive payment. *Mynn* v. *Joliffe*, 1 M. & Rob. 326.

The owner of an estate, residing abroad, gave a power of attorney to his agent in this country to sell the estate and give a discharge for the purchase-money. The agent sold the estate, and the conveyance sent abroad and executed was by the principal. Semble, the agent in England cannot give an immediate good discharge for the purchase-money, by reason of the uncertainty whether the principal may be alive at the time of the payment. *Bailey* v. *Collett*, 18 Beav. 179; 23 L. J., Ch. 230; 2 W. R. 216.

Payment to Vendor when Bankrupt.]—A trader had, before adjudication (the purchaser having had no notice of any act of bankruptcy), contracted to sell a property, and had received a deposit. After the adjudication had been made, but before it had been advertised, the purchaser, having no notice, paid the remainder of the purchase money to the bankrupt:—Held, that the trustee in the bankruptcy could not be compelled to assign the lease to the purchaser except upon the terms of his paying the purchase money. *Rabbidge, Ex parte, Pooley, In re*, 8 Ch. D. 367; 38 L. T. 663; 26 W. R. 646—C. A.

—— **Notice of Adjudication.**]—Purchasers paid part of the purchase money by a post-dated cheque. Before the date of payment they had notice that the vendor was adjudicated a bankrupt, but they did not stop the cheque, which was honoured in due course:—Held, that they must pay the money over again to the trustee. *Armstead, Ex parte, Palmer, In re*, 45 L. T. 557; 30 W. R. 124.

To Debtor after Filing Petition.]—When a debtor has filed a petition for liquidation, and resolutions accepting a composition are afterwards passed as provided by the act, such debtor remains absolute master of his property until the creditors take action under s. 126 of the Bankruptcy Act, 1869, and a purchaser from him is not entitled to any evidence whether or not the instalments under the composition have been duly paid. *Kearley and Clayton's Contract, In re*, 47 L. J., Ch. 474; 7 Ch. D. 615; 38 L. T. 92; 26 W. R. 324.

Heir at Law.]—A person contracted to purchase real estate, subject to a condition that if he made any requisition which the vendor was unable or unwilling to comply with, the vendor should be at liberty to rescind the contract. He made several requisitions and died intestate without completing the contract, and after his death the vendor rescinded:—Held, that the heir at law of the purchaser was entitled to have the amount of the purchase money paid to him out of the intestate's personal estate. *Hudson* v. *Cooke*, 41 L. J., Ch. 306; L. R. 13 Eq. 417; 26 L. T. 180; 20 W. R. 407.

The vendor's heir at law, who has obtained a decree setting aside the sale on repayment of the purchase money to the purchaser, has no equity to resort to the personal estate to recoup him; not even to a portion of it identified as part of the purchase money. *Ryder* v. *Ryder*, Ir. R. 8 Eq. 86.

Payment into Court on Objection to Conveyance.]—When the purchaser of property under an administration decree declined to complete his purchase upon the ground of non-concurrence on a previous sale of persons interested in the purchase money:—Held, that he must nevertheless bring the purchase money into court, the objection being one of conveyance and not of title. *Matson* v. *Deanes*, 4 De G. J. & S. 345; 10 Jur. (N.S.) 461; 10 L. T. 391; 12 W. R. 926.

Loss of Deposit.]—The plaintiff contracted to sell land to the defendant for 4,069*l.* The parties subsequently agreed that 4,000*l.* should be deposited in a bank in their joint names pending the completion of the purchase:—Held, that the loss sustained in consequence of the failure of the bank subsequent to the deposit must be borne by the plaintiff. *St. Paul* v. *Birmingham, Wolverhampton & Stour Valley Ry.*, 11 Hare, 305; 1 Eq. R. 274; 17 Jur. 1176; 1 W. R. 494. And see *Fenton* v. *Browne*, supra, col. 1275.

c. Payment into Court.

To Solicitor.]—Payment to the solicitor for all parties in the suit is equivalent to payment into court. *Price* v. *North*, 2 Y. & C. 620; 7 L. J., Ex. Eq. 9.

Belongs to Vendor.]—Purchase money paid into court is the property of vendor. *Gell* v. *Watson*, 2 Sim. & S. 402; 3 L. J. (O.S.) Ch. 199.

Order For.]—Purchase money ordered to be paid into court till the hearing. *Grundy* v. *Masters*, 4 Jur. 669.

Without Prejudice.]—Purchaser under circumstances allowed to pay his purchase money into court, and to be let into the possession and receipt of the rents and profits without prejudice to any subsequent objection which he might be advised to make to the title. *Marfell* v. *Rudge*, 2 Y. & C. 566; 2 Jur. 78.

Offer by Purchaser.]—Offer of a purchaser before conveyance to pay into court instalments due, and interest, according to the contract, the subject being a coal mine, and the purchaser in possession and working it. *Buck* v. *Lodge*, 18 Ves. 450.

Practice.]—Purchaser taking possession without consent or privity of vendor, ordered, on motion, before answer to pay purchase money into court. *Blackburn* v. *Stace*, 6 Madd. 69.

—— **Committal.**]—A purchaser may be committed for disobeying an order to pay in his money. *Lansdown* v. *Elderton*, 14 Ves. 512.

—— **Affidavits after Answer.**]—Affidavits admitted, after answer, to be read in support of a motion to pay purchase money into court. *Bradshaw* v. *Bradshaw*, 2 Mer. 492.

Purchaser (a trustee acting on behalf of himself, his co-trustees, and the cestui que trust) ordered to pay purchase money into court, the agreement having been entered into in the name of himself alone, upon affidavit after answer that the plaintiffs (the vendors) had no notice of his acting for others, and of acts of ownership committed since possession. *Crutchley* v. *Jerningham*, 2 Mer. 502.

Death of Vendor.]—Conditions of sale provided that the purchase should be completed on a given day, and that "if from any cause whatever the purchase should not be then completed," the purchaser should pay interest from that time till the day of completion. Two days before that time the vendor died, having devised her estates to an infant, which rendered a suit necessary to obtain completion, and delay was occasioned. After filing the bill, the purchaser paid his money into court, to the general credit of the cause:—Held, that the death of the vendor was an event within the contemplation of the parties, and the purchaser was liable to pay interest, and that, there being no fault in either party, the decree must be without costs. *Bannerman* v. *Clarke*, 3 Drew. 632; 26 L. J., Ch. 77; 5 W. R. 37.

The vendor dying intestate, and having an infant heir, the purchase money, being paid into court in a suit for a specific performance instituted after his death, will be retained till the heir attains twenty-one, and conveys. *Bullock* v. *Bullock*, 1 J. & W. 603.

Demurrer.]—Where, pending a demurrer to bill, the vendor is ordered to place proper conveyance into hands of court, purchaser is ordered to place purchase money there also; the purchaser will not be permitted to take out conveyance, though he consents to vendor taking out the money. *Cutler* v. *Broughton*, 3 Madd. 95.

Accepting Title.]—A purchaser is not conclusively bound by the acceptance of the title by his counsel, but if he pays his purchase money into court he is bound. This rule does not apply to a case where the counsel it misled by the abstract of title. *M'Culloch* v. *Gregory*, 1 K. & J. 286; 3 Eq. R. 495; 24 L. J., Ch. 246; 3 W. R. 231.

Title not Accepted.]—A purchaser who is not in possession, and has not accepted the title, will not be ordered to pay his purchase money into court. *Anon.*, 1 L. J. (o.s.) Ch. 177.

Payment or Giving up Possession.]—Generally a purchaser shall not be allowed both to retain possession of the estate, and to keep his purchase money; but in a case where he was willing to give up possession, and it was a question whether there was a subsisting contract, the lord chancellor refused to order payment of the purchase money into court. *Morgan* v. *Shaw*, 2 Mer. 138; 16 R. R. 161.

C. contracted with a railway company to sell land, with a stipulation that they should have possession and pay the purchase money in two years, with interest. They took possession, but only paid one-third of the purchase money, and a bill was filed for specific performance. Before answer the plaintiff moved for payment of the balance of the purchase money into court, or delivery up of the land. Order made for payment or delivery up within a month. *Cooper* v. *L. C. & D. Ry.*, 14 W. R. 985.

Possession by a purchaser given or permitted by the vendor, without receipt of rents and profits by the purchaser, does not render the purchaser liable to pay the purchase money into court, but he will be ordered to give up possession, or to pay the purchase money into court. *Curling* v. *Austin*, 2 Dr. & Sm. 129; 10 W. R. 682.

Delay—Of Purchaser.]—Court will not compel vendor to pay deposit money into court, though he retains possession of the estate, if the delay in the completion of the contract is occasioned by purchaser. *Wynne* v. *Griffith*, 1 Sim. & S. 147; 1 L. J. (o.s.) Ch. 110.

—— **Of Vendor.**]—Motion for a purchaser in possession to pay money into court, refused, under the circumstances of possession given independently of the agreement to purchase, and laches on the part of the vendor in completing his title. *Foæ* v. *Birch*, 1 Mer. 105; 15 R. R. 37.

Tenants in Common.]—Motion by one tenant in common, who had agreed to sell to the other, that the latter should pay his purchase money into court, refused, where such purchaser had been before and at the time of the purchase in possession of the whole, with the approbation of the other tenant in common. *Freebody* v. *Perry*, G. Cooper, 91; 14 R. R. 219.

Different Agreements in Bill and Answer.]—A motion by vendor that a purchaser who had taken possession should pay the purchase money into court, refused; the agreement admitted by the answer differing from that stated by the bill. *Benson* v. *Glastonbury Navigation Co.*, C. P. Cooper 42; 1 Coop. t. Cott. 350.

The bill stated a parol agreement for sale, and possession given of five acres. The answer admitted an agreement to purchase three acres only. Motion, that the purchase money for the five acres, or for the three acres, might be brought into court, refused. *Ib.*

Rents.]—Where purchasers were entitled under the contract to possession and receipt of the rents from a certain day, and obtained possession previously thereto from the tenants, the court refused to order payment in of the

purchase money, though the corpus of the estate was being dealt with, but directed the rents to be paid into court. *Robertshaw* v. *Bray*, 35 L. J., Ch. 844; 12 Jur. (N.S.) 224; 14 L. T. 101.

Account.] — Bill for specific performance against vendor, the vendee being in possession, and an account being necessary of the vendee's personal estate, referred to the master to fix a short day for the payment of the purchase money; otherwise the bill to be dismissed, as against those defendants, with costs. *Lowther* v. *Andover*, 1 Bro. C. C. 396.

Vendor permitting Purchaser.]—Vendor permitting purchaser to take possession before completion of title, without stipulation as to purchase money, cannot, on motion, have purchase money paid into court. *Clarke* v. *Elliot*, 1 Madd. 606.

Objection to Title.]—Parties interested in an estate which was sold for a large sum of money asked that the purchaser might pay a part of the purchase money into court without prejudice to objections to the title:—Held, that such an order would be contrary to the rule of the court; and the court refused to make the order even with the consent of the purchaser. *Ouseley* v. *Anstruther*, 11 Beav. 399; 18 L. J., Ch. 157.

Where a purchaser was allowed to enter into possession by consent before the time fixed for completion, and, when that time arrived, delayed payment of the purchase money, alleging that the title had not yet been sufficiently shown, the court ordered payment of the purchase money into court. *Lilley* v. *Allen*, 12 Jur (N.S.) 181; 14 L. T. 52.

Purchaser in possession not ordered to pay money into court where he objects to title. *Gell* v. *Watson*, 3 Madd. 225; 18 R. R. 219.

Purchaser having taken possession, but objecting to the title, required to pay in the purchase money, or deliver up possession. *Clarke* v. *Wilson*, 15 Ves. 317; 10 R. R. 82. S. P., *Boothby* v. *Walker*, 1 Madd. 197; *Burroughs* v. *Oakley*, 1 Mer. 52; 15 R. R. 85; *Tindal* v. *Cobham*, 2 Myl. & K. 385; 4 L. J., Ch. 98.

—— **Dower.**]—Purchaser in possession, and objecting to title on the ground of a claim to dower, ordered to pay the purchase money into court, on the objection being removed by the widow consenting to accept an equivalent from the vendor. *Mole* v. *Smith*, 1 J. & W. 665.

—— **Purchase Money to be Secured on Mortgage of Estate.**]—By an agreement for the sale of an estate, the purchaser was to pay part of his purchase money on the 24th December then next, when the conveyance was to be executed, and the residue was to be secured by a mortgage of the estate, payable at not less than twelve months from the date of the conveyance. The purchaser entered into possession immediately, but on some objections to the title refused to pay his purchase money:—Held, that the defendant must pay the purchase money into court. *Younge* v. *Duncombe*, Younge, 275.

Acts of Ownership.]—Purchaser having taken possession, and exercised ownership, although good title was to be made before purchase money paid, which was not done, must nevertheless pay purchase money into court. *Wickham* v. *Evered*, 4 Madd. 53.

A purchaser, who entered into possession, without prejudice to any question of title, took objections to the title, and, in consequence of the minority of a party necessary to the conveyance, the conveyance was postponed. The purchaser remained in possession, doing various acts of ownership:—Held, that under the circumstances, the defendant should pay the purchase money into court, with interest. *Adams* v. *Heathcote*, 10 Jur. 301.

Where a purchaser is let into possession of the estate under contract, his dealing with the property may be ground for ordering him to pay the purchase money into court, or for the appointment of a receiver, but will not authorise a decree against him, to compel him to accept the title on the ground of waiver of objections. *Osborne* v. *Harvey*, 1 Y. & C. C. C. 116; 12 L. J., Ch. 66; 7 Jur. 229.

Possession by a purchaser, according to the contract, not a ground for payment of the money into court, on objections to the title; acts of alteration or destruction against the nature of the contract, are. *Dixon* v. *Astley*, 19 Ves. 564; 1 Mer. 133; 13 R. R. 258.

Acts of ownership amounting to waste, by alteration and conversion of property, sufficient to induce the court to order payment of purchase money into court, upon the ground that a vendor has a lien on the estate for the amount, and might have filed his bill to restrain the purchaser in possession from committing such acts of ownership. *Cutler* v. *Symons*, 2 Mer. 103; 16 R. R. 151.

On bill by vendor for a specific performance, the court will not, before answer, make an order for payment of the purchase money, by the defendant in possession, unless under special circumstances, such as unreasonable delay, committing acts of ownership in alteration of the property, &c. *Bonner* v. *Johnston*, 1 Mer. 366; 15 R. R. 86, 134.

—— **Improvements.**]—Purchaser in possession having made alterations and improvements on estate, ordered to pay purchase-money into court. *Bramley* v. *Teal*, 3 Madd. 219.

—— **Deterioration.**]—A company having contracted with the ground landlord for the purchase of property, entered into possession and turned out the weekly tenants. The property was greatly damaged by strangers, who entered forcibly and pulled some of the houses to pieces:—Held, that the damage, to the deterioration of the property, having been occasioned by the act of the railway company, in entering upon the houses and turning the tenants out of possession, they must pay the purchase money into court without being allowed the option of giving up possession. *Pope* v. *G. E. Ry.*, 36 L. J., Ch. 60; L. R. 3 Eq. 171; 15 W. R. 192.

—— **Infant Heir.**]—Defendant being in possession, and having exercised acts of ownership, payment of the money ordered, although an infant heir was a necessary party to the conveyance. *Bradshaw* v. *Bradshaw*, 2 Mer. 492.

Deduction of Income Tax.]—Upon the question whether when a purchaser pays his purchase-money into court he is entitled to deduct income tax:—Held, that he is not. Semble, there is no

difference between the former and modern statutes. *Flight* v. *Comac*, 2 Eq. R. 1134; 2 W. R. 437. S. P., *Dawson* v. *Dawson*, 11 Jur. 984; *Humble* v. *Humble*, 12 Beav. 43; *Holroyd* v. *Wyatt*, 1 De G. & Sm. 125; 16 L. J., Ch. 174; 11 Jur. 261.

A purchaser liable to pay interest on his purchase-money may deduct income tax from such interest. It was the practice to deduct the tax from the interest on debts upon promissory notes, and the like, in the offices of the masters in chancery. *Bebb* v. *Bunny*, 1 K. & J. 216; 1 Jur. (N.S.) 203.

The tax is not deducted on payment of purchase-money into court, but the purchaser, it seems, may apply to have it deducted when the purchase money is paid out of court; the words "yearly interest" in s. 40 of 16 & 17 Vict. c. 34, mean not only interest accruing de anno in annum, but any interest at a fixed rate per cent. per annum, though accruing de die in diem. *Ib.*

Where a vendor in the occupation of property is charged with an occupation rent, a direction for the deduction of income tax ought not to be inserted in the decree. *Sherwin* v. *Shakespear*, 5 De G. M. & G. 517; 2 Eq. R. 957; 23 L. J., Ch. 898; 18 Jur. 843; 2 W. R. 668.

d. Application and Apportionment.

Sale by Mortgagee.]—Under a will A. was tenant for life, with remainder to B., his eldest son, in fee, of lands in which the legal estate was outstanding. In 1849 A. mortgaged his equitable life estate, and in 1852 B. mortgaged his remainder in fee to the same persons, with powers of sale. Default was made, and in 1864 the mortgagees in exercise of the power of sale conveyed a portion of the lands to C., by a deed, which recited (as the fact was) that the purchase-money had been apportioned between the life estate and the remainder according to the valuation, the propriety of which was not disputed:—Held, that the mortgagee's powers of sale were properly exercised. *Cooper, In re*, 46 L. J., Ch. 133; 4 Ch. D. 802; 35 L. T. 890; 25 W. R. 301.

—— **Separate Receipts.**]—Trustees advanced money on mortgage, a deed containing the usual power of sale and a declaration that the receipts of the mortgagees or their assigns should be sufficient discharges to purchasers, and that the power of sale might be exercised by any person who for the time being should be entitled to receive and give a discharge for the moneys for the time being owing upon the security of the mortgage. Subsequently the mortgagees assigned their shares separately to two sets of trustees, who, in exercise of the powers of sale, offered part of the property for sale. The purchaser of one of the lots accepted the title, but required that the purchase money should be apportioned between the two sets of trustees, and that each set of trustees should give a separate receipt, and that this should appear on the conveyance:—Held, that the joint receipt of the vendors was sufficient, and that no apportionment was necessary. *Parker and Beech's Contract, In re*, 56 L. J., Ch. 358; 56 L. T. 95; 35 W. R. 353—C. A.

Sale of Lease.]—On a bill for specific performance of an agreement, for the sale of a lease, the court cannot apportion the price according to the time already expired. *King* v. *Wightman*, 1 Anstr. 80.

When a vendor succeeds in a suit for specific performance, he is entitled to costs, notwithstanding the title was first shown in the master's office, if the suit was occasioned solely by the conduct of the defendant. Interest on arrears of rent and an apportionment, as between landlord and tenant, disallowed. *Peers* v. *Sneyd*, 17 Beav. 151.

Term to Pay Debts.]—Where a testator had created a term of 500 years for the payment of his debts and legacies, and, subject thereto, had devised the property in strict settlement; and the fee simple had been sold under a private act of parliament:—Semble, that the difference between the price realised by the sale of the fee, and that which would have been realised by the sale of the term, ought to be apportioned between the reversion and the term. *Brook* v. *Mostyn*, 4 N. R. 41.

Legatee of Term.]—If the legatee in remainder of a term of years which was converted into stock, the legatee in remainder not being a party to the conversion, sues for a portion of the purchase money in the lifetime of the tenant for life, whether the court will do more than secure the fund, or whether it will apportion it according to the value of the respective interests, quære. *Phillips* v. *Sarjent*, 7 Hare, 33.

Sale of Estate and Judgment.]—The plaintiff by one contract purchased an estate and a judgment for 1,000*l.*:—Held, that he was entitled to apportion the purchase money between the estate and the judgment, and to have separate conveyances of each. *Clark* v. *May*, 16 Beav. 273; 22 L. J., Ch. 302; 1 W. R. 69.

A purchaser of property included in one contract may divide the property purchased and apportion the purchase-money, and he may direct its conveyance to be made by the vendors in such a manner as he may deem most expedient, and by one or more deeds. *Ib.*

Trust Property Sold with Other.]—A trustee for sale may properly sell the trust property, together with other property, for an entire price, where a sale in that manner will be more beneficial for the cestui que trust, provided the purchase money be properly apportioned, and the conditions of sale affecting the other property, are not such as to injure the sale of the trust property. *Cooper, In re* (supra).

A purchaser under such circumstances ought to see that the purchase-money is properly apportioned before completion. *Ib.*

A messuage belonged to one who devised his real estate in trust for sale. An adjoining messuage was vested in the trustees of his settlement upon trust for sale and the purchase-money subject to the payment of definite sums, belonged to the testator's estate. Under a decree for administering the estate the two messuages were put up for sale together, and it was provided that the purchase money should be paid into court to the credit of the cause, "the proceeds of the sale of the testator's real estate":—Held, that an objection that the two properties were sold together for one lump sum, without any provision for apportioning it, and that it was to be paid into court in a suit unconnected with the

settlement was not sustainable, for that the court, having the money in its custody, would see it properly applied. *Cavendish* v. *Cavendish*, L. R. 10 Ch. 319; 33 L. T. 219; 23 W. R. 313.

Trustees Vendors — Investment.]—Where a mortgage was made to secure stock, which was for the purpose sold by trustees who had power to give receipts for moneys and power to vary securities, the mortgage held, as between vendor and purchaser, not to be sufficiently discharged on payment of a sum of money to the trustees, the money not appearing to have been again invested in stock or upon security. *Pell* v. *De Winton*, 2 De G. & J. 13; 27 L. J., Ch. 230; 4 Jur. (N.S.) 225; 6 W. R. 179.

Semble, that an innocent vendor of lands, discovering before completion that the purchasers are trustees, is not concerned to see that the investment is authorised by the trust. *Mansfield* v. *Childerhouse*, 46 L. J., Ch. 30; 4 Ch. D. 82; 35 L. T. 590; 25 W. R. 68.

A. B. contracted to purchase a mortgaged estate, the mortgagee to be paid off out of the purchase money. The mortgagee held his debt as trustee for a third party, who, while the contract was pending, filed a bill to establish the trust, and gave notice to the purchaser. In the meantime the mortgagee filed a petition in lunacy to carry out the sale, and the purchaser paid the purchase money to the receiver, to be administered under the order in lunacy:—Held, in a suit by the cestui que trust, that the purchaser was bound to see to the application of the purchase money. *Norris* v. *Stuart*, 16 Beav. 359; 1 W. R. 94.

On Sale by Executor.]—On a purchase from an executor or other person having power to deal with real estate, if there is no reason to infer that the executor is not selling for payment of debts, the purchaser is discharged from seeing to the application of the purchase moneys. Secus, if the executor is selling for securing his own private debt, or otherwise for his own benefit. *Haynes* v. *Forshaw*, 22 L. J., Ch. 1060; 17 Jur. 930; 1 W. R. 346. *And see cases*, supra, col. 1105.

Debtor.]—Semble, the rule requiring purchasers of property to see to the application of the purchase money, does not apply to the case of debtors, so as to implicate them in trusts created by their creditors. *Fernie* v. *Maguire*, 6 Ir. Eq. R. 137.

Discharge of Incumbrances.]—It is not a rule of equity that upon the purchase of property, subject to incumbrances, for its full value, the vendor is bound to apply the purchase money in payment of the incumbrances according to their priorities. Such a duty can only be the result of express agreement, or of a contract to be implied from the circumstances of the case. *Att.-Gen.* v. *Cox*, 3 H. L. Cas. 240.

Where a purchaser is in possession of lands under an executed conveyance, and part of the purchase money has been secured by a bond, the purchaser may come into equity to have it employed in the discharge of an arrear of ground-rent due at the date of the conveyance, and is not confined to his remedy at law on the covenants in his conveyance. *Woods* v. *Martin*, 11 Ir. Ch. R. 148.

Purchaser not permitted to apply part of his purchase money in discharge of a mortgage on the estate, though some of the parties consented, others being infants. —— v. *Stretton*, 1 Ves. J. 266.

Purchaser buying up Incumbrances.]—If a purchaser compromises debts charged on purchased premises (the vendor being bound to relieve the incumbrances), he ought not to charge the vendor more than he actually pays. *Cane* v. *Allen* (*Lord*), 2 Dow, 296.

A purchaser is not at liberty to use information derived from the abstract for his own advantage, adversely to the vendor. *Murrell* v. *Goodyear*, 2 Giff. 51; 6 Jur. (N.S.) 91. Affirmed, 29 L. J., Ch. 425; 8 W. R. 398.

Where a purchaser having ascertained that the concurrence of the heir was required to complete the title, gave notice to rescind the contract and bought up the interest of the heir, the court allowed him to deduct from the price he had paid the heir. *Ib. And see cases*, supra, col. 1253.

e. Return of.

Failure of Vendor's Title.]—When an interest, either legal or equitable, in any real property has been sold, and the conveyance has been executed by the parties to the same, the purchaser, in the absence of fraud on the vendor's part, cannot maintain an action for money received for his use to recover the price paid by him, if the vendor had no title to the property sold and his conveyance turns out to be worthless. In order to protect himself, a purchaser ought to take care that proper covenants are inserted in the deed of grant to him. *Clare* v. *Lamb*, 44 L. J., C. P. 177; L. R. 10 C. P. 334; 32 L. T. 196; 23 W. R. 389.

Upon Bond.]—S. bought an estate of A., who gave him a bond to suffer a recovery within three years, or to return him his money upon a reconveyance. A. tendered a recovery, but before it was suffered, a third person made a title to the land, whereupon S. brought his bill for the purchase money, but the court could not relieve him, for having consented to take the bond, he must resort to A.'s covenant against incumbrances. *Maynard's case*, 2 Free. C. C. 42.

Solicitor acting for Both Parties.]—A. purchased an estate from B., and on the completion one solicitor acted for both parties, and the purchase money was paid into his hands. Afterwards the purchaser was defeated by C., who had a paramount mortgage. On petition by the purchaser the court held that the money having come to the hands of the solicitor as agent of the vendor, and not of the petitioner, it could not interfere. *Tylee* v. *Webb*, 14 Beav. 14; 15 Jur. 1023.

Where Compensation cannot be Ascertained.]—Where a purchaser was not bound to take property agreed to be sold to him without compensation, and the compensation could not be ascertained:—Held, that he was entitled to the return of his purchase money with interest at four per cent., and to a lien on the estate for the amount. *Westmacott* v. *Robins*, 4 De G. F. & J. 390.

Death of Vendor.]—A. agrees with B., lord of the manor, to purchase a copyhold for two lives, such as A. shall name; A. pays 200*l.*, part of the purchase money, and was to pay the rest in

three months. A court is held; three months pass. B. died suddenly, and the money came to one who was not bound by the contract. The executors of B. to refund the 200*l.* *Awbrey* v. *Keen*, 1 Vern. 472.

If an estate be conveyed away in the lifetime of the party to whom it belonged, and he dies within forty days from the execution of the conveyance, his heir may recover it from the purchaser. Under such circumstances, if the heir has received the purchase money, he cannot have the estate restored without refunding the price paid for it. But where the price has been paid to other persons, the purchaser cannot call upon the heir to repay it, but must recover it as he can from those to whom it has been given by the deceased. *Marett* v. *Jennes*, 1 Knapp, 103.

Injunction against Action at Law.]—Purchaser entering into possession knowing of objections to abstract, but continuing to negotiate, cannot break off contract, and injunction will lie against his proceeding at law to recover back purchase money. Secus, if he had declared off, on delivery of abstract. *Warde* v. *Jeffery*, 4 Price, 294; 18 R. R. 716.

No Title in Vendor.]—The defendant, having sold and conveyed land to the plaintiff, and it afterwards appearing that he was not entitled to part, though no eviction had happened, or was threatened, a bill lies to set aside the conveyance, and for a return of the purchase money and all expenses. *Edwards* v. *M'Leay*, G. Cooper, 308; 2 Swanst. 287; 14 R. R. 261.

A. purchases an estate from B., and pays part of the purchase money; it is afterwards discovered that B. has no title to it, or interest, except a share of the proceeds of sale:—Held, that a court of equity cannot give the purchaser any relief beyond directing an account of B.'s share of the proceeds. *Williams* v. *Hignett*, 6 L. J. (o.s.) Ch. 125.

Over-Payment.]—A. purchases from B. a share in a concern, and gives for it a price which he understands to be four times the amount of the yearly profits, but which turns out to be more than that; the deed of assignment purports to be for an absolute sum:—Held, that a court of equity will not decree the sum, which A. alleges to be overpaid, to be refunded to him. *Stewart* v. *Stuart*, 1 L. J. (o.s.) Ch. 61.

Fraud.]—A vendor and his solicitor fraudulently, and in the absence of the purchaser's solicitor, obtained from a purchaser the purchase money and covenants for the production of title deeds, while the title as to a part of the purchased premises was still under investigation:—Held, that the plaintiff was entitled to have the contract rescinded, and his purchase money, together with all costs, charges, and expenses (including auction duty), repaid to him. *Berry* v. *Armitstead*, 2 Keen, 221; 5 L. J., Ch. 370.

f. Investment and Appropriation.

Investment — At whose Risk.]—Purchase money invested under order of court, obtained by purchaser without notice to all parties, is at risk of purchaser; is at risk of estate, if order is made, of which all parties had notice. *M'Cann* v. *Forbes*, 1 Hog. 13.

—— **Proposed by Vendor.**]—Pending a dispute respecting the title, and to avoid the question as to the interest of the purchase money, the vendor gave the purchaser the opportunity of investing the purchase money in consols, in the joint names of the vendor and purchaser:—Held, that the vendor, having proposed the investment, could not have charged the purchaser with loss, and was entitled to the benefit accruing from the funds having risen. *Burroughes* v. *Browne*, 9 Hare, 609; 22 L. J., Ch. 148.

A purchaser cannot throw upon a vendor the risk of an investment of the purchase money. *Ib.*

—— **Money in Court.**]—Money paid in as earnest at a sale of an estate, and ordered to be laid out in the funds, is part payment of the purchase money, and the vendor must abide by the rise or fall of the funds. *Poole* v. *Rudd*, 3 Bro. C. C. 49.

—— **Purchaser Trustee.**]—If a purchaser agrees to pay, on a specified day, for an estate in 3 per cent. consols, but the purchase cannot be completed on that day, and he continues to hold the stock, he holds it as a trustee for the vendor, and, when the purchase is completed, must pay by a transfer of the stock at a value fixed, unless the vendor desired him to convert it into money. *Puddicombe* v. *Bythesea*, 1 L. J. (o.s.) Ch. 186.

When purchase money is agreed to be paid, and a conveyance made at a given time, and disputes arise as to title, and the purchaser proposes to vendor to lay out the purchase money in exchequer bills till wanted, but vendor returns no answer, and money is so laid out, the purchaser is at the risk, and the vendor is entitled to the money, with 4 per cent. interest. *Ackland* v. *Cuming*, 2 Madd. 28; 17 R. R. 117.

—— **Deposit.**]—A deposit made on opening a bidding having been laid out in the public funds, this deposit is considered as part of the purchase money paid, and therefore the depositor is not entitled to the dividends accruing between the time of the deposit and the completion of the purchase; but only interest on the deposit at 4 per cent. *D'Oyley* v. *Powis (Countess)*, 1 Cox, 206; 2 Bro. C. C. 33. S. P., *Ambrose* v. *Ambrose*, 1 Cox, 194.

Appropriation—Notice to Vendor.]—A contract having been made for sale of an estate, the agreement not being completed within the time specified, the purchaser shall be allowed interest for such time as the purchase money shall appear to have been kept dead for the especial purpose of completing the contract. *Howland* v. *Norris*, 1 Cox, 59.

To excuse a purchaser from paying interest during the delay in clearing difficulties as to the title, it is not sufficient that the money was appropriated and unproductive, but the vendor must have notice thereof. *Powell* v. *Martyr*, 8 Ves. 146; 7 R. R. 7.

Effect of a deposit by vendee, with notice to vendor to stop or determine the rate of interest, not as a tender and appropriation, transferring the risk as to the principal: therefore, upon an investment in stock by the vendee, the title not being ready, and the vendor having notice, but returning no answer, the advantage by a rise, as

the loss by a fall, is the vendee's. *Roberts* v. *Massey*, 13 Ves. 561 ; 9 R. R. 227.

Where the Great Western Railway Co. have paid the purchase money of property under settlement into the Bank of England, the vendors (the trustees) cannot apply under the act, by petition, to charge them with interest during the time it has lain idle, on the ground that the company ought to have paid it to the trustees who were authorised by the settlement to receive it. *White, Ex parte, G. W. Ry., In re*, 9 L. J., Ex. Eq. 9.

By the conditions of sale it was stipulated that the purchaser should pay the remainder of the purchase money into court on or before a date fixed ; but, if he should fail in making such payment, &c., then, and from whatever cause the delay might have arisen, he should pay interest at 5 per cent. per annum from that day until the day of payment. The purchaser deposited the balance with his bankers at 2½ per cent. per annum, and gave notice thereof to the vendors. The title was not completed, but the purchaser, being satisfied with the title, paid the balance and interest at 5 per cent. into court, reserving the question of his right to compensation for loss of the difference between interest at 2½ and 5 per cent. occasioned by the delay of the vendors :—Held, that the purchaser must bear the loss arising from the unproductiveness of the purchase money, it being his own voluntary act to invest it. *De Visme* v. *De Visme*, 1 Mac. & G. 336 ; 1 Hall & Tw. 408 ; 19 L. J., Ch. 52 ; 13 Jur. 1037.

The rule that, where a vendor fails to complete at the time agreed upon, the purchaser, by providing himself with the money, and giving notice that it is lying idle, may free himself from payment of subsequent interest, is settled by well-established authorities, and could not have been intended to be rendered doubtful by the dicta in *De Visme* v. *De Visme* (supra). *Dyson* v. *Hornby*, 4 De G. & Sm. 481.

Vendor held accountable for the rents, but not entitled to any interest on the purchase money, the purchase not having been completed through the default of the vendor, and the purchase money having, after notice to the vendor, been lying idle. *Regent's Canal Co.* v. *Ware*, 23 Beav. 575. See *Storry* v. *Walsh*, 18 Beav. 559 ; 27 L. J., Ch. 338 ; 18 Jur. 503 ; 2 W. R. 300.

Where interest was to be paid, if delay arose from any cause in payment of the purchase money :—Held, that it was not payable where notice was given that the money was lying unproductive, and the delay arose from the state of the title. *Denning* v. *Henderson*, 1 De G. & Sm. 689 ; 17 L. J., Ch. 8 ; 12 Jur. 89. S. P., *Golds and Norton, In re*, 52 L. T. 321 ; 33 W. R. 333.

Where there is a condition that the purchaser should pay interest from the day fixed for completion in case of delay from any cause "except the wilful neglect or default of the vendor," the purchaser cannot relieve himself from the liability to pay interest by setting apart the unpaid purchase money and giving the vendor notice of such appropriation. *Golds and Norton, In re* (supra), not followed. *Riley* to *Streatfield, In re*, 56 L. J., Ch. 442 ; 34 Ch. D. 386 ; 56 L. T. 48 ; 35 W. R. 470.

A. agreed to advance B. 4,000*l.* on mortgage of freehold and copyhold premises ; and it was stipulated, that, within one week from the date of the agreement, B. should deliver to A. or his solicitor a complete abstract of the title to the premises, and produce the title deeds necessary to verify the same, and deduce and show a good marketable title within one month after the delivery of the abstract. An abstract was delivered, but from September, 1831, to May, 1832, B. could not show a good title, and A. informed B. that the purchase money during all that time was lying idle :—Held, that A. was not entitled to any interest on this purchase money. *Sweetland* v. *Smith*, 1 C. & M. 585 ; 3 Tyrw. 491 ; 2 L. J., Ex. 190.

A purchaser agreed that, "if from any cause whatever" the purchase should not be completed by a day named, interest should be payable. After the date for completing the purchaser, on receiving a note from the vendor that he should be charged with interest, paid the money into a banker's, and informed the vendor that it should lie there until the completion, having meanwhile raised some objections of little weight to the title, which were removed after a reasonable time :—Held, that under these circumstances the vendor was entitled to the stipulated interest. *Stocks* v. *Holdsworth*, 2 W. R. 450.

A purchaser contracted for the purchase of estate at the price of 38,500*l.*, which was to carry interest at 5 per cent. until payment, and he was let into possession. Afterwards, difficulties having arisen in completing, he paid 38,000*l.* into a bank to a separate account, and gave notice to the vendors that this sum was appropriated for the purposes of the purchase, and that he would refuse to pay interest under the contract :—Held, that the purchaser was not liable for interest subsequently to the time when he paid 38,000*l.* into the bank. *Kershaw* v. *Kershaw*, L. R. 9 Eq. 56 ; 21 L. T. 651 ; 18 W. R. 477.

Purchaser paying purchase money into his banker's, where it remained four years with notice to vendor :—Held, not liable for interest on difference between his average balance in banker's hands during a few days, when less than the purchase money was therein, and during the three preceding years. *Winter* v. *Blades*, 2 Sim. & S. 393 ; 4 L. J. (o.s.) Ch. 81 ; 25 R. R. 236.

The decree in a suit for specific performance established, that a good title had been shown within a few days of the original contract. There had been, however, after that time, a second agreement between some parties qualifying the terms of the original contract, and which was made under the impression that a good title had not then been shown since the date of the original contract, which was more than thirteen years before the decree, but only fifteen months before the bill was filed :—Held, that interest on the purchase money only ran from the filing of the bill, and interest also was given to the purchaser in the terms of the second agreement, between the date of that agreement and the filing of the bill, upon the balance of his purchase money then lying unproductive. *Minchin* v. *Nance*, 4 Beav. 332.

And see cases under next section.

iii. *Interest.*

See cases under preceding section.

a. In General.

From what Time Payable.]—A purchaser taking possession without a conveyance was compelled to pay interest, though the money was to be paid at a particular day, on the execution of the conveyance. *Fludyer* v. *Cocker*, 12 Ves. 25 ; 8 R. R. 275.

—— **Title made Good.**]—Purchaser is entitled to interest on his deposit, and to costs at law and in equity, until the vendor has made his title good; but vendor is entitled to subsequent costs. The rents belong to the vendor till his title is made good, and afterwards the purchaser must take to the rents and pay interest on his purchase money till the principal is discharged. *Pincke* v. *Curteis*, 4 Bro. C. C. 329. And see *Ib.*, 333, n.

—— **Delaying Payment.**]—Interest against a purchaser for delaying payment. *Child* v. *Abingdon* (*Lord*), 1 Ves. J. 94.

Purchaser, after long possession and vexatious objections to complete:—Held, to have waived his right to an investigation of the title, and decreed to perform the agreement specifically, to pay interest at 4 per cent. on the unpaid purchase money from the time of taking possession and the costs of the suit. *Hall* v. *Laver*, 3 Y. & C. 191.

Non-delivery of Abstract.]—The purchaser of a reversion, under a decree, stipulated to pay the purchase money by a certain day. The vendors did not deliver an abstract of their title until after the day named for payment of the purchase money:—Held, that the vendors were entitled to interest from that day. *Lewis* v. *Tucker*, 5 Jur. 1105.

Taking Possession.]—A purchaser under a decree having accepted and retained possession, must pay interest on the purchase money from the time at which he might have safely taken possession, and is entitled to an allowance for prior, not for subsequent, deterioration of the estate. *Binks* v. *Rokeby* (*Lord*), 2 Swanst. 222; 19 R. R. 68.

A railway company having agreed to let its line to another, which had taken possession under the agreement, filed a specific performance bill against the other, which thereupon gave notice that it would pay the rent into court. The plaintiffs then gave the defendants notice, that, unless the rent were paid to the plaintiffs, interest would be claimed on it under the 3 & 4 Will. 4, c. 42, s. 28. The defendants obtained ex parte an order that they might be at liberty to pay the rent into court, and paid it in accordingly:—Held, that they thereby obstructed the recovery of interest at law, and that the court had jurisdiction to order payment of interest. *Hull & Selby Ry.* v. *N. E. Ry.*, 5 De G. M. & G. 872; 24 L. J., Ch. 109; 3 W. R. 129.

Where the ordinary relation of vendor and purchaser existed between a railway company and the owner of lands taken by the company; the owner was entitled to interest on the purchase money, from the time the company took possession, up to the time of lodging the money in the bank. *Blount* v. *Great Southern and Western Ry.*, 2 Ir. Ch. R. 40.

—— **Evidence of Possession.**]—The putting up of a notice board for the purpose of selling or letting building land by a purchaser:—Held, to render him liable to pay interest on the purchase money. *Ballard* v. *Shutt*, 49 L. J., Ch. 618; 15 Ch. D. 122; 43 L. T. 173; 29 W. R. 73.

—— **Title depending on Award.**]—Where the impropriator of an allotment sold before the award for 700*l.*, to be paid on the 25th March then next, on a good and valid title being made, and the award was not made for several years, and the purchaser continued in possession, the court ordered him to pay 4 per cent. interest on his purchase money from the 25th March next after the date of the agreement, although a good title could not be made until the award was executed. *Att.-Gen.* v. *Christ Church* (*Dean*), *Oxford*, 13 Sim. 214; 12 L. J., Ch. 28; 5 Jur. 1007.

—— **Increase in Value of Estate.**]—Though a purchaser has the benefit of the increased value of ornamental timber during the years between his agreement and the time from which he is considered as in possession of the land, he will not, in respect of that benefit, be charged with interest on any part of the purchase money. *Boehm* v. *Wood*, 1 L. J. (o.s.) Ch. 234; 25 R. R. 280.

Vendor retaining Possession.]—Where vendor has improperly delayed performance of contract, and refused to give possession, he is not entitled to benefit of general rule as to interest on purchase money. *Paton* v. *Rogers*, 6 Madd. 257; 12 R. R. 183, n.

On a bill by a purchaser for specific performance, a vendor, who during fifteen years had retained possession and one-third of the purchase money, was charged with interest on one-third of the rents and profits. *Burton* v. *Todd*, 1 Swanst. 255.

—— **Suit by Purchaser Dismissed.**]—A bill by purchaser alleging conveyance of part only of estate, for conveyance of remainder. Part of purchase money was ordered to be paid into court to abide the event of the suit. The bill was dismissed:—Held, that the vendor was entitled to the residue of the purchase money, and the interest upon it, to the time of payment, although the purchase money in court had not been laid out. *Humphries* v. *Horne*, 3 Hare, 276.

The plaintiff, having purchased the defendant's interest in two leases, was allowed by the defendant to go into possession without paying the purchase money, and was afterwards dispossessed by force by the defendant:—Held, that, once possession was taken by the defendant, it should be treated as the ordinary possession of a vendor; that the plaintiff should be charged with interest on the purchase money during the time of his possession; and that, from the date when possession was resumed by the defendant, interest on the unpaid purchase money should not be charged against the plaintiff, nor should the rents, profits, or damages be charged against the defendant. *Johnston* v. *Johnston*, Ir. R. 3 Eq. 328.

When good Title first shown.]—A purchaser who has not been in possession is bound to pay interest on the purchase money, and take the rents and profits only from the time when a good title was first shown, and not from the time fixed by the agreement for the completion of the purchase. *Jones* v. *Mudd*, 4 Russ. 118; 6 L. J. (o.s.) Ch. 26; 28 R. R. 22.

A sum not exceeding the interest of the purchase money, or the rents of the estate, paid to the purchaser when the money had been lodged three years, but the title was not yet completed. *Piers* v. *Piers*, Sau. & Sc. 414. Affirmed 1 Dr. & Wal. 265; 11 Ir. Eq. R. 358.

—— **"Produce" good Title.**]—Where in the

contract the word "produce" a good title is used, the vendor is only entitled to interest from the day on which he has verified the title. *Parr* v. *Lovegrove*, 4 Drew. 170; 4 Jur. (N.S.) 600; 6 W. R. 709.

—— **Concurrence of Party having Charge.**]—A purchaser is liable to pay interest on his purchase money from the time when he could prudently take possession; but held, that he could not prudently take possession at the time a good title was shown, if he had no assurance that a person having a charge on the property would join in the conveyance. *Wells* v. *Maxwell*, 32 Beav. 550.

Completion of Conveyance.]—A purchaser will be charged with interest on his purchase money only from the time when, with reasonable diligence on his part, the conveyance might have been completed. *Boehm* v. *Wood*, supra.

From Date of Report.]—In a suit against an executor, the plaintiff, having taken a decree on consent for specific performance, and a reference to take an account of real and personal assets, was held entitled to interest only from the date of the report, the executor having admitted assets by his answer, and the accounts having been unnecessarily taken. *Enraght* v. *Fitzgerald*, 2 Dr. & War. 43; 1 Con. & L. 181; Ir. R. 8 Eq. 87.

From Confirmation of Report.]—Sale of an annuity before the master takes effect from the confirmation of the report, and interest was given from the first day on which the report could have been confirmed. *Twigg* v. *Fifield*, 13 Ves. 517.

From date fixed in Contract for Completion.]—Where, on a reference as to title, the plaintiff, the vendor, showed a good title in the opinion of the master from the time of producing before him certain evidence, known to the defendant; but it had formed no subject of dispute between him and the vendor:—Held, that interest ought to be allowed from the time fixed by the contract for completion. *Monro* v. *Taylor*, 3 Mac. & G. 713; 21 L. J., Ch. 525. Affirming 8 Hare, 51.

Where delay arose from a defect in a power of sale, in a settlement which was afterwards cured by a decree rectifying the settlement:—Held, that interest was payable from the day appointed for completion. *Palmerston* (*Viscount*) v. *Turner*, 33 Beav. 525; 4 N. R. 46; 33 L. J., Ch. 457; 10 Jur. (N.S.) 577; 10 L. T. 364; 12 W. R. 816.

—— **Reasonable Inquiry.**]—On a sale of real estate by a trustee under a will, open to suspicion, the title was approved; but before completion the heir-at-law gave notice that he intended to dispute the will, and brought an action against the tenant for rent; the purchaser thereupon refused to complete, and a bill for specific performance was filed, but before it came to a hearing the action brought by the heir was tried, and a verdict given against the heir; a reference as to title was then directed, and the master having reported in favour of the title, a decree was made for specific performance. The vendor then instituted a suit against the heir, which resulted in the will being established. The lord chancellor thereupon confirmed the decree for specific performance, and directed the purchaser to pay interest from the time when under the contract the sale ought to have been completed, and also to pay the costs of the suit subsequently to the hearing, when the reference as to title was directed. *Grove* v. *Bastard*, 1 De G. M. & G. 69. And see *Grove* v. *Young*, 5 De G. & Sm. 38; 21 L. J., Ch. 95; 15 Jur. 1099.

Sale at a Valuation.]—Under a contract to take together with a mill the machinery in it at a valuation, the purchaser was held not liable to pay interest on the amount of the estimate down to the time at which a good title to the mill was first shown. *Carrodos* v. *Sharp*, 20 Beav. 56.

Bill and Cross-bill.]—Specific performance prayed both by original and cross-bill, after considerable delay upon the title; the rents to be received, and interest paid, from the time stipulated. *Fenton* v. *Browne*, 14 Ves. 144; 9 R. R. 255.

Compensation.]—Specific performance of an agreement decreed, notwithstanding a variance from the description, with compensation for the deficiency in value; the premises consisting of leasehold farm, and three years having expired pending the suit, interest was given to the vendor, and a rent set upon it in respect of his possession. *Dyer* v. *Hargrave*, 10 Ves. 505; 8 R. R. 36.

Company—Sale by Official Manager.]—In the course of the winding-up of a company, it was ordered that the real estate of the company should be sold. The hereditaments had been, when purchased, conveyed to each of the shareholders, his heirs and assigns, in so many undivided one-hundredth parts as represented the number of his shares in the company. By one of the conditions it was provided that the vendor should deliver to the purchaser an abstract of the documents affecting the shares into which the company was divided, but that he should nevertheless accept a conveyance of the entire property from the official manager, under the powers contained in the winding-up acts, without requiring the concurrence of any of the shareholders, or of any other person:—Held, that the contract was completed when the conveyance of the equitable interest by the official manager was made; and that the purchaser must pay interest on the remainder of the purchase money from that time. *Sheerness Waterworks Co.* v. *Polson*, 3 De G. F. & J. 35; 29 Beav. 70; 30 L. J., Ch. 326; 7 Jur. (N.S.) 12; 4 L. T. 568; 9 W. R. 113.

Instalments.]—In a suit by purchasers to set aside a sale, it was ordered, as a condition of obtaining an injunction to stay proceedings at law, that the plaintiff should pay into court from time to time interest on the balance of purchase money, under which order five instalments were paid in and invested in stock, which, upon judgment being given for the plaintiff, were transferred to him with the accumulations and sold out by him. The payment of interest, however, had been suspended before the hearing in consideration of some indulgence to the defendant. The house of lords reversed the decree, and remitted the cause to the court below, and that court directed the repayment to the defendant, without interest, of the produce of the sale of the stock; also the instalments of interest which became due between the order for suspension and the original de-

cree, but no interest thereon. But as to the interest on balance of purchase money between the decree and judgment of reversal, the court had no jurisdiction. *Small* v. *Attwood*, 3 Y. & C. 105.

Sale set Aside.]—Where sale by trustee to purchaser with notice of trust is set aside, neither purchaser nor trustee pays interest on the rents. *Macartney* v. *Blackwood*, 1 Ridgw. L. & S. 602.

Deterioration.]—The amount of deterioration of an estate pending a suit for specific performance having been ascertained by an issue, the purchaser was allowed it out of his purchase money, which he had paid into court under an order, with interest from the time when he paid in his money. *Furguson* v. *Tadman*, 1 Sim. 530; 27 R. R. 236.

At what Rate.]—Where no stipulation as to interest, and purchaser completes, he pays 5 per cent. interest, and takes rents and profits; but where rents and profits do not value at 5 per cent. he pays no interest, and vendor takes rents and profits. *Esdaile* v. *Stephenson*, 1 Sim. & S. 122; 24 R. R. 151.

Purchaser charged with 5*l.* per cent. interest on the purchase money unpaid. *Burnell* v. *Brown*, 1 J. & W. 168; 21 R. R. 136.

Compound Interest.]—Agreement for the payment of the purchase money of an estate, by half-yearly instalments, the four last of which are to be retained by the purchaser as an indemnity until a good title shall be made, does not entitle the vendor to compound interest on such instalments, it appearing that he was not prepared to make a good title. *Stratton* v. *Symon*, 2 Moore, 125.

Where payments have been made by vendee at different times on account of purchase, all exceeding the interest due at the time of such payments, and the decree in suit by vendor for specific performance directs accounts to be taken of what is due to the plaintiff for principal and interest in respect of purchase, rests are always made therein. *Griffith* v. *Eaton*, 1 Sim. & S. 271; 1 L. J. (o.s.) Ch. 197. S. P., *Rowe* v. *Dodson*, 1 L. J. (o.s.) Ch. 183.

On Deposit.]—On motion by vendor against purchaser in possession for reference to set occupation rent, title not being completed, order was accordingly made, and that interest at 5 per cent. on deposit should, under circumstances, be deducted from rent. *Smith* v. *Jackson*, 1 Madd. 618; 16 R. R. 279.

Sale of Reversion.]—Upon the sale of a reversion, interest is payable from the time appointed for completion. *Bailey* v. *Collett*, 18 Beav. 179; 23 L. J., Ch. 230; 2 W. R. 216. S. P., *Williams* v. *Glenton*, 34 Beav. 528. Affirmed, 35 L. J., Ch. 284; 12 Jur. (N.S.) 175; 13 L. T. 727; 14 W. R. 294.

A purchaser of a reversion must pay interest on his purchase money from the time of his purchase. *Trefusis* v. *Clinton* (*Lord*), 2 Sim. 359.

The purchaser of a reversion, expectant on a lease for lives, must pay interest on the purchase money from the day on which the master reports that a good title could have been made to the time of payment. *Enraght* v. *Fitzgerald*, supra, col. 1297.

—— **At what Rate.**]—The purchaser of a reversionary interest under the decree of the court is bound to pay interest at the rate of 3*l.* 10*s.* per cent. on the three-fourths of his purchase money from the date of the report of good title, he not having been guilty of any laches up to that period, to the date of the lodgment. *Hutchinson* v. *Catheart*, Jon. & C. 260; 1 Ir. Eq. R. 452.

The rule is the same if the property be in its nature reversionary, though there be a small present profit arising from it. *Ib.*

—— **Lives Dropping.**]—The advantage a purchaser receives from the extinction of lives has never been considered in equity as a reason for his paying interest on his purchase money. Where lives drop in after a man is reported the best bidder, the court will direct the purchaser to make some compensation in respect to the estates being bettered. *Blount* v. *Blount*, 3 Atk. 636.

Where purchaser has an advantage by dropping in of lives, the court will direct an inquiry what interest he should pay on that account. *Davy* v. *Barber*, 2 Atk. 489. Sed quære. And see *White* v. *Nutt*, 1 P. Wms. 61.

A purchaser of a future interest, after a term, shall not pay interest or an increased price for a part of the term elapsing before the purchase is completed unless the delay be his fault. *Growsock* v. *Smith*, 3 Anstr. 877.

A reversion expectant on an estate for life is decreed to be sold; B. is confirmed the best purchaser, and the order made absolute 1724; in 1726, B. is ordered to bring his money into the bank; the life drops; if the life had dropped the next day after the report made absolute the purchase must have stood, and as for that time the life was wearing, so from that time the purchaser ought to pay interest. *Manning*, *Ex parte*, 2 P. Wms. 410.

b. Under Express Stipulation.

Delay by Vendor.]—Where conditions of sale provide that interest shall be paid from a certain day, if purchase not then completed, purchaser cannot relieve himself therefrom, though vendor caused delay. *Esdaile* v. *Stephenson*, 1 Sim. & S. 122; 24 R. R. 151. But see *Monck* v. *Huskisson*, 4 Russ. 121, n.

Otherwise in case of no stipulation. *Ib.* S. P., *Portman* v. *Mill*, 8 L. J., Ch. 161.

Higher rate of Interest.]—Where a purchaser enters into a contract to pay interest on his purchase money, and in certain events a higher rate of interest, and those events occur, it is not open to him to complain of the contract into which he has so entered. *Herbert* (*Lady*) v. *Salisbury & Yeovil Ry.*, 14 L. T. 507.

A purchaser covenants with his vendor to pay interest at 5 per cent. upon the unpaid portion of his purchase money; but the vendor covenanted that, if interest at the rate of 4 per cent. was regularly paid, he would accept that in lieu of the larger rate. The purchaser did not pay the 4*l.* per cent., but alleged an agreement between him and the vendor for the payment of 2*l.* per cent. only. The vendor being dead, and the purchaser not having paid even the 2*l.* per cent., an action was brought on the covenant

against the purchaser :—Held, that the agreement as to the 2*l.* per cent. not having been satisfactorily proved, there was in that respect no equity for an injunction ; but as the non-payment of the 2*l.* per cent. had been, to a certain extent, condoned, execution in the action would be restrained upon terms. *Houghton* v. *Crawford*, 23 L. T. 340.

Deposit.]—By conditions of sale the purchase money was to carry interest ; a deposit of 20*l.* per cent. was to be paid, and the auction duty was to be borne equally by the purchaser and the vendor : the purchaser paid only the amount of the deposit, and out of it the auctioneer paid the whole of the auction duty :—Held, that the portion of the deposit applied in discharge of the purchaser's moiety of the auction duty was to be considered as an unpaid part of the purchase money, and that the vendor was entitled to interest on it. *Townshend* v. *Townshend*, 2 Russ. 363.

Condition as to Non-completion.]—Where a purchaser agrees, that if, "from any cause whatever," the purchase shall not be completed on the day fixed, he will pay interest,—he must pay such interest, unless the delay has been occasioned by any misconduct on the part of the vendor. *Williams* v. *Glenton*, 34 Beav. 528 ; 35 L. J., Ch. 284 ; 12 Jur. (N.S.) 175 ; 13 L. T. 727 ; 14 W. R. 294.

The mere existence of difficulties in making out the title is not sufficient. *Ib.* And see *Storry* v. *Walsh*, 18 Beav. 559 ; 27 L. J., Ch. 338 ; 18 Jur. 593 ; 2 W. R. 300. S. P., *Vickers* v. *Hand*, 26 Beav. 630.

—— **Sale of Advowson.**]—On the sale of an advowson, the purchase money was to be paid on a fixed day, and the conveyances to be executed ; but, in default of payment, the purchaser was to pay interest. The purchase was not completed, through the default of the vendor :—Held, that no interest was payable *Weddall* v. *Nixon*, 17 Beav. 160 ; 22 L. J., Ch. 939 ; 17 Jur. 642 ; 1 W. R. 250.

—— **Defective Title.**]—Where conditions of sale provide that interest shall be paid by the purchaser from a fixed time, if the completion should be delayed by any cause whatever, delay merely occasioned by the state of the title, and not wilful on the part of the vendor, falls within the provision. *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517 ; 2 Eq. R. 957 ; 23 L. J., Ch. 898 ; 18 Jur. 843 ; 2 W. R. 668.

Where, in addition to such a provision, there were stipulations that the vendor might rescind on the title being objected to, and that if a good title should not be made to a definite proportion of the property, compensation should be allowed :—Held, that the non-delivery of a complete abstract, at a time fixed by the conditions, would not of itself exempt the purchaser from payment of interest. *Ib.*

Where the execution of an agreement fixing a time for completion, and requiring payment of interest in case of delay, was intercepted by negotiations, ending in an alteration of the agreement, but not of the time of completion :—Held, that in fixing the period for the payment of interest this circumstance ought to be regarded. *Ib.*

In conditions of sale, it was stipulated, "that if, from any cause whatever, the purchase should not be completed" on a day named, the purchaser should pay interest from that day to the completion. There was delay due only to defect in title :—Held, that the purchaser was bound to pay interest, and was entitled to the corresponding rents. *Palmerston* (*Viscount*) v. *Turner*, 32 Beav. 524 ; 4 N. R. 46 ; 33 L. J., Ch. 457 ; 10 Jur. (N.S.) 577 ; 10 L. T. 364 ; 12 W. R. 816.

The principle of *Sherwin* v. *Shakspear* (supra) applies as well to an actual defect of title as to imperfections in the abstracts delivered. *Ib.*

—— **Money lying Idle.**]—A condition that if from any cause whatever the purchase money shall not be paid by a particular day, the purchaser making default shall pay interest from that day, does not render the purchaser liable to pay interest where he has given notice that his money is lying unproductive, and the delay arises from the state of the title. *Denning* v. *Henderson*, 1 De G. & Sm. 689 ; 17 L. J., Ch. 8 ; 12 Jur. 89. *And see cases*, supra, col. 1292.

—— **Non-delivery of Abstract.**]—In conditions of sale, a time was fixed for the delivery of the abstract, and also for the payment of the purchase money, or for interest to run if the money was not paid at that time, "from whatever cause the delay might have arisen." The vendor did not deliver the abstract at the time stipulated :—Held, that the purchaser was only liable to pay interest from the time a good title was shown. *De Visme* v. *De Visme*, 1 Mac. & G. 336 ; 1 Hall & Tw. 408 ; 19 L. J., Ch. 52 ; 13 Jur. 1037. S. P., *Robertson* v. *Skelton*, 12 Beav. 363 ; 19 L. J., Ch. 140 ; *Monck* v. *Huskisson*, 4 Russ. 121, n. ; 5 L. J. (O.S.) Ch. 163.

The case of *De Visme* v. *De Visme* (supra) must be acted on with some caution ; and it is not in every case of delay in the delivering of a sufficient abstract that a vendor is to lose the interest which he has stipulated for. *Rowley* v. *Adams*, 12 Beav. 476.

Upon a sale under the court, there was a condition that the purchaser should confirm the report, and before the 10th November pay his purchase money and interest from the 29th September, and "under no circumstances" was he to be excused paying interest from that time. The purchaser was unable to serve the order of confirmation until the 29th November. The abstract was delivered on the 6th December, and the requisition finally answered on the 17th January :—Held, that there was no such delay on the part of the vendor as to release the purchaser from payment of interest. *Ib.*

Under a similar condition delay of six months from default of vendor in not furnishing proper abstracts :—Held, the purchaser must pay interest. *Coupe* v. *Bakewell*, 13 Beav. 421.

On a sale under the court in June, 1839, condition that the abstract should be delivered in twenty-one days ; that the purchaser should be entitled to the rents from October, and pay his purchase money in November ; and if, "from any cause whatever," it should not be paid, he should pay interest at 5 per cent. The vendors were unable to deliver the abstract within the time, and the title was not made out till 1845 :—Held, that the purchaser would not be relieved from payment of interest, but the order to pay was made without prejudice to any application for compensation. *Greenwood* v. *Churchill*, 8 Beav. 413 ; 14 L. J., Ch. 143 ; 9 Jur. 196.

—— **Neither Party at Fault.**]—Where the condition is that interest on the purchase money is

to be paid from a certain day, "if from any cause whatever" the purchase money be not then paid, the vendor will be entitled to interest where the delay in perfecting the title has arisen from circumstances under which no blame could attach to him, though the purchaser also was not to blame. *Durham (Dean and Chapter), Ex parte, Tewart* v. *Lawson*, 2 Jur. (N.S.) 345; 4 W. R. 419. S. P., *Stewart* v. *Lawson*, 3 Sm. & G. 307.

—— **Completion prevented by the Court.**]—Condition on sale by trustees that on payment of purchase money on date fixed purchaser should be entitled to the rents up to which time all outgoings, including interest to the mortgagees, were to be borne by the vendors; if, from any circumstances, the money should not be paid, the purchaser should pay interest at 5 per cent. until payment. The purchaser was ready with his money on the day appointed, and also to pay off the mortgagees, to whom he had given notices; but the contract could not be carried into effect, in consequence of an order of the court made subsequently to the contract, subjecting all contracts by the trustees to the approbation of the court:—Held, that the purchaser was bound to pay interest on his purchase money at 5 per cent. from the date fixed; and also to the mortgagees, at 5 per cent., the rate payable on their mortgages. *Matson* v. *Swift*, 5 Jur. 645.

—— **Irrelevant Objections.**]—By a contract for purchase, interest was to be paid on the purchase money from the 26th December, 1852, if the purchase was not then completed. The purchaser made objections which the court considered not relevant to the title, and decreed specific performance, with costs, and interest from the 26th December, 1852. *Litchfield* v. *Brown*, 23 L. J., Ch. 176.

—— **Reversion.**]—On a sale by the court of a reversion in fee, subject to a term of ninety-nine years, determinable on the death of the survivor of two lives at a small chief rent, it was provided by one of the conditions that the vendors should procure and confirm the master's report, and obtain an order for the purchaser to pay his purchase money into court on a date fixed, when the purchaser was to pay his purchase money, and be entitled to the receipt of the rents; "but if from any cause whatever the purchase money should not be so paid in" on that day, the purchaser should pay interest at the rate of 5 per cent. to the time of payment. The vendors did not make out agreed title for three years:—Held, that the condition did not apply, but that, as the purchaser had had the benefit of the wearing out of the lives, he must pay interest at the rate of 4*l.* per cent. *Wallis* v. *Sarel*, 5 De G. & Sm. 429; 21 L. J., Ch. 717. *And see cases*, supra, col. 1300.

—— **Death of Vendor.**]—A contract stipulated that the purchase was to be completed on the 11th October, and the purchaser was to be entitled to the rents from that day; and if, from any cause whatsoever, the purchase should not then be completed, the purchaser was to pay interest at the rate of 5*l.* per cent. per annum until completion. The vendor died before the date for completion, leaving an infant devisee. The purchaser paid the purchase money into court:—Held, that interest must be paid by the purchaser from the time fixed for completing; held, also, that payment into court was not a payment to the purchaser. *Bannerman* v. *Clarke*, 3 Drew. 632; 26 L. J., Ch. 77; 5 W. R. 37.

—— **"Wilful Default."**]—Conditions of sale provided that the purchase was to be completed by the 8th of September, and that "if from any cause whatever other than wilful default on the part of the vendor" completion of the purchase was delayed beyond that day, the purchase money was to bear interest to the day of actual payment:—Held, that by his going abroad, two days before the time known by him to have been fixed for completion, there had been so far "wilful default on the part of the vendor," that the purchasers were entitled to recover out of the interest paid by them a sum proportionate to the day. *Young and Harston, In re*, 31 Ch. D. 168; 53 L. T. 837; 34 W. R. 84; 50 J. P. 245—C. A.

Delay in completing a purchase arising from the vendor insisting that a certain mode of releasing incumbrances is effectual, is delay arising from the "wilful default" of the vendor, and exonerates the purchaser from the payment of interest on his purchase money under the usual condition. *Strafford (Lord)* to *Maples*, 65 L. J., Ch. 124; [1896] 1 Ch. 235; 73 L. T. 440.

Condition that if from any cause whatever other than the wilful default of the vendors, the purchase should not be completed by a certain date, interest should be paid upon the purchase money. The particulars and conditions of sale stated that the whole of the property had been acquired under a certain act of parliament, and was being sold under the powers of such act, but the sale plan showed that portions of the property had been acquired under a later act. The misdescription arose through the inadvertence of the vendors to examine the title before the particulars and conditions of sale were framed. The title to the whole was not made out or accepted by the purchaser until after the date fixed for completion. The real cause of the delay was the difficulty of the purchaser in obtaining the purchase money:—Held, by Lindley and Lopes, L.JJ. (Kay, L.J., dissenting), that the omission to verify the statement as to the title did not amount to wilful default on the part of the vendors within the condition, and that they were entitled to interest on the purchase money until completion. *London Corporation and Tubbs, In re*, 63 L. J., Ch. 580; [1894] 2 Ch. 524; 7 R. 265; 70 L. T. 719—C. A.

—— **Copyholds — Neglect by Vendors to obtain Admittance.**]—Deliberate neglect by a vendor of copyholds to which he has not been admitted to perfect his title by admission until after the date fixed for the completion of purchase amounts to wilful default. *Wilson & Stevens' Contract, In re*, 63 L. J., Ch. 863; [1894] 3 Ch. 546; 8 R. 641; 71 L. T. 388; 43 W. R. 23.

—— **Willingness to Complete.**]—A purchaser agreed that, if the completion of the purchase "shall be delayed on his part" beyond the 27th June, he would pay interest. The vendor and his trustee were willing to complete on that day, but the purchaser was not prepared; and on the 28th November, when the purchaser was ready, the vendor's trustee would not join:—Held, that the purchaser was liable to interest only from

the 27th June to the 28th November. *Perry* v. *Smith*, Car. & M. 554.

—— **Sale by Court—Deduction of Rents and Profits.**]—The conditions of sale by the court provided that each purchaser should pay the balance of his purchase money into court to the credit of the action, on or before 21st July, 1885, or in default, should be charged interest at the rate of 5 per cent. per annum until payment of the purchase money; and that upon such payment the purchaser should be entitled to possession, or to the rents and profits, as from 21st July, 1885. A purchaser not complying with this condition, an order was made that on or before a date fixed, the purchaser should lodge in court the balance of his purchase money, with interest thereon, from the 21st July, 1885. The purchaser asked that, after the direction for the payment of the money, there should be inserted the words, "Less the rents and profits of the said premises from the 21st July, 1885": —Held, that the purchaser's application must be refused. *Smith, In re, Day* v. *Bonaini*, 55 L. T. 329—C. A.

Sale of a Brewery and Utensils—Interest on Part of Purchase Money.]—Part of a letter was to the effect that if a brewhouse and utensils should not fetch 900*l.*, and if the brewhouse should not be sold within six months, S. agreed to pay interest at 4*l.* per cent on the 550*l.*, being the value of that property without the utensils. On a bill for specific performance, the court declared that, according to the true construction of the letter, the defendant was the purchaser of the brewhouse and utensils at the price of 900*l.*; that she, upon 550*l.*, part thereof, must pay interest at 4*l.* per cent.; and that she must account for and pay 350*l.* for the utensils, without interest, to the date of the decree; and ordered a general account to be taken. *Deller* v. *Simonds*, 5 Jur. (N.S.) 997.

Instalments—Part left on Mortgage.]—An estate was contracted to be sold at a sum to be paid by six instalments, with additions in the form of interest, at 5 per cent., until the day of payment thereof. By a subsequent contract it was agreed, that the last instalment, instead of being paid at the appointed day, should remain on mortgage, at 4½ per cent. for fourteen years, but that the stipulations of the first contract as to the previous instalment should continue in force. The reduction from 5 to 4½ per cent. is dependent upon the fulfilment of the terms of the first contract with respect to the previous instalments; and these being suffered to remain unpaid long after the appointed periods, and no mortgage having been executed, the vendor is entitled to recover 5 per cent. upon the last instalment, as well as upon the others. *Attwood* v. *Taylor*, 1 Man. & G. 279; 1 Scott (N.R.) 611.

—— **Terms of Contract varied.**]—It is a general rule of equity, that if a purchaser is in possession of an estate, receiving the rents, he is liable to pay the purchase money, and that the purchase money, being retained by him, will carry interest, to be paid by him to the seller. An agreement, which appears to prevent the application of this rule, will be examined in a court of equity by its aid, and will or will not be enforced, according to circumstances. *Birch* v. *Joy*, 3 H. L. Cas. 565.

B. agreed to purchase from C. an incumbered estate, C. to make a title free from all incumbrances except one mortgage. B., on being put into possession of part, was to pay an instalment of the purchase money, and further instalments on being put into possession of the whole, free from incumbrances. The first instalment was not paid, nor any after incumbrances cleared off by C., and a fresh agreement was entered into by which B. was forthwith to advance 10,000*l.* to pay off certain incumbrances, and he was to be let into immediate possession, and to be entitled to the rents and profits. It was further agreed that "the interest of the remainder of the purchase money shall not commence till lady-day next, in case the title shall be perfected." B. was let into possession, but the business was not completed:—Held, first, that under the clause in the second agreement, exempting "the remainder of the purchase money" from the payment of interest, the sum remaining unpaid of the instalments came under that description; secondly, that the exemption of a purchaser in possession of the estate from liability to interest on the purchase money, though permissible if the agreement had been speedily executed, would not be enforced by any court of equity where that state of things continued for many years; and, thirdly, that the second contract must be taken to have failed by circumstances, and that the first contract must be decreed to be executed so far as it had remained unexecuted. *Ib.*

Parties to Sue—Joint Interest in Lands.]—A., B., and C., being interested in lands, but having no common legal interest in any portion of them, agreed together to put them up for sale, according to their interests. Each lot was described in a separate paper containing the conditions of sale, which stipulated that the vendors should deliver an abstract of title; that the conveyances should be executed, and the purchase money paid on a certain day, from which time the purchaser should have possession; and that if the purchaser should be let in before payment of the purchase money, he should be considered tenant at will to the vendors, and pay interest at the rate of 4 per cent. on the amount of purchase money, as and for rent. The defendant bought some of the lots. No abstract of title was delivered; but he was let into possession and held for several years, not paying the purchase money. He knew of the arrangement entered into between A., B., and C:—Held, that A., B., and C. could not jointly sue upon an implied contract by the defendant, to waive the delivery of an abstract, and perform the condition for payment of 4 per cent. interest as rent. *Seaton* v. *Booth*, 4 A. & E. 529; 1 H. & W. 742; 5 L. J., K. B. 97.

Covenant for Delivery of Abstract.]—By articles of agreement, the defendant agreed to purchase land of the plaintiff, and the plaintiff agreed that he would within one month from the date thereof, or from being required so to do, deliver to the defendant an abstract of title; and the defendant agreed that he would pay a portion of the purchase money on signing the agreement, and the residue on or before a given day (four years from the date of the agreement), with interest thereon, payable half-yearly, between the date of the agreement and the day fixed for the payment of the residue:—Held, that the delivery of the abstract was not a con-

dition precedent to the plaintiff's right to enforce payment of the half-yearly interest. *Dicker* v. *Jackson*, 6 C. B. 103; 17 L. J., C. P. 234; 12 Jur. 541.

Meaning of "Completion."]—Agreement that purchase money of property taken by a company should remain in their hands until completion of the purchase, and should then, with interest at 5 per cent. per annum, be handed over to vendor:—Held, under the circumstances, that the words "completion of the purchase" meant completion on the part of a purchaser by payment of the purchase money to the vendor. *Lewis* v. *South Wales Ry.*, 10 Hare, 113; 22 L. J., Ch. 209; 16 Jur. 1149; 1 W. R. 45.

Set-off—Purchase by Mortgagee.]—An estate was mortgaged at 5*l.* per cent. The mortgagor died, and the devisees of the equity of redemption sold the mortgaged premises, together with other lands of the mortgagors, to the mortgagee. By the conditions of sale 4*l.* per cent. was payable on the balance of the purchase money. The mortgagee entered into possession, and remained in possession until her death, when her devisees entered into possession. Upon a claim by the devisees of the mortgagor for specific performance of the contract, eleven years after the sale, no demand having been made during that period either for the payment of the residue of the purchase money into court, or for interest on the mortgage:—Held, under the circumstances, that a set-off pro tanto was to be inferred at the date when possession was taken by the mortgagee, and that, from that period, interest at 4*l.* per cent. only was payable upon the balance of the purchase money. *Wallace* v. *Bastard*, 4 De G. M. & G. 251; 17 Jur. 1107.

e. Lien.

i. *In General.*

Inquiry as to—Payment Recited in Conveyance.]—In a suit by a vendor, to establish a lien upon the estate for the amount of the unpaid purchase money, the court decreed that the plaintiff, notwithstanding the recital in the deed of conveyance of the payment of the consideration money, and the receipt indorsed on it, was entitled to an inquiry whether the full amount of the consideration money was paid; and to a lien as unpaid vendor, on the lands, for so much of the consideration money as should, upon the inquiry, appear to be unpaid, with interest from the date of the conveyance. *Croly* v. *Callaghan*, 5 Ir. Eq. R. 25.

Held, that the onus of proving the payment of the consideration money lay upon the defendant (the assignee of the vendee); and that neither the recital nor the receipt was any evidence of the fact. *Ib.*

Absence of Receipt Clause or Receipt Endorsed.]—Where a purchase deed does not contain a receipt clause for the purchase money in the body or deed, or a receipt endorsed, the purchaser must pay the expense of proving that there is no vendor's lien for unpaid purchase money should he insist upon such proof. *Scott* v. *Alvarez, Scott and Alvarez's Contract, In re*, 64 L. J., Ch. 376; [1895] 1 Ch. 596; 12 R. 474; 72 L. T. 455—C. A.

Mortgagee.]—An unpaid vendor is entitled to proceed as a mortgagee. *Hope* v. *Booth*, 1 B. & Ad. 498; 9 L. J. (o.s.) K. B. 21.

Bankruptcy of Purchaser.]—Upon the bankruptcy of the purchaser of timber felled, quære, whether the vendor has a lien, and can prove for the deficiency. *Gwynne, Ex parte*, 12 Ves. 379.

A. sells lands to B., who afterwards becomes bankrupt, part of the purchase money not being paid. A. shall not be bound to come in as a creditor under the statute; but the lands shall stand charged with the money unpaid, though no agreement for that purpose. *Chapman* v. *Tanner*, 1 Vern. 268.

A trustee for the sale of a brewhouse and plant, contracts to sell them, and lets the purchaser into possession:—Held, that the purchaser was in possession within the statute 21 Jac. 1, c. 19, and therefore the plant, upon his becoming bankrupt, passed to his assignees without being subject to the lien for the purchase money. *Dale, Ex parte*, Buck, 365.

Testator had, according to his usual course of dealing with the bankrupts, sold them land, allowing the purchase money to remain as a charge, and made them advances for the purpose of building, such advances, as well as the purchase money, being stated in a written memorandum to be a charge upon the land. The executors of the testator, being authorised by the will to continue the same course of dealing, did so:—Held, these latter advances, as well as those made by the testator, and the purchase money in each case, were a charge upon the lands. *Linden, Ex parte, Baker, In re*, 1 Mont. D. & D. 428; 10 L. J., Bk. 22; 5 Jur. 57.

Payment to Vendors' Agent.]—The agent of vendors who had authority to receive the purchase money had in his hands a sum belonging to the purchaser, and was directed by him to apply it in payment. The agent accordingly debited the purchaser's account, and credited the vendors' account with the amount, and he rendered to the vendors an account charging himself with that sum as received from the purchaser:—Held, that this was not a valid payment to the vendors, and that they had still a lien on the estate. *Wrout* v. *Dawes*, 25 Beav. 369; 27 L. J., Ch. 635; 4 Jur. (N.S.) 396.

Trustee retaining Purchase Money.]—If a vendor who knows that the purchase money is trust money suffers one of the trustees to retain part of it, without the knowledge of the co-trustees, or the cestui que trust, he has no lien on the estate for the part so retained. *White* v. *Wakefield*, 7 Sim. 491; 4 L. J., Ch. 195.

A trustee sold property for 300*l.* Before completion the house was burnt down and the trustee received 100*l.* insurance money. On conveyance the purchaser paid 200*l.* to a mortgagee of the property, knowing the mortgage to be fraudulent. The trustee absconded:—Held, that the cestuis que trustent had a lien on the property for the whole amount of the purchase money. *Poole* v. *Adams*, 4 N. R. 9; 33 L. J., Ch. 639; 10 L. T. 287; 12 W. R. 683.

Secret Trust.]—A son conveys an estate to his father nominally as purchaser, but really as a trustee; the father died, having, by a will, subsequent to the conveyance, made a general

devise of all his real estate. The son has a lien on the estate as vendor for the apparent consideration, no part of which was paid. *Leman* v. *Whitley*, 4 Russ. 423; 6 L. J. (O.S.) Ch. 152.

Rights against Heir of Intestate.]—The heir of an intestate, who had contracted to purchase land, was held entitled to the lands freed from the vendor's lien as against the estate of the intestate. *Harding* v. *Harding*, 41 L. J., Ch. 523; L. R. 13 Eq. 493; 26 L. T. 656.

On Title Deeds.]—An unpaid vendor of a real estate conveyed to a purchaser has not at law any lien on the title deeds for his purchase money. *Goode* v. *Burton*, 1 Ex. 189; 16 L. J., Ex. 309; 11 Jur. 851.

Interest in Land.]—A lease is a sale pro tanto, and a premium reserved on a lease is in the nature of purchase money, for which, if unpaid, there is a lien on the land; and, consequently, unpaid premium is an interest in land within 9 Geo. 2, c. 36, s. 3. *Shepheard* v. *Bretham*, 46 L. J., Ch. 763; 6 Ch. D. 597; 36 L. T. 909; 25 W. R. 764.

Assignment of Leaseholds.]—In consideration of parental love and affection, a father assigned certain leasehold premises to his son, subject to a peppercorn rent, and to the lessee's covenants: —Held, that the son was a purchaser for value under the deed, and not a volunteer, and that the vendor's lien would not hold as against him. *Harris* v. *Pubb*, 58 L. J., Ch. 434; 42 Ch. D. 79; 60 L. T. 699; 38 W. R. 75.

Mistake.]—Particulars stated that the property was an absolute reversion in a freehold estate, and at the auction conditions were read stating that the property was subject to two mortgages. On a bill by the purchaser, who stated that he was deaf and had read the particulars, but did not understand that he was buying only an equity of redemption:—Held, that, he was entitled to a rescission of the contract, and to a return of the deposit with interest and a declaration of lien. *Torrance* v. *Bolton*, 42 L. J., Ch. 177; L. R. 8 Ch. 118; 27 L. T. 738; 21 W. R. 134.

Payment by Instalments.]—Under a contract for the purchase of an estate, where the money is to be paid in portions, every payment is a part performance of the contract by the vendee, and in equity transfers to him a corresponding portion of the estate. *Rose* v. *Watson*, 10 H. L. Cas. 672; 3 N. R. 673; 33 L. J., Ch. 385; 10 Jur. (N.S.) 297; 10 L. T. 106; 12 W. R. 585.

Where Specific Performance Impossible.]—Extent of lien on a fund, where the grantor of an annuity agreed to sell to the grantee the fund on which the annuity was secured, and to repurchase the annuity, but, in consequence of a mutual mistake, the contract for the sale of the fund could not be specifically performed. *Colyer* v. *Clay*, 7 Beav. 188.

Equitable Lien of Creditors.]—Where part of the price of an estate is set apart in the hands of trustees, as a security to the purchaser against the claims of judgment creditors of the vendor, who have a general equitable lien on the estate sold, the judgment creditors must be parties to a bill which seeks to have this money disposed of. *Anon.*, 1 L. J. (O.S.) Ch. 16.

Assignment of Lien.]—The benefit of the vendor's lien for purchase money unpaid may be assigned by parol to a third party, semble. *Dryden* v. *Frost*, 3 Myl. & Cr. 670; 8 L. J., Ch. 235; 2 Jur. 1030.

J. S. being indebted, sold his lands, and took the purchaser's bond, which he assigned to one of his creditors. This assignment is good in equity. *Munn* v. *East India Co.*, Finch, 299.

ii. *Discharge of.*

Sale for Annuity.]—Whether a vendor who takes an annuity as the consideration has or has not a lien on the estate for his annuity must depend upon the particular circumstances of each case. *Dixon* v. *Gayfere*, 1 De G. & J. 655; 27 L. J., Ch. 148; 3 Jur. (N.S.) 1157; 6 W. R. 52.

Where there was an agreement for the sale of an equitable estate in land, in consideration of the grant of an annuity for three lives and the life of the survivor, to be secured by bond, but neither the bond was given nor the estate conveyed in the lifetime of the purchaser; upon the annuity falling into arrear:—Held, that the principle of vendor's lien did not apply, the agreement evidencing a contrary intention. *Ib.*

A. agreed to sell an estate to B. for an annuity, and B. was to pay off a mortgage to which the estate was subject. Accordingly, B. executed a deed, by which he granted the annuity to A., and covenanted to pay it; and by a conveyance of even date but executed after the annuity deed, A. and the mortgagee, in consideration of the annuity having been so granted, and of the payment of the mortgage money, conveyed the estate to B.:—Held, that A. had no lien on the estate for the annuity. *Buckland* v. *Pocknell*, 13 Sim. 406.

A. conveys an estate to B., in consideration of B.'s entering into the covenant contained in the deed, for paying an annuity to A., and 3,000*l.* to certain persons, in the event of his (B.'s) marrying:—Held, that the covenants did not create a lien on the estate. *Clarke* v. *Royle*, 3 Sim. 499; 30 R. R. 193.

A. conveyed her life estate in lands to her son, in consideration of his paying the rent of a house for her, and supplying her with sufficient hay and corn, and he covenanted to pay the rent and supply the hay and corn:—Held, that A. had a security on the estate in the nature of a vendor's lien for the performance of the son's contract. *Richardson* v. *M'Causland*, Beat. 457.

An agreement to purchase land for an annuity for the life of the vendor, to be a charge on the land, and to be paid quarterly, entitles the vendor, not only to the security of the charge, but to the covenant of the purchaser for the payment of the annuity. *Bower* v. *Cooper*, 2 Hare, 408; 11 L. J., Ch. 287; 6 Jur. 681.

Sale and assignment of a life interest in leaseholds in consideration of a weekly sum to be paid to the vendor during her life, with a covenant by the purchaser to make the weekly payment to the vendor, and to perform the covenants in the lease:—Held, that the vendor

was entitled to a lien on the life interest in the leaseholds. *Matthews* v. *Bowler*, 6 Hare, 110; 16 L. J., Ch. 239; 11 Jur. 297.

A vendor, in lieu of the price of 3,000*l.*, agreed to accept an annuity of 100*l.* a year for the joint lives of her intended husband and herself. This is not a security, but a substitution for the price; and the lien of the vendor on the land is discharged. *Parrot* v. *Sweetland*, Myl. & K. 655.

Obtaining Judgment.]—Judgment against the purchaser of a leasehold house and furniture for damages and costs does not destroy lien of the vendor upon the house and furniture. *Seaforth* (*Lord*), *Ex parte*, 19 Ves. 235; 1 Rose, 306.

Relief in Equity.]—If the vendor parts with his estate, and takes a security for the consideration money, there is no reason for a court of equity to assist him against the creditors of the purchaser. *Fawell* v. *Heelis*, Amb. 726.

Proof of.]—Purchase money unpaid is primâ facie a lien on the lands sold; and if a security is taken for that money, it lies on the vendee to show that the vendor agreed to rest on that security, and to discharge the lands. *Hughes* v. *Kearney*, 1 Sch. & Lef. 132; 9 R. R. 30.

Vendor's lien, unless clearly relinquished, of which another security taken and relied on, may be evidence; the proof being upon the purchaser, and, failing in part, another security being relied on, may prevail as to the residue. *Mackreth* v. *Symmons*, 15 Ves. 329; 10 R. R. 85.

Bond Taken.]—The rule of equity, in the case of an implied lien, is that the vendor's lien is not gone by accepting a bond or note from the purchaser, nor will a receipt for the purchase money discharge the lien till the money be paid; this rule is strengthened when applied to the case of an express charge. *Saunders* v. *Leslie*, 2 Ball & B. 514; 12 R. R. 114.

A vendor accepting a mortgage on another estate is not conclusive evidence against the existence of his lien on the estate sold. *Ib.*

A vendor who has taken, as security for part of the purchase money, the bond of the vendee and a mortgage of part of the property sold, has not, on the bankruptcy of the vendee, a lien on the whole estate. *Capper* v. *Spottiswoode*, Tam. 21; 31 R. R. 60.

An agreement by a vendor to take a bond for the payment of the consideration for land sold exonerates the land from all claim for the purchase money in the hands of a subsequent bonâ fide purchaser. *Dixon* v. *Gayfere*, supra. S. P., *Blackburne* v. *Gregson*, 1 Cox, 90; 1 Bro. C. C. 420.

Upon a sale of a debt proved in an administration suit the purchaser gave a bond for the purchase money, payable by instalments:—Held, that the vendor had not lost his lien on the debt for payment of the unpaid purchase money. *Collins* v. *Collins*, 31 Beav. 346.

On purchase by a trustee the conveyance contained a receipt for the whole purchase money. In fact, only part was paid, and the trustee gave his bond, and a memorandum reciting that the vendor had lent the trustee the sum to enable him to complete:—Held, that the vendor had no lien on the title deeds in his possession. *Muir* v. *Jolly*, 26 Beav. 143. And see *Goode* v. *Burton*, supra, col. 1309.

By an agreement for the sale of an estate, the purchase money, with interest, was to be secured by the bond of the purchaser. The conveyance expressed that the purchase money had been paid, and the vendor's receipt was indorsed upon it; but, in fact, only a part of the price had been paid, and the residue was secured by the purchaser's bond. The vendor was held to have a lien on the estate for the amount of the bond. *Winter* v. *Anson*, 3 Russ. 488; 6 L. J. (o.s.) Ch. 7; 27 R. R. 117.

Promissory Note.—A. purchases lands of B., and mortgages back those lands for part of the purchase money, and gives a note to B., for 200*l.*, the other part thereof; A. devises those lands to be sold for payment of his debts: this 200*l.* note shall not be preferred to other debts, nor be a charge on the land in equity. *Bond* v. *Kent*, 2 Vern. 281.

Bills of Exchange.]—The vendor's lien on the estate for the purchase money is not discharged by taking bills of exchange; which are to be considered, not as a security, but as a mode of payment. *Grant* v. *Mills*, 2 V. & B. 307; 13 R. R. 101. S. P., *Loaring*, *Ex parte*, 2 Rose, 79.

Vendor has a lien on estate sold for purchase money, though he has received bills from purchaser in payment of same, and though purchaser becomes bankrupt. *Peake*, *Ex parte*, 1 Madd. 346; 16 R. R. 233.

The vendor takes, in payment of the purchase money, certain bills of exchange, and also a mortgage to secure the due payment of the bills. The bills are returned under protest:—Held, that the vendor has a preferential right to payment out of the proceeds of the estate, not only for the amount of the bills, but also in respect of interest, costs, and damages, although, at the time of the purchase, another creditor had a judgment against the purchaser, the court being of opinion, that the damages, in fact, formed part of the purchase money. *Cameron* v. *Gillard*, 6 Jur. 113.

—— **Pawnees.**] — Where the purchaser accepted bills for the purchase money, and the original lease was deposited with a third person to be delivered up to the purchaser on payment of the bills; and the seller got possession of the lease and pledged it with persons who bonâ fide advanced money upon it, and to whom he indorsed the outstanding bills:—Held, that the pawnees had no lien on the lease beyond the amount of these bills. *Hooper* v. *Ramsbottom*, 4 Camp. 121; 6 Taunt. 12; 1 Marshall, 414.

Pledge of Stock.] — Vendor's equitable lien upon the estate for purchase money is lost by taking special security by way of pledge of stock. *Nairn* v. *Prowse*, 6 Ves. 752; 6 R. R. 37.

Contract in Substitution.]—A contract for the payment of purchase money must be explicit to deprive a vendor of his lien upon the estate sold; and, though a contract is stated in the conveyance, evidence may be given to show the real nature of the transaction, and a subsequent purchaser is bound to inquire whether it was accepted in substitution of the lien. *Frail* v. *Ellis*, 16 Beav. 350; 22 L. J., Ch. 467; 1 W. R. 72.

Sale to Company for Cash and Shares.]—A vendor agreed with a trustee for a company about to be formed for the sale of his business for 6,000*l.* in cash and 2,000*l.* in paid-up shares. The company was wound up, and the only assets consisted of the proceeds of sale of the property which had been resold:—Held, that the vendor had no lien on those proceeds, his lien being excluded by the nature of the contract. *Brentwood Brick and Coal Co., In re, Rowe's Claim*, 46 L. J., Ch. 554; 4 Ch. D. 562; 36 L. T. 343; 25 W. R. 481—C. A.

Second Sale.]—Case in which vendor of an estate loses his lien, by a contract between all parties for a second sale, the first vendor being unable to complete his contract. *Cood* v. *Pollard*, 10 Price, 109; 23 R. R. 713.

Express Stipulation.]—Agreement for sale of paper mills, the purchase money being payable by instalments. There was a clause that if the purchaser should cease to carry on business the vendors should have a right to re-enter and take possession of the premises, and of everything which should have been built or placed thereon, and to hold the same for their own use and benefit absolutely, without prejudice to the liability of the purchaser for unpaid purchase money. The vendors (a bank) entered under the clause and claimed against the official liquidator of the purchaser, the fixtures and the trade machinery under their vendor's lien:—Held, that the bank had no vendor's lien for unpaid purchase money, as an express stipulation had been substituted for such lien. *London and Lancashire Paper Mills Co., In re*, 58 L. T. 798.

—— **Covenant to Repay.**]—Covenant between vendor and purchaser, that purchase money should be repaid within two years after resale, discharges the vendor's lien. *Parkes, Ex parte*, 1 Glyn & J. 228.

Waiver—Vendor Retaining Title Deeds.]—Semble, that a vendor by retaining, under a special agreement, possession of the title deeds of the estate, does not waive or exclude his lien. *Wreforde* v. *Lethern*, 2 L. J. (O.S.) Ch. 173.

iii. *Enforcement of.*

Statute of Limitations.]—An agreement was entered into for the purchase of freehold land for 6,300*l.*, to be paid on the 13th May, 1811, and the purchaser was immediately put into possession. In 1827 the purchaser, before any conveyance was made to him, and before he had paid any part of the purchase money, died, having devised the lands to trustees. In 1834 the attorney of these trustees wrote to the assignees of the vendor, stating that the purchase money was ready to be paid on the purchase being completed. On a bill filed by the assignees in 1844, to enforce the lien:—Held, on evidence not before the court below, that the trustees were persons by whom the purchase money was payable, within the meaning of the Statute of Limitations, 3 & 4 Will. 4, c. 27. *Tuft* v. *Stephenson*, 1 De G. M. & G. 28; 21 L. J., Ch. 129; 15 Jur. 1187.

In 1849 the assignees of the vendor filed a bill, seeking to enforce the vendor's lien on the estate for the purchase money:—Held, that s. 42 of the statute did not apply to the arrears of interest, but that the whole was recoverable from the 13th May, 1811. *S. C.*, 5 De G. M. & G. 735.

Death of Purchaser.]—Decree obtained by vendor for specific performance with a declaration that if the purchase money was not paid by fixed date, estate should be sold and the purchaser personally liable for any deficiency. Before the day the purchaser died insolvent. The estate was afterwards sold, but the proceeds were insufficient to pay the whole amount due to the vendor:—Held, that by the decree the vendor was entitled to prove for the balance only of his debt, but semble that independently of the decree he would have been entitled to prove for the balance only. *Rome* v. *Young*, 4 Y. & C. 204; 9 L. J., Ex. Eq. 41; 2 Jur. 963.

Where an estate has been sold to a person who has since died, the court will direct an account to be taken of the personal estate, and decree that the vendor shall have a lien on the land for so much as the personal estate will not extend to pay. *Topham* v. *Constantine*, Tam. 135.

Insolvency of Purchaser.]—The purchaser of a real estate became insolvent after part of the purchase money was paid. The vendor died, having devised the estate to the plaintiffs and appointed one of them his executor. The bill was filed against the provisional assignee of the insolvent and an equitable mortgagee by deposit of the agreement for purchase. The plaintiffs did not prove their title as devisees; the defendants disclaimed:—Held, that the court could not make the decree sought without evidence of the devise, but that, upon payment of the costs of the defendants, the court might (the defendants not opposing) declare the plaintiffs absolutely entitled to the estate. *Gabriel* v. *Sturgis*, 5 Hare, 97; 15 L. J., Ch. 201; 10 Jur. 215.

Application by vendor who has not conveyed for a sale of the premises in discharge of his lien for the unpaid purchase money, and to prove for any deficiency, granted. *Gude, Ex parte*, 1 Glyn & J. 323.

Decree for Sale.]—The vendor's title and the contract being admitted, decree will be made for sale, and satisfaction to the vendor out of the moneys, and for payment of the deficiency, if any, by the purchaser, notwithstanding an act of parliament has dealt with the lands in question since the date of the contract. *Nash* v. *Worcester Improvement Commissioners*, 1 Jur. (N.S.) 973.

Bill to enforce Agreement.]—A vendor of some mines, who by express agreement had a lien for his unpaid purchase money, filed a bill to enforce that lien, and to recover from the purchasers the value of the minerals they had got, and by getting which they had made the premises an inadequate security; a demurrer for want of equity was overruled. *Attwood* v. *Small*, 6 Cl. & F. 523, n.; 8 L. J., Ch. 145.

Petition.]—In a suit by an unpaid vendor, the court decreed a specific performance, and the payment of the purchase money and damages. The purchasers were unable to pay, and the property was in the possession of a receiver in another suit. A petition by the vendor to enforce his lien was dismissed with costs, the proper remedy being by bill. *Att.-Gen.* v. *Sit-*

tingbourne Ry., 35 Beav. 268 ; 35 L. J., Ch. 318 ; L. R. 1 Eq. 636 ; 14 L. T. 92 ; 14 W. R. 414.

Purchase Money payable by Instalments.]—In an action by a vendor whose purchase money was to be paid by instalments, some of which were not yet due, for specific performance of his contract and a declaration of his lien, liberty was given to apply in respect of future instalments as they accrued due. *Nives* v. *Nives*, 49 L. J., Ch. 674 ; 15 Ch. D. 649 ; 42 L. T. 832 ; 29 W. R. 302.

Lien on One of Several Estates.]—Where the court had declared that certain devised estates were subject to incumbrances, and a vendor had a lien for unpaid purchase money on one of such estates :—Held, that the vendor's lien stood precisely in the same position as any other incumbrance, and that it must be paid out of the particular estate on which it attached. *Barnewall* v. *Iremonger*, 1 Dr. & Sm. 255 ; 3 L. T. 462 ; 9 W. R. 88.

Fund in Court.]—Vendor may acquire a lien on fund in court, under contract for sale, and, if vendee refuses to complete contract, may prevent him by injunction from drawing out of court fund which was appropriated by the contract to be applied in part discharge of purchase money. *Doyne* v. *Harvey*, 1 Hog. 3.

Against Railway Company.]—When a landowner seeks to enforce his lien for unpaid purchase money against a railway company, the court will order a sale of the land, but will not grant an injunction to restrain the company from running trains over the land. *Lycett* v. *Stafford and Uttoxeter Ry.*, 41 L. J., Ch. 474 ; L. R. 13 Eq. 261 ; 25 L. T. 870.

An unpaid vendor of land taken by a railway company is entitled to the usual relief of unpaid vendors ; therefore in an action by him for the enforcement of his lien on the land, the court will, without requiring the land to be offered for sale, grant an injunction against the company from using the land, and make an order for delivery up of possession. *Allgood* v. *Merrybent and Darlington Ry.*, 55 L. J., Ch. 743 ; 53 Ch. D. 571 ; 55 L. T. 835 ; 35 W. R. 180.

iv. *Priorities.*

In General.]—Vendor's lien for purchase money unpaid against the vendee, volunteers, and purchasers with notice, or having equitable interests only claiming under him, unless clearly relinquished. *Mackreth* v. *Symmons*, 15 Ves. 329 ; 10 R. R. 85.

Subsequent transactions, even under authority of a special act of parliament, cannot affect a vendor's lien for unpaid purchase money. *Nash* v. *Worcester Improvement Commissioners*, 1 Jur. (N.S.) 973.

Recital as to Payment.]—When a purchase deed contained a recital that the purchase money had been paid or accounted for, but there was no receipt for the purchase money on the back of the deed :—Held, that the vendor, in respect of his lien for unpaid purchase money, was entitled to priority over a mortgagee of the purchaser. *Bacon* v. *Cobb*, 19 W. R. 614—L.JJ.

Receipt Indorsed.]—Vendor conveyed without receiving his purchase money ; the receipt of it was indorsed on the deed, and the title deeds delivered to the purchaser. The purchaser then made a mortgage by deposit, and absconded :—Held, as between the vendor's lien and the right of the mortgagee, that the possession of the title deeds and the fact of the indorsement of the receipt gave the mortgagee the better equity. *Rice* v. *Rice*, 2 Drew. 73 ; 2 Eq. R. 341 ; 23 L. J., Ch. 289 ; 2 W. R. 139.

Principles of the rule as to the effect of priority in point of time. *Ib.*

Where a vendor signs a receipt for the whole purchase money, but suffers the purchaser to retain part of it, and remains in possession of the estate as tenant to the purchaser, his possession is no notice, to a subsequent purchaser or incumbrancer, of his lien on the estate for the sum retained. *White* v. *Wakefield*, 7 Sim. 401 ; 4 L. J., Ch. 195.

Vendor retaining Title Deeds.]—The plaintiffs conveyed an estate, but retained the conveyance and title deeds, as security for unpaid purchase money. The purchaser mortgaged the estate :—Held, that the plaintiffs had a lien upon the estate prior to that of the mortgagee. *Worthington* v. *Morgan*, 16 Sim. 547 ; 18 L. J., Ch. 233 ; 13 Jur. 316.

Equitable Mortgagee.]—An equitable mortgagee from vendee who has not paid purchase money can sell only bankrupt's interest, unless vendor consents ; and the court will not act till he is served. *Wright, Ex parte, Watts, In re*, 3 Mont. & Ayr. 49.

Settlement—Notice.]—An estate was devised to trustees, upon trust, to discharge a specific debt, and to apply the residue for the benefit of the testator's children. A. purchased, but left the purchase money, except what was required to satisfy the debt, unpaid, giving his bond as a collateral security for the payment of it. A. made a marriage settlement which referred to the conveyance, and the conveyance referred to the will :—Held, that the settlement conveyed notice to the will, and that such notice was binding on the beneficiaries under the settlement, and that the testator's children were entitled, as against the beneficiaries, to a lien on the estate to the amount of the purchase money left unpaid. *Davies* v. *Thomas*, 2 Y. & C. 234 ; 7 L. J., Ex. Eq. 21.

In 1811 B., in partnership with A. and C., agreed to sell his share, they paying interest on his money remaining in their hands. In August, 1812, C., by his marriage settlement, conveyed his one-third to A. and D., as trustees for himself for life, with remainder for plaintiffs as tenants in common ; this deed was registered in 1814. In 1819 the amount due by A. and C. to B. was 24,000*l.*, including purchase money and interest and advances made by B. A mortgage of the mills was then executed by A. and C. to B., to secure this 24,000*l.*, and was registered. C. died in 1820, and A. in 1823. In 1826 B. procured, from the representatives of A., an assignment of the equity of redemption, and entered into possession of the mills :—Held, that B. had no claim of lien against the plaintiffs, as an unpaid vendor. *Stuart* v. *Ferguson*, Hayes, 452.

Judgment Creditors.]—M. obtained a decree against H. for specific performance of an agreement for payment of the residue of the purchase

money, and in default, for a sale of the hereditaments. S., a judgment creditor of H., prior to the decree, refused to release and disclaim, but as to S.'s interest, the court declared that the hereditaments were freed and absolutely discharged, and ordered him to pay all the costs of the suit. *Moscrop* v. *Sandeman*, 9 Jur. (N.S.) 1146; 9 L. T. 352.

Notice of Incumbrances before Completion.]—A purchaser of property subject to a mortgage gave a cheque for the purchase money, but stopped the payment of the cheque. The existence of second and third incumbrances was disclosed to him, and he subsequently withdrew his countermand, and the cheque was cashed. On a bill by the third incumbrancer claiming priority over the purchaser, the court held that the purchase was not completed by the delivery of the cheque, considering the circumstances that took place afterwards, and a decree was made in conformity with the prayer of the bill. *Tildesley* v. *Lodge*, 3 Jur. (N.S.) 1000.

Notice to Solicitor.]—A. conveyed an estate to B., and, according to the conveyance, an acceptance was given in full satisfaction for the absolute purchase; but in reality it was agreed that the vendor should have a mortgage for the money. Before the acceptance became due, B. mortgaged to C., who employed the same solicitor as had been engaged in the purchase, and C. had notice that the bill had not been paid, and of the form of the conveyance:—Held, first, that C. was affected by the notice to his solicitor; and, secondly, that, under the circumstances, he was bound to inquire into the true nature of the transaction between A. and B., and consequently that his security ought to be postponed to A.'s. *Frail* v. *Ellis*, 16 Beav. 350; 22 L. J., Ch. 467; 1 W. R. 72.

Vendor acting Malâ fide.]—A plaintiff agreed with H. to grant him a building lease of some land. The plaintiff advanced H. 970*l.* to enable him to build. Afterwards E. and P. jointly made further advances to H. for the same purpose. Subsequently E. (who was the solicitor both of the plaintiff and of P.) induced the plaintiff to execute a conveyance to H. without receiving the consideration, in order that H. might then execute a mortgage to E. and P. to secure their advances:—Held, that the plaintiff had lost his lien for his purchase money and his priority for it, and his advances over the mortgage. *Smith* v. *Evans*, 28 Beav. 59; 29 L. J., Ch. 531; 6 Jur. (N.S.) 388; 2 L. T. 227.

Equitable Mortgage.]—In 1845 P. became purchaser from A. of a piece of land. A. retained the title deeds of the land, and in 1851 deposited them with the plaintiff to secure the payment of a sum then advanced. P. and A. had various transactions, but there was no appropriation of the balance due to P. in satisfaction of the purchase money due to A. A. in 1855 was adjudicated bankrupt:—Held, that the plaintiff was entitled to a decree against P. to the extent of the equitable interest which A. had in the land. *Rayne* v. *Baker*, 1 Giff. 241; 6 Jur. (N.S.) 366.

A solicitor purchased through a third party property belonging to his clients; the solicitor paid no purchase money to his clients, but their trustee, acting under his direction, indorsed on a conveyance to a third party, whom the client treated as the real purchaser, a receipt for the purchase money payable to the third party; the solicitor afterwards deposited the title deeds by way of equitable mortgage, became bankrupt, and left the country:—Held, that the claim of the equitable mortgagee had priority over the clients' lien for unpaid purchase money. *Worthington* v. *German*, 16 W. R. 187.

A person through his son, as solicitor, lent money on mortgage of property. The son did not inquire whether the purchase money had been paid by the mortgagor, and there was no receipt for it on the mortgagor's purchase deed. The money so lent was applied in paying off a mortgage held by a third person on the property, and the deeds were handed to the son by such third person, not as mortgagee, but as solicitor of the mortgagor:—Held, that, under the circumstances, the representative of the vendor was entitled to his lien for unpaid purchase money in priority to the mortgagee. *Bowen* v. *Cobb*, 19 W. R. 614.

Land in Register County—Purchasers without Notice.]—Trustees of a charity conveyed land in Yorkshire to R. and W., part of the purchase money remaining unpaid, and allowed R. and W. to register the conveyance, knowing that they wanted to do so in order to resell the land in lots:—Held, that the trustees had, by their conduct, precluded themselves from asserting their lien for unpaid purchase money against bonâ fide sub-purchasers from R. and W. without actual notice, though the sub-purchasers had not examined, as it was their duty to have done, the conveyance to R. and W., a memorial of which was registered, and though the estate of one of the sub-purchasers was equitable only. *Kettlewell* v. *Watson*, 53 L. J., Ch. 717; 26 Ch. D. 501; 51 L. T. 135; 32 W. R. 865—C. A.

Registration.]—A vendor's lien for unpaid purchase money need not be registered under 2 & 3 Anne, c. 4. *Ib.*

Notice.]—The mortgagee of a sub-purchaser's lot left it to R. and W. "to manage the business":—Semble, he was not affected with constructive notice of the lien. *Ib.*

v. *Purchaser's Lien.*

Character of.]—Lien of vendee, having paid prematurely, is analogous to that of vendor. *Mackreth* v. *Simmons*, 15 Ves. 345; 10 R. R. 85.

Contract at an End.]—On a conveyance executed by some but not all the parties, where the contract has gone off by the vendor's default, if there is any lien it is vested in the purchaser as a security for his deposit. *Oxenham* v. *Esdaile*, 3 Y. & J. 262.

Incumbrance.]—A purchaser, who has accepted a conveyance with knowledge of an incumbrance, has no lien on the fund in court in respect of the incumbrance. *Miller* v. *Pridden*, 26 L. J., Ch. 183; 3 Jur. (N.S.) 78; 5 W. R. 171.

Although the vendor of an estate has fraudulently concealed an incumbrance, yet the purchaser has no lien on the purchase money after it has been paid over. *Cator* v. *Bolingbroke*, 1 Bro. C. C. 301.

A purchaser from a remainderman who

advances money to pay off a pressing incumbrance, the remainderman representing that he can sell with the concurrence of the tenant for life, has such an equitable title to the purchase as to establish a lien on the property, which equity will protect by enjoining the tenant for life from proceeding by ejectment to obtain possession, until the cause shall be finally determined on the hearing. *Ludlow* v. *Grayall*, 11 Price, 58; 25 R. R. 703.

Defect in Title.]—Where, in a suit by a vendor for specific performance, it was certified that a good title was not deduced, the court ordered a return to the defendant of his deposit money, with interest at 4 per cent., and declared the defendant entitled to a lien on the estate of the same, and also for his costs. *Turner* v. *Marriott*, L. R. 3 Eq. 744; 15 L. T. 607; 15 W. R. 420.

Resale.]—L. having contracted in writing to sell estates for 350,000*l.* to H., by a defeasance and subsequent agreement, on the same stipulations, resells to W. for 380,000*l.*, not subject to defeasance. W., having paid 38,000*l.* deposit of 10*l.* per cent. on the purchase money, files a bill for the return of such deposit, costs, interest, and expenses; and for a declaration that he has a lien on the estates for such sums. A general demurrer for want of equity, overruled without costs, on the ground that primâ facie a purchaser who has paid his deposit, where the contract goes off for defect of title, ought to have a lien upon the estate for such deposit, on the dicta and opinions of Sir Thomas Clarke, in *Burgess* v. *Wheate* (1 Eden), and Lord St. Leonards, in his Treatise on Vendors and Purchasers. *Wythes* v. *Lee*, 3 Drew. 396; 26 L. T. 192. *S. C.*, on appeal, 25 L. J., Ch. 389; 2 Jur. (N.S.) 130; 4 W. R. 316.

Payment by Instalments.]—Under a contract for the purchase of an estate, where the money is to be paid in portions, every payment is a part performance of the contract by the vendee, and in equity transfers to him a corresponding portion of the estate. *Rose* v. *Watson*, 10 H. L. Cas. 672; 33 L. J., Ch. 385; 10 Jur. (N.S.) 297; 10 L. T. 106; 12 W. R. 585.

The purchaser of an estate was bound to pay certain sums at stated intervals, with interest on what remained unpaid. He paid several sums, and then declined to complete on the ground of misrepresentation:—Held, that he was entitled, so far as the payments extended, to claim a lien on the estate for that amount, and to enforce that claim against the assignees of the vendor. *Ib.*

Interest was allowed the purchaser on the sums paid by him at the rate of 4*l.* per cent. per annum, simple interest. *S. C.*, 3 N. R. 673.

Feme Covert—Sale by Husband.]—The wife, being entitled in equity to real estate under a contract of sale entered into before her marriage, the husband, after their marriage, completed the purchase, and took the conveyance to himself. Afterwards, acting upon the supposition that the estate was his own, the husband laid out money in improvements upon it, and in the lifetime of the wife sold the estate, and the purchasers took a conveyance from him. The husband survived the wife. After the death of the husband, the heir-at-law of the wife recovered the estate from the purchasers by a suit in equity:—Held, that the husband, and the purchasers from him, were entitled in that suit to a lien on the estate in respect of the purchase money paid by the husband; and semble, also, in respect of the money expended on lasting improvements. *Neesom* v. *Clarkson*, 4 Hare, 97; 9 Jur. 82.

Purchaser abandoning Contract.]—Agreement to buy an hotel. The owner continued to carry on the business, the purchaser being unable to find the purchase money, and eventually the purchaser wrote to the owner, "You must mortgage or sell the premises":—Held, that although the purchaser would have been entitled to a lien, if the contract had failed through the vendor's default, as the purchaser had himself abandoned the contract, the purchaser was not entitled to any lien. *Dinn* v. *Grant*, 5 De G. & S. 451.

Lien for Compensation.]—R. agreed to sell W. lands free from incumbrances, and the greater part of the purchase money was paid. The land was subject to reservations and conditions. W. was declared entitled to compensation, but the amount on inquiry could not be ascertained:—Held, that as W. was not bound to take the property without compensation, and as the compensation could not be ascertained, he was entitled to the return of his purchase money, with interest at 4*l.* per cent., and to a lien on the estate for the amount. *Westmacott* v. *Robins*, 4 De G. F. & J. 390.

—— **Refusal of Party to Concur.**]—A husband agreed to sell property which was settled as he and his wife should jointly appoint, and in default of appointment to the use of trustees during the life of the wife for her separate use, with remainder to the husband in fee. The purchase money was paid to the trustees of the settlement. On the death of the husband before completion, the wife refused to convey her life interest:—Held, that the purchaser was entitled to a conveyance of the property subject to the widow's life interest, with compensation in respect of such interest out of the husband's personal estate; and that he was entitled to a lien on the consols in the hands of the trustees for such compensation. *Barker* v. *Cox*, 46 L. J., Ch. 62; 4 Ch. D. 464; 35 L. T. 662; 25 W. R. 138.

f. Abatement and Compensation.

i. *In General.*

And see cases under *Conditions of Sale, When Misleading*, supra, col. 1171.

Rule in Equity.]—If an agreement be in part unperformed, the principle of a court of equity is in compensation, not forfeiture. *Page* v. *Broom*, 4 Russ. 6. Affirmed, 2 Russ. & M. 214.

Where a bill for specific performance is dismissed on the ground of inadequacy of consideration, the court will not aid a party in recovering his deposit, or giving him compensation for his loss, by decreeing an account. *Kendall* v. *Beckett*, 9 L. J. (O.S.) Ch. 24.

If a purchaser cannot have what was his strong inducement to the contract, a specific performance, with compensation, not to be enforced. *Stapylton* v. *Scott*, 13 Ves. 426.

Specific performance upon the principle of compensation and indemnity: not if the effect is the substantial deviation from the contract.

Halsey v. *Grant*, 13 Ves. 73. S. P., *Horniblow* v. *Shirley*, id. 81.

General rule of specific performance that the purchaser shall have what the vendor can give, with an abatement out of the purchase money, for so much as the quantity falls short of the representation, enforced against trustees for infants, upon the mere mistake of their agent without fraud, &c., but the relief adapted to the justice of the case. *Hill* v. *Buckley*, 17 Ves. 394 ; 11 R. R. 109.

The principle of equity with respect to specific performance is, that if substantially the purchaser can have the thing contracted for, a slight variation in the qualifications of it will not disable the vendor from having a decree for specific performance, when the difference is such as can be compensated in money. *Magennis* v. *Fallon*, 2 Moll. 588.

The jurisdiction of equity is never exercised to decree compensation singly without other relief. As to the jurisdiction in cases of compensation generally. *Newham* v. *May*, 13 Price, 749 ; M'Cle. 511.

Semble, that in a case of misdescription, a court of equity would not enforce against trustees specific performance with compensation, as being prejudicial to the cestui que trust, and incapable of being ascertained. *White* v. *Cuddon*, 8 Cl. & F. 766 ; 6 Jur. 47.

Contract by trustees under power of sale, though by subsequent events it cannot be executed under the power, shall be made good in equity by the effect of the interest acquired on the estate bound by the contract. *Mortlock* v. *Buller*, 10 Ves. 315. Affirmed 2 Dow. 518.

Though generally, it is not universally, true that a purchaser may take what he can get, with compensation for what he cannot have. Whether that is ever done without express undertaking on his part to do what court shall order, quære. *Paton* v. *Rogers*, 1 V. & B. 351 ; 12 R. R. 183, n.

Extent of Doctrine.]—The doctrine of compensation ought not to be extended. Jurisdiction has been exercised in giving compensation founded on the minuteness of the object, compared with the estate sold, and not upon any jurisdiction to find and adjust pecuniary equivalents, where essential parts of the contract cannot be performed. *Pendergast* v. *Eyre*, 2 Hog. 81.

After Decree.]—At the hearing, a decree was drawn up, simply for specific performance, although without prejudice to the question of compensation :—Held, that the plaintiff was not thereby precluded from compensation. *Wilson* v. *Williams*, 3 Jur. (N.S.) 810.

Title not Proved.]—Where a bill by a vendor for specific performance does not set up a right to compensation, but avers that the vendor was and is able to make a good title, the court will not, upon the failure of the averment, entertain the question of compensation. *Ashton* v. *Wood*, 3 Sm. & G. 436 ; 3 Jur. (N.S.) 1164.

Rescission.]—Though the conduct of a purchaser, after the discovery of circumstances entitling him to rescind, may preclude him from so doing, it does not necessarily follow that he is entitled to compensation. *Hughes* v. *Jones*, 3 De G. F. & J. 307 ; 31 L. J., Ch. 83 ; 8 Jur. (N.S.) 399 ; 5 L. T. 408 ; 10 W. R. 139.

Reference—Damage.]—Upon a reference to the master to inquire as the title to compensation for damage done to lands, the master ought regularly to inquire whether the damage was temporary or permanent. *Ctor* v. *Croydon Canal Co.*, 4 Y. & C. 405 ; 13 L. J., Ch. 89.

No Estimable Loss.]—Quære, per Turner, L.J., whether the principle of compensation is applicable where there is no estimable loss to a purchaser unless he happen to sell. *Edwards-Wood* v. *Marjoribanks*, 1 Giff. 384 ; 3 De G. & J. 329 ; 7 H. L. Cas. 806 ; 30 L. J., Ch. 176 ; 6 Jur. (N.S.) 1167 ; 3 L. T. 222.

A. contracted with B. and C., trustees, for the purchase of an advowson and rectory, and parish church. A loan by the Governors of Queen Anne's Bounty had not been paid off and was not disclosed by the abstract. A. filed a bill for specific performance, with compensation. Specific performance was decreed, but :—Held, that A. was not entitled to compensation. *Ib.*

Annuity.]—Mode of determination of amount of compensation to purchaser in respect of an annuity charged upon the land purchased together with the other land of the vendor, and of exonerating the purchased land therefrom. *Powell* v. *South Wales Co.*, 1 Jur. (N.S.) 773.

Joint Purchase.]—Where two purchase in equal moieties between them and one has abatement in price, &c., made to him, he shall account to other as to it. *Carter* v. *Horne*, 1 Eq. Ca. Abr. 7.

Intentional Misrepresentation.] — Purchaser not bound to take with compensation in a case of great intentional misrepresentation, although so provided by the conditions of sale in case of "any error or misstatement" in the particulars. *Stewart* v. *Alliston*, 1 Mer. 26 ; 15 R. R. 81.

Failure of Title.]—One of the terms of an agreement was, that the contract should be void if the purchaser's counsel should be of opinion that the marketable title could not be made by a certain time. The counsel being of that opinion, a bill by the purchaser for specific performance with a compensation was dismissed with costs. *Williams* v. *Edwards*, 2 Sim. 71 ; 29 R. R. 61.

—— **Condition that Purchaser shall Assume certain State of Things.**]—In an agreement for the sale of seventeen undivided shares of a coal mine there was an article stating two conveyances by which six undivided shares of the land, beneath which the coal lay, had been conveyed to the vendor's predecessor in title, but stating that there was no express mention in the conveyances of the minerals under the land, and requiring that the purchasers should assume that six undivided shares of the minerals passed by the conveyances of the land, and thereby became absolutely vested in the vendor's predecessor in title. In the abstract of the vendor's title sent to the purchasers mention was made of a certain indenture, but nothing further was said about it. Subsequently the deed was found, and showed that the six undivided shares had never belonged to the vendors :—Held, that as the purchasers had notice, there was a doubt as to the title before entering into the agreement, specific performance ought to be decreed with a deduction as compensation for the loss of the

six shares. *English* v. *Murray*, 49 L. T. 35 ; 32 W. R. 84.

Practice.]—Course of proceeding where purchaser seeking specific performance asks also compensation for a misdescription. *Hoy* v. *Smythies*, 2 Jur. (N.S.) 1011.

Minute Defects.]—Specific performance decreed, notwithstanding a variance from the description, with compensation for the deficiency in value, though a minute examination might have discovered the defects, as in the state of the house, &c., but not for a variance from the description, as lying within a ring fence. *Dyer* v. *Hargrave*, 10 Ves. 505 ; 8 R. R. 36.

Leaseholds—Tenant from Year to Year.]—Part of the lands sold under the decree was stated in the rental to be held from year to year by C.; but the purchaser found, after he lodged his one-fourth of the purchase money, that it was held for a term. The tenure by which other parts were held was not stated in the rental, but the purchaser on going into possession found they were held for lives still subsisting :—Held, that the purchaser was entitled to compensation. Held also, that he was not entitled to compensation in respect of the premises whose tenure was not stated, as he should have ascertained how they were held. *Martin* v. *Cotter*, 8 Ir. Eq. R. 147.

—— **Custom to Renew.**]—Premises sold at auction were described in the particulars as being customary leaseholds, renewable every twenty-one years, at the customary rent of 10*s.*, on payment of the customary fine. The sixth condition stipulated that errors of description, or any errors inserted in the particular, should not vacate the sale, but should be subject to abatement or compensation. It turned out that there was no custom to renew, but that the premises were held for an absolute term of twenty-one years :—Held, first, that the property being sold as leaseholds renewable by custom, when there was no such custom, was an error of description, not a defect of title. Secondly, that the purchaser was, under the sixth condition, entitled to specific performance, with a deduction from the price. *Newby* v. *Paynter*, 11 Hare, 26 ; 1 Eq. R. 173 ; 22 L. J., Ch. 871 ; 17 Jur. 483.

—— **Underlease.**]—Although according to the decided cases, a vendor who contracts for the sale of property described as held under a lease, cannot, if nothing further is said, make a good title unless it is held under an original lease, in a case where the particulars and conditions of property so described contained enough to give notice to a purchaser that the property was held under a derivative lease :—Held, that the purchaser could not on that account claim compensation on the ground of misdescription. *Madeley* v. *Booth* (2 De G. & Sm. 718) commented on. *Camberwell & South London Building Society* v. *Holloway*, 49 L. J., Ch. 361 ; 13 Ch. D. 754 ; 41 L. T. 752 ; 28 W. R. 222. *And see cases*, supra, col. 1195.

Occupation.]—Purchaser not entitled to compensation where the misdescription consisted in stating that the premises sold were in the joint occupation of A. and B. as lessees, the fact being that the premises had been demised to C., and by C. assigned to A., who was, together with B., in the occupation of them at the time of sale. *Ridgway* v. *Gray*, 1 Mac. & G. 109 ; 1 Hall & Tw. 196.

The purchaser could not in this case be compelled to accept an indemnity. *Ib.*

Possession.]—In July, 1867, L. sold to a railway company a house, the terms being that the purchase-money was to be paid on the 25th of March, 1869, or at such earlier time as the company should choose, possession to be given on payment, they paying 5 per cent. interest in the meantime ; and he was to be their tenant, the tenancy not to be determined before the 25th of March, 1869, but to be determinable on the 25th of March, 1869, by a week's notice. The interest and rent were paid up to the 25th of March, 1869. L. gave due notice to determine the tenancy on that day ; but the company not having the purchase money ready, he refused to give up possession, and filed a bill for specific performance. A decree for specific performance was made, with an order for payment of the purchase money, with interest from the 25th of March, 1869 :—Held, that the company was not entitled to any allowance by way of occupation rent. *Leggott* v. *Metropolitan Ry.*, L. R. 5 Ch. 716 ; 18 W. R. 1060.

Agreement for the sale of a lease, "with possession on the 1st December, the rent to commence at Christmas." Possession was not given until the 31st January, through the default of the vendor :—Held, that the purchaser was entitled to compensation, and an inquiry was directed. *Gedye* v. *Montrose* (*Duke*), 26 Beav. 45.

—— **Loss of Tenant and Deterioration.**] — Two houses, stated in the particulars to have been "recently in the possession of F.," were put up by mortgagees from F. for sale, and were bought by the defendant. A day was fixed for completion, when the rents or possession were to belong to the purchaser. At that day F. was still in possession, and remained so until more than a month after. The purchaser had agreed to let the houses to a tenant as from a day five days later than the day fixed for completion, but the tenant, finding that he could not have immediate possession, had refused to take the houses, which had remained unoccupied, and had also been damaged by the removal of some fixtures :—Held, that the purchaser was entitled to damages in the nature of compensation for loss of a tenant, and that the damages would be the amount of rent lost, and that the purchaser was entitled to damages for the deterioration of the property. *Bain* v. *Fothergill* (infra, col. 1340) distinguished. *Phillips* v. *Silvester* (supra, col. 1257) followed and discussed. *Royal Bristol Permanent Building Society* v. *Bomash*, 56 L. J., Ch. 840 ; 35 Ch. D. 390 ; 57 L. T. 179.

How Assessed.]—R. agreed to sell to W. lands free from incumbrances. On an investigation of the title it appeared that these lands were held, with other lands, under a crown grant, containing various reservations and conditions, with a proviso for re-entry on breach of condition. W. filed a bill for specific performance. An order was made on appeal, declaring him entitled to compensation, and directing a reference as to the amount. In answer to this inquiry, it was found that the amount of compensation could not be ascertained :—Held, on supplemental bill by W., that as the compensation could not be ascer-

tained, he was entitled to the return of his purchase money, with interest at 4*l.* per cent., and to a lien on the estate for the amount. *Westmacott* v. *Robins*, 4 De G. F. & J. 390. And see *Powell* v. *South Wales Co.*, supra, col. 1322.

—— **Reversion.**]—A condition that any error in the particulars shall not vitiate the sale, but a compensation shall be made, only applies to cases where the circumstances afford a principle by which this compensation can be estimated. *Sherwood* v. *Robins*, M. & M. 194; 3 Car. & P. 339.

Therefore, on the sale of a reversion, expectant on the death of A. without children, an error in the statement of A.'s age does not come within the condition, and the purchaser is entitled to rescind the contract. *Ib.*

A reversion depending on the contingency of a tenant for life dying without issue, the tenant for life being fifty-six years of age, and married, and his wife being in her fifty-fourth year, and the only issue of the marriage having been a still-born child, eleven years previously, is the subject of estimate and calculation. *Boothby* v. *Boothby*, 1 Mac. & G. 604; 2 Hall & Tw. 214.

A reversion depending upon the contingency of the tenant for life, who was sixty-three years of age, and a bachelor, dying without issue, is not the subject of estimate or calculation; but the purchaser of this reversion having proposed to deduct one-half of the reversion in respect of such contingency, and the treaty having been concluded upon that basis, the court, as between the vendor and purchaser, will value the contingency accordingly. *Baker* v. *Bent*, 1 Russ. & M. 224; Tam. 368.

Forfeiture—Making a Road.]—One stipulation in a contract for purchase was that the vendor should make a certain road, which it turned out he could not make without incurring a forfeiture: —Held, that the purchaser was entitled to a decree for a specific performance with a compensation for the road. *Peacock* v. *Penson*, 11 Beav. 355; 18 L. J., Ch. 57; 14 Jur. 518.

ii. *After Conveyance Executed.*

General Rule.]—After the purchaser of real estate has taken a conveyance, and the purchase-money has been paid, no action can be maintained for damages or compensation on account of errors as to the quantity or quality of the subject matter, unless such errors amount to breach of some contract or warranty in the conveyance, or unless fraud or deceit has been practised upon the purchaser. *Jolliffe* v. *Baker*, 52 L. J., Q. B. 609; 11 Q. B. D. 255; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.

Notice — Mistake.] — After conveyance the omission of certain parcels, of which omission the purchaser had notice by the abstract:—Held, not a ground for rescinding the contract. The purchaser having by his mistake allowed the vendor to convey the omitted parcels to another purchaser:—Held, that a decree for compensation cannot be made after conveyance. *Leuty* v. *Hillas*, 2 De G. & J. 110; 27 L. J., Ch. 534; 4 Jur. (N.S.) 1166; 6 W. R. 217.

Misrepresentation.]—A purchaser cannot, in the absence of fraud, obtain compensation after conveyance for a misrepresentation, even though such misrepresentation related to the subject matter of the conveyance. *Manson* v. *Thacker*, 47 L. J., Ch. 312; 7 Ch. D. 620; 38 L. T. 209; 26 W. R. 604.

Condition that any errors should be the subject of compensation. After completion of conveyance a defect discovered:—Held, that the purchase having been completed the condition did not apply. *Ib.*

Where the conditions provided that if any error or misstatement should be found it should not annul the sale, but that compensation should be made in respect thereof, and an error in the quantity of the land was discovered after the conveyance had been executed:—Held, that the purchaser was entitled to compensation. *Manson* v. *Thacker* (supra) not followed. *Turner and Skelton, In re*, 49 L. J., Ch. 114; 13 Ch. D. 130; 41 L. T. 668; 28 W. R. 312. *But see next case.*

Mutual Mistake.]—Sale of term for fifty years of a beerhouse, subject to a covenant against Sunday trading. It was stated at the sale that the freeholder had offered to release the covenant on having 25*l.* additional rent. The purchaser received an abstract which showed that the vendor was an under-lessee. A release was obtained from the freeholder, and the purchaser paid the purchase-money partly by an order on his brewers. On the day after completion he became aware that the release from the freeholder was not effectual without a release from the original lessee, and stopped payment of the order on the brewers until this should be obtained. The required release could not be obtained:—Held, that compensation could not be given for an error discovered after completion. *Turner and Skelton, In re* (supra), dissented from. *Allen* v. *Richardson*, 49 L. J., Ch. 137; 13 Ch. D. 524; 41 L. T. 614; 28 W. R. 313.

Reference.]—A condition of sale provided that mistake or error should not annul the sale but be the subject of compensation, such compensation to be settled by two referees with an umpire. A purchaser of a house, after the execution of the conveyance, discovered an error in the rental:—Held, that the condition was not limited to errors discovered before the conveyance was executed, and that he was entitled to compensation. *Boss* v. *Helsham*, 4 H. & C. 642; 36 L. J., Ex. 20; L. R. 2 Ex. 72; 15 L. T. 481; 15 W. R. 259.

Error in Rental.]—The contract provided, that any material error in the rental furnished, should not annul the sale, but that compensation should be made in respect thereof. The rental so furnished, represented that by a fee-farm grant the timber (which was of the value of 800*l.* or thereabouts) was reserved to the vendor. The timber was not reserved by the fee-farm grant, and the vendor had no title to it. This fact was not known to the purchaser or his solicitor until after the purchase-money was paid, the conveyance executed, and possession taken by the purchaser:—Held, that the purchaser was entitled to compensation for the value of the timber. *Manson* v. *Thacker* (supra) and *Allen* v. *Richardson* (supra) considered; and *Boss* v. *Helsham* (supra) and *Turner and Skelton, In re* (supra), approved of. *Phelps* v. *White*, 7 L. R. Ir. 160—C. A.

Error in Income.]—Specific performance of contract to purchase colliery works was decreed, but with compensation in respect of misrepresentation as to the amount of stores consumed. It was found that there was a large excess in the statement of income:—Held, that the purchasers were entitled to a deduction from their purchase money bearing the same proportion to the whole purchase-money as the excess bore to the income stated. *Powell* v. *Elliott*, L. R. 10 Ch. 424; 33 L. T. 110; 23 W. R. 777.

Length of Lessor's Term.]—The defendant, believing his term had thirty years to run, agreed to grant an underlease for twenty-one years to the plaintiff, nothing being said about compensation for misdescription. The plaintiff did not investigate the defendant's title, and a year after the lease was granted it was discovered that the defendant's term had only fourteen years to run:—Held, that, as there was no contract as to compensation, and the plaintiff claimed for a defect which he might have discovered before he took the lease, he was not entitled to any compensation. *Clayton* v. *Leech*, 41 Ch. D. 103; 61 L. T. 69; 37 W. R. 663—C. A.

iii. *Charges and Outgoings.*

Charge.]—A tenant for life of a real estate, the trustees of which were empowered to sell it at his request and by his direction, entered into a contract to sell it. The estate was subject to a charge. The tenant for life died without issue, and the fee of the estate passed under his will:—Held, that the purchaser, on waiving the objection as to the charge, was entitled to a specific performance against the representatives of the vendor, but he was not entitled either to an indemnity against the charge or to compensation. *Bainbridge* v. *Kinnaird*, 32 Beav. 346; 2 N. R. 5; 9 Jur. (N.S.) 862; 8 L. T. 447; 11 W. R. 608.

Outgoings.]—A contract having been made for sale of an estate, it afterwards appeared that there were some outgoings from the estate which were not disclosed at the time of the contract, yet, these being matters which are in compensation, the contract, shall be carried into execution, with an allowance only to the purchaser for those particulars which diminish the value. *Howland* v. *Norris*, 1 Cox, 59.

Quit Rent and Tithe Rent Charge.]—Quit rents, being incidents of tenure, are subjects of compensation. *Esdaile* v. *Stephenson*, 1 Sim. & S. 122; 24 R. R. 151.

Quære, if rent charges are. The court, when small, has allowed them so. *Ib.*

Part of the lands sold under the decree was liable to quit-rent and tithe rent-charge, though not so stated in the rental:—Held, the purchaser was entitled to compensation for the quit-rent but not for the tithe rent-charge. *Martin* v. *Cotter*, 8 Ir. Eq. R. 147.

A. agreed to sell an estate, tithe free, to B. Afterwards the vicar of L. filed a bill for tithes against the occupiers of part of the estate. A. agreed that part of the purchase money should be set apart as an indemnity to B. against the claim made, which was accordingly done, and B. paid the remainder of his purchase money, and took a conveyance of the estate. A fresh suit was instituted for the tithes of the same lands, and then it was discovered that the lands were situate in the parish of S., and were tithable to the rector of S., and the latter suit was dismissed:—Held, that B. was entitled to a compensation out of the land for the tithes of the land situate in S. *Crompton* v. *Melbourne*, 5 Sim. 353.

—— **Injunction.**]—In enforcing contracts upon principle of compensation for variance from description, the court has gone so far, to the extent even of totally defeating the object of the purchaser, that where the principal subject of the contract was all the corn and hay tithes of a parish, and of hay tithe half was allotted to vicar, or half commuted for customary payment, the nature of that payment, the extent of meadow, and the possible conversion of arable, not distinctly appearing, the injunction against recovering the deposit was continued after answer. *Drewe* v. *Hanson*, 6 Ves. 675; 17 R. R. 46, n.

Where land is sold tithe free a purchaser is not compelled to complete his contract, with a compensation, if a good title cannot be made to the tithe; but this rule admits of exception where the circumstances manifest that the right to the tithe did not form any inducement to the purchaser to enter into the contract. *Smith* v. *Tolcher*, 4 Russ. 302; 28 R. R. 103.

The purchaser of an estate, sold as tithe-free, cannot be compelled to take it subject to tithe on terms of compensation; but an estate of 140 acres being sold under a decree, the particulars stating about thirty-two acres to be tithe free, and no evidence of exemption having been produced on the reference of the title, the master was directed to certify the proper amount of compensation. *Binks* v. *Rokeby* (*Lord*), 2 Swanst. 222; 19 R. R. 68.

A purchaser of land part subject to tithes, though represented as tithe-free, has, if he chooses to take the purchase, a right to compensation, but not to compel the vendor to purchase the tithes. *Todd* v. *Gee*, 17 Ves. 273; 11 R. R. 76.

Taxes.]—An estate consisting of fen land, and so described in particulars of sale, was charged by a local but public act with draining and embanking taxes, of which purchaser had no express notice:—Held, he was not entitled to compensation. *Barraud* v. *Archer*, 2 Sim. 433; 9 L. J. (O.S.) Ch. 173; 29 R. R. 129.

—— **Eau Brink Tax.**]—An estate sold, and eau brink tax stated at a certain amount. It was afterwards discovered that the eau brink tax was less than stated, and the corporation tax more; and on a bill filed by the vendors for a specific performance, the defendant was allowed compensation for the excess in amount of the corporation tax, after deducting the difference in the amount of the eau brink tax. *Townshend* v. *Granger*, 9 L. J. (O.S.) Ch. 176.

Fines.]—Trustees for sale of a manor stated that the fines were arbitrary, adding that the clear profits on an average of the last eight years had been 150*l.* a year. There was a condition of sale that if there should be any error or misstatement, the vendors or purchaser, as the case might happen, should pay or allow a proportionate value, according to the average of the whole purchase money, as a compensation either way. After the sale it was found that arbitrary fines were payable only on alienation. It was

also found that the clear profits exceeded 200*l.* a year :—Held, on appeal, that there was no such misdescription as would entitle the purchaser to compensation, as the annual profits which constituted the substantial value far exceeded the amount stated. *White* v. *Cudden*, 8 Cl. & F. 766.

iv. *Outstanding Estates and Interests.*

Limited Interest of Vendor.]—Principles upon which the court proceeds in determining whether the purchaser is entitled to a partial performance of the contract, with compensation for the deficiency, where the vendor has only a limited interest in the estate contracted to be sold, and is, therefore, incapable of performing the whole contract. *Thomas* v. *Dering*, 1 Keen, 729 ; 6 L. J., Ch. 267 ; 1 Jur. 427. And see *Paton* v. *Rogers*, supra, col. 1321.

—— **Estate pur autre vie.**]—A. contracted with B. for the purchase in fee of property in ignorance that B. was only entitled to an estate pur autre vie, and that C. (B.'s wife) was entitled to the remainder in fee on the determination of the particular life. D., with full knowledge of A.'s contract, took a conveyance from B. and C. of the property, acknowledged by C. so as to pass her interest :—Held, that A. was entitled to a conveyance from D. of B.'s interest, with compensation in respect of C.'s interest, which B. was unable to bind or convey. *Barnes* v. *Wood*, 38 L. J., Ch. 683 ; L. R. 8 Eq. 424 ; 17 W. R. 1080.

—— **Husband and Wife Vendors.**]—When a husband and wife agreed to sell her estate in fee simple, the purchaser being aware that the estate belonged to the wife, and she afterwards refused to convey :—Held, that the purchaser could not compel the husband to convey his interest and accept an abated price. *Castle* v. *Wilkinson*, 39 L. J., Ch. 843 ; L. R. 5 Ch. 534 ; 18 W. R. 586.

A husband agreed to sell property which was settled as he and his wife should jointly appoint, and in default of appointment to the use of trustees during the life of the wife for her separate use, with remainder to the husband in fee. The purchase money was invested in consols and paid to the trustees of the settlement. On the death of the husband before completion, the wife refused to convey her life interest :—Held, that the purchaser was entitled to a conveyance of the property subject to the widow's life interest, with compensation in respect of such interest out of the husband's personal estate ; and to a lien on the consols in the hands of the trustees for such compensation. *Barker* v. *Cox*, 46 L. J., Ch. 62 ; 4 Ch. D. 464 ; 35 L. T. 662 ; 25 W. R. 138.

Dower.]—A. contracted to sell to B. the fee simple, clear of incumbrances. B., aware that on a former occasion an attempted sale had gone off in consequence of A.'s wife refusing to bar her dower, asked as to this, and was informed that she would join. Afterwards she refused to join :—Held, that B. was entitled to compel a specific performance, with a compensation and an indemnity against the right to dower. *Wilson* v. *Williams*, 3 Jur. (N.S.) 810.

Semble, a proper indemnity would be to retain in court a third part of the purchase money, the dividends to be paid to A. and his assigns during the joint lives of himself and wife ; and if she survived A., to B. during her life ; and upon her decease, the capital so retained in court to be paid to the husband. *Ib.*

A vendor contracted to sell an estate in fee, with a stipulation that if counsel should be of opinion that a good title could not be made, the contract should be rescinded. Upon the delivery of the abstract, it appeared that the vendor's mother had a life interest in the premises, and that her interest was known to the vendor at the time of the contract. Upon her refusing to join in the conveyance :—Held, that the vendor was not entitled to rescind under the stipulation, but that the contract must be specifically performed, with compensation in respect of the life interest. *Nelthorpe* v. *Holgate*, 1 Coll. C. C. 203 ; 8 Jur. 551.

Lease Outstanding.]—The purchaser, under his contract, is entitled to actual possession where the contrary is not stipulated for, and an outstanding lease is not the subject of compensation. *Linehan* v. *Cotter*, 7 Ir. Eq. R. 176. *And see cases*, supra, col. 1190.

The defendant contracted to sell an inn to the plaintiff, and represented to him that the agreement under which the tenant in possession held was void, and that he would give the plaintiff possession at Michaelmas following. He had given the tenant notice to quit at that time ; the tenant did not quit :—Held, that the plaintiff was entitled to be released from the agreement, or that he might at his election perform it and have compensation. He elected to have performance, and it was decreed to him, with compensation and costs. *Besant* v. *Richards*, Tam. 509.

—— **Surrender.**]—A. contracted to purchase a leasehold estate subject to an underlease to B.'s father. A. agreed with B., on having a surrender of this underlease, to grant him a new lease, and B. agreed to procure a surrender of the underlease from his father, and to accept such new lease. B.'s father refused to surrender his underlease :—Held, upon demurrer, that A. could not obtain specific performance of this agreement, the question as to compensation to A. being determinable by action at law for damages. Held, also, that B. could not be compelled to accept a lease in the terms proposed at the expiration of the underlease. *Beeston* v. *Stutely*, 27 L. J., Ch. 156 ; 6 W. R. 206.

—— **Duration of Term.**] —Where the particulars of sale of certain leasehold property contained a misstatement, thereby causing the reversion to appear as if it would fall in eight years earlier than actually was the case, and the conditions of sale provided that any error or misstatement in the particulars should not annul the sale, but compensation should be made to or by the purchaser :—Held, that, even if the purchaser were aware of the misstatement in the particulars, the vendors were not thereby relieved from the liability to make him compensation, in accordance with the terms of the conditions of sale. *Lett* v. *Randall*, 49 L. T. 71.

Specific performance decreed, with compensation for a defect of title, if to be ascertained, by reduction of the purchase money ; if not, or the plaintiff would so take it, with an indemnity ; the defect consisting in the representation of a church lease for twenty-one years, the lease

being actually for lives, and the covenant limited and contingent. *Milligan* v. *Cooke*, 16 Ves. 1.

—— **Tenants in Possession.**]—A purchaser buying with notice of tenants in possession is bound to inquire into the nature of their interest, and is not entitled to an abatement of the purchase money because their interest proves to be larger than he supposed when he entered into the contract. *James* v. *Lichfield*, 39 L. J., Ch. 248; L. R. 9 Eq. 51; 21 L. T. 521; 18 W. R. 158.

An estate was put up for sale by a particular, describing it as "now or late in the several occupations of H. R. and others," and by one of the conditions it was provided that, on completion, the purchaser should be "let into the receipt of the rents and profits." Some parts of the property were subject to leases for lives at a low rent:—Held, that a purchaser who entered into the contract without knowing of the existence of such leases could not be compelled to take the title without compensation. *Hughes* v. *Jones*, 3 De G. F. & J. 307; 31 L. J., Ch. 83; 8 Jur. (N.S.) 399; 5 L. T. 408; 10 W. R. 139.

Reservations.] — R. agreed to sell to W. lands in New South Wales free from incumbrances, and the greater part of the purchase money was paid. On an investigation, it appeared that these lands were held under a crown grant, containing various reservations and conditions, with a proviso for re-entry on breach of condition. W. filed a bill for specific performance, with compensation on account of these reservations. An order was made on appeal, declaring him entitled to compensation, and directing a reference as to the amount. In answer to this inquiry, it was found that the amount of compensation could not be ascertained:—Held, that W. was bound to take the property without compensation, and as the compensation could not be ascertained he was entitled to the return of his purchase money, with the interest at 4*l.* per cent., and to a lien on the estate for the amount. *Westmacott* v. *Robins*, 4 De G. F. & J. 390.

—— **Mines and Minerals.**]—In a contract for sale of land containing valuable quarries, was a clause reserving to the vendor power to rescind in case any objection or requisition should be persisted in; in another clause provision was made for compensation in case any error or mistake should appear to have been made in the description of the property, or the vendor's interest therein. The purchaser objected that a reservation of mines and minerals included the quarries, and the objection being persisted in, he rescinded the contract:—Held, that the requisition was one of title, giving the vendor the right to rescind. *Mawson* v. *Fletcher*, 40 L. J., Ch. 131; L. R. 6 Ch. 91; 23 L. T. 545; 19 W. R. 141.

A contract was made for the purchase of land, and the purchaser afterwards discovered that another person had a right to dig coal on the land:—Held, that the purchaser was entitled to take the land with compensation for the defect. *Ramsden* v. *Hurst*, 27 L. J., Ch. 482; 4 Jur. (N.S.) 200; 6 W. R. 349.

A vendor of an estate had granted to A. the right to work coals under the property, with a proviso that, when the workings of the coal had finally ceased, the pits should be filled up, and the land restored to a proper state of cultivation. A. ceased to work the mines, and filled in the pits. Upon the sale of the estate, A. claimed to be entitled to re-work the coal, and the purchaser therefore claimed compensation. The court considered that there had only been a temporary cessation to work the coals, and that the purchaser was entitled to compensation. *Ib.*

Reservation of salt works, mines, &c., in 1704, with a right of entry, though no instance of any claim, and the title had been transferred in 1761, without such reservation upon the usual covenants:—Held, an objection, giving a right to compensation, the purchaser not insisting upon it further. *Seaman* v. *Vawdrey*, 16 Ves. 390; 10 R. R. 207.

v. *Misrepresentation.*

And see *Rescission*, supra, col. 1245.

a. As to Quantity.

General Rule.]—General rule of specific performance that the purchaser shall have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation, enforced against trustees for infants upon the mere mistake of their agent without fraud, &c.; but the relief adapted to the justice of the case. *Hill* v. *Buckley*, 17 Ves. 394; 11 R. R. 109.

Small Deficiency.]—Where a plaintiff failed to show a good title to a small portion of the lands, which was not material to the beneficial enjoyment of the remainder of the lands, the court decreed specific performance of the agreement, with compensation, and directed the costs to follow the event. *Carver* v. *Richards*, 6 Jur. (N.S.) 667. S. P., *M'Queen* v. *Farquhar*, 11 Ves. 467.

A purchaser of real estate at a sale in the court of bankruptcy, will not be discharged from his purchase on objections to title, where the abstract of title posted in the court contains express notice of the defects objected to:—Held, also that where title cannot be made out to small portions of the estate, the purchaser will not be discharged, but will be entitled to compensation pro tanto only, unless he can show that the deficient portion was essential to the proper enjoyment of the whole, or that it constituted his main object in entering into the contract. Difference in practice between sales of real property in bankruptcy and in courts of equity. *Gethin, Ex parte, Smith, In re*, Ll. & G. t. Plunk. 429.

Sale by Court.]—In the case of a sale under the order of the court, it being clear that a certain portion of the property was not intended by the vendor to be included in the contract of sale; the court, in the absence of any proof of misconduct in the purchaser or his agent, refused to compel a specific performance by the purchaser, excluding the portion in question. The purchaser, however, electing to take exclusive of the portion of the property in dispute, the court ordered accordingly, and without compensation. *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1; 14 Jur. 837.

Cases in which the court will or will not, and how far, interfere, considered. *Ib.* And see *Magawley* v. *Brady*, 7 Ir. Eq. R. 557.

Condition as to Measurement.]—Upon the sale of real estate one of the conditions was as follows:—"The admeasurements are presumed to be correct, but if any error be discovered therein, no allowance shall be made or required

either way." It was stated in the particulars that the property contained an area of 7,683 square yards or thereabouts; but upon admeasurements, the area was found to be 4,350 only:—Held, that the purchaser was not entitled to compensation. *Cordingley* v. *Cheesebrough*, 4 De G. F. & J. 379; 3 Giff. 496; 31 L. J., Ch. 617; 8 Jur. (N.S.) 755; 6 L. T. 642.

Purchaser is not entitled to abatement for deficiency of quantity, the particulars of sale describing lot as containing "more or less." *Winch* v. *Winchester*, 1 V. & B. 375; 12 R. R. 238.

Where it was stated by one of the conditions of sale, that the quantity of a particular lot of the estates sold under a decree was stated from estimation, and that the purchaser should not object to complete this purchase if the quantity should turn out less than that stated:—Held, that the purchaser was not by such condition precluded from his right to compensation in the event of the quantity having turned out deficient. *Frost* v. *Brewer*, 3 Jur. 165.

—— **Purchase at Specified Rate.**]—On the purchase at a specified price per acre, of land, described as grass land, bounded by a public drain, and "containing by estimation twenty-three acres or thereabouts, but to be surveyed," the land when measured usque ad medium filum aquæ contained 23a. 0r. 26p., of which 1a. 0r. 33p. was comprised within the drain:—Held, that, if the land comprised within the drain was included in the conveyance, the purchaser was bound to pay for it at the specified rate. *Popple, In re*, 25 W. R. 248.

Quantity Excessive.]—Condition of sale that any mistake or error should not annul the sale, but a compensation should be given or taken to be settled by two referees or an umpire. It was found that one of the lots contained about twenty acres more, and another about ten acres less, than the quantity described in the particulars:—Held, that, the excess and the deficiency were both subjects of compensation within the condition, and that the court would, if necessary, refer it to the master to settle the amount of such compensation, notwithstanding that, from the variety in the nature of the different portions of the land, there was no uniform standard for computing such amount. Where the description was inaccurate as to quantity and had been prepared by the vendor's solicitors from former particulars and conditions drawn up on the report of a surveyor, the court will not enforce the contract against the vendor, unless the case should be one for compensation, and the purchaser should submit to make such compensation. *Leslie* v. *Thompson*, 9 Hare, 268; 20 L. J., Ch. 561; 15 Jur. 717. And see *Orange* to *Wright*, supra, col. 1185.

Notice of Defect.]—On the sale of seventeen undivided shares in a coal mine, there was a condition that the purchasers should assume that six undivided shares of the minerals passed by conveyances of the land, and thereby became absolutely vested in the vendor's predecessor in title. In the abstract of the title, mention was made of a certain indenture, but nothing further was said about it. The purchaser's solicitor was told this deed could not be found, and no abstract of it or information about it could be furnished, but that it was believed not to affect the property sold. Subsequently, the deed was found, and showed that the vendors never had had any title to those shares:—Held, that, as there had been no fraud in the matter, but the vendors had acted under a bonâ fide mistake, and the purchasers had had the fact that there was a doubt as to title brought to their notice, and had thought fit to run the risk of taking the property without having the matter cleared up, specific performance of the agreement ought to be decreed, but that a deduction must be made from the purchase money as compensation to the purchasers for the loss of the six shares. *English* v. *Murray*, 49 L. T. 35; 32 W. R. 84.

Extent of Deficiency.]—The rule that where there is a deficiency in the quantity of land contracted to be sold, the purchaser is entitled to specific performance of the contract, with compensation for the deficiency, only applies within certain limits. Estate sold as containing 21,750 acres; it contained only 11,814 acres:—Held, that the purchaser was not entitled to specific performance with a proportionate abatement, but that he could only enforce the contract on payment of the full price or rescind the contract. *Durham* (*Earl*) v. *Legard*, 34 Beav. 611; 34 L. J., Ch. 589; 11 Jur. (N.S.) 706; 13 L. T. 82; 13 W. R. 959.

The plaintiff tendered for a lease of a farm of 214 acres and 35 acres. The defendant accepted the offer, believing it to be for the 214 acres and 27 acres not comprised in the tender. Specific performance of a lease of the 214 acres was decreed with compensation for the loss of 27 acres. *M'Kenzie* v. *Hesketh*, 47 L. J., Ch. 231; 7 Ch. D. 675; 38 L. T. 171; 26 W. R. 189.

Vendors who bind themselves to make out a good title to all the lands, but are unable to show a title to $\frac{1}{350}$ part, not necessary to the enjoyment of the other parts, the bill averring that they could make title to all the lands sold, seeking specific performance as to all:—Held, that they could not at the hearing seek performance with compensation. *Ashton* v. *Wood*, 3 Sm. & G. 436; 3 Jur. (N.S.) 1164.

Quære, whether the court will in no case decree specific performance with compensation for defects of title in small particulars, the question of compensation being raised by the bill. *Ib.*

Misdescription of the quantity of land in regard to the acres being statute acres or customary, is not matter of compensation, but a ground for setting aside the sale. *Price* v. *North*, 2 Y. & C. 620; 7 L. J., Ex. Eq. 9.

At a sale by auction under a decree the property sold was stated in the particulars to contain 753 square yards or thereabouts, and one of the conditions provided that any error, misstatement, or omission in the particulars should not annul the sale, nor should any compensation be allowed by the vendor or purchaser in respect thereof. The property was found to contain 573 square yards only:—Held, that the condition only applied to small errors, and that the purchaser was entitled to compensation. *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603.

A residence, with four acres, was sold. It turned out that there was no title to a slip of ground, of about a quarter of an acre, between the house and the highroad:—Held, that it was not a proper subject for compensation, and that a good title could not be made. *Perkins* v. *Ede*, 16 Beav. 193.

A tenant in possession purchased the property, which was represented to be forty-six feet in

depth ; it turned out to be thirty-three only :—Held, that he was entitled to an abatement. *King* v. *Wilson*, 6 Beav. 124.

Where a vendor can make a title to three-fourths only, the purchaser is not entitled to take the three-fourths with an abatement, but he may take the three-fourths at the price agreed on for the whole. *Maw* v. *Topman*, 19 Beav. 576.

A., being entitled to nine-sixteenths only of an estate agrees, by mistake, to sell the entirety to B. Semble, that a specific performance will not be decreed as to the nine-sixteenths, with an abatement out of the purchase money. *Wheatley* v. *Slade*, 4 Sim. 126.

An agreement for the sale of two-sixths of certain leasehold property. It turned out that the vendors were only entitled to two twenty-one parts :—Held, that the purchaser was entitled to specific performance to the extent of the vendors' interests with a proportionate abatement. *Jones* v. *Evans*, 17 L. J., Ch. 469 ; 12 Jur. 664.

Vendors agreed to sell the entirety of certain freehold property for 6,000*l*., and to make out a good marketable title. It was discovered that the vendors were entitled to only a moiety :—Held, that the purchaser was entitled to specific performance by the vendors of their moiety, with an abatement of one-half of the purchase money. *Bailey* v. *Piper*, 43 L. J., Ch. 704 ; L. R. 18 Eq. 683 ; 31 L. T. 86 ; 22 W. R. 943.

When two persons agreed to sell property, of whom one was entitled to a moiety subject to a mortgage for its full value, and the other had no interest :—Held, that a judgment for specific performance with abatement might be made against the former. *Horrocks* v. *Rigby*, 47 L. J., Ch. 800 ; 9 Ch. D. 180 ; 38 L. T. 782 ; 26 W. R. 714.

—— **Copyhold and Freehold.**]—An estate was described in particulars of sale as containing 227 acres, and as being freehold with the exception of 50 acres copyhold of a forest. A clause was inserted in the contract that the estate was sold as being about 50 acres copyhold, but no abatement or compensation was to be made in favour of the purchaser in case the quantity of pure copyhold should exceed 50 acres, and the rest of the estate was sold as being partly of freehold and partly of copyhold tenure. The vendor was not to be required to distinguish which portions were of one tenure and which of the other, nor was any compensation to be allowed. The purchaser afterwards discovered that the 227 acres consisted of about 178 acres of copyhold and 49 of freehold, and that all minerals except stone were reserved to the crown :—Held, that there had been a misdescription of the property, and specific performance was refused. *Turquand* v. *Rhodes*, 37 L. J., Ch. 830 ; 18 L. T. 844 ; 16 W. R. 1074. *And see cases*, supra, col. 1192.

b. As to Nature of Property.

Amount of Rent.]—Purchaser, under a decree, having paid in his entire purchase money, was not entitled to compensation out of the fund, for the difference between the amount of rent received by the receiver before possession given, and the amount which ought to have been received according to the rental, which was erroneous, it appearing that he was aware, when he purchased, of the discrepancy. *Campbell* v. *Hay*, 2 Moll. 102.

An estate sold under a decree was described as of a certain annual value, and, by the conditions, compensation was to be made for any error in the particular. After the purchaser took possession he discovered that the rent was over-stated :—Held, that he was entitled to a compensation out of his purchase money. *Cann* v. *Cann*, 3 Sim. 447 ; 30 R. R. 184. *And see Cases*, supra, col. 1176.

Defective State of Premises.]—Compensation for the dry rot in house and premises decreed, upon representation of the vendor to the purchaser as to the state of repairs ; he relying upon such representations, and stating to the plaintiff that he did not employ a surveyor for that reason. *Grant* v. *Munt*, G. Cooper, 173 ; 14 R. R. 231.

Specific performance of an agreement for sale decreed, notwithstanding a variance from the description, with compensation for the deficiency in value ; though a minute examination might have discovered the defects, as in the state of the house, &c., the premises consisting of leasehold farm, and three years having expired pending the suit, interest was given to the vendor, and a rent set upon it in respect of his possession. *Dyer* v. *Hargrave*, 10 Ves. 505 ; 8 R. R. 36.

Timber Estate.]—There is no instance of a court of equity compelling a purchaser who contracted for the purchase of a demesne with ornamental timber, where ornamental timber has been cut down between the contract and possession given, or title shown, to complete the purchase. Ornamental timber is essentially different from ordinary timber. *Magennis* v. *Fallon*, 2 Moll. 590.

Lands of copyhold and freehold tenure, lying intermixed and undistinguishable, were sold with the timber standing on them. The conditions of sale stipulated that the vendor was not to be bound to distinguish the freeholds from the copyholds, and that the timber was to be taken at a valuation made for the purposes of that sale, the value of the timber on each lot being specified. The deposit was paid on the whole price of the land and timber :—Held, first, that the contract was an entire contract for the sale of land with timber on it ; secondly, that the purchaser was not entitled to any abatement, though he could not cut a single tree, not being able to distinguish any one tree as standing on freehold ground ; thirdly, that in the case of one lot sold under the same conditions, which consisted entirely of copyholds, the purchaser was equally bound to pay the stipulated price for the timber, although he could not cut any of it. *Crosse* v. *Lawrence*, 9 Hare, 462 ; 21 L. J., Ch. 889 ; 16 Jur. 142.

Particulars of sale described a timber estate as comprising a certain wood with upwards of sixty-five acres of fine oak timber trees, the average size of which approached fifty feet, and the particulars of the lot described it only as sixty-five acres, two roods, and twelve perches of growing timber. The statement as to the size of the trees was incorrect :—Held, that as the representation on the particulars of sale was incorrect the court would not enforce the specific performance of the contract without compensation, and that it was not a case in which the court could ascertain the amount of compensation, and that the bill must therefore be dismissed. *Brooke* (*Lord*) v. *Rounthwaite*, 5 Hare, 298 ; 15 L. J., Ch. 332 ; 10 Jur. 656.

General rule of specific performance, enforced against trustees for infants, upon the mere mistake of their agent, without fraud, &c.; but the purchase being of wood upon a gross valuation, without regard to the quantity of land, an abatement for a deficiency of quantity from erroneously inserting the hedges and fences, not included in the purchase, was directed with reference to land merely, not wood-land. *Hill* v. *Buckley*, 17 Ves. 394; 11 R. R. 109.

Water Supply.]—Property was described in particulars of sale as being well supplied with water. It was supplied with water from a neighbouring waterworks at considerable expense; but the evidence showed that other property near to it, and at a higher level, was supplied with water from sources existing on such property:—Held, that there was a misdescription of the property purchased, and that the purchaser was therefore entitled to compensation. *Leyland* v. *Illingworth, Webster, Ex parte*, 2 De G. F. & J. 248; 29 L. J., Ch. 611; 6 Jur. (N.S.) 811; 8 W. R. 695.

An estate was set up to sale in lots. In the particulars, the lots were described respectively, as "All that, &c.—comprising lot — in the sale-plan." The sale-plan circulated at the auction represented a well on lot 4, with a drain and pipe conveying the water from the well through lot 2 to lot 1. The purchaser of lot 1 filed his bill for specific performance, with compensation for the loss of the water, the vendor having conveyed away the other two lots, without any reservations to the plaintiff of a right to a flow of water from the well:—Held, that the sale-plan would not carry the case higher than a view of the property by the purchaser. Decree for specific performance, without compensation. *Fewster* v. *Turner*, 11 L. J., Ch. 161; 6 Jur. 144.

Indemnity.]—The court will not compel a vendor to give an indemnity unless vendor and purchaser have contracted for it. *Aylett* v. *Ashton*, 1 Myl. & Cr. 105; 5 L. J., Ch. 71.

Purchaser not entitled to indemnity where the misdescription consists in stating that the premises sold were in the joint occupation of A. and B. as lessees, the fact being that the premises had been demised to C., and by C. assigned to A., who was, together with B., in the occupation of them at the time of sale. *Ridgway* v. *Gray*, 1 Mac. & G. 109; 1 Hall & Tw. 195.

—— **Covenants.**]—A vendor of freehold property, who, on his own purchase of it, had entered into a covenant to observe the covenants entered into with a former vendor, put it up for sale, pursuant to particulars and conditions, noticing the existence of the covenant, but not stipulating that the purchaser should enter into any covenant on the subject:—Held, that the plaintiff was not entitled to a conveyance, unless on the terms of giving or providing for the vendor a sufficient indemnity against any breach of the covenant on the part of the plaintiff, his heirs, appointees, or assigns. *Moxhay* v. *Inderwick*, 1 De G. & Sm. 708.

Held, also, that a covenant on the part of the plaintiff, his heirs, executors, administrators, appointees, and assigns, with the defendant, his heirs, executors, and administrators, to the same effect, mutatis mutandis, as the covenant entered into by the vendor on his own purchase, ought to be considered as a sufficient indemnity. *Ib.*

—— **Charge.**]—Estates being sold in lots under conditions, one of which expressed that they were subject to the perpetual payment of 12*l.* a year to the curate of N., but that the same and the perpetual annual payment of 20*l.* to the hospital of C. were in future to be charged upon, and paid by, the purchaser of lot 1 only, the purchasers of the other lots are entitled, not to an absolute exoneration, but to an indemnity from the purchaser of lot 1. Nature of the indemnity which they may require. *Casamajor* v. *Strode*, 2 Swanst. 347; 1 Wils. 428; Jacob. 630.

A tenant for life of a real estate, the trustees of which were empowered to sell it at his request and by his direction, entered into a contract to sell it. The estate was subject, with others, to a charge for younger children. The tenant for life died without issue, and the fee of the estate passed under his will:—Held, that the purchaser, on waiving the objection as to the charge, was entitled to a specific performance against the representatives of the vendor, but he was not entitled to an indemnity against the charge. *Bainbridge* v. *Kinnaird*, 32 Beav. 346; 2 N. R. 5; 9 Jur. (N.S.) 862; 8 L. T. 447; 11 W. R. 608.

—— **Quit Rent.**]—A. seised in fee of premises subject to quit-rent, sold a portion, then in possession of B., and by the deed of conveyance, which recited that A. was seised of other premises, which, with those conveyed, were subject to a quit-rent, and that B. had agreed to indemnify A. and the other premises therefrom, B. covenanted to pay the quit-rent of all the premises, and indemnify A., &c.:—Held, in a suit by the assignee of the unsold lands against a volunteer claimant under B., that the sold lands were specifically bound to indemnify the unsold lands against the payment of the quit-rent. *Hatton* v. *Waddy*, 2 Jones, 541.

Semble, the proper form of indemnity is a grant of a rent-charge in fee, equal in amount to the quit-rent, and to be issuing out of the sold lands. *Ib.*

—— **Title Deeds Lost.**]—Vendor, having lost title deeds, agrees to give real security for title:—Held, that personal security is not sufficient, and that he must purchase real estate for that purpose. *Walker* v. *Barnes*, 3 Madd. 247; 18 R. R. 226.

—— **Dower.**]—A. contracted to sell to B. the fee simple, clear of incumbrances. B., aware that on a former occasion an attempted sale had gone off in consequence of A.'s wife refusing to bar her dower, asked as to this, and was informed that she would join. Afterwards she refused to join:—Held, that B. was entitled to compel a specific performance, with a compensation and an indemnity against the right to dower. *Wilson* v. *Williams*, 3 Jur. (N.S.) 810.

Semble, a proper indemnity would be to retain in court a third part of the purchase-money, the dividends to be paid to A. and his assigns during the joint lives of himself and wife; and if she survived A., to B., during her life: and upon her decease, the capital so

retained in court to be paid to the husband. *Ib.*

—— **Supersedeas.**]—Upon supersedeas by consent, a purchaser is entitled to be indemnified against judgments outstanding before the bankruptcy. *Latour, Ex parte*, Mont. & B. 89; 2 L. J., Bk. 15.

Copyholds Described as Freehold—Bonâ Fide Mistake of both Parties.]—The plaintiff and defendant had been partners in a brewery to which a number of tied houses were attached. In an action between them an order was made for dissolution and sale by tender. By the chief clerk's certificate the defendant was declared the purchaser, as being the highest bidder, of the moiety of the plaintiff. The conditions, which were prepared by the plaintiff's solicitor and approved by the defendant's solicitor and the defendant, provided that the title should be accepted as it stood, the properties being well known to both parties, and nothing was said about compensation. It subsequently transpired that certain of the properties which were to be conveyed as freeholds were copyholds. Negotiations thereupon took place between the parties and their legal advisers, and, as it was feared that there would be delay (the properties being in mortgage), a conveyance was executed by the plaintiff in the form settled by counsel. The defendant, having had to pay a large sum in respect of enfranchisement of the copyholds, took out a summons in the action, in which he asked that the plaintiff might be ordered to pay him one-half of that sum in effect by way of compensation:—Held, that the principle laid down in *Mortlock* v. *Buller* (supra, col. 1321), and *Castle* v. *Wilkinson* (supra, col. 1329), which allowed the purchaser to insist on having all the vendor could convey, with a compensation for the difference, was confined to the class of cases where the vendor knew the title and the purchaser did not, and had no application to the present case. And that, therefore, it was unnecessary to consider whether compensation could be enforced by a purchaser after the money was paid and the conveyance executed. The summons was accordingly dismissed. *Hopcraft* v. *Hopcraft*, 76 L. T. 341.

g. Breach of Contract.

After Completion.]—After the purchaser of real estate has taken a conveyance and the purchase money has been paid, no action can be maintained for errors of description unless such errors amount to breach of contract or warranty, or fraud has been practised upon the purchaser. *Jolliffe* v. *Baker*, 52 L. J., Q. B. 609; 11 Q. B. D. 255; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.

Damages—Measure of.]—The measure of damages for breach of contract is the same in contracts relating to realty as in contracts relating to chattels. *Noble* v. *Edwards*, 5 Ch. D. 378; 37 L. T. 7.

In an action for refusing to complete an agreement for the purchase of land, the measure of damage is not the amount of the purchase money, but only such damage as the vendor has actually sustained by the breach of contract. *Laird* v. *Pim*, 7 M. & W. 474; 8 D. P. C. 860; 10 L. J., Ex. 259.

In the case of a breach of contract where a vendor is only entitled to compensation for the loss and injury he has sustained by the breach of contract, the measure of the damage is the difference between the price fixed by the contract and the market value at the time of the breach. But when the market value is unascertainable, and a serious loss and injury is proved, the court, acting on the principle that no wrong done is to remain without a redress, awards substantial damages. *Lafitte & Co., In re, Lafitte's claim*, 23 W. R. 379. S. P. *Engel* v. *Fitch*, 10 B. & S. 738; 38 L. J., Q. B. 304; L. R. 4 Q. B. 659; 17 W. R. 894—Ex. Ch.

—— **Loss of Bargain.**]—A contractor for the purchase of real estate, the title to which proves defective, is entitled to no satisfaction for the loss of his bargain. *Flureau* v. *Thornhill*, 2 Wm. Bl. 1078. S. P., *Richards* v. *Barton*, 1 Esp. 268. *Pownsett* v. *Fuller*, 17 C. B. 660; 25 L. J., C. P. 145; 4 W. R. 323.

But this rule of law does not apply to the case of a lease granted by one who has no title to grant it. *Lock* v. *Furze*, 19 C. B. (N.S.) 96; 11 Jur. (N.S.) 726. Affirmed, 1 H. & R. 379; 35 L. J., C. P. 141; L. R. 1 C. P. 441; 15 L. T. 161; 14 W. R. 403—Ex. Ch.

Upon a contract for the sale and purchase of a real estate, if the vendor, without fraud, is incapable of making a good title, the proposing purchaser is not entitled to recover compensation in damages for the loss of his bargain. *Bain* v. *Fothergill*, 43 L. J., Ex. 243; L. R. 7 H. L. 158; 31 L. T. 387; 23 W. R. 261.

An auctioneer entered into an agreement, on the behalf of A., to sell certain premises to B., without having communicated to A. that B. was in treaty for them. A. had previously sold the premises to another party, and therefore could not fulfil the contract so made with B., whereupon B. sued A. for non-performance of his contract:—Held, that B. was not entitled to recover damages for the loss of his bargain. *Tyrer* v. *King*, 2 Car. & K. 149.

On the sale of real property, if the proposed vendor fails to make out a good title, the intended purchaser can recover as damages only the amount of his deposit, and the cost of investigating the title. He cannot recover damages for the loss of the bargain, where the vendor has not been guilty of at least some culpable want of truth. *Sikes* v. *Wild*, 1 B. & S. 587; 7 Jur. (N.S.) 1280. Affirmed, 4 B. & S. 421; 32 L. J., Q. B. 375; 8 L. T. 642; 11 W. R. 954—Ex. Ch.

The expenses attendant on an attempt which is made, after the bargain goes off, to enter into a fresh arrangement, are not recoverable. *Ib.* S. P., *Walker* v. *Moore*, 10 B. & C. 416; 8 L. J. (O.S.) K. B. 159.

—— **Expenses of Investigating Title.**]—Mortgagees with a power of sale sold to the plaintiff by auction the lease of a house, the particulars of sale stating that possession would be given on completion of the purchase. The transaction was, by the conditions of sale, to be completed by the 26th December. The mortgagor being in possession refused to give it up; and the plaintiff, having sold to a purchaser who bought the house for occupation, required possession before completion:—Held, that the plaintiff was entitled to recover not only the deposit and expenses of investigating the title,

but also damages for the loss of his bargain. *Engel* v. *Fitch*, 10 B. & S. 738; 38 L. J., Q. B. 304; L. R. 4 Q. B. 659; 17 W. R. 894.

In an action for damages by a vendee against a vendor, for not making a good title to an estate, he is not entitled to recover for expenses incurred in negotiating the purchase or for having the estate surveyed. *Hodges* v. *Lichfield (Earl)*, 1 Scott, 443; 1 Hodges, 40; 1 Bing. (N.C.) 492.

But he is entitled to recover charges incurred in investigating the title, including the searching for judgments, but not the costs of drawing and ingrossing a conveyance of the estate, the same having been prematurely prepared. *Ib.*

Held, also, that the vendee could not recover costs incurred by him in investigating the title to the estate, after the filing the bill in equity. *Ib.*

—— **Up to Date for Completion.**]—Agreement that defendant would on or before the 25th of March well and effectually convey the estate to the plaintiff with a good title. The plaintiff alleged damage by expense in investigating title and loss of interest on the purchase money lying idle:—Held, that the plaintiff could not recover for any expenses or loss of interest subsequent to the 25th of March. *Metcalfe* v. *Fowler*, 6 M. & W. 830; 10 L. J., Ex. 84.

Breach of Trust—Voluntary Settlement.]—B. executed a voluntary settlement of land. Subsequently B., being about to leave England, executed a power of attorney to E., authorising him to sell all or any of his lands, but in general terms. E., as B.'s attorney, agreed to sell a portion of the land comprised in the settlement to the defendant; and the defendant contracted the next day, the 4th May, 1876, to sell the same piece of land to the plaintiffs. An order had been obtained by consent in an action to administer the trusts of the settlement, confirming the proposed sale by E. to the defendant, and it had also been decided in the action that an order might be made directing a person to convey for B.:—Held, that the power of attorney did not authorise E. to sell to the defendant any portion of the land comprised in the settlement: that the plaintiffs could not be affected by the order in the administration action; and that, the title being defective, the plaintiffs were entitled to recover the deposit, with the costs of the action; the damages, to be ascertained, to be limited to the conveyancing costs. *General Meat Supply Association* v. *Boufflet*, 41 L. T. 719—C. A.

Vendor with Equitable Title.]—A vendor contracting to sell to a vendee an estate with a good title, when he has only an equitable title himself, and is not in possession, and failing in his contract by the time stipulated, is liable to more than nominal damages for the breach of the contract, in addition to the expenses incurred by the purchaser. *Hopkins* v. *Grazebrook*, 9 D. & R. 22; 6 B. & C. 31; 5 L. J. (O.S.) K. B. 65.

Failure as to Part of Agreement.]—Agreement between reversioners and the plaintiff holding under a lease that the plaintiff would surrender part of the premises, and the reversioners would construct a new entrance and re-build, and grant a lease of the new premises, and the entrance to the plaintiff for the same term as he then held for. The plaintiff surrendered part of his premises and new buildings were erected, and an entrance made, but this was stopped up by third parties not claiming under the reversioners:—Held, that the plaintiff was entitled to such damages as would amount to the difference between the present state of things and what it would have been if the contract had been performed and the plaintiff had got a title to the entrance. *Wall* v. *City of London Real Property Co.*, 43 L. J., Q. B. 75; L. R. 9 Q. B. 249; 30 L. T. 53.

Resale.]—Where the vendor, after an abortive sale, resells to another person, he cannot sue the first purchaser for lands bargained and sold. *James* v. *Shore*, 1 Stark. 426; 18 R. R. 798.

The expenses of a purchaser about his purchase were allowed him by way of damages, but damages in respect of expenses incurred in respect of an attempted resale were refused as being too remote. *Hart* v. *Swaine*, 47 L. J., Ch. 5; 7 Ch. D. 42; 37 L. T. 376; 26 W. R. 30.

—— **To Solicitor for Company.**]—Agreement for sale to the plaintiff, a solicitor and promoter of a company. After the agreement, the company was provisionally registered by the plaintiff as its promoter. In consequence of objections to the title, the company could not proceed with its objects, and was finally dissolved. The purchase money was not paid to the defendant:—Held, that the plaintiff was entitled to recover as damages the costs of preparing, stamping, and entering into the agreement, the expenses of investigating the title, and endeavouring to procure a good title, and procure the lease to be granted, but not the expenses of raising the purchase money and loss of interest, nor the expenses of preparing the company's deed of settlement and registering it provisionally, nor the loss of profits from the granting of the lease and the establishment of the company, nor the profits he would have derived from being employed as solicitor by the company. *Hanslip* v. *Padwick*, 5 Ex. 615; 19 L. J., Ex. 372.

Agent acting without Authority.] — The defendant professing to be agent for the owners (he being one of them) of an estate, entered into a contract of sale of it to the plaintiff; afterwards he wrote to say that he thought he was authorised to sell, but that it appeared that the parties interested took a different view; the owners refused to complete, and sold the estate for a larger sum than that offered by the plaintiff:—Held, that he was entitled to recover as damages, the costs of investigating title; the difference between the contract price and the market value, of which the price for which the estate sold was primâ facie evidence; but he could not recover loss on cattle, &c., bought in contemplation of the completion of the purchase. *Godwin* v. *Francis*, 39 L. J., C. P. 121; L. R. 5 C. P. 295; 22 L. T. 338.

Fraud by Agent and Purchaser.]—When an agent for the sale of an estate colludes with a purchaser, and in consideration of a bribe allows the purchaser to obtain the estate at less than its value, with a view to a sale at a higher price to a sub-purchaser, and the transaction is concealed from the vendor, both agent and purchaser will be held jointly and severally liable to pay to the vendor the increased amount obtained by the sub-sale. *Morgan* v. *Elford*, 4 Ch. D. 352.

Money borrowed by Purchaser.]—Interest paid by a purchaser upon money borrowed by him to complete the purchase, and kept idle (pending an endeavour by the vendor to clear up the title), may be recovered as damages against the latter for breach of contract. *Sherry* v. *Oke*, 3 D. P. C. 349.

Deeds of Conveyance.]—A purchaser cannot recover from the vendor the expenses of preparing deeds of conveyance of the property, after he has refused to complete the purchase, on account of the non-production of certain title deeds. *Jarmain* v. *Egelstone*, 5 Car. & P. 172.

An incumbrancer on land broke his covenant which he had made with the plaintiff, to join in a conveyance to A., by which the plaintiff was to profit:—Held, per Pollock, C.B., and Bramwell, B., that he was only liable in damages for the expenses of preparing the deed of conveyance. Per Martin, B.: He was liable, in addition, for the loss of profit to the plaintiff. *Duckworth* v. *Ewart*, 2 H. & C. 129; 33 L. J., Ex. 24; 10 Jur. (N.S.) 214; 12 W. R. 608.

Building Land—Houses Erected.]—A. sold some building land to B., and he covenanted for title. After some houses had been built on the land, the purchaser was evicted:—Held, that he was entitled to recover upon the covenants, not only the value of the land, but also that of the houses subsequently built thereon. *Bunny* v. *Hopkinson*, 27 Beav. 565; 29 L. J., Ch. 93; 6 Jur. (N.S.) 187; 1 L. T. 53.

Leasehold—Improvements.]—A. entered into possession under an agreement with B., under which he was to hold as tenant for two years, at the yearly rent of 50*l.*, with liberty to him to make, at his expense, such alterations in and additions to the premises as he might think proper, the same being improvements, and A. to have the option of purchasing the premises at any time during the two years for 600*l.*:—Held, that A. was only entitled to recover the value of the proposed lease, and not the value of the improvements. *Worthington* v. *Warrington*, 8 C. B. 134; 18 L. J., C. P. 350.

To Build Railway Station.]—A contract entered into by a railway company with a landowner to build a railway station at a particular spot, nothing being said as to the user of the station, is too vague to be enforced by specific performance; but the court will give damages for the breach of such contract, and in assessing those damages will give the landowner the benefit of all such presumptions as, according to the rules of law, are made against wrongdoers. *Wilson* v. *Northampton and Banbury Junction Ry.*, 43 L. J., Ch. 503; L. R. 9 Ch. 279; 30 L. T. 147; 22 W. R. 380.

Parties to Sue—Joint or Several Liability.]—By articles of agreement, reciting that the defendant had contracted with J., as the agent of the plaintiff and the other owners of the property, for the purchase of the lands therein mentioned, the defendant covenanted with the plaintiff and the several other parties beneficially interested, to perform such contract by paying the purchase-money on a certain day:—Held, that this covenant was several; and that the plaintiff might sue alone for the non-payment of his share of the purchase-money, without joining the other parties beneficially interested. *Poole* v. *Hill*, 6 M. & W. 835; 9 D. P. C. 300; 10 L. J., Ex. 81.

—— **Death of Vendee.**]—Where the vendor of an estate fails to make out a good title by the time stipulated, and the vendee dies, the personal representative of the vendee, and not his heir, is entitled to maintain an action to recover damages for loss of interest on the deposit, and for expenses incurred by the vendee in endeavouring to procure a title—the injury accruing to the personal estate. *Orme* v. *Broughton*, 4 M. & Sc. 417; 10 Bing. 359; 3 L. J., C. P. 208.

Costs in Chancery.]—M. agreed with F. to purchase land from him: M. then filed a bill against F. for specific performance, and master reported that F. had not a good title, whereupon the bill was dismissed without costs on either side:—Held, that M. could not recover from F., as damages for breach of the contract, costs incurred by M. in the chancery suit. *Malden* v. *Fyson*, 11 Q. B. 292; 17 L. J., Q. B. 85; 12 Jur. 228.

Mutual Obligations.]—By a memorandum A. agreed to sell to B. certain lands therein described, and all the mines, beds and veins of coal under the same, at a certain price; and B. agreed to purchase from A. all coal that he might from time to time require, at a fair market price:—Held, that these were concurrent acts, and that A. could not sue B. for not taking the coal, without averring performance or a readiness to perform his part of the agreement. *Bankart* v. *Bowers*, L. R. 1 C. P. 484.

Pleading.]—In an action by a vendee against a vendor for a return of the deposit, he can only recover the expenses of investigating the title by declaring specially. *Flureau* v. *Thornhill*, 2 Wm. Bl. 1078.

—— **Bill of Costs.**]—Where a declaration for breach of an agreement to assign a lease alleged that the defendant did not make out a good title, "by reason whereof the plaintiff has been necessarily put to great expenses amounting to a large sum of money," in and about investigating the title:—Held, that he might, by way of damage, recover the amount of a bill of costs due to his attorney, for investigating the title, though he had not paid such bill before action. *Richardson* v. *Chasen*, 10 Q. B. 756; 16 L. J., Q. B. 341; 11 Jur. 890.

—— **Claims.**]—Held, that general allegations of title in the plaintiff, and that his title was made good and satisfactory to the defendant, and that the plaintiff was ready and willing and offered to convey to the defendant, were tantamount to a performance of the agreement on his part, so as to entitle him to recover for a breach on the defendant's part in not paying the purchase money. *Martin* v. *Smith*, 6 East, 555; 2 Smith, 543.

A declaration alleging that the plaintiff agreed to sell and the defendant to buy land for 120*l.*, which the defendant agreed to pay on or before four years, with 5 per cent. half-yearly, until paid; that the four years had not expired, that the money had not been paid, and that a certain sum was due for interest, is good—without averring title to the land, or that the plaintiff was ready and willing to convey. *Wilks* v. *Smith*, 2

D. (N.S.) 215; 10 M. & W. 355; 11 L. J., Ex. 365.

Held, in an action by the seller, for the non-performance on the part of the purchaser, that it was not sufficient to state that the seller had been always ready and willing and frequently offered to make a good title to the estate, and to make a proper surrender on payment of the purchase money; but the declaration ought to have averred, that the seller actually made a good title, and surrendered the estate to the purchaser, or a tender and refusal; and also to have shown what title the seller had. *Phillips* v. *Fielding*, 2 H. Bl. 123.

A plaintiff declared upon a contract by the defendant then holding land for a term of years, to assign all his interest to the plaintiff, on payment by the plaintiff, within seven years from a day named, of 140*l.* Breach, that, before the seven years expired, the defendant assigned all his interest to a stranger:—Held, that it was not necessary that the declaration should aver a tender of the money, or a request by the plaintiff, or the plaintiff's readiness to accept an assignment. *Lovelock* v. *Franklin*, 8 Q. B. 371; 15 L. J., Q. B. 146; 10 Jur. 246. S. P., *Giles* v. *Giles*, 9 Q. B. 164; 15 L. J., Q. B. 387; 11 Jur. 83.

—— **Consideration—I O U.**]—Count stated agreement for sale and 500*l.* to be paid as deposit, that the defendant being unable to pay the 500*l.*, in consideration that the plaintiff dispensed with payment down of the 500*l.*, and would take the defendant's I O U for the same, he promised the plaintiff that he would pay the 500*l.* as soon as he could write to his banker to remit the same. Breach, that the money was not paid:—Held, that the count disclosed a sufficient consideration for the defendant's promise. *Davis* v. *Nisbett*, 10 C. B. (N.S.) 752; 31 L. J., C. P. 6; 8 Jur. (N.S.) 211; 9 W. R. 840.

A plea, that before the defendant could procure his banker to remit, and before any demand of payment of the I O U, the defendant was disapproved as a tenant by S., is a good answer to the count. *Ib.*

—— **Defences.**]—A declaration stated, that the defendant caused to be put up to sale by auction certain premises, for the residue of a term of years, on the condition, that the defendant should deduce and make a good title thereto, commencing with the lease of the premises under which they were then held; and assigned, as a breach, that he did not deduce a good title commencing with the lease. Plea, that the defendant did deduce a good title to the premises, commencing with the lease, in all respects except this, that the premises were out of repair, of which the plaintiff had full knowledge:—Held, bad on general demurrer. *Barnett* v. *Wheeler*, 7 M. & W. 364; 10 L. J., Ex. 102.

The plaintiff agreed to sell to the defendant a share in a mining sett for 250*l.*, and the defendant agreed to purchase at that price:—Held, that the readiness and willingness of the plaintiff to convey, and the payment of the purchase money, were concurrent acts, and that therefore, to an action for non-payment of the money, a plea that the plaintiff was not ready and willing to convey was a good answer. *Marsden* v. *Moore*, 4 H. & N. 500; 28 L. J., Ex. 288.

In an action by vendee against vendor, for not delivering a proper abstract of title, the declaration alleged, that the sale was subject to a condition that the vendor should deliver an abstract of title to the purchaser; and assigned a breach in the non-delivery of any abstract showing such a good and sufficient title as the vendee was, according to the condition, entitled to require to be shown. A plea, that at the time of the making of the contract, it was agreed, as part of the contract, that the vendor should deliver an abstract of his title, commencing with a deed of conveyance from A. to B. only, and should not be required to furnish any other abstract, or go into any previous title:—Held, to amount to an augmentative and circuitous denial of the contract stated in the declaration, and to the general issue. *Sharland* v. *Leifchild*, 4 C. B. 529; 5 D. & L. 139; 16 L. J., C. P. 217; 11 Jur. 523. S. P., *Wheeler* v. *Wright*, 7 M. & W. 359; 9 D. P. C. 729; 10 L. J., Ex. 130.

—— **Replication.**]—On the sale by auction of property, the conditions provided, that the vendors should, within twenty days after the sale, deliver an abstract of title; and that all objections thereto not taken in writing within ten days afterwards should be considered as waived. In an action by the purchaser against the vendors for breach of the conditions, the latter pleaded that they, within twenty days after the sale, delivered an abstract; but that the purchaser did not, within ten days afterwards, take any objection to the title in writing. The purchaser replied, that, although the vendors did, within twenty days, deliver an abstract, yet that they did not by the abstract disclose a good and sufficient title; and that the purchaser did, within ten days after the delivery of the abstract, take objections to the title in writing:—Held, that the replication did not introduce new matter, but amounted to a traverse of the latter allegation in the plea. *Smith* v. *Tanner*, 2 Scott (N. R.) 77; 1 Man. & G. 802; 1 Drink. 21.

Evidence.]—Where there was a misrepresentation as to certain property made bonâ fide, but without authority, by the auctioneer at the time of sale:—Held, that evidence of what passed at the sale was admissible against the vendor. *Brett* v. *Clowser*, 5 C. P. D. 376.

A declaration stated, that the defendant agreed to sell a dwelling-house and fixtures for the residue of a term of years, to commence on and from the 1st of January, 1840, for the sum of 60*l.* The evidence adduced was the following agreement: "I agree to sell the house and fixtures, 163, Piccadilly, to commence from the 1st of January next, for 60*l.*":—Held, a variance between the declaration and agreement, as the latter purported to convey the fee-simple. *Hughes* v. *Barker*, 1 D. (N. S.) 80; 8 M. & W. 244; 10 L. J., Ex. 297.

Where the plaintiff stated in his declaration, that he was possessed of a lease of certain premises for a certain term of years, which he put up for sale, and which the defendant purchased; in an action for not completing the purchase, the plaintiff in proving his title must prove the execution of the original lease as well as of the mesne assignments to himself. *Laythorpe* v. *Bryant*, 1 Scott, 327; 1 Bing. (N.C.) 421; 1 Hodges, 19; 4 L. J., C. P. 108.

In a declaration for not completing a purchase of a copyhold, it was alleged, that on the 27th June the vendor "was ready and willing, at the office of the steward of the manor, to receive the residue of the purchase money, and then and

there to surrender." This was denied by the plea:—Held, that this allegation was proved by showing that the vendor was ready and willing to have gone to the steward's office on that day to surrender, but did not do so, because on the 25th the purchaser told the solicitor, who was concerned for all parties, that he was not ready to complete the purchase on the 27th. *Perry* v. *Smith*, Car. & M. 554.

In an action against a purchaser of a freehold at an auction for not completing, the declaration averred that the vendor delivered an abstract of title pursuant to the conditions of sale, which averment was traversed:—Held, that the allegation was not sustained by proof that the vendor caused the lease and assignment which composed the whole title to be handed to the purchaser for perusal. *Horne* v. *Wingfield*, 3 Scott (N.R.) 340; 3 Man. & G. 33; 10 L. J., C. P. 295.

Upon a sale of houses by auction, the purchaser of two houses paid a deposit, signed an agreement as purchaser, and obtained a receipt from the auctioneer for the money paid as for a deposit on a sale by auction of the premises described in the particulars and conditions of sale. The abstract of title not being delivered, the purchaser brought an action against the auctioneer for the recovery of the deposit:—Held, that the production of the receipt and of the conditions of sale, without producing the written contract signed by the purchaser, was insufficient. *Curtis* v. *Greated*, 3 N. & M. 449; 1 A. & E. 167; 3 L. J., K. B. 126.

—— **Knowledge of Defect.**]—Where a party agrees to grant a good and valid lease, having full knowledge that he has no title, the plaintiff, in an action for breach of such agreement, may recover, beyond his expenses, damages resulting from the loss of his bargain, and the defendant cannot, under a plea of payment of money into court, give evidence that the plaintiff was aware of the defect of title. *Robinson* v. *Harman*, 1 Ex. 850; 18 L. J., Ex. 202.

T. agreed to sell to C. certain freehold houses, and to make a good marketable title. On investigation it appeared that the title was not marketable owing to certain restrictive covenants, of which it was alleged C. was aware at the time of the purchase:—Held, that evidence of C.'s knowledge was not admissible to vary the express terms of the contract. *Cato* v. *Thompson*, 9 Q. B. D. 616; 47 L. T. 491—C. A.

h. Title Deeds.

And see infra, C. 7.

Right to Production.]—Right of the purchaser to the production and to an abstract of all the documents relating to the property in the vendor's possession, whether a good title is made without them or not. *Sparrow* v. *Hilton*, 1 W. R. 87.

—— **By Mortgagee.**]—A mortgagee, who was a party to the suit, consented to a sale of the mortgaged property:—Held, that he must produce, and leave in the master's office, the title deeds which were necessary in order to complete such sale. *Livesey* v. *Harding*, 1 Beav. 343.

—— **Covenant for.**]—If vendor retains title deeds, and covenants for further assurance only, the purchaser may, under that covenant, compel him to enter into a covenant for production of deeds. *Fain* v. *Ayers*, 2 Sim. & S. 533; 4 L. J. (o.s.) Ch. 166; 25 R. R. 264.

—— **By Agreement.**]—An agreement on the sale of an estate, that the title deeds should be delivered to the purchasers on completion; but, as the deeds related also to other property belonging to the vendors, the purchasers should enter into proper and sufficient covenants with the vendors for the production and delivery of copies of such deeds. The purchasers bought as trustees of a will which directed a strict settlement of the lands purchased:—Held, that the agreement to enter into a proper and sufficient covenant for the production of the deeds did not mean that the vendors should be entitled to a covenant which would secure to them their production at all times and under all circumstances. *Onslow* v. *Londesborough* (*Lord*), 10 Hare, 67.

Trustees sell and convey property held on trust for sale in the event of the debts of a partnership in which A. was interested exceeding a certain sum. The conveyance recites that A. had died intestate as to his real estates; and the heir-at-law of A. joins in that deed, and enters into a covenant for the title of the trustees, a covenant against all acts done by him or his father, and a covenant for further assurance. It afterwards appears to be uncertain whether A. had not devised his real estate:—Held, that the purchaser is not entitled to a covenant from any person for the production of the partnership books and papers. *Hallett* v. *Middleton*, 1 Russ. 243.

Deeds not Produced.]—Purchaser not bound to complete purchase without the title deeds, unless he has legal covenant to produce them. *Barclay* v. *Raine*, 1 Sim. & S. 449; 24 R. R. 206.

—— **Security by Vendor.**]—Vendor, having lost title deeds, agrees to give real security for title:—Held, personal security not sufficient, and that he must purchase real estates for that purpose. *Walker* v. *Barnes*, 3 Madd. 247; 18 R. R. 226.

—— **Recital of Lost Deeds.**]—Where, in title deed, there is a recital of prior deeds which are lost, and presumption is in favour of the title, purchaser cannot object to title on the ground of the absence of those deeds. *Prosser* v. *Watts*, 6 Madd. 59; 22 R. R. 238.

—— **Secondary Evidence.**]—In an abstract of title was contained a conveyance in 1797, in which were recitals of earlier deeds. Neither the conveyance nor the deeds mentioned in the recitals were produced, but secondary evidence was given, consisting of a draft of the release, which was produced, and proved to have been ingrossed; and extracts of entries in the books of a deceased solicitor of charges for preparing and attesting the execution of the deeds were also furnished:—Held, that as a sixty years' title was shown, the purchaser was not bound to verify the recitals contained in the earlier deeds. *Moulton* v. *Edmonds*, 1 De G. F. & J. 246; 29 L. J., Ch. 181; 6 Jur. (N.S.) 305; 8 W. R. 153.

The proper test in such a case, is whether the recited deeds cast reasonable suspicion on the title. *Ib.*

A purchaser objected to a title for want of a deed which had been inrolled, but could not be

found. A copy of it, taken in 1632, attested by five witnesses:—Held, sufficient even without an attestation. Sed secus, if the original deed has been in a private hand. *Harvey* v. *Philips*, 2 Atk. 541.

A purchaser objected to complete, alleging a bad title, because three deeds were not produced, and there were covenants for the production of only two. The deeds were collateral only to the title; as to two, the purchaser had had their production, and attested copies; and as to the third, an opportunity of inspecting it, with an undertaking to have an attested copy of it:—Held, that the purchaser must complete his contract. *Offen* v. *Harman*, 29 L. J., Ch. 307; 6 Jur. (N.S.) 487; 1 L. T. 315; 8 W. R. 129—L.JJ.

—— **Objection Waived.**]—By the terms of an auction the title deeds were to be produced by a certain day; they were not then ready; but the purchaser received them afterwards without objection: he cannot afterwards object to the delay. *Smith* v. *Burnam*, 2 Anstr. 527; 3 R. R. 620.

If counsel for the purchaser waive the production of a particular document stated in the abstract to be lost, and the purchaser adopt the opinion and deal with the seller upon that view, he will not be permitted to repudiate the opinion of his counsel. *Alexander* v. *Crosby*, 1 Jo. & Lat. 666; 7 Ir. Eq. R. 445.

In 1745 I. executed a settlement of lands, reserving power, with the consent of A., to revoke the uses. The abstract of title set forth a will of I., dated in 1761, whereby he, with the consent of A., revoked the uses; and it referred to a copy of the will. P., the son and heir of I., by indenture of 1763, reciting the will of his father, resettled the estates, and possession had since gone accordingly. The will was not forthcoming:—Held, that its non-production was not an objection to the title. *Ib.*

—— **Destruction by Fire.**]—If after contract for sale of an estate before the title is accepted the title deeds be destroyed by fire, this court will not compel the specific performance of the contract, unless the vendor can furnish the purchaser with the means of showing what were the contents of the destroyed deeds and of proving that such deeds were duly executed and delivered. *Bryant* v. *Bush*, 4 Russ. 1; 28 R. R. 1.

Information not in Vendor's Possession—Expense of Obtaining.]—Where on a sale of property one of the documents of title is not in the possession of the vendor, and he does not know where it is, the expense of procuring information as to the whereabouts of the document must, under sub-s. 6 of s. 3 of the Conveyancing and Law of Property Act, 1881, in the absence of special agreement, be borne by the purchaser, even although the document in question should be the root of the vendor's title. *Stuart and Olivant and Seadon's Contract, In re*, 65 L. J., Ch. 576; [1896] 2 Ch. 328; 74 L. T. 450; 44 W. R. 610—C. A. And see *Willett and Argenti, In re*, infra, col. 1501.

Sale of Manor.]—Where a manor is sold subject to the existing copyhold tenancies, the vendor must covenant for the production of the court rolls anterior to the time of sale. *Poulett* v. *Hood*, 37 L. J., Ch. 224; L. R. 5 Eq. 115; 17 L. T. 486; 16 W. R. 323.

Sale of Copyholds.]—The vendor of a piece of copyhold land enfranchised in 1799 delivered to the purchaser two abstracts commencing in 1736; one of the title to the land, the other of that of the manor. The deed of 1799 was forty years old, and recited that the then lord and the then owner of the land were respectively seised in fee, and several of the deeds relating to the lord's title were bargains, and sales inrolled; and, therefore, copies of them, as well as of the surrenders and admittances, which would be good evidence, might be procured by the purchaser at any time. The vendor was unable to deliver to the purchaser the deed of 1799, or any of the prior instruments, but was willing to covenant to produce that deed:—Held, that he was bound to give the purchaser covenants for production not only of that deed, but of all the prior instruments noticed in the abstracts. *Cooper* v. *Emery*, 10 Sim. 609. This was varied on appeal as to the copyholds, but affirmed as to the rest. 1 Ph. 388; 13 L. J., Ch. 275; 8 Jur. 181.

The period for which a good title is required to be shown is sixty years, notwithstanding the 3 & 4 Will. 4, c. 27. *Ib.*

Right to Inspection.]—Where a title commenced by a general devise and seisin, and only proved by a deed more than sixty years old, reciting the seisin, and there was ground to assume that the vendor had deeds earlier than those on the abstract:—Held, the purchaser was entitled to inspection of those deeds, if in the vendor's possession, but not to have them in the abstract. *Parr* v. *Lovegrove*, 4 Drew. 170; 4 Jur. (N.S.) 600; 6 W. R. 709.

Quære, whether a purchaser is generally entitled to inspection of deeds earlier than a sixty years' title. *Ib.*

It is generally admitted that a purchaser may inspect the earlier deeds in the vendor's possession, but cannot require to have them abstracted. *Ib.*

A purchaser who agrees not to require an abstract of title has nevertheless a right to inspect the deeds which constitute the vendor's title. *Harding* v. ——, 4 L. J. (O.S.) Ch. 213.

Right to Copies.]—One of the conditions of a sale by public auction stated that the purchaser should not require the production of any title deeds which were not in the possession of the vendors, and all attested copies of or extracts from deeds, which might be required by the purchaser for the purpose of examination with the abstract, should be procured at the expense of the purchaser. A. became the purchaser of two lots:—Held, that the purchaser was not entitled to attested copies of the title deeds at the expense of the vendors. *Abbott* v. *Darnell*, 2 Jur. (N.S.) 631; 4 W. R. 314.

A. agreed to sell to B. certain lands, and one of the conditions of sale was "as the title deeds of the property relate to other property of greater value, the vendor shall retain the custody thereof; and a covenant will be entered into for the production of such of them as are not inrolled, and for giving attested or other copies thereof to the respective purchasers at their expense":—Held, that B. could not compel A. to deliver attested copies at the expense of A. *Cotton* v. *Scudamore*, 1 K. & J. 321.

Custody—Contract for Sale of Land—Retention by Vendor of "Part of an Estate."]—A

mortgagee of freehold land and policies on the life of the mortgagor under one deed, who, during the life of the mortgagor, in exercise of the power of sale contained in the mortgage, sells the land but retains the policies, does not retain "part of an estate" within the meaning of rule 5 of s. 2 of the Vendor and Purchaser Act, 1874, and is therefore, in the absence of special condition, not entitled to retain the mortgage-deed, but must deliver it to the purchaser on completion. *Fuller and Leathley's Contract, In re*, or *Williams and Newcastle's Contract, In re*, 66 L. J., Ch. 543; [1897] 2 Ch. 144; 76 L. T. 646; 45 W. R. 627; 61 J. P. 454.

Sale in Lots—Purchaser of Largest Lot.]—Conditions of sale stipulated that the vendor of an estate, sold in lots, should deliver an abstract of the title to the purchasers, and deduce a good title; but that as to a part of the estate, acquired under an inclosure act, he should not be bound to show any title thereto prior to the award; and that the vendor should deliver up to the largest purchaser in value all the title deeds and other documents in his custody, but should not be required to produce any original deed or other documents than those in his possession, and set forth in the abstract:—Held, that these conditions did not excuse the vendor from verifying the title shown upon the abstract by producing the deeds, or, if any of them were not in his possession, by other satisfactory evidence. *Southby* v. *Hutt*, 2 Myl. & Cr. 207; 1 Jur. 100.

Where an estate is sold under a decree in several lots, and there is no condition of sale as to the title deeds, the purchaser of the largest lot is to have the custody of the title deeds common to all the lots, on the terms of giving to the purchasers of the smaller lots, attested copies, and a covenant for safe custody and production. *Cunnyngham* v. *Hume*, 1 Ir. Eq. R. 150.

By conditions of sale, the title deeds were to be delivered to "the purchaser of the largest lot." A. purchased the largest lot, in value and extent, but B. purchased several lots whose aggregate value and extent exceeded those of A.'s lot:—Held, that A. was entitled to the custody of the deeds. *Scott* v. *Jackman*, 21 Beav. 110.

The conditions of sale stipulated that the purchaser of "the largest lot" should be entitled to possession of the deeds:—Held, that "largest lot" had reference to quantity and not to price. *Griffiths* v. *Hatchard*, 1 K. & J. 17; 23 L. J., Ch. 957; 18 Jur. 649; 2 W. R. 672.

—— **Copies.**]—In a sale under the order of the court, the purchaser of the largest lot in extent and value is, in the absence of express condition, entitled to the deeds; and in the absence of express condition, the purchaser of a smaller lot is entitled, at the expense of the estate, to attested copies of all such deeds. A condition that all attested copies of deeds, "shall be procured at the expense of the purchaser":—Held, not sufficiently express to vary the rule. *Peterson* v. *Elwes*, 6 W. R. 611.

—— **Costs.**]—Although by the practice of conveyancers, the costs of covenants to produce title deeds which cannot be delivered up fall on the vendors, yet where, by the conditions of sale of property in lots, provision is made for the largest purchaser to have the deeds, and to covenant to produce them to the purchaser of smaller lots, without reference to the costs, each purchaser, and not the vendor, is bound to bear his own costs of such covenants. *Strong* v. *Strong*, 4 Jur. (N.S.) 943; 6 W. R. 455.

Purchaser who cannot have the original title deeds, the estate being sold in number of lots, is entitled to attested copies at expense of vendor. *Dare* v. *Tucker*, 6 Ves. 460. S. P., *Boughton* v. *Jewell*, 15 Ves. 176.

Where title deeds cannot be delivered, assignees must, like any other vendor, give attested copies of them at the expense of the estate; but their covenant, for the production of the deeds, should be confined to the time of their continuance as assignees. *Stuart, Ex parte*, 2 Rose, 215.

Delivery up of Title Deeds.]—See *Heath* v. *Crealock*, infra, col. 1359.

Rights of Third Parties.]—Covenant to produce title deeds remains with lands for benefit of purchasers, but not for benefit of vendors. *Barclay* v. *Raine*, 1 Sim. & S. 449; 24 R. R. 206.

A defendant entitled to the benefit of a covenant to produce deeds for the "maintenance, manifestation, or justification" of his own title, is not compellable to inspect and discover the contents of such deeds, or procure their production in a hostile suit to which the covenantor is not a party. *Bethell* v. *Casson*, 1 H. & M. 806; 3 N. R. 29; 9 L. T. 321; 12 W. R. 200.

Where a defendant holds a covenant for the production of deeds for the maintenance and manifestation of his title, he is not bound, in answer to interrogatories, to set out such deeds in a suit, the object of which is to show that a disputed piece of land is not comprised in the defendant's title. *Ib.*

A title deed of the defendant was ordered to be produced where it contained a recital that might affect him with constructive notice of the plaintiff's interest in the estate. *Neesom* v. *Clarkson*, 2 Hare, 166, n. C. P. Cooper, 93; 12 L. J., Ch. 99; 6 Jur. 1055.

—— **Covenants for Production.**]—By conditions of sale, it was stipulated that the vendors should not be required to produce any deeds not in their possession, and that all deeds of covenant for production of any deed or document, whether referred to in an abstract or not, which the purchaser should require for verifying the abstract, or for any other purpose, should "be made, and obtained by and at the expense of the purchaser requiring the same":—Held, that the vendors were not bound to procure covenants for production from parties holding deeds referred to in the abstract. *Gabriel* v. *Smith*, 16 Q. B. 847; 20 L. J., Q. B. 386; 15 Jur. 1124.

Possession by Incumbrancer.]—The possession of the title deeds by the equitable incumbrancer, without any default on the part of the person who has contracted to purchase, does not give the former any right to priority over the latter, or to require the latter to redeem him, or be foreclosed. *Flinn* v. *Fountain*, 58 L. J., Ch. 389; 60 L. T. 484; 37 W. R. 443.

2. Of Third Parties.

a. Purchaser without Notice.

i. *In General.*

In General.]—A man who purchases without notice of a prior incumbrance or prior right,

shall not have his title impeached in equity, nor shall he be compelled to discover any writings which may weaken his title, neither shall any advantage be taken from him which may defend him at law. *Harding* v. *Hardrett*, Rep. t. Finch. 9; *Heyman* v. *Gomeldon*, *id.* 34; *Snelling* v. *Squib*, 2 Ch. Ca. 47; *Wilkes* v. *Bodington*, 2 Vern. 599; *Stephens* v. *Gaule*, *id.* 701. He must plead himself a purchaser, without notice. *Bodmin* v. *Vandenbendy*, 1 Vern. 179. S. P., *Anon.*, 3 Salk. 85; *Gordon* v. *Bank of England*, 8 Jur. 1132.

Bill by purchaser without notice of mortgage and assignment for delivery up of deeds, and conveyance of legal estate, upheld. *Bennett* v. *Harrison*, 7 Jur. 436.

Plea of purchase for valuable consideration without notice protects defendant from answering to title set up by plaintiff. *Fitzgerald* v. *Fauconberge*, Fitz. 207; 2 Madd. 321.

This court will not take the least step against a purchaser for valuable consideration without notice, not even to perpetuate testimony against him. *Jerrard* v. *Saunders*, 2 Ves. J. 454.

Devisee shall not examine witnesses in perpetuam rei memoriam, to prove a will against a purchaser without notice, till the will has been established by a verdict at law. *Bechinall* v. *Arnold*, 1 Vern. 354.

Where Purchaser's Interest is Equitable.]—Legal interest prevails against a prior equitable interest. *Wilson* v. *Stafford*, Amb. 181.

Purchase for valuable consideration without notice, is not available as a defence against a plaintiff who relies upon a legal title. *Collins* v. *Archer*, 1 Russ. & M. 284.

Semble, that a purchase for a valuable consideration without notice, is available as a defence against a plaintiff who relies on a legal title. *Payne* v. *Compton*, 2 Y. & C. 457.

Purchase for valuable consideration without notice, may be a good defence, although the legal estate is outstanding in a mortgagee. *Penny* v. *Watts*, 2 De G. & Sm. 501.

A court of equity does not restrict the protection it will afford a purchaser for valuable consideration without notice, to a case in which he has got the legal estate. *Colyer* v. *Finch*, 5 H. L. Cas. 905; 2 Eq. R. 117; 2 W. R. 655.

A purchaser without notice shall not be hurt in equity, not only where he has a prior legal title, but where he has a better right to call for the legal estate than another, who has got an incumbrance prior to his title. *Wilkes* v. *Bodington*, 2 Vern. 599. S. P., *Medlicott* v. *O'Donell*, 1 Ball & B. 171.

He who would entitle himself to protection of equity as a purchaser, must claim under actual conveyance, but need not have the legal estate. *Fitzgerald* v. *Fauconberge*, supra.

He that is a purchaser in law, as by taking estate in right of wife by his marriage, is not a purchaser in notion of equity. *Ib.*

The court will protect a purchaser for valuable consideration without notice, even though his estate may be merely equitable. *Hunter* v. *Walters*, 41 L. J., Ch. 175; L. R. 7 Ch. 75; 25 L. T. 765; 20 W. R. 218. S. P., *Ernest* v. *Vivian*, 33 L. J., Ch. 513; 9 L. T. 785; 12 W. R. 295.

A purchase for a valuable consideration without notice, is a defence as well against a legal as an equitable title. *Joyce* v. *De Moleyns*, 2 Jo. & Lat. 374; 8 Ir. Eq. R. 215.

—— **Charity.**]—And also as against a charity. *Att.-Gen.* v. *Wilkins*, 17 Beav. 285; 22 L. J., Ch. 830; 17 Jur. 885; 1 W. R. 472.

When Plea is Available.]—The defence that he is a purchaser for value without notice, is only available where the plaintiff is seeking to take something away from the defendant which he already has. *Barnard* v. *Hunter*, 2 Jur. (N.S.) 1213; 5 W. R. 92.

The plea of a purchaser for value without notice is not available to the mortgagee of an assignment of a chose in action as against the assignor, even though the assignor seeks to enforce a personal equity against his assignee. *Ib.*

—— **Purchaser failing to make Inquiries.**]—A purchaser cannot plead no notice if he abstain from calling for information to which he is entitled by law. *Parker* v. *Whyte*, 1 H. & M. 167; 2 N. R. 157; 32 L. J., Ch. 520; 8 L. T. 446; 11 W. R. 683.

Plea of valuable consideration without notice is no protection against adverse claim, of which purchaser might have had notice by using due diligence. *Jackson* v. *Rowe*, 2 Sim. & S. 472; 4 L. J. (O.S.) Ch. 118; 25 R. R. 250.

A deed of conveyance purported to grant the whole of the demised premises, and the covenants for title corresponded with the granting part; the vendor had previously assigned a portion of the premises to a railway company by a deed not disclosed to the purchaser, but the purchaser knew of the works erected by the railway company:—Held, that the condition of the premises being known to both parties, they should be taken to have contracted as to them in that condition, and that the deed of conveyance should be rectified. *Young* v. *Halahan*, Ir. R. 9 Eq. 70.

—— **Condition not to Inquire.**]—A purchaser of a lease, under a condition not to inquire into the lessor's title, cannot protect himself against a suit to set aside the lease on the ground that he is a purchaser for value without notice. *Robson* v. *Flight*, 33 Beav. 268; 34 L. J., Ch. 226; 11 Jur. (N.S.) 147; 11 L. T. 725; 13 W. R. 393.

—— **Grounds for not Inquiring.**]—The rule with respect to the consequence of a purchaser abstaining from making inquiries does not depend exclusively on a fraudulent motive for such abstinence. *Jones* v. *Williams*, 24 Beav. 47; 3 Jur. (N.S.) 1066; 5 W. R. 775.

Sufficiency of Inquiry.]—W., after completing a contract to buy premises, told M. that he had done so. M. was afterwards informed by the vendor that the treaty with W. was off. M. did not make any further inquiry, and bought and took an assignment of the premises himself:—Held, that he must be held to have had notice of W.'s contract. *Waldron* v. *Jacob*, Ir. R. 5 Eq. 131.

Fraud.]—Quære, whether purchaser for valuable consideration, under a decree fraudulently obtained, though ignorant of fraud, can protect himself, when fraud appears on face of proceedings. *Gore* v. *Staepoole*, 1 Dow, 30; 14 R. R. 1.

The rule that a purchaser for valuable consideration without notice, is protected by the

legal estate, extends not only to cases where his title is impeached by reason of some secret act done by the vendor, but to cases also of the falsehood of a fact of title asserted by the vendor, provided the falsehood of the alleged fact could not have been discovered by reasonable diligence. *Jones* v. *Powles*, 3 Myl. & K. 581; 3 L. J., Ch. 210.

Equitable Incumbrance.]—There is no general rule that a court of equity will never assist a plaintiff against a defendant who is a purchaser without notice; and an incumbrancer for value of an equitable interest may successfully file a bill against a subsequent incumbrancer for value to have a priority declared and enforced. *Phillips* v. *Phillips*, 4 De G. F. & J. 208; 31 L. J., Ch. 321; 8 Jur. (N.S.) 145; 5 L. T. 655; 10 W. R. 236. Affirming 3 Giff. 200. S. P., *Stackhouse* v. *Jersey (Countess)*, 1 J. & H. 721; 30 L. J., Ch. 421; 7 Jur. (N.S.) 359; 4 L. T. 204; 9 W. R. 453.

—— **Priorities.**]—A person who has contracted to purchase real estate is entitled to specific performance of the contract as against a person claiming under an equitable incumbrance created by the vendor subsequently to the contract, whether the incumbrancer had or had not notice of the contract when the incumbrance was created. *Flinn* v. *Fountain*, 58 L. J., Ch. 389; 60 L. T. 484; 37 W. R. 443.

One seised of an estate, subject to several equitable incumbrances, sells it to a purchaser, and conveys the legal estate to him free from incumbrances, except some of the equitable incumbrances, which were later in date to the others; the purchaser, having no notice of the other incumbrances, was held a trustee for the excepted creditors only, and they were preferred to the other creditors. *Ingram* v. *Pelham*, Amb. 153.

Purchase of Chose in Action.]—The purchaser of a chose in action (whether with or without notice) cannot be in a better position than the person from whom he purchased. *Brandon* v. *Brandon*, 7 De G. M. & G. 365; 25 L. J., Ch. 896; 2 Jur. (N.S.) 981; 5 W. R. 1.

A purchaser (even for valuable consideration without notice) of a share of a fund in court cannot be in a better position than his vendor. *Ib.*

Purchaser of an equitable title to a rent-charge, claiming against some purchasers of the land for a valuable consideration without notice, must try his title at law in the name of his vendors. *Whitfield* v. *Fausset*, 1 Ves. sen. 387. And see *Barnard* v. *Hunter*, supra.

Where Relief Sought.]—Title of purchaser for valuable consideration is a good ground of defence, but not for relief. *Patterson* v. *Slaughter*, Amb. 293.

Bankruptcy.]—Equity will not relieve the assignees of a bankrupt against a purchaser of the bankrupt's lands without notice of the act of bankruptcy. *Chandos* v. *Brownlow*, 2 Ridgw. 425.

Private Act.]—Purchasers for valuable consideration not bound by private act of parliament. *Pomfret (Earl)* v. *Windsor (Lord)*, 2 Ves. sen. 480.

Lease after Sequestration.]—Lease of lands in Ireland, made after the lessor's estate had been put under sequestration for contempt of court of exchequer in that kingdom, was held good, the lessee having no notice of sequestration. *Vicars* v. *Colclough*, 5 Bro. P. C. 31.

Marriage Settlement.]—A party claiming to be a purchaser for a valuable consideration without notice, under a marriage contract, must show that he had no notice at the time of the settlement. *Davies* v. *Thomas*, 2 Y. & C. 234; 7 L. J., Ex. Eq. 21.

Money actually Paid.]—Where a defendant, by his answer, insists that he is a purchaser for valuable consideration, and without notice, proof of payment of the purchase money is essential. *Molony* v. *Kernan*, 2 Dr. & War. 31. S. P., *Harrison* v. *Southcote*, 1 Atk. 538.

On plea of purchase for valuable consideration, the consideration must be actually paid; if, in fact, it is only secured to be paid, the plea will be overruled. *Hardingham* v. *Nicholls*, 3 Atk. 304.

Purchase for a valuable consideration bonâ fide paid:—Held, a good defence, though the consideration was much less than the real value. *Bullock* v. *Sadlier*, Amb. 764.

Where purchaser has given a full value for estate, mistake of some party to conveyance of their claim thereto under a marriage settlement shall not turn to the prejudice of the purchaser without notice. *Malden* v. *Menill*, 2 Atk. 8.

Dower.]—Plea of purchase for valuable consideration, not good to a bill for dower. *Williams* v. *Lambe*, 3 Bro. C. C. 264.

Notice before Completion.]—Sale subject to first and second mortgages. The purchaser paid by cheque, which he stopped, but after notice of a third mortgage withdrew his countermand:—Held, bound to redeem the third mortgage. *Tildesley* v. *Dodge*, 3 Sm. & G. 543; 3 Jur. (N.S.) 1000.

A purchaser gives the vendor's bankers an undertaking to give them his acceptance for a sum due to them from the vendor, but before he has given his acceptance, he has notices of incumbrances:—Held, that he is not a purchaser for valuable consideration without notice. *Reid* v. *Tait*, 1 L. J. (O.S.) Ch. 6.

The plaintiff, previous to his marriage with A.'s daughter, wrote to A., inquiring what fortune his daughter was entitled to. A., in his reply, stated that certain houses were entailed on his daughter after his decease. A. died, leaving his daughter his only child, and having devised all his real estates to his wife. It was then discovered that A. was tenant in tail male of the houses, with reversion to himself in fee. Pending proceedings by the plaintiff and his wife, A.'s widow mortgaged the houses to H., charged them with an annuity to M., and conveyed them, subject to the mortgage and annuity, to W. in fee. H., W., and M. had none of them then any notice of the suit or of the plaintiff's claim. After notice to M. the houses were conveyed to him in fee by H. and W. After a decree taken pro confesso against A.'s widow, the plaintiff had notice of the conveyance to M., and filed a bill against M. M. relied on the want of notice in H. and W., and in himself when he purchased the annuity, but the court, on motion,

granted a receiver. *Landon* v. *Morris*, 5 Sim. 257; 2 L. J., Ch. 35.

Will—Partnership.]—A trader by his will allowed his executors to leave his capital in the business for three or seven years. A year after the death the partners agreed with the administratrix that the new firm should "take to" the whole stock on paying her 63,000*l.*, and should become purchasers of the testator's share for that sum:—Held, they were purchasers of the share for valuable consideration, and without notice of the trusts of the will. *Chambers* v. *Howell*, 11 Beav. 6; 12 Jur. 905.

Lease obtained by Fraud.]—Where A. entered into an agreement with B. respecting lease of lands, which lease B. had obtained from landlord by fraud and circumvention:—Held, that heir of A., and purchasers for valuable consideration claiming under him, were entitled in equity to benefit of agreement between B. and A., and that heir of landlord was entitled to benefit of agreement, so far as B. took an interest. *Butler* v. *Mulvihill*, 1 Bligh, 137.

Trustee—Tenants in Common.]—When a person seised in trust for himself and another in common retains the entire rents, the debt arising in favour of the co-tenant will not be charged on the trustee's beneficial interest as against a purchaser without notice from him. *British Mutual Investment Co.* v. *Smart*, 44 L. J., Ch. 695; L. R. 10 Ch. 567; 32 L. T. 849; 23 W. R. 800.

—— **Breach of Trust.**]—If the persons claiming under the breach of trust have notice of it, then they are subject to the same trust; so, if the conveyance be voluntary, or without a valuable consideration; but if for a valuable consideration, and without notice, the purchaser will hold the land discharged, and the trustees must buy and settle other land to the same uses. *Mansell* v. *Mansell*, 2 P. Wms. 681.

A cestui que trust of an annuity, secured by a term in an estate, filed a bill against the trustee of the term and the purchaser for value of the estate, praying that the trusts of the term might be administered. The purchaser, who was in possession of the estate, had no notice of the term, and denied the existence of any term in the trustee:—Held, that until the trustee had established his right to the term at law, the cestui que trust could have no such relief as prayed in equity. *Clemow* v. *Geach*, 19 W. R. 53.

—— **Fraud.**]—Trustees of a marriage settlement, whereby a mortgage debt was settled for the benefit of A., cannot set up the defence of purchasers for valuable consideration without notice, independently of A., when the mortgage is attempted to be set aside on the ground of fraud. *Spaight* v. *Cowne*, 1 N. R. 550; 2 J. & H. 617.

A purchaser, upon signing the contract, assigned and delivered a negotiable bond as a deposit to T., who alleged himself to be the solicitor for the vendor. T. transferred the bond to the defendant, as a security for his own debt. The vendor of the real estate was a fictitious person, and the contract a fraud:—Held, that the deposit did not make T. a trustee for the plaintiff; and that the defendant, being a purchaser for value without notice, could not be restrained from dealing with the bond. *Ashwin* v. *Burton*, 32 L. J., Ch. 196; 9 Jur. (N.S.) 319; 7 L. T. 589; 11 W. R. 103.

Fraud on Power.]—Voluntary settlement of personal property, in trust for such one or more of his children as the settlor shall appoint. Appointment to one child exclusively, upon a secret understanding that the child shall reassign a part of the fund to or in favour of a stranger. This appointment is void, in toto. Bill, by purchaser for valuable consideration, without notice, under this appointment, dismissed as against the person entitled under the settlement, in default of appointment; such person having also the legal estate in the fund. *Daubeny* v. *Cockburn*, 1 Mer. 626; 15 R. R. 174.

ii. *On Acquiring the Legal Estate.*

Mortgage.]—On a mortgage by A., the mortgagee allowed A. to retain the title deeds. A. covenanted with B. and C. to execute a mortgage of the estate as a security for the debt due to them; and the title deeds were at the same time deposited by A. with his own solicitor, but no legal mortgage was ever executed by A. to B. and C. In 1850 A. made a legal mortgage of the estate to D., who had no notice of the prior incumbrances, and the title deeds were delivered to D.:—Held, that as D. acquired the legal estate without notice of the prior incumbrances, he became entitled to priority over B. and C. *Lloyd* v. *Attwood*, 3 De G. & J. 614; 29 L. J., Ch. 97; 5 Jur. (N.S.) 1322.

Equitable Mortgage.]—Title deeds were deposited as a security for money; the defendant, a creditor of the mortgagor, fearing his immediate insolvency, took a conveyance of the same premises, without notice of the incumbrance: this was held good. *Plumb* v. *Fluitt*, 2 Anstr. 432; 3 R. R. 605.

Forged Will.]—Where the purchaser, for valuable consideration, claimed under a party who had obtained possession under a forged will, which no reasonable diligence could have discovered:—Held, that the legal estate acquired from a trustee of a satisfied mortgage protected him as a purchaser for valuable consideration without notice. *Jones* v. *Powles*, 3 Myl. & K. 581.

Pendente Lite.]—A person who has bonâ fide paid money without notice of any other title, may afterwards, even pendente lite, get a legal title if he can, and may hold it, though during the interval between the payment and the getting in of the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself. *Blackwood* v. *London Chartered Bank of Australia*, 43 L. J., P. C. 25; L. R. 5 P. C. 92; 30 L. T. 45; 22 W. R. 419.

Settlement.]—Purchaser for valuable consideration without notice shall not be impeached, especially when a settlement has been since made in his favour. *Rochfort* v. *Nugent*, 5 Bro. P. C. 351.

How Acquired.]—A purchaser for valuable consideration without notice of any prior equity

having accidentally acquired the legal estate under a deed of which he had no notice at the time of the purchase, is not affected without notice of anything contained in such deed. *Pilcher* v. *Rawlins*, 41 L. J., Ch. 485; L. R. 7 Ch. 259; 25 L. T. 921; 20 W. R. 281.

Such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of the court. *Ib.*

—— **From Trustee.**]—A purchaser for valuable consideration, without notice, getting in the legal estate from a trustee, takes it subject to all those trusts upon which the trustee held it, and appearing upon the face of the instrument under which the trustee takes. *Carter* v. *Carter*, 3 K. & J. 618; 27 L. J., Ch. 74; 4 Jur. (N.S.) 63.

—— **By Fraud.**]—When purchasers were purchasers only of an equity of redemption, and where they could not avail themselves of the legal estate, the reconveyance of which had been procured by fraud:—Held, that the reconveyance must be cancelled, and an account taken of what was due on the security, and a decree that the amount found due should be paid, and that upon default of payment and on the purchaser failing to pay such amount, there must be a foreclosure instead of a sale. *Heath* v. *Crealock*, 44 L. J., Ch. 157; L. R. 10 Ch. 22; 31 L. T. 650; 23 W. R. 95.

Held, also, that the purchasers could not be ordered to deliver up the title deeds in their possession, the rule being that from a purchaser for value without notice the court takes nothing away which he has honestly acquired. *Ib.*

Deposit of Title Deeds.]—T., claiming under a fictitious lease, mortgaged to A. M., under another fictitious lease, mortgaged to B. M. (being in possession of the legal estate) then mortgaged to C. by deposit of the title deeds, and C., as equitable mortgagee, entered into possession. In an action by A. to settle the priorities of himself, B. and C. as incumbrancers on the property:—Held, that as purchaser for value without notice by deposit of the genuine title deeds, C., though subsequent in date, was entitled in priority over A. and B. *Keate* v. *Phillips*, 50 L. J., Ch. 664; 18 Ch. D. 560; 44 L. T. 731; 29 W. R. 710. And see *Plumb* v. *Fluitt*, supra.

Deposit of Agreement for Sale.]—A father in possession of land under an agreement for sale was advanced sums by his sons. The sons surreptitiously obtained possession of the agreement, and deposited it with a bank as a security for a loan, alleging that the father had given up to them all his interest in the land, and would execute a conveyance to the bankers when required. The father had previously to this transaction become surety for the sons to another bank:—Held, that the sons had an equitable charge upon the land, as against the father, for the amount paid by them to the father; that although the deposit was made under false representations, and did not bind the father, yet that the bankers were purchasers for value without notice, and were entitled to a charge on the land to the full extent of the lien on the sons; and that although the father, in respect of his suretyship, had a right to set-off against his sons, yet it could not be enforced against the bankers, whose right accrued without notice of any claim of the father. *Unity Joint Stock Banking Association* v. *King*, 27 L. J., Ch. 585; 4 Jur. (N.S.) 470; 6 W. R. 264.

F. contracted to sell to P. leasehold property. P. having paid to F. part of the purchase money, deposited with a bank the contract in order to secure a debt due by him to the bank, and F. received and accepted a formal notice of this charge. Subsequently F. assigned the legal estate in the premises to P. in such manner as to enable P. to defeat the bank's charge, which he did by assigning the premises to a purchaser without notice:—Held, that F. was not liable to make good the loss occasioned to the bank by such his assignment *Shaw* v. *Foster*, 42 L. J., Ch. 49; L. R. 5 H. L. 321; 27 L. T. 281; 20 W. R. 907.

Administration taken out.]—R., representing A. to be dead, took out administration and sold a charge to which A. was entitled under a term in reversion after a life estate, to a purchaser for value, who took an assignment of the term from the trustee of the term. A. was not dead, and claimed to set aside the sale:—Held, that the purchaser had no good title to the charge, though he had obtained the legal estate by the assignment of the term. *Monckton* v. *Braddell*, Ir. R. 6 Eq. 352.

Purchase by Agent.]—The plaintiffs appointed by parol W. as their agent to purchase land. W. entered into a contract in his own name, and then assigned the benefit of the contract to J. for valuable consideration. In an action by the plaintiffs against W. and J., to establish the agency:—Held, that the plea of purchase for value without notice, raised by J., was of no avail, inasmuch as the prior equitable title vested in the plaintiffs by the force of the contract. *Cave* v. *Mackenzie*, 46 L. J., Ch. 564; 37 L. T. 218.

Release from Mortgage.]—S. executed mortgages to B. upon estates in Ireland. The deed contained several covenants that the lands were free from incumbrances, and for further assurance. Before the deeds were registered it was discovered that a portion of the land was subject to a mortgage to E. S., by fraud, procured a release from E. of the land subject to the mortgage. B., in ignorance of the fraud, then registered his deeds:—Held, that E. was the equitable owner of the estate, and could at any time, by bill in equity, have set aside the fraudulent release, and his equitable title ought to be preferred to the claim of B. *Eyre* v. *Burmester*, 10 W. R. 587.

Statute.]—A subsequent purchaser protected by getting in an old satisfied statute. *Stanton* v. *Sadler*, 2 Vern. 30.

Assignee of a statute purchases the estate, having notice of a second statute. How far he shall make use of the first statute to protect his purchase, quære. *Huntingdon* v. *Greenville*, 1 Vern. 49.

Conusee of a statute, having extended the land, assigns it to J. and dies. One that had a second statute gets administration, and acknowledges satisfaction on the first statute. Equity will relieve against this practice, and put the

assignee in the same plight as if the statute was still in force. *Id.* 51.

iii. *Practice and Pleading.*

Pleading.]—The defence of purchaser for valuable consideration, without notice, must be stated distinctly in the pleadings, else it cannot prevail. Therefore, in an affidavit on a motion it was not allowed. *Phillips* v. *Phillips*, 3 Giff. 200. Affirmed, 4 De G. F. &. J. 208; 31 L. J., Ch. 321; 8 Jur. (N.S.) 145; 5 L. T. 655; 10 W. R. 236.

—— **Notice.**]—Bill by a dowress to remove trust term; defendant pleads himself a purchaser, but does not deny notice; ordered to answer. *Bodmin* v. *Vandenbendy*, 1 Vern. 179. S. P., *Ireland* v. *Kidd*, Jon. & C. 249; *Hardy* v. *Reeves*, 5 Ves. 426.

Notice must be denied positively, not evasively. *Cason* v. *Round*, Pre. Ch. 226. S. P., *Jerrard* v. *Saunders*, 2 Ves. J. 187; 4 Bro. C. C. 322; *Jones* v. *Thomas*, 3 P. Wms. 243.

On plea of purchase for valuable consideration without notice of plaintiff's title, it is not sufficient to deny notice at or before the execution of the conveyance to him; he must aver that he had none at or before payment of the purchase money. *Story* v. *Windsor* (*Lord*), 2 Atk. 630; 1 Ch. Ca. 34. S. P., *Fitzgerald* v. *Burk*, 2 Atk. 397.

In plea of purchase for valuable consideration without notice, it is enough to deny notice generally, in plea, unless facts are specially charged in bill, as evidence of notice. *Pennington* v. *Beechy*, 2 Sim. & S. 282.

If special notice of title is charged by bill, such notice must be denied specially; a general demurrer is not sufficient. *Radford* v. *Wilson*, 3 Atk. 815. S. P., *Att.-Gen.* v. *Marrett*, 10 Ir. Eq. R. 167.

A bill against assignee of a lease, charging that defendant knew t at the lease was expired, and that the same did appear by writing in his custody. Defendant pleads that he was a purchaser of the lease, and was then informed that there were fifty-seven years to come in the lease, and therefore gave nineteen years' purchase for it; allowed a good plea. *Worcester* (*Bishop*) v. *Parker*, 2 Vern. 255.

—— **Notice not Denied.**]—A defendant in a plea of a purchase for valuable consideration, omits to deny notice; if the plaintiff replies to it, all the defendant has to do is to prove his purchase. *Harris* v. *Ingledew*, 3 P. Wms. 94.

Where in a plea of purchase for valuable consideration, the purchaser omitted to deny notice, and the plaintiff replied to it instead of setting it down for argument, if the defendant prove what he has pleaded, the bill as against him must be dismissed with costs. *Eyre* v. *Dolphin*, 2 Ball & B. 302; 12 R. R. 94.

—— **Seisin and Possession.**]—In the pleading of a purchase or mortgage, the defendant must plead that the sellor or mortgagor was, or pretended to be, seised in fee. *Head* v. *Egerton*, 3 P. Wms. 281. S. P., *Strode* v. *Blackburne*, 3 Ves. 222.

A plea of purchase for valuable consideration without notice of plaintiff's title; it is sufficient to aver that the person who conveyed was seised, or pretended to be seised, when he executed the purchase deeds; but where a fine or non-claim is the bar, averment of actual seisin is necessary. *Story* v. *Windsor* (*Lord*), 2 Atk. 630; 1 Ch. Ca. 34.

Plea of purchaser for valuable consideration, stating vendor seised, &c., but not adding in possession, overruled. *Lanesborough* (*Lord*) v. *Kilmaine* (*Lady*), 2 Moll. 403.

The defendant put in a plea of purchase for valuable consideration without notice, averring that "A., before the execution of the conveyance, alleged that she was seised," and was in possession. The court held that such a plea must aver that the vendor was seised, or pretended to be seised, and in possession when the conveyance was executed. *Jackson* v. *Rowe*, 4 Russ. 514; 9 L. J. (O.S.) Ch. 32; 28 R. R. 168. S. P., *Trevanian* v. *Mosse*, 1 Vern. 246; *Daniels* v. *Davison*, 16 Ves. 252; 10 R. R. 171; *Att.-Gen.* v. *Backhouse*, 17 Ves. 290; *Wallwyn* v. *Lee*, 9 Ves. 24; 7 R. R. 142.

—— **Consideration.**]—Plea of purchaser for value need not set forth the consideration paid. *More* v. *Mayhow*, 1 Ch. Ca. 34; 2 Free. C. C. 175.

—— **Reversionary Interest.**]—Plea of purchaser from one having a reversionary estate, and consequently not in possession, overruled, because it did not set out how the person from whom the title was deduced became entitled. *Hughes* v. *Garth*, 2 Eden, 168; Amb. 421.

Discovery.]—A man who purchases without notice, shall not be compelled to discover any writings which may weaken his title, neither shall any advantage be taken from him, which may defend him at law. *Harding* v. *Hardrett*, Rep. t. Finch. 9; *Heyman* v. *Gomeldon*, *id.* 34; *Snelling* v. *Squib*, 2 Ch. Ca. 47; *Wilkes* v. *Bodington*, 2 Vern. 599; *Stephens* v. *Gaule*, *id.* 701. He must plead himself a purchaser without notice. *Bodmin* v. *Vandenbendy*, 1 Vern. 179. S. P., *Williams* v. *Lane*, 8 Bro. P. C. 291.

Assignee of a mortgage from persons not having notice of mortgagor's being only tenant for life, not bound to discover whether he himself had notice. *Sweet* v. *Southcote*, 2 Bro. C. C. 66; Dick. 670.

A plea of purchaser without notice, is a bar to the discovery as well as the relief. *Eyre* v. *Dolphin*, 2 Ball & B. 303; 12 R. R. 94.

Claim for rent charge. The defendant admitted the right to the rent charge, but contended that he represented purchasers for valuable consideration without notice. He admitted he had in his possession title deeds which made out his own title, but did not make out or evidence the title of the claimant:—Held, that the defendant was not bound to produce them. *Att.-Gen.* v. *Strutt*, 3 Beav. 396; 10 L. J., Ch. 24.

Bill by tenant in tail in possession, under marriage settlement, for discovery and delivery of title deeds. Plea, mortgage by tenant for life alleging himself to be seised in fee, and in possession of premises and deeds as apparent owner. *Wallwyn* v. *Lee*, 9 Ves. 24; 7 R. R. 142.

—— **Contents of Deed Stated.**]—A. first mortgaged to B., and afterwards sold and conveyed to C., to whom he delivered the title deeds. In a suit by B. against C., insisting on his priority, C., by his answer, professed to state the contents of the deed of conveyance to A. He admitted

the possession of this and the other title deeds, but insisted that he was a purchaser for valuable consideration without notice:—Held, that B. was entitled to the production of the conveyance to A., but that the other title deeds were privileged. *Hunt* v. *Elmes*, 27 Beav. 62; 28 L. J., Ch. 680; 5 Jur. (N.S.) 645; 7 W. R. 471.

If the defendant in his answer sets out partially the conveyance made to his vendor, he must produce the deed to verify the statement. *Ib.*

—— **Mortgage — Tenants in Common.**]—Motion by a plaintiff, for the production of a deed in possession of the defendant as tenant in common with the plaintiff, refused as the defendant had sold his share, and was in possession of the deed only as a mortgagee to the purchaser. A mortgagee has no right to show the title of his mortgagor. *Lambert* v. *Rogers*, 2 Mer. 489; 16 R. R. 204.

—— **Person not Party to Action.**]—Person interested in issue devisavit vel non, refusing to be party to it, is yet allowed to attend trial by counsel, and ordered to produce deeds, &c., except those she held as mortgagee. *Pindar* v. *Smith*, 6 Madd. 48.

—— **Recital giving notice of Plaintiff's Title.**]—A title deed of the defendant was ordered to be produced where it contained a recital that might affect him with constructive notice of the plaintiff's interest in the estate. *Neesom* v. *Clarkson*, 2 Hare, 166, n.; C. P. Cooper, 93; 12 L. J., Ch. 99; 6 Jur. 1055.

—— **Fraud.**]—A deed in the custody of a purchaser for valuable consideration which the bill impeached for fraud, ordered to be produced. *Kennedy* v. *Green*, 6 Sim. 6.

Where the purchase was impeached on the ground of fraud and inadequate consideration, the purchaser was bound to produce the deeds by which that transaction was effected, and all subsequent documents relating to it, but not any of the other title deeds. *Addis* v. *Campbell*, 1 Beav. 258; 8 L. J., Ch. 305.

A son, heir-at-law to his father and one of the executors and trustees of his father's will, which had been proved by the other executors, and whose christian names and description were identical with those of his father, after his father's death, executed mortgages of property of the father, and applied the mortgage money to his own purposes. He handed over the title deeds to the mortgagees. The transaction took place without the knowledge of the co-trustees and co-executrixes. The will had not been registered in the Middlesex registry, though the property was situate in that county. The mortgage deeds were registered, and the solicitor who acted for both parties searched the Middlesex registry:—Held, that the mortgagees could obtain no title by virtue of the Middlesex Registry Act. *Cooper, In re, Cooper* v. *Vesey*, 51 L. J., Ch. 862; 20 Ch. D. 611; 47 L. T. 89; 30 W. R. 648.

Held, also, that the mortgagees must deliver up the title deeds to the plaintiffs. Since the Judicature Act the chancery division has jurisdiction on the application of the legal owner of the title deeds to order them to be delivered up by a purchaser for value without notice. *McLeod* v. *Drummond* (17 Ves. 152; 11 R. R. 41) distinguished. *Ib.*

Mortgage by trustees. The mortgagor subsequently, with the concurrence of one trustee, sold part of the mortgaged property with a recital that the mortgagor was seised or otherwise well and sufficiently entitled in fee simple. The solicitor-trustee received the purchase money, and retained it. Eleven years afterwards both trustees executed a reconveyance of the property so sold, the other trustee believing that the property was then about to be sold by the mortgagor:—Held, that though the purchasers were purchasers for valuable consideration without notice, they could not avail themselves of any legal estate acquired by means of the reconveyance, which, having been obtained by fraud, must be cancelled; and that they had purchased only the equity of redemption. *Heath* v. *Crealock*, 44 L. J., Ch. 157; L. R. 10 Ch. 22; 31 L. T. 650; 23 W. R. 95.

Held, that a decree must be made against the purchasers, but for foreclosure and not for sale; and that the purchasers would not be ordered to deliver up the deeds which were in their possession. *Ib.*

—— **Deed held by Executrix.**]—A jointress had her own part of the marriage settlement in her custody, and became possessed of her husband's, as his executrix; on motion, she was ordered to produce it to the clerk in court, but not to deliver it up, that being the very end of the bill. *Aston* v. *Aston*, 3 Atk. 302.

A jointress or purchaser ought to produce their deeds, to see if the lands they claim are comprised therein. *Ib.*

—— **Bankrupt Vendor.**]—Equity will not compel a man to discover what goods he really bought of a bankrupt after the bankruptcy, and before the commission sued out, where the party has no notice of the bankruptcy. *Abery* v. *Williams*, 1 Vern. 27.

Under a commission against a bankrupt mortgagor, the commissioners have authority, by the 6 Geo. 4, c. 16, ss. 33, 34, to enforce from a mortgagee of the bankrupt's property the production of his mortgage deed. The rule that a purchaser for valuable consideration, without notice, cannot be compelled to discover his title deeds, does not extend to the mortgage or purchase deed itself. *Caldecott, Ex parte, White, In re*, Mont. 55.

—— **Of Rents and Charges.**]—A plaintiff sought to set aside a lease and to obtain mesne profits. The defendant, the assignee, insisted on its validity, and that he was a purchaser for valuable consideration without notice:—Held, that the defendant was bound to answer, as to the amount of rents and profits, the particulars of his underletting and of his receipts, and what charges he had created. *Robson* v. *Flight*, 33 Beav. 268; 34 L. J., Ch. 226; 11 Jur. (N.S.) 147; 11 L. T. 725; 13 W. R. 393.

b. Purchaser with Notice.

In General.]—If a man will purchase with notice of another's right, giving a consideration will not avail him. *Mead* v. *Orrery (Lord)*, 3 Atk. 238.

A purchaser with notice is bound to the same manner as his vendor. Although a purchaser with notice be not a party to the original fraud, yet he is considered an accessory after

the fact. *Dunbar* v. *Tredennick*, 2 Ball & B. 319.

Equitable Transfer—Subsequent Acquisition of Legal Estate.]—The purchaser of a legal estate having express notice of a prior equitable conveyance by registered deed, and purchasing from a vendor who is out of possession, is not entitled to the property as against the equitable purchaser, and an erroneous recital of the earlier title in the registered deed does not preclude the grantor from showing what interest really passed by the deed. *Trinidad Asphalte Co.* v. *Coryat*, 65 L. J., P. C. 100; [1896] A. C. 587; 75 L. T. 108.

Purchase of Reversion — Fraud.] — B. purchased a reversionary interest of A. at a gross undervalue, and under circumstances which rendered the transaction void in equity. C. had notice of the invalidity of the contract, but ten years afterwards he purchased the reversion of B., paying to B. the full value; A. joined in the conveyance and confirmed the sale. The court, being of opinion that C. had not taken proper steps to protect A. in the second transaction, set it aside and decreed a reconveyance, on repayment of the consideration given by B. to A. in the first transaction. *Addis* v. *Campbell*, 4 Beav. 401.

Purchaser held Trustee.]—Purchaser, with notice of agreement to settle:—Held, a trustee. *Skirme* v. *Meyrick*, 2 Comyn, 700.

A mortgagee with notice of the settlement cannot protect himself as a purchaser, or be distinguished from the tenant for life, the mortgagor. *Eyre* v. *Dolphin*, 2 Ball & B. 290; 12 R. R. 94.

A purchaser or mortgagee shall not protect himself by taking a conveyance from a trustee after notice of the trust, for, by taking such conveyance, he becomes the trustee himself. *Saunders* v. *Dehew*, 2 Vern. 271.

An executor in trust for an infant renews a lease, in his own name, and having mortgaged it, assigns the equity of redemption to a trustee who sells to one who had notice of the infant's title. Purchase set aside. *Walley* v. *Walley*, 1 Vern. 484.

Trustee with Notice.]—By marriage settlement a rent charge was granted to trustees upon trusts; and the lands were granted to other trustees for a term to secure the rent charge. One trustee of the rent charge had notice of a prior incumbrance, no evidence that trustees of term had notice:—Held, that notice to the trustees of the rent charge was sufficient. *Wise* v. *Wise*, 2 Jo. & Lat. 403.

—— Inadequacy of Price.]—S., in 1810, bought a messuage in fee for 462*l*. The price paid by C. to the trustees of his will was only 73*l*. 4*s*., and the contract price between C. and the plaintiff in 1859 was 350*l*.:—Held, that the sale to C. was a breach of trust of which the plaintiff had notice and was entitled to refuse to complete the contract. *Stevens* v. *Austen*, 3 El. & El. 685; 30 L. J., Q. B. 212; 7 Jur. (N.S.) 873; 3 L. T. 810.

—— Covenant not to Appoint without Consent of Mortgagees.]—A tenant for life, with a power to charge, mortgaged his life estate; he covenanted with some of the mortgagees that he would not execute the power without their consent. He subsequently exercised the power, and created a term. The trustees, and also the appointees, had notice of the mortgages and of the covenant:—Held, that the appointees were not entitled to any priority, and that they must be postponed to the previous mortgage. *Hurst* v. *Hurst*, 22 L. J., Ch. 538; 1 W. R. 105.

Contract to Appoint.] — Equity will not relieve against a contract entered into by a child with a parent, for an appointment from him; and the purchaser from the parent, with notice of the fraud, will be affected with it. *Palmer* v. *Wheeler*, 2 Ball & B. 30; 12 R. R. 60.

Rights of Third Parties.]—Those who, with notice of his title, deal with a person entitled to a partial interest in the estate, are responsible for any dealing with the property which professes to encumber and embarrass the estate of the other persons claiming under the same instrument. *Nixon* v. *Robinson*, 2 Jo. & Lat. 4; 7 Ir. Eq. R. 520.

Notice to Subsequent Husband — Marriage Settlement.]—On the marriage of an infant, her reversionary interest in choses in action was settled for her separate use for life, with remainder to her children. She afterwards married twice, but no further settlement was executed:—Held, that the third husband, who had notice of the settlement previous to his marriage, was bound thereby. *Ashton* v. *M'Dougall*, 5 Beav. 56; 11 L. J., Ch. 344; 6 Jur. 447.

—— Purchaser from Husband.]— Notice of ancient articles, by which the estate is agreed to be settled on the husband for life, remainder, subject to a charge by way of jointure, for the wife, and to the heirs male of the husband, by his wife, shall not affect the title of a purchaser claiming under the husband by reason of the modern method of carrying such articles into execution. *Senhouse* v. *Earle*, Amb. 285; 2 Ves. sen. 450.

Title by Marriage.]—A. contracted to purchase real estate and died, having made his widow his universal devisee and legatee. The widow married B., who in 1793 took a conveyance of the premises to himself, and a trustee reciting the contract by A., his will, and death,—the marriage of his widow with B., and that "thereupon B. became entitled to the beneficial interest in the purchase." B. sold to C., and C. took a conveyance from B., and his trustee, not reciting the deed of 1793. The bill was brought by the heir-at-law, after the death of B.:—Held, that the recital in the deed must be understood as stating that the widow was devisee of the purchased premises, and that the title of B. accrued by the marriage; that C. must be presumed to have been cognisant of, and to have taken the title of, B. his vendor; and that the heir-at-law was entitled to the decree for conveyance of the estate. *Neesom* v. *Clarkson*, 2 Hare, 163; 12 L. J., Ch. 99; 6 Jur. 1055.

Account—Satisfaction.]—Account of arrears of annuity against purchaser with notice, length of time not being sufficient to presume satisfaction. *Wynn* v. *Williams*, 5 Ves. 130.

Will Suppressed—Purchase from Heir.]—A devisee obtains a decree to hold and enjoy against the heir, who had suppressed the will. Pending the suit, a third person gets an assignment of a mortgage of the testator, and then purchases the equity of redemption of the heir, with notice of the will. The court would not admit the purchaser to dispute the justice of the decree. *Finch* v. *Newnham*, 2 Vern. 216.

Voluntary Agreement.]—A. voluntarily agrees to give certain houses to his niece, after the death of himself and his wife, but no conveyance was executed by A. In the meantime, A. becomes indebted, and by his will devises all his estate to his wife. This agreement is not good against a purchaser for valuable consideration, although a subscribing witness to it. *Powell* v. *Pleydell*, 1 Bro. P. C. 124.

Goods Purchased by Consignor.]—A consignor who had purchased goods on account and at the risk of his correspondent, has no right to deliver them to another person; and a party taking from the consignor with notice, is subject to the rights of the correspondent. *Green* v. *Maitland*, 4 Beav. 524.

Nature of Interest Sold.]—A person, agreeing to purchase the right and interest of another, under a contract for a lease with full notice of the nature of it, cannot object that such contract is not binding on the other party to it, or for want of title. *Baxter* v. *Conolly*, 1 J. & W. 576; 21 R. R. 237.

Lease by Lord of Manor.]—Lord of manor (his tenants refusing to renew) makes a lease of the premises to his daughter for ninety-nine years, and afterwards sells the manor to A., who has notice of the lease, but has security that the daughter when at age should surrender; daughter decreed to have the benefit of the lease. *Jennings* v. *Selleck*, 1 Vern. 467.

Sale Subject to Lease.]—A. sold to B. an estate in fee simple expressly subject to a lease which purported to have been granted by A.'s predecessor in title. The lease was, in fact, invalid:—Held, that B. was not bound to give effect to the invalid lease. *Smith* v. *Widlake*, 47 L. J., C. P. 282; 3 C. P. D. 10; 26 W. R. 52—C. A.

A. made an equitable mortgage to B., and afterwards agreed to grant a lease to C., who had notice of the mortgage: B. afterwards purchased the equity of redemption, with notice, and took a conveyance:—Held, that B. was bound, out of his interest, to grant the lease to C. *Smith* v. *Phillips*, 1 Keen, 694; 6 L. J., Ch. 253.

Purchaser from tenant in tail, with notice of agreement by him, to renew a lease which the father, tenant for life, had covenanted to renew, is bound to renew. *Brooke* (*Earl*) v. *Bulkeley*, 2 Ves. sen. 498.

Purchaser with notice is bound in all respects as the vendor: therefore, where tenant for life granted leases for lives under a power, and bound himself, upon the dropping of a life, to grant a new lease, and afterwards joined in a sale; if a life drops in the life of the lessor, the purchaser, having notice, must grant a new lease with the same provisions. *Brydges* v. *Chandos* (*Duke*), 2 Ves. J. 437.

Knowledge of Invalidity of Title.]—When a husband and wife agreed to sell her estate in fee simple, the purchaser being aware that the estate belonged to the wife, and she afterwards refused to convey:—Held, that the purchaser could not compel the husband to convey his interest and accept an abated price. *Wilkinson* v. *Castle*, 39 L. J., Ch. 843; L. R. 5 Ch. 534; 18 W. R. 586.

Purchaser bound to Inquire into Title of Co-Tenants.]—Property held by C. and B., tenants in common in fee, was agreed by them to be partnership property, and B. made a legal mortgage in fee of one moiety, to secure his private debt, to a person who knew that the property was the place of business of the firm. The firm became largely indebted to C.:—Held, that as the mortgagee, when he took his security, knew that the firm was in possession of the property, he had constructive notice of the title of the partnership, and that his claim must be postponed to that of C. *Cavander* v. *Bulteel*, 43 L. J., Ch. 370; L. R. 9 Ch. 79; 29 L. T. 710; 22 W. R. 177.

Notice as to Subsisting Tenancy.]—A purchaser buying with notice of tenants in possession is bound to inquire into the nature of their interest, and is not entitled to an abatement of the purchase money because their interest proves to be larger than he supposed when he entered into the contract. *James* v. *Lichfield*, 39 L. J., Ch. 248; L. R. 9 Eq. 51; 21 L. T. 521; 18 W. R. 158.

Notice to a purchaser of the occupancy of a portion of the lands by a tenant fixes him with notice of all the rights of the tenant, not only as between the purchaser and the tenant, but also as between the purchaser and the vendor. *Carroll* v. *Keayes*, Ir. R. 8 Eq. 97; 22 W. R. 243. *See* preceding case.

The conditions of sale of a public-house stated that it was in the occupation of a tenant:—Held, that the purchaser was not bound to ascertain from the tenant the terms of his tenancy. *Caballero* v. *Henty*, 43 L. J., Ch. 635; L. R. 9 Ch. 447; 30 L. T. 314; 22 W. R. 446.

Clause of Forfeiture—Sale by Sheriff.]—A lease contained a clause of forfeiture, if any writ of execution should issue, by virtue of which it should be liable to be taken in execution or sold; under a writ of fieri facias issued against the lessee, the sheriff sold and conveyed his interest under the lease, "if any," to the plaintiff, who was aware of the clause of forfeiture; the purchaser having got possession and having been evicted:—Held, that he could not afterwards recover the purchase money. *Griffin* v. *Caddell*, Ir. R. 9 C. L. 488.

Notice of Title.]—Purchaser of a lease, bound to know from whom the lessor derived his title, not to take notice of all the circumstances under which it is derived. Therefore, understood to have notice, that the lessors were trustees for a charity, not that the lease was bad, that depending on circumstances dehors. *Att.-Gen.* v. *Backhouse*, 17 Ves. 293.

The rule, that a purchaser is bound to inquire into the title of his vendor, applies to the case of a lessee who neglects to inquire into his lessor's title. *Fielden* v. *Slater*, 38 L. J., Ch. 379; L. R. 7 Eq. 523; 20 L. T. 112; 17 W. R. 485.

The doctrine of purchase for value without notice, does not apply to a purchase of a leasehold interest without notice of the lessor's title, if it turns out that the lessor had no power to grant the lease. *Robson* v. *Flight*, 34 L. J., Ch. 101 ; 10 Jur. (N.S.) 1228 ; 11 L. T. 558 ; 13 W. R. 195.

Notice of a lease is not notice that the reversion remained vested in the lessor until his death. *Pegler* v. *White*, 33 L. J., Ch. 569 ; 10 Jur. (N.S.) 300 ; 10 L. T. 84 ; 12 W. R. 455.

A person contracting to purchase leasehold property, is held to contract with notice of the clauses of the lease. *Walter* v. *Maunde*, 1 J. & W. 181 ; 21 R. R. 141.

A party claiming title under a lease or any other instrument is presumed to know the title under which he takes and the circumstances connected with it, unless he can show the contrary. *Butler* v. *Portarlington (Earl)*, 1 Dr. & War. 20 ; 1 Con. & L. 1 ; 4 Ir. Eq. R. 1.

—— **Collateral facts.**]—Quære, whether the doctrine, that a purchaser of leaseholds, or of freeholds subject to a lease, has notice of the covenants in the lease, can be extended to fix him with notice of collateral facts stated in such covenant. *Darlington* v. *Hamilton*, 1 Kay, 550 ; 2 Eq. R. 906 ; 23 L. J., Ch. 1000.

—— **Covenants.**]—A purchaser of a leasehold sold under a decree is bound by notice of all clauses and covenants in the lease, whether unusual or not, without their being specially mentioned in the rental or conditions. *Vaughan* v. *Magill*, 12 Ir. Eq. R. 207.

During a treaty for an assignment for a lease, the plaintiff produced and the defendant looked at the lease :—Held, that the defendant had notice of a covenant against assignment without licence. *Smith* v. *Capron*, 7 Hare, 189 ; 19 L. J., Ch. 322 ; 14 Jur. 686.

—— **Unusual Covenants.**]—The purchaser of leaseholds has notice of what it is he purports to buy, and that he must be bound by all the covenants in the lease ; but one who contracts for a lease from a party, with knowledge that he holds under a leasehold title, has notice of ordinary but not of unusual covenants in the original lease. *Wilbraham* v. *Livesey*, 18 Beav. 206.

Covenants in restraint of trade in a trading locality are not considered usual covenants. *Ib.*

A purchaser of leasehold property cannot avoid specific performance, on the ground that it contains an unusual covenant, which was not mentioned in the particulars or at the sale. *Grosvenor* v. *Green*, 28 L. J., Ch. 173 ; 5 Jur. (N.S.) 117 ; 7 W. R. 140.

Upon the sale of leasehold property, it is the duty of the purchaser to inquire into the contracts and stipulations of the original lease ; leasehold property about to be sold was described in the particulars as being held at a ground-rent of 86*l.* per annum, and it appeared from the lease that the ground-rent was 80*l.*, and one-third of the improved yearly rent or value, and there were other stringent covenants in the lease, not noticed in the particulars :—Held, nevertheless, that the purchaser must be held to his contract. *Pope* v. *Garland*, 4 Y. & C. 394 ; 10 L. J., Ex. Eq. 13.

The original conveyance contained a covenant with the vendors, that no building to be erected on the premises should be used for the sale of beer, wine, or spirits. A house was built, and a tenant from year to year, not having actual notice of the covenants, opened a beershop :—Held, that it was the duty of the tenant to have inquired into the title of his lessor. *Wilson* v. *Hart*, 35 L. J., Ch. 569 ; L. R. 1 Ch. 463 ; 14 W. R. 748.

The rule, that a purchaser is bound to inquire into the title of his vendor, applies equally to a tenant from year to year in relation to the title of his lessor. *Ib.*

A purchaser or lessee having notice of a deed forming part of the title of his vendor or lessor, has constructive notice of the contents of such deed, and is not protected from the consequences of not looking at the deed, even by the representation of the vendor or lessor that it contains no restrictive covenants, nor anything in any way affecting the title. The rule that a lessee has constructive notice of his lessor's title has not been altered by s. 2, sub-s. 1 of the Vendor and Purchaser Act, 1874, but a lessee is now in the same position with regard to notice as if he had, before the act, stipulated not to inquire into his lessor's title. *Wilson* v. *Hart* (supra) observed upon. *Patman* v. *Harland*, 50 L. J., Ch. 642 ; 17 Ch. D. 353 ; 44 L. T. 728 ; 29 W. R. 707.

—— **Offer to Inspect Leases.**]—Particulars of sale described the thing to be sold, and stated the property to be held under a sub-lease of the full term of the ground lease. The conditions of sale provided that no objection should be taken by reason of the sub-lease being in excess of the superior lease, and offered inspection of the lease, and provided that the purchaser should be held to have notice of the leases, and their effect, whether he inspected or not :—Held, that the particulars disclosing the facts, and the conditions referring to the facts, the purchaser was bound, particularly having regard to the circumstances that inspection was offered. *Smith* v. *Watts*, 4 Drew. 331 ; 28 L. J., Ch. 220 ; 7 W. R. 126.

—— **Underlease.**]—Although a vendor who contracts for the sale of leasehold property described as held under a lease cannot, if nothing further is said, make a good title unless it is held under an original lease, yet in a case where the particulars and conditions of sale of property contained enough to give notice that the property was held under a derivative lease :—Held, that the purchaser could not refuse to complete, or claim compensation. *Camberwell and South London Building Society* v. *Holloway*, 49 L. J., Ch. 361 ; 13 Ch. D. 754 ; 41 L. T. 752 ; 28 W. R. 222.

A purchaser of a lease who knows at the date of the contract that the vendor's interest is only an underlease, is bound, although the interest is described in the contract as a lease. *Flood* v. *Pritchard*, 40 L. T. 873.

It is the duty of a person contracting for an underlease to inform himself of the covenants contained in the original lease, and he will be bound by those covenants. Where the original lease contained unusual covenants, but the defendant's solicitor had an opportunity of inspecting the original lease, it was held that the defendant was bound to accept a lease with the unusual covenants. *Cosser* v. *Collinge*, 3 Myl. & K. 283 ; 1 L. J., Ch. 130.

A party who enters into an agreement for an

underlease, without inquiring into the covenants of the original lease, has constructive notice of all usual covenants in the original lease. Quære, whether he has such notice of unusual covenants. But where a party agreed to take an underlease and informed lessee of the business he meant to carry on:—Held, that the silence of the lessee was equivalent to representation that there was no prohibiting covenant. *Flight* v. *Barton*, 9 Myl. & K. 282.

c. Sub-Purchaser.

Rule as to Notice.]—A person affected by notice, has the benefit of the want of notice by intermediate parties. *M'Queen* v. *Farquhar*, 11 Ves. 478; 8 R. R. 202. S. P., *Lowther* v. *Carlton*, 2 Atk. 242; Cas. t. Talb. 186.

One affected with notice conveys to another without notice; the assignee having legal estate shall not be affected with the notice to assignor, and so vice versâ. *Mertins* v. *Jolliffe*, Amb. 313.

A. sells to B., who has notice of an incumbrance on the estate; B. sells to C., who has no notice; and he to D., who has notice; whether this revives the first notice to B. *Harrison* v. *Forth*, Pre. Ch. 51.

Assignee of a mortgage from persons not having notice of mortgagor's being only tenant for life:—Held, not bound to discover whether he himself had notice. *Sweet* v. *Southcote*, 2 Bro. C. C. 67; Dick. 670.

—— **Fraud.**]—A. articles to sell lands to B. for 15,000*l.*, the whole to be paid in money, or so much land returned as would make up what he paid short of 15,000*l.* A. conveys part of the lands to B., and by persuasion values that part at an undervalue: and then B. sells this part to C., and afterwards would have returned so much of the lands as would make up the 15,000*l.* Articles set aside as unreasonable, but the sale to C. to stand. *Whorwood* v. *Simpson*, 2 Vern. 183.

—— **Land in Register County.**]—A vendor of land situate in a register county, part of whose purchase money remains unpaid, is under no obligation to obtain for the unpaid amount any written security which can be registered, but is entitled to rely simply on his equitable lien, which he can enforce against sub-purchasers who have notice of it, actual or constructive; and such a vendor will not, by registering the conveyance to his purchaser, if he retains the deed in his possession, lose his lien as against sub-purchasers from the original purchaser. *Kettlewell* v. *Watson*, 51 L. J., Ch. 281; 21 Ch. D. 685; 46 L. T. 83; 30 W. R. 402.

—— **No Notice Proved.**] — The plaintiffs sought to set aside a conveyance made by a lunatic, under undue influence, and for an inadequate consideration. The defendant, who claimed under a derivative title from the purchaser, insisted that he was a purchaser for valuable consideration without notice. No notice, actual or constructive, having been proved, the court dismissed the bill with costs. *Greenslade* v. *Dare*, 20 Beav. 284; 24 L. J., Ch. 490; 1 Jur. (N.S.) 294; 3 W. R. 220.

Exception to Rule—Fraud.]—The only exception to the rule which protects a purchaser with notice taking from a purchaser without notice, is that which prevents a trustee buying back trust property which he has sold, or a fraudulent man who has acquired property by fraud saying he sold it to a bonâ fide purchaser, without notice, and he got it back again. Semble, *Barrow's Case*, 49 L. J., Ch. 498; 14 Ch. D. 445; 42 L. T. 891.

A purchaser for value, without notice, from one who claimed under a conveyance obtained by fraud, cannot defend himself where the person who so claimed was not in possession as apparent owner at the time of the sale. *Ogilvie* v. *Jeaffreson*, 29 L. J., Ch. 905; 8 W. R. 745.

—— **Voluntary Deed.**]—A purchaser for a valuable consideration, with notice of voluntary settlement from a person who bought without notice, shall shelter himself under the first purchaser, but he cannot defend himself in equity upon articles only. *Brandlyn* v. *Ord*, 1 Atk. 571; 1 West, 512.

One purchases, having notice of a settlement, whereby the vendor was but tenant for life, and afterwards sells to one who had no notice. Decreed, the last purchaser shall hold the land, but the first shall account for the purchase money, which he received with interest. *Ferrars* v. *Cherry*, 2 Vern. 383.

The purchaser, having notice of the settlement, it was incumbent on him to inquire whether it was voluntary. *Ib.*

Sale to Different Purchasers.]—A. agrees verbally to sell an estate to B.; he afterwards agrees in writing to sell it to C.; and then conveys it to B., in pursuance of the first contract, B. having notice of the second. Semble, C. cannot call on B. for a conveyance. *Dawson* v. *Ellis*, 1 J. & W. 524; 21 R. R. 227.

A parol agreement for the purchase and possession delivered, decreed to be performed against a subsequent purchaser with notice, who had a conveyance, and had paid his money. *Butcher* v. *Stapeley*, 1 Vern. 363.

If a vendor contract with two different persons for the sale to each of them of the same estate, the court will primâ facie enforce the contract which was first made; and if the party with whom the second contract was made should, after notice of the first contract, get in the legal estate, the court will compel him to convey to the first purchaser. *Potter* v. *Sanders*, 6 Hare, 1.

A. and B. having entered into a verbal treaty for the purchase of premises belonging to A., and not being able to agree as to the purchase money, A. addressed a letter to C., stating that he would take a certain sum from B. for the premises, if C. approved of it. B. subsequently lodged the sum named by A. with C. During the negotiations between A. and B., A. entered into a contract with D., and although notice of the agreement between A. and B. was given to D., conveyed the premises to D.:—Held, that D. having had notice of the agreement, the conveyance to him must be considered as fraudulent, and should be delivered up to be cancelled, and that the costs of B. should in the first place be paid out of the funds lodged by her in the hands of C. *Field* v. *Boland*, 1 Dr. & Wal. 37.

W. after completing a contract to buy premises, told M. that he had done so. M. was afterwards informed by the vendor that the treaty with W. was off. M. did not make any further inquiry, but bought and took an assignment of the premises himself:—Held, that he must be held to have had notice of W.'s contract. *Waldron* v. *Jacob*, Ir. R. 5 Eq. 131.

d. Assignment of the Contract.

Rights of Assignee.]—An equitable interest under a contract of purchase may be the subject of sale; the sub-contract converts the original vendee into a trustee of his equitable interest for his vendee, who acquires the same rights which he had under the primary contract. *Wood* v. *Griffith*, 1 Swanst. 56; 18 R. R. 18.

—— **Notice to Vendor.**]—Notice to a vendor that his vendee has agreed to make a valid assignment of the contract, if requested, does not put the vendor upon inquiry whether his vendee has been requested to make, or has made, such assignment, nor does it justify the vendor in refusing to convey to the vendee upon payment of the purchase money. *Shaw* v. *Foster*, 42 L. J., Ch. 49; L. R. 5 H. L. 321; 27 L. T. 281; 20 W. R. 907.

The persons who claim the benefit of the assignment must give distinct notice to the vendor of their claim, and of their readiness to put themselves in the vendee's position for the completion of the contract. *Ib.*

—— **Two Contracts.**]—P. agreed to sell to M. a plot of land, the purchase to be completed in five years or earlier at M.'s option. P. had previously agreed to sell an adjoining plot to M. The plaintiff was employed by M. to build on the first plot, and M. became indebted to him on that account and agreed to sell the first plot to the plaintiff. P. then told the plaintiff that both contracts must be completed together, and P. and M. sold and conveyed both plots to H.:—Held, that the plaintiff had no equity to have his sub-contract performed. *Crabtree* v. *Poole*, 40 L. J., Ch. 468; L. R. 12 Eq. 13; 24 L. T. 895.

Assignee substituted for Vendee.]—Bill for specific performance of an agreement against the original vendee and an assignee of his contract dismissed as against the former, the plaintiff being held to have accepted the latter as purchaser. Quære, if the bill had been filed against the original purchaser only. *Holden* v. *Hayn*, 1 Mer. 47; 15 R. R. 83.

C. SALE BY THE COURT.

1. In General.

Jurisdiction of Court.] — Devise to trustees upon trusts to pay debts, and subject thereto upon trust as to a house to allow his wife to reside there, and on her death upon trust for sale. In an administration suit:—Held, that during the life of the widow the court had no power to order a sale. *Carlyon* v. *Truscott*, 44 L. J., Ch. 186; L. R. 20 Eq. 348; 32 L. T. 50; 23 W. R. 302.

On the sale by the court of a reversionary interest in which infants were interested there was a special condition that the purchaser should make no objection on the ground of want of jurisdiction:—Held, that the condition of sale was fair and reasonable. *Nunn* v. *Hancock*, 40 L. J., Ch. 700; L. R. 6 Ch. 850; 25 L. T. 469; 19 W. R. 1041.

Semble, that the court had jurisdiction to make the order for sale, and that the infants and all other parties were bound by it. *Ib.*

Conveyancing Counsel of the Court.]—The conveyancing counsel of the court, though in a sense an officer of the court, is still counsel for the vendor, who is responsible for any misrepresentations in the conditions of sale settled by such counsel. *Broad* v. *Munton, Bannister, In re*, 40 L. T. 319, 828; 27 W. R. 826.

After Decree.]—By the decree, the plaintiff's demand was declared a charge upon the lands, and liberty was given to all parties to apply as occasion might require. The court, subsequently, on motion, directed a sale. *Watson* v. *Pim*, Dr. 90.

Before Trial.]—In an action to enforce a charge on real estate, the plaintiff is, under ordinary circumstances, entitled to an order for sale before the trial on showing a case upon which such an order would be made at the trial. Action by creditor for a debt secured on real estate of a company in liquidation. Upon an interlocutory application, under s. 55 of the Chancery Procedure Act, 1852, 15 & 16 Vict. c. 86, the court ordered an immediate sale. *Davis* v. *Ashwin, Brynmawr Coal and Iron Co., In re*, 47 L. J., Ch. 70; 26 W. R. 139.

Order for Sale Free from Incumbrance.]—Under s. 5 of the Conveyancing Act, 1881, an order for the sale of land free from an incumbrance (the incumbrancer not being a party to the action) should follow the words of the act, which are to be interpreted strictly, and after directing payment into court of the purchase money, and setting apart a sufficient amount to meet the claims of the incumbrancer, proceed to declare that thereupon any person interested should be at liberty to apply in chambers for a declaration that the land is free from the incumbrance. *Dickin* v. *Dickin*, 30 W. R. 887.

And see cases, supra, col. 1253.

Direction as to Mode of Sale.]—Where a real estate, forming part of an estate which is being administered by the court, is charged with an annuity, upon further consideration the court will not, under the Conveyancing Act, 1881, s. 5, direct the property to be sold free from the annuity, but will direct an application in chambers as to the mode of sale. *Patching* v. *Bull*, 46 L. T. 227; 30 W. R. 244.

Real estate ordered to be sold pending inquiries before the master. *Martin* v. *Hadlow*, 1 W. R. 101.

On further Consideration.]— Hearing for further directions. Decree for a sale pronounced. *Simpson* v. *O'Sullivan*, Dr. 89.

Reference to Master.]—Court refused to make an order under an act of parliament for sale of estate upon opinion of conveyancer merely approving the conveyance, without reference to the master. *Newcastle (Duke), Ex parte*, 6 Ves. 454.

—— **Statement of Title.**]—The master will not be ordered to sell an estate until a statement of title is made out and lodged in his office. How to proceed when defendant refuses to give statement of his title. *Roberts* v. *Roberts*, 1 Hog. 124.

Collateral Order—Sale of a Term.]—The decree being for sale of a term, the court, on the application of the inheritor, superadded a direction to the master at the same time to sell the fee. This collateral order being for the benefit of one party, and without prejudice to any, may be appended without affecting the enrolment of the decree. *Sheppard* v. *Murdock*, 1 Moll. 130.

Equitable Estate.]—Though the court will not, in general, give a decree for a sale of an equitable estate in lands; yet if the plaintiff is not entitled to call for a conveyance of the legal estate, it will make such decree. *Tremble* v. *Simpson*, 6 Ir. Eq. R. 98.

Heir out of Jurisdiction.]—Two of four co-heiresses-at-law residing out of the jurisdiction, sale of the inheritance decreed in their absence, at the suit of judgment creditor of ancestor. The heir-at-law being absent from the jurisdiction, real estate may be sold by the court at the suit of creditor. *Leahy* v. *Dancer*, 3 Moll. 108.

Duty of Purchaser.]—Purchaser under decree bound to see directions of decree observed. *Colclough* v. *Sterum*, 3 Bligh, 181; 22 R. R. 1.

Settled lands directed to be sold subject to charges prior to the settlement. Pending suit, tenant for life creates charges upon the lands, and they are sold subject to those charges:—Held, that the sale, subject to charges not warranted by decree, is void. *Ib.*

Misrepresentation and Concealment of Facts.]—The proposition laid down by the court of appeal, that "a person desirous of buying property which is being sold under the direction of the court must either abstain from laying any information before the court in order to obtain its approval, or must lay before it all the information he possesses, and which it is material that the court should have to enable it to form a judgment on the subject under its consideration," is too broadly stated. It does not follow that because information on some material point or points is offered, or is given on request, by a purchaser from the court, it must therefore be given on all others as to which it is neither offered nor requested, and concerning which there is no implied representation, positive or negative, direct or indirect, in what is actually stated. *Cooks* v. *Boswell*, 55 L. J., Ch. 761; 11 App. Cas. 232; 55 L. T. 32—H. L. (E.)

Dower.]—The decree directed a sale of a competent part of the lands, and the claim of dower subject to which the sale was to be had, overriding the whole lands. All parties consenting a commission was decreed to set out dower without a bill for that purpose. *Chambers* v. *Davenport*, 1 Moll. 490.

Rights of Incumbrancers.]—A decree for the sale of an incumbered estate does not, of itself, alter the rights of parties. *Wild* v. *Lockhart*, 10 Beav. 320; 16 L. J., Ch. 519.

—— **Interest on Purchase Money.**]—Purchase money paid in by confirmed purchaser under a decree was invested in stock:—Held, that the purchaser was entitled either to his money with interest or to the stock bought, to the amount of an incumbrance which could not be paid off. *Scott* v. *Rothe*, 2 Moll. 548.

—— **Annuity.**]—Where lands are decreed to be sold subject to an annuity, it is conclusive evidence that the annuity is prior to the claims of all persons claiming under the decree. *Sparrow* v. *Cooper*, 1 Jones, 72.

Vacating Biddings.]—Consent of owner of property sold under decree is necessary to a motion to vacate a bidding. *Rex* v. *Brickdale*, 8 Price, 630.

Warranty of Title.]—The court of chancery does not warrant the title of an estate, which is purchased under its direction. *Toulmin* v. *Steere*, 3 Mer. 223; 17 R. R. 67.

Protection of Purchaser.]—By s. 70 of the Conveyancing Act, 1881, the title of the purchaser is protected even where an objection to the order appears on the face of it. *Hall Dare's Contract, In re*, 51 L. J., Ch. 671; 21 Ch. D. 41; 46 L. T. 755; 30 W. R. 556—C. A.

2. Mode and Conduct of Sale.

a. In General.

In Chambers.]—Sales ought to be ordered to be made at chambers, not by parties with the approbation of the judge at chambers. *Nash* v. *Worcester Improvement Commissioners*, 1 Jur. (N.S.) 973.

The court of appeal will not interfere with an order of the judge of the court directing the sale to take place in his own chambers. *Macdonald* v. *Foster*, 6 Ch. D. 193; 37 L. T. 296; 25 W. R. 687.

Sale of Shares.]—Shares in joint-stock and other companies, directed to be sold, should be sold out of court. *Cobden* v. *Maynard*, 1 N. R. 354.

Sale in One Lot.]—Premises held under distinct leases ordered to be sold in one lot upon the probability that a higher price would be obtained by that mode of sale. *Cook* v. *Collingridge*, 3 Russ. 520.

Sale subject to Annuity.]—See *Patching* v. *Bull*, supra, col. 1374.

Lease after Decree.]—If lands be leased by the inheritor after a decree to account, they will be set up in the first instance subject to the lease; and if they do not produce sufficient to pay the incumbrances, decreed with costs, they will then be set up discharged of the lease. *Barrett* v. *Bermingham*, Sau. & Sc. 678.

Reserve Price Disclosed.]—A property ordered by the court to be sold by auction was bought in. Before the auctioneer had left the rostrum, A. signed a contract to purchase it, at the reserved price, which was divulged contrary to instructions given to the auctioneer:—Held, that there was a valid binding contract. *Else* v. *Barnard*, 28 Beav. 228; 29 L. J., Ch. 729; 6 Jur. (N.S.) 621; 2 L. T. 203. S. P., *Bousfield* v. *Hodges*, 33 Beav. 90.

Sale by Private Contract.]—Although in pursuance of an order of court directing a sale of real estate by public auction, an attempt has been made to sell by public auction and has failed, the property cannot be sold otherwise than by public auction until a proper order for the purpose has been obtained. *Berry* v. *Gibbons, Lee, Ex parte*, 42 L. J., Ch. 231; L. R. 15 Eq. 150.

Where sale before master is directed to take place by decree, a contract for private sale by

trustee will not be enforced. *Raymond* v. *Webb*, Lofft, 66.

Who may Sell—Master.]—The masters are personally to superintend sales under decrees, and a sale had in the master's office, before his clerk, but in his absence, will be set aside for irregularity. *Ellis* v. *Molloy*, 2 Hog. 255.

—— **Auctioneer.**]—Auctioneer in the country appointed to conduct the sale under a decree, to avoid the expense of sending the master's clerk. *Thompson* v. *Dodgson*, 2 Y. & C. 311; 6 L. J., Ex. Eq. 80.

—— **Chief Clerk.**]—The court, if parties are present and consent, has jurisdiction to direct an estate to be sold by auction by the chief clerk, without the employment of an auctioneer. *Pemberton* v. *Barnes*, 41 L. J., Ch. 209; L. R. 13 Eq. 349; 26 L. T. 389.

—— **Plaintiffs.**]—Where a sale is made by the court, and the purchasers pay their money into court, the plaintiffs are entitled to the conduct of the sale; but where a sale, directed by decree, is made out of court, the trustee or executor is the proper person to conduct it. *Cobden* v. *Maynard*, 1 N. R. 354.

The plaintiff in a cause held entitled to the conduct of the sale of partnership property. *Dale* v. *Hamilton*, 10 Hare (App.) vii.

—— **Plaintiff Bidding.**]—Where a plaintiff obtains liberty to bid, the management of the sale will be taken from his solicitor. *Drought* v. *Jones*, Fl. & K. 316; *Ennis* v. *Casey*, *id.* 319, n.

—— **Defendant.**]—Ordinarily, the conduct of a sale directed by the court is committed to the plaintiff; but when it appears for the benefit of the parties, it will be given to a defendant. This right does not, however, depend on the extent of the interest of the parties in the property. *Knott* v. *Cottle*, 27 Beav. 33.

—— **Trustee.**]—When a sale has been decreed in one of two concurrent suits, the fact of the party to whom has been given the conduct of the cause being an entire stranger to the family and to the property is a sufficient reason for taking away from him the conduct of the sale, and giving it to the trustee and testamentary guardian of infant parties. *Garmeson, In re, Garmeson* v. *Sharrod*, 21 W. R. 98.

—— **Other Parties.**]—Under a decree, directing the sale of an estate, but not directing by whom the sale shall be conducted, the master is not bound to give the conduct of the sale to the plaintiff, but may in his discretion, if he considers it more beneficial to the estate, give the conduct of the sale to other parties. *Dixon* v. *Pyner*, 7 Hare, 331; 19 L. J., Ch. 402; 14 Jur. 217.

Grounds on which the conduct of a sale, under the decree of the court, may properly be given to parties other than the plaintiff. *Ib.*

—— **Solicitor.**]—In a sale under a decree, the solicitor of the plaintiffs having the management of the sale is to be considered, as between the vendors and the purchaser, to be the agent of all the parties to the suit. *Dalby* v. *Pullen*, 1 Russ. & M. 296; 8 L. J. (o.s.) Ch. 74.

No one except the person having the conduct of the sale may interfere in any way. Thus, where the court gave the conduct to an independent solicitor, both plaintiff and defendant having liberty to bid, the plaintiff was restrained from issuing and circulating advertisements that the sale was about to take place. *Dean* v. *Wilson*, 48 L. J., Ch. 148; 10 Ch. D. 136; 27 W. R. 377.

Non-compliance with Formalities.]—After the estate had been sold by auction under a decree, the purchaser's title is not to be attacked merely on the ground that the holder of the decree had not complied with all the statutory formalities for the conduct of such sale. *Singh* v. *Singh*, 9 L. T. 129.

Reserved Biddings.]—A direction for a reserved bidding ought not to be inserted in a decree for sale, but ought to be the subject of a separate order. *Brooker* v. *Collier*, 3 Russ. 369.

—— **Mortgage.**]—Although in sales by the court it is usual to fix the reserved price at the amount at which the estate has been valued, an exception will be made where a mortgagee, who, being also a trustee, is incapable of bidding, is desirous of having it fixed at an amount sufficient to cover his debt. *Tennant* v. *Trenchard*, 41 L. J., Ch. 779; 20 W. R. 785.

A trustee who had a charge on the estate of greater amount than its value, as fixed by the cestui que trust for the reserved bidding, was allowed to fix the reserve bidding at the amount of his charge. *Ib.*

—— **Resale.**]—The conditions of sale fixed a reserve bidding, under which the auctioneer announced a sum, and there being an uncertainty as to who had the bid, the estate was bought in at another sum:—Held, that the auctioneer had no right to fix more than one reserved bidding, nor could a bidder claim a resale if the parties interested did not desire it. *Notley* v. *Salmon*, 1 W. R. 240.

—— **By whom Fixed.**]—At a sale by order of the court, a reserved bidding allowed to be made one of the conditions, the master to fix the amount, and to use his discretion in communicating it to the parties or their solicitors. *Jervoise* v. *Clarke*, 1 J. & W. 389.

Conditions.]—The court in proper cases will refer it to the remembrancer to settle conditions of sale. *Bennett* v. *Beamish*, Jon. & C. 178. And see *Cooke* v. *Campbell*, *id.* 183, n.; *Mackay* v. *Orr*, *Barrington* v. *Blake*, *id.* 184, n.; *Johnson* v. *Auchinleck*, *id.* 185, n.

—— **Defect in Title.**]—The court will not set up a title knowing it to be bad; therefore, when the court is apprised of a defect of such a nature that it must render the title absolutely bad, it will not, by a condition of sale, preclude objection to such a defect. *Bennett* v. *Wheeler*, 1 Ir. Eq. R. 18.

Where there was a decree for the sale of the whole lands, a reference to settle conditions of sale of a moiety refused, as decree was for sale of the whole. The court will not set up lands for sale knowing the title to be bad. *Piers* v. *Piers*, Sau. & Sc. 414. Affirmed, 1 Dr. & Wal. 265.

—— **Lease.**]—The court will not make a con-

dition of sale of an interest under a lease, that no objection be made to the title of the lessor to make the lease; but it will direct that a purchaser shall not require the plaintiff to show that the lessor had such power, leaving the purchaser at liberty to object aliunde. *Willes* v. *Latham*, Sau. & Sc. 441.

—— **Sale by Lots.**]—Where an estate was set up for sale in two lots and one was sold, the court approved of a condition of sale to the remaining lot: that the purchaser should not require original searches for judgments, but should be satisfied with compared and certified copies of searches made by purchaser of the first lot. *Fitzgerald* v. *Lane*, 2 Ir. Eq. R. 447.

—— **"Grantees."**]—On a sale in court, the court refused to alter the conditions under which the property had been sold, so as to substitute the word "grantees" for the word "grantors," though probably there had been a clerical error. *Brown* v. *Paull*, 2 Jur. (N.S.) 317.

—— **Rescission.**]—Conditions of sale, settled by the court, provided that a conveyance on a sale made by B. in 1838, should be the root of title: that no objection or requisition should be made with respect to earlier title, and that recitals in deeds twenty years old should be conclusive. That conveyance purported to recite the will, but stopped short of the final gift over, thus showing a good title to the fee in B.:—Held, that a purchaser was not precluded from showing that B.'s title under the will was defective, and that he was entitled to be freed from his contract, and to costs. *Else* v. *Else*, 41 L. J., Ch. 213; L. R. 13 Eq. 196; 25 L. T. 927; 20 W. R. 286.

A sale in chambers under a decree having been declared invalid on the ground that the sale took place before the certificate was made:—Held, that the vendors could not avail themselves of a condition enabling them to rescind on repayment of the deposit without interest and without costs on either side; and that the discharged purchaser was entitled to the stock arising from his deposit, which had been paid into court and invested, with the dividends thereon, with costs, charges, and expenses. *Powell* v. *Powell*, 44 L. J., Ch. 311; L. R. 19 Eq. 422; 32 L. T. 148; 23 W. R. 482.

And see *Scott* v. *Rothe*, supra, col. 1375.

—— **Restrictive Covenant.**]—In a sale by the court one of the conditions provided that the conveyances should contain covenants by the purchasers; the form of such covenants, in case of dispute, to be settled by the judge. A dispute having arisen, the judge settled the covenant, adding a proviso that if the purchaser assigned his purchase, and the assignee entered into a similar covenant, the purchaser should be freed from further liability:—Held, that the vendor was entitled to an unqualified covenant, and that the proviso must be struck out. *Pollock* v. *Rabbits*, 21 Ch. D. 466; 47 L. T. 637; 31 W. R. 150—C. A.

And see *Nunn* v. *Hancock*, supra, col. 1373.

b. Biddings.

i. *Who may Bid.*

Practice on Application.]—Application that a party in the suit may bid at the sale must be on notice. *Clarke* v. *Dobbin*, 8 Ir. Eq. R. 111.

Party in the Cause.]—It is irregular for a party in the cause to bid at the sale of lands, without having previously obtained the permission of the court so to do. And the court will not, in such case, declare him the purchaser, unless special circumstances are shown to excuse this irregularity. *Byrne* v. *Lafferty*, 8 Ir. Eq. R. 47.

Whether the defendant who has not the carriage of the decree may bid at the sale in the master's office, without an order permitting him so to do, quære. *Munns* v. *Feris*, 11 Ir. Eq. R. 203.

Where the defendant had bid for property sold under a decree without leave of the court, a motion by another defendant that the estate might be again put up, and that he might be held to his biddings, unless a higher sum was offered, and that he should pay the expenses of resale, refused, but without costs. *Elworthy* v. *Billing*, 10 Sim. 98; 10 L. J., Ch. 176. And see *Wilson* v. *Greenwood*, 10 Sim. 101, n.

—— **Plaintiff.**]—If the plaintiff, or a person standing in the situation of a plaintiff, purchases under the decree, the transaction is to be examined with the utmost strictness; and if the decree be reversed, the sale cannot be upheld. *Talbott* v. *Minnett*, 6 Ir. Eq. R. 83.

Where lands decreed to be sold for payment of the plaintiff's demand were of insufficient value, and no bonâ fide bidders could be procured, the court permitted the plaintiff to bid without taking from him the carriage of the decree. *Spaight* v. *Patterson*, 9 Ir. Eq. R. 149.

Solicitor.]—The rule that, at a sale by the court, parties to the suit and their solicitors cannot become purchasers, will not be extended to a purchase by a solicitor in another suit for persons interested in the proceeds of sale, who has obtained an order to attend the proceedings on their behalf, and whose name, without his consent, has been placed in the particulars as that of a person from whom copies and information could be obtained. *Guest* v. *Smythe*, 39 L. J., Ch. 536; L. R. 5 Ch. 551; 22 L. T. 563; 18 W. R. 742.

Leave to bid at a sale by the court, granted to a solicitor on the record, relieves him from his fiduciary character, and places him in the same position as an ordinary purchaser. *Coaks* v. *Boswell*, supra, col. 1375.

A party to a suit, who was also a solicitor and had the conduct of sale, purchased under a feigned name. The court, after the purchase had been confirmed, ordered the estate to be again offered for sale at the price at which the party had purchased it, and if there should be no higher bidder the party to be held to his purchase. *Sidney* v. *Ranger*, 12 Sim. 118.

Executor.]—A testator's estate was directed to be sold by an order of the court. The executor applied for leave to bid, alleging that such bidding would be for the benefit of the estate; but the court refused to grant the application. *Geldard* v. *Randall*, 9 Jur. 1085.

Cestui que Trust.]—A term of two hundred years, of which only nine months remained unexpired, was vested in trustees, upon trust to

sell. It was not known who was entitled to the reversion. Upon a bill by one of the cestuis que trustent, the court declared a sale, giving all the cestuis que trustent liberty to bid. *Edmunds* v. *Foley* (*Lord*), 30 L. J., Ch. 887; 7 Jur. (N.S.) 1268; 9 W. R. 859.

Trustees.]—The court, when it has directed the sale of a trust estate, will not, in opposition to the wishes of cestuis que trustent, grant leave to the trustee to bid, notwithstanding that he is entitled to a charge on the estate, and that the sale is in order to pay such charge. *Tennant* v. *Trenchard*, 38 L. J., Ch. 661.

Residuary Legatee—Reversioner.]—Residuary legatee, tenant for life, or reversioner, may become the purchaser of an estate sold in the master's office. *Williams* v. *Attenborough*, Turn. & R. 76; 1 L. J. (O.S.) Ch. 138; 23 R. R. 186.

ii. *Opening Biddings.*

a. In General.

General Rule.]—Biddings are opened for the benefit of the suitor and estate, not of the purchaser, as where he was too late, and the overbidding is small. *Anon.*, 1 Ves. J. 453.

In order to set aside a sale under a decree, there must be an affidavit of a greater sum having been offered. *Keogh* v. *Wood*, Vern. & Scriv. 118.

The court has always discretion to open biddings, resting wholly on circumstances of the case. *Ryder* v. *Gower*, 6 Bro. P. C. 306. S. P., *Mayne* v. *Macartney*, 2 Ir. Eq. R. 324.

Agreement between Bidders.]—On a sale under the court, two persons agreed not to bid against each other, but that one should bid up to 1,500*l.*, and divide the lot between them. They bought it for 650*l.*:—Held, that this agreement furnished no ground for opening the biddings or annulling the sale. *Carew's Estate, In re*, 26 Beav. 187; 28 L. J., Ch. 218; 4 Jur. (N.S.) 1290; 7 W. R. 81.

Frivolous Applications.]—Where applications to open biddings are frivolous or litigious, and grounded only on application of the owner, and especially where value of estate is but little more than will satisfy incumbrances, court is well justified in refusing such applications. *Baillie* v. *Chaigneau*, 6 Bro. P. C. 313.

Who may Apply.]—One party having moved to open biddings, although he has not drawn up the order nor paid his deposit, another person cannot open biddings without notice to the first. *Gibbons* v. *Howell*, 4 Madd. 52.

Quære, whether any party, except the plaintiff, in a creditor's suit can apply to open the biddings. *Price* v. *North*, 2 Y. & C. 620; 7 L. J., Ex. Eq. 9.

Amount of Advance.]—In opening biddings, the court does not tie itself down to any precise rule as to the amount of the sum to be advanced, but looks substantially to that which is for the benefit of the parties. *Power* v. *Power*, 3 Ir. Eq. R. 511.

Sham Bidders.]—Person opening biddings setting up sham bidders, who are reported best bidders, ordered himself to be best bidder at price he opened biddings. *Molesworth* v. *Opie*, 2 Eden, 289.

Person Opening Discharged.]—The person who opens the biddings is discharged, if he is outbid at the resale. *Williams* v. *Attenborough*, Turn. & R. 76; 1 L. J. (O.S.) Ch. 138; 23 R. R. 186.

Offer.]—On opening the biddings in the case of property held for lives, the court imposed the condition that the party opening should be bound by his offer, if no better bidding could be enforced. *Walond* v. *Walond*, 8 Beav. 352; 9 Jur. 479.

Reopening.]—Biddings opened upon a second application by the same person, the purchaser not appearing upon notice. *Preston* v. *Barker*, 16 Ves. 140.

Where the property was again put up for sale, and there was no bidding:—Held, that the biddings might be opened again, although an order had been made that the person at whose instance they had been opened before should be the purchaser if there should be no bidding higher than his offer. *Ewings* v. *Waite*, L. R. 1 Eq. 440; 12 Jur. (N.S.) 117; 13 L. T. 664.

Sale by Private Contract—Tender.]—The rule under which the court permits a stranger to intervene for the purpose of opening biddings on a sale by auction before the master, has no application to a sale before him by private contract. *Millican* v. *Vanderplank*, 11 Hare, 136; 1 Eq. R. 429; 17 Jur. 986; 1 W. R. 364.

When there are grounds for refusing to confirm a sale by private contract approved by the master, the fact that the purchaser has, before the confirmation of the report, entered upon the property and expended money thereon, or incurred liabilities with respect to it, will not afford any reason for supporting the sale; but where all the parties interested have approved of the contract, and encouraged such acts of the purchaser, they may then constitute reasons for not disturbing the sale. *Ib.*

Under ordinary circumstances, if a purchaser does any act of ownership before the master's report is confirmed, he must do so at his own risk. *Ib.*

An estate was, by the direction of the court, advertised for sale by sealed tender, the tender expressing that the contract was subject to certain conditions of sale; the condition of sale stated that the certificate of sale would in due course be signed and filed, and become binding, without any further notice or expense to the purchaser:—Held, that the court had the same power of ordering a resale, on an advance of price, as in the case of a sale by auction. *Ib.*

Where on a sale by sealed tender the condition of sale stated, that "the certificate of sale would be settled, and in due course be signed and filed, and become binding, without further notice or expense to the purchaser," and the certificate was duly signed and approved by the judge and filed, and on the same day B. applied to reopen the biddings and made an offer of an advance price:—Held, that this was a case to which the ordinary rules of a sale by auction would attach, and that the court had the power to order a resale. *Barlow* v. *Osborne*, 6 H. L. Cas. 556; 27 L. J., Ch. 308; 4 Jur. (N.S.) 367; 6 W. R. 315. Affirming 8 De G. M. & G. 122.

The case of *Millican* v. *Vanderplank* (supra) distinguished. *Ib.*

A sale of an estate upon sealed tenders must be treated as a sale by auction, and the biddings may be opened on application to the judge. *Ib.*

Where, after an unsuccessful sale by auction, the chief clerk arranged that, in lieu of a second auction, sealed tenders might be sent in :—Held, that this was a sale within the rules as to opening biddings, and the biddings opened accordingly on the offer of a large advance by a person who had not made the highest offer. *Waterhouse* v. *Wilkinson*, 1 H. & M. 636 ; 3 N. R. 369 ; 9 L. T. 799 ; 12 W. R. 336.

Death before Confirmation.]—A purchaser under the court died before the confirmation of the report :—Held, that it was not necessary to serve his heir with notice of an application to open the biddings. *Templer* v. *Sweet*, 8 Beav. 464 ; 14 L. J., Ch. 424.

Sale subject to Annuity.]—An estate was sold subject to a life annuity equal to the rent. After sale, but before the purchaser was declared by the master, the annuity determined. The court opened the sale on an advance. *O'Hara* v. *Chaine*, 8 Ir. Eq. R. 365.

Person present at Sale.]—Person present at sale not allowed to open biddings. Sed quære. *M'Culloch* v. *Cotbatch*, 3 Madd. 314.

There is no general rule that a party present at the sale shall not open biddings ; each case must depend on its own circumstances. *Thornhill* v. *Thornhill*, 2 J. & W. 347.

Biddings opened by a person who was present at the sales. *Rigby* v. *M'Namara*, 6 Ves. 117. S. P., *Tait* (*Lord*) v. *Northwick*, 5 Ves. 655 ; *Williams* v. *Attenborough*, Turn. & R. 76 ; 1 L. J. (O.S.) Ch. 138 ; 23 R. R. 186.

—— **Larger Advance.**]—A person present at the sale allowed to open biddings, but a larger advance expected from him. *Tyndale* v. *Warre*, Jacob, 525. S. P., *Graham* v. *Gledstanes*, 1 Jones, 436.

What Advance sufficient.]—Biddings opened on the application of a person who was present at the sale, though the advance offered was less than 5 per cent. on the price. *Lefroy* v. *Lefroy*, 2 Russ. 606.

Biddings were opened at the instance of a party to the cause, who had had liberty given to bid at the former sale, on an advance of 150*l.* on 1,650*l.* *Logan* v. *Dowbinson*, 7 L. J., Ch. 130.

The biddings having been opened upon an advance of 150*l.* on 2,500*l.*, the court refused the application of the first purchaser to open the second biddings upon an advance of 150*l.*, it appearing that he had been present at and had bid at the second sale. *Jackson* v. *Granard* (*Lord*), 3 Ir. Eq. R. 513.

Biddings opened on an advance of 250*l.* upon a sum of 8,500*l.*, by a person who was present and had bid at the former sale. *Gorman* v. *Browne*, Sau. & Sc. 154, n.

Where an estate had been sold for 5,050*l.*, the sale was opened upon an advance of 300*l.*, on the application of a person who had bid at the sale. *Biggs* v. *Rowe*, Sau. & Sc. 152.

Biddings opened on an advance of 400*l.* upon a sum of 6,200*l.* by a person who bid at the former sale. *Langford* v. *Carroll*, Sau. & Sc. 155, n.

Biddings opened by a person who had attended the former sale by an agent, he offering an advance of 500*l.* in 8,950*l.* *Pearson* v. *Collett*, M'Cle. 82 ; 13 Price, 213.

The court declined to open biddings upon an advance under 10 per cent. *Holroyd* v. *Wyatt*, 2 Coll. C. C. 537.

Bidding not opened, even in creditor's suit, upon an advance of 350*l.*, being less than 10 per cent. *Garstone* v. *Edwards*, 1 Sim. & S. 20.

Upon advance of 500*l.*, though less than 10 per cent., court will act. *Ib.*

The rule that an advance of 10 per cent. entitles party to open biddings, not to prevail in future. *Andrews* v. *Emmerson*, 7 Ves. 420.

Order made opening the biddings upon an undertaking to abide by the order of the court as to the expenses of the resale, where the advance was only 9*l.* more than the probable expenses of such resale. *Bridger* v. *Penfold*, 1 K. & J. 28 ; 3 Eq. R. 141.

On a petition to open the biddings, offering more than twice the amount at which the property had been knocked down, and payment of the former bidder's costs :—Held, a proper case for such an order. *Lee*, *ex parte*, 1 De G. 628 ; 18 L. J., Bk. 6 ; 12 Jur. 995.

Biddings not opened whatever the rate per cent. of the advance offered, unless the total of the advance amounts to 40*l.* at least. *Leland* v. *Griffith*, 2 Moll. 510. S. P., *Farlow* v. *Weildon*, 4 Madd. 460 ; *Brookfield* v. *Bradley*, 1 Sim. & S. 23.

The court refused to open the biddings on an advance of 20*l.*, the property having been sold for 430*l.* *Gardiner* v. *Blessinton*, 10 Ir. Eq. R. 220.

Bidding opened on advance of 50*l.* on 380*l.*, and paying the expenses ; 10 per cent. not sufficient on a small sum. *Upton* v. *Ferrers* (*Lord*), 4 Ves. 700 ; 5 R. R. 167.

Biddings opened on advance of 60*l.* on 430*l.* *Bourn* v. *Bourn*, 13 Sim. 189.

Biddings opened after the report, confirmed simply upon an advance of 61*l.* on 305*l.* ; 35*l.* not sufficient. *Chetham* v. *Grugeon*, 5 Ves. 86.

Biddings opened on advance of 80*l.* on 730*l.* *Terson* v. *Hawkins*, 18 Jur. 721.

Biddings were ordered to be opened on an advance of 80*l.* on 775*l.* *Connel* v. *Hardie*, 3 Y. & C. 677.

Biddings opened on advancing 100*l.* on 800*l.*, and 200*l.* on 1,200*l.* *Anon.*, 2 Ves. J. 487.

On advance of 200*l.* on 2,600*l.* *Jones's Settled Estates*, *In re*, 1 Giff. 284 ; 29 L. J., Ch. 139 ; 5 Jur. (N.S.) 1243 ; 1 L. T. 186 ; 8 W. R. 56.

Biddings opened on advance of 200*l.* upon 3,200*l.*, but 100*l.* was held too little. *Anon.*, 5 Ves. 148.

Biddings opened on a sale of mortgaged premises on an advance of 190*l.* to 310*l.* *Hutchinson*, *Ex parte*, *Hunt*, *In re*, 2 Mont. & Ayr. 727.

Biddings opened on an advance of 300*l.* on 5,030*l.* *Lawrence* v. *Halliday*, 6 Sim. 296.

Biddings opened on an advance of 300*l.* upon a sum of 5,500*l.* *Moloney* v. *Bernard*, Sau. & Sc. 156, n.

The biddings were opened on an advance of 500*l.* upon 13,500*l.* under the circumstances. *Cockrane* v. *Cockrane*, 2 Russ. & M. 684.

Biddings opened on an advance of 1,000*l.* upon a sum of 33,000*l.* *M'Clintock* v. *Knox*, Sau. & Sc. 155, n.

In a creditor's suit, bidding opened on an advance of 500*l.* upon 10,000*l.*, paying the advance into court, and the expenses of the discharged purchaser. *Brooks* v. *Swaith*, 3 V. & B. 144.

The court opened the biddings upon an advance of 75*l.* on 1,650*l.* There is no fixed rule in Ireland for the quantum of advance; the court will always open the biddings where it is for the benefit of the estate. *Digby* v. *Browne*, 1 Ir. Eq. R. 277.

Biddings opened on advance of 5*l.* per cent. on 7,300*l.*, on application of a mortgagee, but he was not allowed to conduct the sale. *Domville* v. *Berrington*, 2 Y. & C. 723; 7 L. J., Ex. Eq. 58.

—— **Sale of Colliery.**]—The rules which regulate the practice of opening biddings upon a sale of landed estate, do not apply when a colliery is the subject of sale. *Williams* v. *Attenborough*, Turn. & R. 76; 1 L. J. (o.s.) Ch. 138; 23 R. R. 186.

Biddings not opened on advance of 1,150*l.* on 8,850*l.* for a colliery. *Ib.*

Sale in Lots.]—Where a person is purchaser of several lots, if the biddings are opened as to one, he shall have an option to open them as to all, semble. *Boyer* v. *Blackwell*, 3 Anstr. 657. S. P., *Price* v. *Price*, 1 Sim. & S. 386; 1 L. J., (o.s.) Ch. 184.

Where two lots are purchased together, biddings cannot be opened as to one lot only, unless the first purchaser choose to keep the one remaining lot alone. *Tilsley*, *Ex parte*, 4 Madd. 227 n.

Upon an affidavit of the purchaser that he had bid for the lot in consequence of having been declared the best bidder for the prior lot, the bidding was opened. *Fielder* v. *Fielder*, cited 1 Sim. & S. 386.

A motion to open biddings for several lots, purchased by different purchasers, on an advance of a certain sum for each lot, is irregular. *Goodall* v. *Pickford*, 6 Sim. 379; 3 L. J., Ch. 23.

—— **Resale Together.**]—Nine lots ordered to be resold in one, where the advance offered on such lot was not sufficient to authorise the opening of the biddings for them separately. *Humphries* v. *Roberts*, 6 Jur. 680.

Upon the purchase of several lots by the same party, the court, although it allowed the biddings to be opened, refused to order the resale in one lot. *Ward* v. *Cooke*, 9 Sim. 87; 7 L. J., Ch. 150.

—— **What Advance Sufficient.**]—The biddings allowed to be opened, as to an estate sold in eight lots for 300*l.*, on an advance of 120*l.* *Humphreys* v. *Robinson*, 11 L. J., Ch. 399.

—— **Re-opening.**]—An estate was put up to sale in four lots, and the timber on each lot was to be paid for according to a valuation made. A. purchased lot 1; the other lots were not sold. B. opened the biddings, and, on the resale, purchased lots 1 and 2 for 2,140*l.*, and lot 3 at 380*l.* The court refused to open the biddings for lots 1 and 2 on the application of A., unless he would advance 10*l.* per cent. on the price of the timber as well as the land, and would take lot 3 (in case B. should retire from it), at the price it had been sold for, in case it should not fetch the same price at the re-sale. *Bates* v. *Bonnor*, 6 Sim. 380.

b. Deposit.

Deposit on Opening Biddings.]—The court refused to enlarge the time for payment of the deposit by a party applying to open biddings; or to make a second order for opening the biddings, on the application of the same party who had failed in paying the deposit. *Colebrook* v. *Clarke*, 9 L. J., Ch. 130.

Upon opening biddings, the court refused to dispense with deposit, or order a trifling one to be taken upon particular circumstances. *Anon.*, 6 Ves. 513.

There is no invariable rule as to the sum to be paid into court on obtaining an order opening biddings; but where a sum of 27,000*l.* was the last bidding, a sum of 3,400*l.* was ordered to be paid into court. *Manners* v. *Furze*, 17 L. J., Ch. 485.

—— **In Ireland.**]—There is no settled rule in Ireland to regulate the sum which a person must lodge to obtain an order to open a sale. *Ford* v. *Head*, 1 Hog. 93. And see *Digby* v. *Browne*, supra.

—— **Interest.**]—Interest must be paid by the new purchaser to the old one on the deposit made by him. *Banks* v. *Banks*, 16 Beav. 380; 1 W. R. 511.

When biddings are opened, the purchaser is entitled to interest on his deposit at 4 per cent. *Ib.*

A party opening biddings must deposit the amount of his advance, but he is not required, in the first instance, to pay into court the amount of the original deposit. *Ib.*

Purchaser who has applied to open the biddings, and upon a resale was outbid, allowed, under the special circumstances, interest on his deposit, as well as the costs of the resale and of his application to the court. *Filder* v. *Bellingham*, 1 Coll. C. C. 526; 9 Jur. 8.

Where biddings have been re-opened, and party opening them does not become the purchaser, he cannot have his deposit repaid, till report of resale is confirmed. *Rex* v. *Hilton*, M'Cle. 595.

Where a person who has made a deposit is outbid at a subsequent sale, he is entitled to have his deposit back immediately; but for his interest and costs he must wait until completion. *Archdall* v. *Montgomery*, Vern. & S. 302.

The depositor is not entitled to the dividends accruing between the time of the deposit and the completion of the purchase; but only interest on the deposit at 4 per cent. *D'Oyley* v. *Powis* (*Countess*), 1 Cox, 206; 2 Bro. C. C. 33. S. P., *Ambrose* v. *Ambrose*, 1 Cox, 194.

c. After Report.

After Report or Certificate.]—No order will be made to open biddings until the report of the purchase has been made. *Lovegrove* v. *Cooper*, 9 Hare, 279.

Before the certificate is signed the biddings will be opened in favour of a bidder who makes a substantial advance; but after eight days have expired, and the certificate is signed, the court will not disturb the first purchase, unless in an extraordinary case. *Jones' Settled Estates*, *In re*, 1 Giff. 284; 29 L. J., Ch. 139; 5 Jur. (N.S.) 1243; 1 L. T. 186; 8 W. R. 56.

—— **Time.**]—In a sale the vice-chancellor had signed the certificate approving the purchase. On a motion to open the biddings, made within eight days after the signing of the certificate, with a substantial advance and an offer to pay the costs of the former purchase:—Held, that the biddings might be opened, the signing of the certificate by the vice-chancellor being only equivalent to the order nisi confirming the master's report and s. 34 of act 15 & 16 Vict. c. 80, and the 51st Ord. of 16th October, 1852, allowing eight days within which the signature and filing of the certificate might be discharged. *Bridger* v. *Penfold*, 1 K. & J. 28; 3 Eq. R. 141.

After the expiration of eight days from the filing of the certificate, the court refused to open the biddings on a mere advance of price, though considerable. *Ware* v. *Watson*, 7 De G. M. & G. 739: 25 L. J., Ch. 199; 2 Jur. (N.S.) 129; 4 W. R. 233.

In calculating the eight days, the vacations are not excluded. *Ib.* S. P., *Aubrey* v. *Denny*, 2 Moll. 508.

After Confirmation.]—General rule not to open biddings after confirmation of the report, upon negligence, surprise, the circumstances of the estate, &c., without something unconscientious on the part of the purchaser. *White* v. *Wilson*, 14 Ves. 151.

Biddings opened after confirmation of a sale, under a decree, the plaintiff in the cause being the purchaser. It will always be a question with reference to the particular circumstances of each case, whether the jurisdiction of the court in opening sales ought to be exercised or not. *O'Connor* v. *Richards*, Sau. & Sc. 246.

Biddings will not be opened after confirmation of the report, unless fraud is shown in purchaser, or fraudulent negligence in agent, &c., or other special circumstances. *Morice* v. *Durham* (*Bishop*), 11 Ves. 57.

—— **Fraud.**]—After a sale regularly confirmed the court cannot open the bidding, without first setting aside the order confirming the sale, and that order ought not to be set aside but on the grounds of fraud. *Fergus's Executors* v. *Gore*, 1 Sch. & Lef. 350.

A party to a suit, who was also a solicitor and had the conduct of a sale, purchased at the sale under a feigned name. The court, after the purchase had been confirmed, ordered the estate to be again offered for sale at the price at which the party had purchased it, and, if there should be no higher bidder, the party to be held to his purchase. *Sidny* v. *Ranger*, 12 Sim. 118.

—— **Increase of Price.**]—Increase of price offered is not alone a reason to open biddings after the report confirmed. *Boyer* v. *Blackwell*, 3 Anstr. 656. S. P., *Vincent* v. *Thwaites*, 5 Ir. Eq. R. 526.

The bidding on a lot sold in this court shall not be opened at all after confirmation. *Scott* v. *Nesbit*, 3 Bro. C. C. 475.

—— **Mistake.**]—Biddings opened after confirmation of the master's report, upon considerable advance, there having been a mistake in a particular of the estate, and one of the parties who confirmed the report knowing more than he communicated. *Gower* (*Countess*) v. *Gower* (*Lord*), 2 Eden, 340.

—— **Confirmation Nisi.**]—Purchaser who has confirmed his report nisi cannot, after notice to open biddings, confirm absolutely. *Vansittart* v. *Collier*, 2 Sim. & S. 608.

—— **On What Terms.**]—Biddings opened after confirmation of the report on circumstances, where the owner of the estate was in prison at the time of the confirmation, and a fourth of the original price was offered in advance; but a deposit of the whole advance was required. *Watton* v. *Birch*, 2 Ves. J. 51; 4 Bro. C. C. 172.

—— **In Bankruptcy.**]—In bankruptcy, application to open biddings when deed executed, and purchaser put into possession, too late. *Partington*, *Ex parte*, 1 Ball & B. 209.

d. Since 30 & 31 Vict. c. 48.

Sale by Private Contract.]—The principle of the act 30 & 31 Vict. c. 48, applies to a sale by private contract under the sanction of the court. Therefore, in the absence of fraud or improper dealing, an offer to re-open after the delivery of the chief clerk's certificate was refused, and the chief clerk's certificate was confirmed. *Bartlett*, *In re*, *Newman* v. *Hook*, 50 L. J., Ch. 205; 16 Ch. D. 561; 44 L. T. 17; 29 W. R. 279.

On What Grounds.]—In order to entitle parties to open the biddings after a sale by auction under the court since the passing of the Sales of Land by Auction Act, 1867, there must be either fraud or such misconduct as borders on fraud. *Delves* v. *Delves*, L. R. 20 Eq. 77; 23 W. R. 499.

—— **"Improper Conduct."**]—Neglect on the part of an auctioneer to ascertain the reserved price before the commencement of a sale is not such "improper conduct in the management of the sale" as will authorise the court to open the bidding. *Brown* v. *Oakshott*, 38 L. J., Ch. 717.

—— **Purchase by Party to Suit.**]—If the position of the purchaser comes in any way within the rule that at a sale in a suit by the court, parties to the suit and their solicitors cannot become purchasers, the court would not be precluded from opening the sale by reason of 30 & 31 Vict. c. 48, s. 7. *Guest* v. *Smythe*, 39 L. J., Ch. 536; L. R. 5 Ch. 551; 22 L. T. 563; 18 W. R. 742.

e. Costs.

General Rule.]—Person opening biddings, though not purchaser, is in no case entitled to costs. *Rigby* v. *M'Namara*, 6 Ves. 466. S. P., *Macclesfield* (*Earl*) v. *Blake*, 8 Ves. 214.

Friend of the Family.]—Person who opened biddings, but was not the purchaser, allowed his costs in the special circumstances, having opened them, not on his own account, but for the benefit of the family. *Owen* v. *Foulks*, 9 Ves. 348. S. P., *Chapman* v. *Fowler*, 3 Hare, 577; 13 L. J., Ch. 444; 8 Jur. 613; *West* v. *Vincent*, 12 Ves. 6.

Estate Benefited by Resale.]—A person who opened a sale with the assent of the parties, for the purpose of preventing a sacrifice of the property, but was outbid, allowed the costs on the ground of having benefited the estate. *Cuffe* v. *Young*, 9 Ir. Eq. R. 475. S. P., *Filder* v. *Bellingham*, 9 Jur. 8; *Gravenor* v. *Miles*, 9 Jur. 838.

A resale on opening biddings producing considerable increase of price is no ground for giving party his costs of opening biddings. *Trefusis* v. *Clinton*, 1 V. & B. 361.

On opening biddings, the court in the reference of costs of the purchaser will not give a particular direction for the specific expense. *Anon.*, 2 Ves. J. 286.

Of First Bidder.]—Bidding opened on terms of paying the former bidder all costs, charges, and expenses, to be settled by the master. *Watts* v. *Martin*, 2 Bro. C. C. 113. S. P., *O'Beirne* v. *Macmahon*, 2 Jones, 589; *Chester* v. *Gorges*, 2 Moll. 505; *Farlow* v. *Weildon*, 4 Madd. 460.

Examining Title.]—Biddings were opened on payment by the applicant of the costs properly incurred of the purchaser:—Held, that the costs of perusing the abstract and of the examination of the title, prior to the first purchase being confirmed, ought not to be allowed on taxation. *Raymond* v. *Lakeman*, 34 Beav. 584.

c. Resale.

Default of Purchaser.]—An order for resale made in consequence of purchaser's default in payment of his money, ought not to discharge him from his purchase, the resale being the realisation of a lien, leaving it to the purchaser to make up the deficiency, if any. *Harding* v. *Harding*, 4 Myl. & Cr. 514; 9 L. J., Ch. 124; 3 Jur. 1164. And see *Saunders* v. *Gray*, and *Tanner* v. *Radford*, 4 Myl. & Cr. 515, n.

—— **Reversion.**]—A purchaser under the court of reversionary interest having made default in completing, a resale was ordered, the purchaser to make good any deficiency. Before resale, it was discovered that the reversionary interest had fallen into possession; the court gave the purchaser four days to complete his purchase. *Robertson* v. *Skelton*, 13 Beav. 91; 19 L. J., Ch. 561.

—— **Deficiency to be Made Good.**]—A resale of property, sold under a decree, ordered, in case the purchaser did not pay his money into court within a given time; and the purchaser ordered, in that case, to make good the deficiency, and to pay the costs of all the proceedings. *Gray* v. *Gray*, 1 Beav. 199.

First Purchaser Overbid.]—Where, upon a resale, the former purchaser has been overbid, the court will not pay him his own fourth until after the deposit by the new purchaser. *Anon.*, Hay. & J. 719.

Agent without Authority.]—A. purchased for B., but without authority, an estate sold under a decree; B. died, without adopting the purchase; the order nisi was nevertheless obtained. The court refused to order B.'s executor to pay the purchase money, and, on the heir declining the purchase, discharged the order nisi, and directed a resale. *Lord* v. *Lord*, 1 Sim. 503.

Defective Title.]—The master having, on reference, found against the title:—Held, that there must be an order for discharging the purchaser before the court will give effect to resale. *Williams* v. *Wace*, C. P. Cooper, 42.

Purchaser Insane.]—Estate sold before the master, and A. reported the best bidder. Before the report was confirmed, it was discovered that A. was insane at the time of the bidding. The court directed the estate to be resold generally. *Blackbeard* v. *Lindigren*, 1 Cox, 205.

Where Purchaser Doubtful.] — Where the auctioneer announced a sum as the reserve, and there being an uncertainty as to who had bid, the estate was bought in at another sum:—Held, that the auctioneer had no right to fix more than one reserved bidding, nor could a bidder claim a resale if the parties interested did not desire it. *Notley* v. *Salmon*, 1 W. R. 240.

Resale by Purchaser.]—If, at a sale by auction under the order of the court, a purchaser sell his purchase for an additional sum beyond his purchase money, the court will order the property to be resold; and semble, that if upon such resale the property does not produce the improved price agreed to be given by the sub-purchaser, he will be responsible to the court for the difference. *Holroyd* v. *Wyatt*, 2 Coll. C. C. 327.

3. Possession, Rents and Profits.

Effect of Possession.]—A purchaser under a decree, who takes possession without the order of the court, accepts the title. *Wilden* v. *Andrews*, 4 L. J. (o.s.) Ch. 208.

Purchase Money Idle.]—Purchaser under a decree is not entitled, upon an affidavit that he has had his money lying ready some time, to be let into possession of estate, and receipt of rents for all such time so passed. *Barker* v. *Harper*, G. Cooper, 32.

Injunction.]—The master in the cause having executed the deed of conveyance for the principal defendant, does not preclude his giving the usual certificate to enable the purchaser to obtain an injunction to be put into possession. *Lawlor* v. *Drew*, 7 Ir. Eq. R. 637.

—— **Waste.**]—Where the purchase deed was approved by the master's counsel, though not signed, the purchaser was put into possession by injunction, in consequence of the defendant having committed waste. *Gray* v. *Stanford*, 8 Ir. Eq. R. 678.

An injunction may be obtained to restrain purchaser under decree, who has not paid his purchase money, from committing waste. *Casamajor* v. *Strode*, 1 Sim. & S. 381.

—— **Writ of Restitution.**]—A purchaser under the decree having, under colour of the injunction to put him into possession, dispossessed persons who claimed adversely to the title of the parties in the cause, they were restored by writ of restitution, and the purchaser ordered to pay all damage sustained by them. *Anderson* v. *Barry*, 2 Jones, 631.

Rents and Profits—From what Date.]—A purchaser under a decree, having lodged the whole of his purchase money, is entitled to the rents from the preceding gale day. *Gowan* v. *Tighe*, Ll. & G. t. Plunk. 168. S. P., *Prendergast* v. *Eyre*, *Id.* 180.

Purchaser under decree is entitled to rents of lands from the gale day next preceding the pay-

ment of purchase money, and to have all outgoings cleared off up to that time. *Montgomery* v. *Cosslett*, 2 Jones, 174.

Where before a purchaser under decree was in possession rents to which he was entitled became due, and payments were made by the tenants to the receiver in the cause :—Held, that the payments made after the rents to which the purchaser was entitled had become payable should be applied in payment of those rents, and not of the arrears of rent previously due. *Hargrave* v. *Holland*, 5 Ir. Eq. R. 169.

Rents received by receiver after the gale day next succeeding the lodgment of three-fourths of the purchase money by a purchaser under a decree are applicable first to the payment of solvent arrears, and then to rent due to purchaser, whether or not he has gone into possession. *Lee* v. *Moorhead* (2 Moll. 509) and *Hargrave* v. *Holland*, supra, overruled. *Doorley* v. *Power*, 11 Ir. Eq. R. 577.

Where the gale days were the 1st May and 1st November, and the purchaser lodged one-fourth of the purchase money on the 28th April, and the remaining three-fourths on the 1st May :—Held, that the purchaser was entitled to the rents due on the 1st May. *Scott* v. *Rothe*, 1 Ir. Eq. R. 105.

Where the lands were sold under a decree of the 30th April, one-fourth of the purchase money deposited, a conditional order to confirm the sale made, and the remaining three-fourths lodged in bank, all upon the following day :—Held, that the purchaser was not entitled to the rents from the 1st November, the gale day next preceding the day of sale. *Vincent* v. *Thwaites*, 2 Ir. Eq. R. 426.

—— **Receiver.**]—Purchaser under a decree, having paid in his entire purchase money, was not entitled to compensation for the difference between the amount of rent received by the receiver before possession given, and the amount which ought to have been received according to the rental, which was erroneous, it appearing that he was aware of the error when he purchased : otherwise, if rents had been lost, and the claim had been for compensation for loss accrued after he had paid his purchase money, and before he could get possession. *Campbell* v. *Hay*, 2 Moll. 102.

The court does not insure to a purchaser under its decree the rents which accrue due between the lodgment of the purchase money in court and the execution of the injunction to put him into possession, except in cases where they are in the hands of its own receiver. *Nunn* v. *Mahon*, 2 Jones, 181. And see *Doorley* v. *Power*, supra.

—— **Sale of Manor.**]—A manor was sold under the decree of the court, and an order was made that the purchaser should, on the 17th May, pay his purchase money into court, and be let into possession of the profits from Lady day ; fines for admissions and deaths due before but paid after Lady day belong to the vendors. *Garrick* v. *Camden* (*Earl*), 2 Cox, 231 ; 2 R. R. 37.

—— **Order of Reference.**]—Where a reference had been directed whether an offer was beneficial, and the master reported in favour of the purchase :—Held, that the purchasers were entitled to the rents from the date of the order of reference. *Cheetham* v. *Sturtevant*, 3 De G. & Sm. 468.

—— **Dividend on Stock.**]—The purchaser of a life interest in stock sold before a master is entitled to a dividend becoming due on the day following the sale. *Anson* v. *Towgood*, 1 J. & W. 637.

Sale of Life Interest.]—Where a life interest was sold under a decree, and the tenant for life died subsequently to the lodgment of the one-fourth of the purchase money, but prior to confirmation of sale :—Held, contract not complete till sale confirmed by order of court, and purchaser not bound to complete. *Vincent* v. *Going*, 3 Dr. & War. 75, n.

Estate pur autre vie.]—The purchaser of an estate pur autre vie, sold under a decree of the court :—Held, not entitled to be discharged from his purchase where the sole cestui que vie died subsequently to the bidding, and before the master's report could have been confirmed. *Vesey* v. *Elwood*, 3 Dr. & War. 74 ; 2 Con. & L. 47. Affirming Fl. & K. 668 ; 5 Ir. Eq. R. 184.

Reversion.]—B. is confirmed purchaser of a reversion on an estate for life and the order made absolute. Afterwards the life drops :—Held, B. must pay interest from the date of the report being made absolute. *Manning*, *Ex parte*, 2 P. Wms. 410.

—— **Resale.**]—A purchaser under the court of a reversionary interest having made default in completing, a resale was ordered, and the purchaser was to make good any deficiency. Before such resale it was discovered that the reversionary interest had previously fallen into possession. The court gave the purchaser four days to complete his purchase. *Robertson* v. *Skelton*, 13 Beav. 91 ; 19 L. J., Ch. 561 ; 14 Jur. 323.

4. Losses and Outgoings.

Misconduct.]—The purchaser, under a decree, must bear any loss which accrued after the sale was confirmed, and before he entered into possession, if it would have fallen on him had he been in possession ; but the funds in the cause must make good to him any loss occasioned by the misconduct of the parties or the receiver. *D'Espard* v. *Head*, 1 Hog. 486.

Tithes.]—A purchaser kept out of possession by the plaintiff himself in occupation, is entitled to costs of orders for possession, an occupation rent, compensation for deterioration, and arrears of tithes he had been compelled to pay. *Thomas* v. *Buxton*, 38 L. J., Ch. 709 ; L. R. 8 Eq. 120.

A purchaser of an estate sold under a decree confirmed on the 29th April, but whose purchase deed was not executed until the December following, is liable for the tithe composition which accrued due in November, the lands being in the occupation of tenants from year to year. *Stewart* v. *Alexander*, 2 Jones, 530.

A purchaser of an estate buys it subsequent to the outgoings incident to it. *Ib.*

Accidental Loss.]—A purchaser from the court is in equity the owner from the order confirming the report, and any deterioration of the property arising from accident or by fire, without the default of the vendor, falls upon the purchaser. *Robertson* v. *Skelton*, 12 Beav. 260 ; 19 L. J., Ch. 140 ; 14 Jur. 323.

If, between the contract and conveyance, a loss arises by accident, which brings with it legal obligation, which must be immediately satisfied, the expense incurred by the vendors is payable by the purchaser. *Ib.*

Ornamental Timber.—When difficulties arise to delay the completion of a sale under a decree, and during the interval of making out the title ordinary dilapidation takes place, that is a case for compensation; but if a destruction of ornamental timber, that is a ground for the purchaser to apply to be discharged. *Mugennis* v. *Fallon*, 2 Moll. 585. *And see cases*, supra, col. 1327.

5. Purchase Money.

a. Payment into Court.

In General.]—In sales under a decree, it is irregular to pay the purchase money to the party; it ought to be paid into court. *Bennett* v. *Hamill*, 2 Sch. & Lef. 581.

Order for.]—The usual order for the payment of purchase money into court is to be obtained at chambers. *Davenport* v. *Davenport*, 9 Hare (App.) i.; 22 L. J., Ch. 11; 16 Jur. 988; 1 W. R. 12.

Defendants, part owners of property of which they were in possession, purchased a part on sale under a decree and were required to pay the whole of their purchase money into court notwithstanding the purchasers claimed allowances for improvements. *Bulmer* v. *Allison*, 15 L. J., Ch. 11. Affirming 8 Jur. 440.

Where lands decreed to be sold, subject to a charge, application on consent to lodge the sum in court refused. *Anon.*, 8 Ir. Eq. R. 514. And see *Dickin* v. *Dickin*, supra, col. 1374.

Nonconcurrence of Parties Interested.]—On a sale by mortgagees, B. was certified to be the purchaser of the estate, but he objected to pay the purchase money into court, on the ground that cestuis que trustent were not sufficiently represented. The court overruled the objection, and directed a conveyance to the purchaser by the trustees, it not being necessary that the cestuis que trustent should be parties to the conveyance. *Watters* v. *Jones*, 6 Jur. (N.S.) 530; 2 L. T. 205.

When the purchaser of property under an administration decree declined to complete upon the ground of nonconcurrence in a previous sale of persons interested in the purchase money:—Held, that he must nevertheless bring the purchase money into court, the objection being one of conveyance and not of title. *Matson* v. *Deanes*, 4 De G. J. & S. 345.

Joint Purchase.]—Where two purchase one lot jointly, one party will not be permitted to pay into court his moiety of the purchase money. *Darkin* v. *Marye*, 1 Anstr. 22.

Before Confirmation.]—In the exchequer the three-fourths of the purchase money cannot be paid in until the sale is confirmed. Secus in Chancery. *Vincent* v. *Thwaites*, 2 Ir. Eq. R. 427.

Sale of Copyhold.]—Motion against purchasers in the master's office, to pay in their purchase money, refused; the estate sold being copyhold limited for life, and then in remainder, and the remainderman being abroad, he not having surrendered. *Noel* v. *Weston*, G. Cooper, 138. *See* 19 R. R. 281, n.

Report Confirmed.] — Where the master's report of the purchase was confirmed absolute, and the purchaser was ready with his money, but the abstract not fully delivered, the lord chancellor allowed it to be paid into the bank, to the credit of the cause, and invested, and the accumulating dividend to be invested in like manner: and the accountant-general was to declare the trust thereof, without prejudice to any question as to the rents, &c., and interest on the purchase money; the fund not to be transferred without notice to the purchaser. *Hindle* v. *Dakins*, C. P. Cooper, 381.

Without Accepting Title.]—Upon a sale under the court, an order upon the purchaser to pay his purchase money into court cannot be obtained until the title has been accepted, or the master's report obtained in its favour. Applications of purchasers to pay purchase money into court, and to be let into possession, without prejudice to objections to the title, are always refused. *Rutter* v. *Marriott*, 10 Beav. 33. S. P., *Hutton* v. *Mansell*, 2 Beav. 260.

A purchaser under the decree of the court is never let into possession till he has approved the title. *Williams* v. *Shaw*, 3 Russ. 178; 3 L. J. (O.S.) Ch. 157.

Purchase money may be paid into court without prejudice to acceptance of title, but purchaser will not be let into possession. *Morris* v. *Bull*, 17 L. J., Ch. 9; 12 Jur. 4.

The court may, under special circumstances, permit a purchaser to pay his purchase money into court before he has accepted the title; but express provision must be made against his taking possession until he shall have accepted the title. *Dempsey* v. *Dempsey*, 1 De G. & Sm. 691.

Held, that a purchaser under a decree could not be permitted to pay his purchase money into court without accepting the title, although all parties consent. *Denning* v. *Henderson*, 1 De G. & Sm. 689; 16 L. J., Ch. 173; 11 Jur. 687.

Condition on sale under a decree that purchase money be paid by fixed date and interest charged from that date. On the purchaser's application after that date the court allowed him to pay in the principal and interest up to that day, without prejudice to any question and without acceptance of title. *Rutley* v. *Gill*, 3 De G. & Sm. 640.

Where vendor fails to deliver abstract the purchaser need not pay purchase money until a good title is shown, and he cannot, by giving notice to the vendor, set apart the purchase money. *De Visme* v. *De Visme*, 1 Mac. & G. 336; 1 Hall & Tw. 408; 19 L. J., Ch. 52; 13 Jur. 1037.

It is the rule of the court, on a special case being made out, to receive from the purchaser his purchase money, without compelling him to accept the title. *Ib.*

—— **Possession Allowed.**]—Purchaser, under circumstances, allowed to pay his purchase money into court, and to be let into possession and receipts of the rents and profits, without prejudice to any subsequent objection which he

might make to the title. *Marfell* v. *Rudge*, 2 Y. & C. 566; 2 Jur. 78.

Purchaser allowed to pay the whole purchase money in court and let into possession without prejudice to any claim he might have for compensation for tithes. *Man* v. *Ricketts*, 5 De G. & Sm. 116.

Sale of Timber—Payment by Instalments.]—Order directing timber to be sold before master and purchase money to be paid by instalments. Purchaser desirous of paying purchase money immediately on allowance of discount, the same ordered on consent of defendant. *Sitwell* v. *Sitwell*, 4 Madd. 183.

Forfeiture of Deposit.]—At a sale under a decree the conditions provided that, in case of default, there should be a resale, the deficiency to be made good by the purchaser, but contained no stipulation as to the forfeiture of the deposit. The purchaser paid the deposit, and afterwards became bankrupt, and the assignees having declined to complete:—Held, that the deposit was forfeited. *Depree* v. *Bedborough*, 4 Giff. 479; 3 N. R. 187; 33 L. J., Ch. 134; 9 Jur. (N.S.) 1317; 9 L. T. 532; 12 W. R. 191.

Semble, that where the purchaser makes default, no express stipulation is necessary to entitle the vendor to the deposit. *Ib.*

Where a purchaser, having lodged the one-fourth of his purchase money, refused to lodge the three-fourths unless the abstract of title was first delivered to him, and no report of good title had been obtained:—Held, that no report of good title having been had, the one-fourth could not be forfeited. *Warren* v. *Bateman*, Fl. & K. 189.

A solicitor who attends a sale and bids for his client, is responsible for the payment of the deposit, and will be attached if it is not paid. A purchaser who refuses to pay the remaining three-fourths of the purchase money on the title being declared good, will be ordered to do so on a certain day, or to forfeit his deposit. *Hobhouse* v. *Hamilton*, 1 Hog. 401.

A purchaser under decree is not entitled to have his objections to the title disposed of before he brings in the whole of the purchase money. If he delays to complete he will be ordered to bring in the remaining three-fourths within a limited time, and on default his one-fourth will be forfeited. It is no objection that there has not been any report upon, or reference as to, the title. *Newman* v. *Fitzgerald*, 6 Ir. Eq. R. 258.

Duty of Auctioneer to Pay Money into Court.]—It is the duty of an auctioneer nominated to conduct a sale by the court, to pay any money received by him into court, at all events as between himself and the court. After certificate, the ordinary course of business is for the solicitors to receive the money from the auctioneer, and themselves pay it into court. *Biggs* v. *Bree*, 51 L. J., Ch. 263; 46 L. T. 8; 30 W. R. 278—C. A.

Payment by Promissory Note.] — Where a creditor to the estate is declared the purchaser at a sum less than his demand, he must lodge his promissory note in lieu of the purchase money, in order that the side-bar rule to confirm the sale may be entered. *Edwards* v. *Backas*, 8 Ir. Eq. R. 585.

The court refused to allow a purchaser to lodge his promissory note in lieu of the three-fourths of his purchase money, notice not having been given to all the creditors. *Gardiner* v. *Blevinton*, 11 Ir. Eq. R. 357.

—— **Interest.**]—Where a promissory note payable with interest generally, has been lodged in court, in part payment of purchase money, the word interest signifies legal interest and not the court rate of interest. *Gibbons* v. *Berry*, Sau. & Sc. 158.

Where a purchaser moves on consent to lodge a promissory note in part payment of his purchase money, the consent and note should both specify the rate of interest payable on the note. *O'Connor* v. *Richards*, Sau. & Sc. 160.

A purchaser's promissory note directed to bear interest at 6 per cent. where there were charges upon the estate at that rate of interest, although 5 per cent. was the rate of interest agreed upon. *Ferguson* v. *Eyre*, Sau. & Sc. 160, n.

Promissory note lodged by purchaser for purchase money will bear 6 per cent. interest. *Anon.*, 8 Ir. Eq. R. 158.

Rate of Interest.]—The purchaser who has lodged his purchase money under an order, is entitled, in case the sale does not proceed, to have it back with interest at 6 per cent. The vendor investing it in the funds runs the risk of a fall, whether he does it by order of the court or not. If the investment is at the purchaser's instance, he may, if the sale goes off, be entitled to the stock in specie. *Kirwan* v. *Blake*, 2 Moll. 506; 1 Hog. 151.

The purchaser of a reversionary interest under decree, is bound to pay interest at the rate of 3*l.* 10*s.* per cent. on the three-fourths of his purchase-money, from the report of good title to the date of lodgment. *Hutchinson* v. *Cathcart*, Jon. & C. 260; 1 Ir. Eq. R. 452.

Upon the report it is the duty of the purchaser to bring in the remainder of his purchase-money; and if he is afterwards discharged on account of defect of title, he will be entitled to interest thereupon; he is therefore properly chargeable with interest from that time. *Ib.*

A purchaser from the assignees of a bankrupt is entitled to receive interest upon his deposit, whether the purchase be proceeded with or not. *Page, In re*, 1 Dr. & Wal. 34. S. P., *Hill* v. *Kirwan*, 1 Hog. 357.

A purchaser discharged on a report of bad title is entitled to interest on the one-fourth of the purchase-money from the date of the lodgment. *Gower* v. *Hill*, Hay. & J. 127. S. P., *Lineham* v. *Cotter*, 8 Ir. Eq. R. 104. But see *Feely* v. *Kilkenny*, Fl. & K. 456, infra, col. 1401.

The purchaser lodged his promissory note for the amount of the purchase-money, but was afterwards allowed compensation for a rent-charge:—Held, he was chargeable for interest on his note for the difference only. *Wilson* v. *Poe*, 8 Ir. Eq. R. 139.

A motion to invest the one-fourth of the purchase-money in 3½ per cent. stock, must be upon notice. *Lee* v. *Poole*, 2 Ir. Eq. R. 419.

Payment to Solicitor.]—On a motion that the master might be at liberty to take a deposit on the purchase-money to be paid into the hands of the master's chief clerk, the court, on the applicant's solicitor appearing by counsel, and undertaking to pay what he might receive according to the order of the court, and the applicant himself undertaking to be bound by

any order the court might make in respect of any moneys his solicitor might receive, gave liberty to the master to fix a deposit, and to direct the purchaser to pay the same to such solicitor, such solicitor to pay the same into court on or before a time appointed by the present order. *Lyon* v. *Colvill*, 6 Jur. 680.

b. Payment Out and Application.

Liability of Purchaser.]—Purchaser under a decree for sale, and payment of creditors, answerable for the application of the money, if not paid into court. *Lloyd* v. *Baldwin*, 1 Ves. Sen. 173.

Purchaser, under a decree, bound to see directions of decree observed. *Colclough* v. *Sterum*, 3 Bligh, 181; 22 R. R. 1.

A purchaser of lands sold under a decree is not bound to see to the application of the purchase-money. *Blake* v. *Blake*, 5 Ir. Eq. R. 596.

A purchaser, under a decree, is not affected by irregularities and defects in the decree by which the application of the money may not have been properly secured. *Curtis* v. *Price*, 12 Ves. 89; 8 R. R. 303.

Petition for—Service.]—The purchase-money of an estate sold under decree paid into court to the credit of the cause, becomes the fund of all parties:—Held, that they were properly served with a petition respecting such money. *De Visme* v *De Visme*, 1 Mac. & G. 336; 1 Hall & Tw. 408; 19 L. J., Ch. 52; 13 Jur. 1037.

When Conveyance not Executed.]—The plaintiff can draw out the purchase-money only when he has delivered the deed executed by all necessary parties, or in their default by the master, under an order to the purchaser, and an injunction to put him into possession. *Farrell* v. *Irwin*, 2 Moll. 511. And see *Massey* v. *Massey*, *id.* 511.

The court will not, under any circumstances, suffer money paid in by a purchaser to be paid out to a mortgagee, until a proper conveyance shall have been executed to purchaser. *Rex* v. *Adam*, 9 Price, 660.

This rule holds good even where delay in executing the conveyances arises from the purchaser's own negligence. *Beven* v. *Beven*, 1 L. J. (O.S.) Ch. 159.

Whilst conditional orders for attachments are depending against plaintiff and defendant for not executing the conveyances to the purchaser, the creditors cannot be paid out of the purchase money, though the purchaser has gone into possession, but the court will give them leave to proceed on their security. *Ormsby* v. *Nicholson*, Vern. & S. 115.

Where Estate is Small.]—The court having ordered certain small leaseholds to be sold and the proceeds distributed among numerous parties, upon the certificate of the chief clerk, after summons to the purchasers at chambers to show cause why the proceeds should not be distributed, the proceeds were distributed by the chief clerk. *Thorp* v. *Owen*, 2 Sm. & G. (App.) i.

Title Accepted by Purchaser.]—Purchaser entered, accepted title, and conveyances were executed. On application by the creditors, the purchaser alleged claim by a person to whole estate by adverse title had been set up:—Held, that the purchaser, having accepted the title, &c., could not prevent the money being paid out of court. *Thomas* v. *Powell*, 2 Cox, 394; 2 R. R. 86.

A purchaser under a decree, who has gone into possession, cannot prevent the purchase money being paid out, by alleging that the landlord claims the premises because of a forfeiture, and threatens to bring an ejectment. *Sparrow* v. *Cooper*, 1 Jones, 72.

Leaseholds were sold under the court. The purchaser accepted the title, paid his purchase money into court, and was let into possession. The lessors afterwards instituted a suit to rectify the lease. The court refused to compel the final completion of the purchase, or part with the purchase money, until the result of the suit was known. *Bentley* v. *Craven*, 17 Beav. 204.

Where the purchaser discovering an incumbrance executes the conveyance, he cannot interfere with the distribution of the proceeds. *Miller* v. *Pridden*, 26 L. J., Ch. 183; 3 Jur. (N.S.) 78; 5 W. R. 171.

Where Conveyance cannot be Executed.]—An estate sold was vested in the heir pur autre vie, with legal remainder to the children of A. (who was living) as tenants in common. The purchase money was in court. The case appeared not to be within the 1 Will. 4, c. 47, so that no effective conveyance could be made until the death of A.:—Held, that the purchase money ought not to be distributed. *Heming* v. *Archer*, 9 Beav. 366; 10 Jur. 169.

Creditors—Lien of.]—A judgment creditor not deprived of his lien on the estate in the hands of a purchaser under a decree, by not proving his debt before the master, in pursuance of advertisements. *Barrett* v. *Blake*, 2 Ball & B. 354.

The only inconvenience to a judgment creditor not proving before the master is, that he loses the benefit of having his debt discharged out of the produce of the sale under the decree. *Id.* 357.

A. having a lien on the testator's estate, established his debt under the decree, but his claim for interest was disallowed by the master, whose report stood confirmed. The estate was sold, subject to A.'s lien; and A., having refused to accept from the purchaser his principal without interest, was not allowed to participate as a creditor in the purchase money. *Hempstead* v. *Hempstead*, 4 Beav. 423.

Where lands are sold under a decree, the purchaser is entitled to have all judgments paid out of the purchase money satisfied on record; but where a judgment creditor filed a charge under a decree, and the master's report did not find anything due on foot of the judgment, the purchaser was not entitled to have the judgment satisfied, nor lands released, as the filing of the charge made the creditor a quasi-party. *Fitzgerald* v. *Lane*, 3 Ir. Eq. R. 339.

—— **Outstanding Judgments.**]—Parties to the suit, and all persons coming in under the decree, will be enjoined from disturbing the purchaser. If judgment creditors come in, and only a few can be paid, others are restrained. *Stackpoole* v. *Curtis*, 2 Moll. 504.

Where there are alleged to be outstanding judgments not proved in the cause the court will refer it to the master to ascertain the sums due

under the decree, and to allocate the purchase money without prejudice to the purchasers. *Greene* v. *Elliott*, 1 Ir. Eq. R. 207.

Where a deficient fund is produced by a title under a decree, and judgment creditors having a lien upon the legal estate puisne to the reported incumbrances, refuse to prove under the decree, or to release lands; if the purchaser, who relies on those judgments as objections to the title, will not consent to be discharged, the proper course is to apply for a reference as to title. *Barrett* v. *Bermingham*, Sau. & Sc. 419.

—— **Coming in after Decree.**]—Where judgment creditor, after final decree for sale, was allowed to apply to extend sale to cover his demand, a purchaser, although having the legal estate, would be liable, if, having notice of such prior judgment creditor, he allowed the purchase money to be applied to subsequent incumbrances. *Leake* v. *Moore*, 2 Moll. 127.

—— **Sale by another Court.**]—A judgment creditor, having obtained a decree for a sale in chancery, the lands having been sold under a prior decree in the exchequer, was allowed to file a charge under the decree to account in the exchequer, on foot of his demand, as decreed in chancery, and the remembrancer and registrar were directed to amend the report and final decree by inserting his demand, if it should be proved. *Pidgeon* v. *D'Alton*, Jon. & C. 276.

Retaining Part—Fine.]—The purchaser of a copyhold estate sold, during the infancy of the heir, under the usual decree, is not entitled to have a portion of the purchase money retained in court for defraying the expense of the fine, payable on the death of the heir before a conveyance. *Morris* v. *Clarkson*, 3 Swanst. 558; 19 R. R. 277.

—— **Deficiency of Rents.**]—Loss or deficiency of rents arising while vendor was in default, by not completing the conveyance, the purchaser not having taken possession or changed the receiver, ordered to be made good out of the purchase money in court. *Blennerhassett* v. *M'Namara*, 1 Moll. 81.

Surplus after Payment of Incumbrances.]—Surplus arising from sale of real estate under a decree for payment of all incumbrances (notice to creditors to come in being given by advertisement), after payment of all charges proved thereunder, paid out to the inheritor. The lord chancellor (varying the order of the master of rolls) held that no further advertisement should be issued, as, according to practice, in respect of sales under decrees, bonâ fide purchaser is never liable to answer subsequent creditors. *St. Antonio* v. *Adderley*, 2 Moll. 117; varying 2 Hog. 6.

6. Costs and Expenses.

On Discharge of Purchaser.]—Costs to which a purchaser under the court is entitled, on its being found that a good title cannot be made. *Perkins* v. *Ede*, 16 Beav. 268.

When, in consequence of a defect in the title to lands sold under a decree, the purchaser is discharged, he is entitled to the full amount of his purchase money, interest, and taxed costs, without deduction. *Johnson* v. *Reardon*, 3 Ir. Eq. R. 200.

Where a purchase under a decree goes off on account of defects in the title, a defendant having the conduct of the cause will not be ordered personally to pay the purchaser's costs, though there are no funds in court, and the plaintiff is insolvent. *Mullins* v. *Hussey*, 35 L. J., Ch. 348; L. R. 1 Eq. 488.

Under a decree for a sale, a trustee for the inheritor was declared the purchaser. There was a report of bad title:—Held, that the trustee was entitled to his costs out of the fund in court, it appearing that the inheritor was ignorant of his own title, and that he had acted bonâ fide. *Kirby* v. *O'Shee*, 1 Jones, 164.

Where there has been great delay, and there is little hope of perfecting the title within a reasonable time, the court will dismiss a purchaser with costs. *Fraser* v. *Wood*, 8 Beav. 339; 14 L. J., Ch. 220.

Objections by Purchaser.]—The costs of an unsuccessful application by a purchaser under a decree to be relieved from his purchase, on the ground of defective title, must be paid by the applicant. *Osborn* v. *Osborn*, 18 W. R. 421.

A purchaser, under decree, succeeded in some objections only:—Held, that he was entitled to the proper costs of investigating the title, after deducting the costs occasioned by the objections in which he failed. *Brown* v. *Lynch*, 4 Ir. Eq. R. 59.

Investigating Title.]—Where an estate was sold under decree, and one of the conditions of sale was, that the purchaser pay the purchase money into court on a given day, at his own expense:—Held, that the purchaser was entitled to the costs of a reference as to the title reported good by the master. *Camden* v. *Benson*, 1 Keen, 671.

Where property sold under a decree is bought by a defendant in the suit, he is entitled to his costs of a reference to the master as to title. *Holland* v. *King*, 1 W. R. 80.

Where an estate has been sold under decree, and the master reports against the title, the purchaser is entitled to be paid out of the fund in the cause his costs of and consequent upon his becoming purchaser, and of investigating the title. *Att.-Gen.* v. *Newark Corporation*, 8 Sim. 71. S. P., *Reynolds* v. *Blake*, 2 Sim. & S. 117. *S. C.*, nom. *Anon.*, 3 L. J. (o.s.) Ch. 88.

—— **No Fund in Court.**]—A purchaser under decree is entitled to his costs where master reports against title, though no fund in court. *Smith* v. *Nelson*, 2 Sim. & S. 557; 4 L. J. (o.s.) Ch. 175; 25 R. R. 266.

Where a sale had been directed under a decree, but there was no reference to the master as to the title, and no available fund in court:—Held, that the purchaser was entitled to be reimbursed by the plaintiff the costs of investigating the title and confirming the purchase. *Berry* v. *Johnson*, 2 Y. & C. 564; 1 Jur. 474.

—— **Exception to Reports.**]—A purchaser under decree, who succeeds on exceptions to the master's report approving the title, cannot then have the costs of the reference on title; but must obtain the report in his favour, and then present a petition to be discharged from his purchase and to have his costs. *Hyde* v. *Hyde*, 3 L. J. (o.s.) Ch. 130.

—— **Interest.**]—A purchaser, who having lodged one-fourth only of his purchase money, was discharged upon a report of bad title:—Held, entitled to the costs incurred by him in investigating the title, but not to interest on the one-fourth. *Feely* v. *Kilkenny*, Fl. & K. 456. *And see cases*, supra, col. 1396.

—— **Abstract.**]—If the title shown by the abstract is not sufficient, the purchaser has a right to have a further abstract, and gets his costs up to the time when the proper abstract is furnished. *Goffe* v. *Mitchell*, 2 Moll. 508.

Purchaser under decree is entitled to his costs of investigating the title when there has been a substantial variance from the abstract first furnished. Where the original abstract was not varied from in substance, costs were refused. *Leland* v. *Griffith*, 2 Moll. 150.

Fee of Counsel.]—In sales under decree, as in private sales, the plaintiff or vendor is not bound to furnish to the purchaser a fee for counsel, with the abstract of title, unless by special condition. If the purchaser require the opinion of counsel, he must take it at his own expense. *Alexander* v. *Crosbie*, 2 Ir. Eq. R. 141.

A purchaser under decree is not entitled, at the cost of the estate, to a further opinion of counsel, besides that which he gets with the abstract under Lord Redesdale's rule. But, if afterwards discharged by reason of defects of title discovered by such further opinion, he will be entitled to be repaid the reasonable costs incurred in obtaining it. *Barton* v. *Downes (Lord)* Fl. & K. 633; 4 Ir. Eq. R. 607.

Opening Biddings.]—A discharged purchaser is not entitled, as against a bidder opening the sale, to the costs of investigating the title, where he has proceeded to do so before the order to confirm was made absolute. *Digby* v. *Browne*, 1 Ir. Eq. R. 377.

Nor where there was no reference to the master to report as to good title. *Sullivan* v. *Bayly*, Fl. & K. 460.

Solicitor of Inheritor.]—If solicitor of inheritor is employed by creditor to make out title to purchase, he will be paid his costs out of fund in court. *Thompson* v. *Cooke*, 1 Hog. 28.

Expenses—Receiver's Fees.] — Purchaser of lands under decree, who has obtained an absolute order to confirm the sale, and has paid in his entire purchase money, is not liable to deduction for receiver's fees upon the rents collected in the interim, before he could get into possession. That falls upon the vendor. *Duigenan* v. *Nangle*, 2 Moll. 96.

A purchaser who allows the receiver to continue in possession until the title is declared good, is bound to pay receiver's fees, as he might have gone into possession himself on an undertaking to account if the title turned out defective. *Brown* v. *Dowdall*, 2 Hog. 198.

—— **Claim by Devisee of Vendor.**]—Estates purchased, on the death of the purchaser, were sold in an administration suit. In a suit by a party claiming as devisee of the original vendor, the purchaser was directed to pay his own costs. *Incorporated Society for Protestant Schools* v. *Richards*, 1 Dr. & War. 258; 1 Con. & L. 58; 4 Ir. Eq. R. 177.

—— **Before Conveyance.**]—A purchaser, under the court, who had not obtained his conveyance, paid his money into court:—Held, entitled to his costs of appearance on further consideration, he having been served with notice. *Noble* v. *Stow*, 30 Beav. 272.

—— **Before Report Confirmed.**]—A purchaser under a decree has no lien for his costs on the funds in court, arising out of the sales of other property, so as to prevent any distribution of the fund until the report of the title being bad has been confirmed. *M'Cann* v. *O'Farrell*, 1 Hog. 137.

Costs of Conveyance.] — Where, under a decree in a creditor's suit, directing the master to settle the conveyances if the parties differ, an application is made to the master respecting the conveyance, the purchaser must pay the costs of his attendances before the master. *Hodgson* v. *Shaw*, 16 L. J., Ch. 56; 11 Jur. 95.

When, in consequence of the defendants' refusal to execute the conveyance, it becomes necesary to apply, that the master may execute in their names, the defendants pay the costs of such application. *Clarke* v. *De Burgh*, 2 Ir. Eq. R. 19.

—— **Party Out of Jurisdiction.**]—A plaintiff having charged B.. who was defendant, to be out of the jurisdiction, but omitted to pray process against him on his coming within the jurisdiction:—Held, nevertheless, entitled to the costs of a supplemental suit to compel B. to join in the conveyance. *Oldham* v. *Wilkins*, 1 Dr. & Wal. 717.

—— **Heir not Concurring.**]—Where estates of an intestate were sold under a decree, and the heir-at-law, a feme covert, declined acknowledging the conveyance to the purchaser, semble, that the heir was a trustee within 1 Will. 4, c. 60. *Billing* v. *Webb*, 1 De G. & Sm. 716; 12 Jur. 427.

In such a case, where the costs of the suit exceeded the funds in the cause, the court directed the costs, occasioned by the refusal of the married woman, to be first taxed and paid. *Ib.*

—— **Infant Heir.**] — Under a decree in a creditors' suit, estates of an intestate, leaving an infant heir, were sold:—Held, that the costs of settling the conveyance from the infant by the master ought to be borne by the intestate's estate. *Brown* v. *Lake*, 15 L. J., Ch. 34.

—— **Release by Incumbrancers.**] — A purchaser under the decree of a court of equity, obtaining a conveyance of the legal estate, is not entitled to have, at the expense of the funds in the cause, a release from equitable incumbrancers, who were parties to be paid under the decree. *Keatinge* v. *Keatinge*, 6 Ir. Eq. R. 43.

—— **Sale in Lots.**]—The costs of covenants to produce title deeds which cannot be delivered, fall, by the practice of conveyancers, on vendors; but where on sale in lots, provision was made for the largest purchaser to have the deeds, and to covenant to produce them, or give copies thereof to the purchasers of smaller lots, without reference to the costs, each purchaser was ordered to

bear his own costs. *Strong* v. *Strong*, 4 Jur. (N.S.) 943; 6 W. R. 455.

Motion for Payment into Court.]—Where the purchaser has been the cause of delay in the completion of the title, he will be ordered to pay the costs of the motion for payment by him into court of the purchase money. *Flower* v. *Hartopp*, 12 L. J., Ch. 39.

A purchaser under a decree, one of the conditions of sale being the payment of the money into court by a certain day:—Held, liable to pay the costs of the order for that purpose. *Camden* v. *Benson*, 1 Keen, 671.

—— **Substituted Purchaser.**]—Where, on the same motion by which the purchaser asks to pay his purchase money into court and be let into possession, it is also asked that one purchaser may be substituted for another upon the affidavit of no underhand bargain, costs are not ordered to be paid by the purchasers. *Christian* v. *Chambers*, 4 Hare, 307; 14 L. J., Ch. 340; 9 Jur. 393.

Petition for Payment Out.]—In a sale under the court, after a purchaser has obtained his conveyance, he will not be allowed costs on appearing on a petition for payment out. He should inform the petitioners that he has no claim on the fund. *Barton* v. *Latour*, 18 Beav. 526.

Purchasers who were informed that their appearance on a petition for payment out would be objected to were yet allowed the costs of such appearance. *Strong* v. *Strong*, supra.

Fees of Court.]—Upon a sale by the master in lots, the proper fee to be paid according to the schedule annexed to the orders in chancery, issued under the 3 & 4 Will. 4, c. 94, is 5*l.* where the whole produce of the sale does not exceed 2,000*l.*, and 5*s.* on every 100*l.* beyond that sum, without regard to the number of lots or purchasers. *Allen's Charities, In re*, 2 Myl. & K. 627.

Taxation.]—Charges of a sale to be taxed under the head of just allowances, not of costs. *Crump* v. *Baker*, 18 Ves. 285.

Costs, charges, and expenses of, and incidental to, the sale of the estates, were by the decree ordered to be taxed and paid. It appeared that 340*l.* had been paid for surveying and selling the estates, upon which the fee of taxation of 36 per cent. attached. On a motion by all parties the court varied the order by only directing taxing master to add to the taxed costs of the plaintiffs any sums which he should find to have been properly paid by them to any surveyor or other person, for valuing or otherwise, in reference to the sales. *Bellas* v. *Harmer*, 3 De G. & Sm. 454.

7. Conveyance.

Order for.]—A peremptory order on the wife to execute a conveyance of estate not settled to her separate use, refused. *Jordan* v. *Jones*, 2 Ph. 170.

Where on a sale under a decree a party refuses to convey, the right course for the purchaser is to move that he be ordered to convey. *Stilwell* v. *Mellersh*, 4 Myl. & Cr. 581; 10 Sim. 367; 9 L. J., Ch. 39; 4 Jur. 175.

And see cases, infra, col. 1416.

Form of.]—Conveyances made under a decree are to be settled by the like rule as men of judgment among conveyancers would direct. *Lloyd* v. *Griffith*, 3 Atk. 279.

Practice as to conveyances on sales in master's office. *Smith* v. *Gibbons*, 1 W. R. 74.

—— **Settled by Judge.**]—In a sale by the court:—Held, that the order of a judge settling the form of a conveyance is subject to appeal. *Pollock* v. *Rabbits*, 21 Ch. D. 466; 47 L. T. 637; 31 W. R. 150—C. A.

—— **Draft.**]—The decree for a sale does not direct the remembrancer to settle the draft of the deed of conveyance to the purchaser, and a special application for that purpose is necessary. *Hogg* v. *Waldron*, 6 Ir. Eq. R. 218.

Execution of.]—Upon a sale of lands under a decree in a cause where judgment creditors, prior to the plaintiff, had been made parties by a supplemental bill, the remembrancer ordered to execute the deed of sale. *O'Kelly* v. *Bodkin*, 7 Ir. Eq. R. 338.

—— **Copyhold.**]—Upon sale in court of copyhold, vendor coming for aid is compelled to surrender in person if conveniently it can be done. *Noel* v. *Weston*, 6 Madd. 50; 22 R. R. 235.

Where copyhold is under commission, good title is made by bargain and sale from commissioners direct to purchaser. *Holland, Ex parte*, 4 Madd. 483.

Parties to.]—Purchasers under a decree which is impeached for fraud and error are not necessary parties, if there is a proper undertaking to abide by the sale. *Creed* v. *Creed*, 2 Hog. 215.

A trustee named in a will, who has refused the trust, is not a necessary party. *Ib.*

E. allows his co-trustee K. to sell part of trust funds on his giving a promissory note and deposit of deeds of freeholds. K. is bankrupt, and under an order of a commissioner the freeholds are sold, and the conditions provide that the order in bankruptcy shall be conclusive:—Held, that cestuis que trustent were not necessary parties: the deposit and the memorandum being a personal indemnity only by one trustee to another. *Groom* v. *Booth*, 1 W. R. 423.

—— **Incumbrancers.**]—A. assigned to B. a reversion as a security for money lent, with a power to B. to sell the same, and "give effectual discharges to the purchaser," and afterwards borrowed money of other persons upon the security of the same sum:—Held, that all the incumbrancers must join to discharge a purchaser. *Brasier* v. *Hudson*, 9 Sim. 1.

A defendant, who is an incumbrancer on an estate sold under the decree of the court, and who has concurred in settling conditions of sale, describing such estate as to be sold free from incumbrances, will be ordered to concur in carrying the sale into effect, and to execute the conveyance of the estate to the purchaser, free from his incumbrance. *Tomlin* v. *Hatfield*, 9 L. J., Ch. 119.

—— **Equitable Incumbrancers.**]—A purchaser under a decree for a sale for the payment of equitable incumbrances, has not a right to have the estate released therefrom, the effect of the

decree being to extinguish them as to the estate sold. He must have a conveyance of the legal estate discharged of all incumbrances, legal and equitable. *Webber* v. *Jones*, 6 Ir. Eq. R. 142.

A purchaser under decree of a court, obtaining a conveyance of the legal estate, is not entitled to have, at the expense of the funds in the cause, a release from equitable incumbrancers, who were parties to and paid under the decree. *Keatinge* v. *Keatinge*, 6 Ir. Eq. R. 43.

Custody of Deeds.]—The court will not order the bargain and sale from the commissioners to the assignees to be given by them to the purchaser, upon his allegation merely that the bankrupt had no other freehold property than what was conveyed to the purchaser under the commission. *Pocock, Ex parte, Chapman, In re*, 1 Deac. & C. 104; 1 L. J., Bk. 18.

A purchaser entitled to title deeds having paid his purchase money into court, the court will not order the money to be divided, and the deeds to remain in the hands of the master, until the completion of the sale of another lot. *Hobson* v. *Neale*, Tam. 446.

Production of Deeds.]—A purchaser relied on the memorial of a deed as creating an objection to the title:—Held, that he could not afterwards object that the deed itself was not produced. *Stewart* v. *Conyngham* (*Marquis*), 1 Ir. Ch. R. 534.

A plaintiff who has not established his title has a right to the production of documents in the defendant's custody, by which he alleges that his title will be established. *Moons* v. *Bernales*, 1 L. J. (O.S.) Ch. 185.

Opinion of Counsel.]—The purchaser of lands sold under the decree of the court is not entitled, before the title has been accepted by him, to see the opinion of counsel on the statement of title given pursuant to the 138th General Order. *Stack* v. *Baxter*, 10 Ir. Eq. R. 102. S. P., *Foster* v. *Foster*, 1 Hog. 224.

Searches.]—In Ireland a plaintiff who has obtained a decree for a sale, and cannot procure the title deeds, must make out a statement of title from searches in the registrar's office and elsewhere. *Hamilton* v. *Royse*, 1 Hog. 236.

The court will not entertain an application that further searches should be furnished to a purchaser, being an application to be made to the master. *Lalor* v. *Drew*, 7 Ir. Eq. R. 202.

Map of Lands.]—The purchaser of lands sold under a decree:—Held, to be entitled to a map and survey of them, prepared during the progress of and for the purposes of the cause. *Jepson* v. *Minton*, Fl. & K. 95.

Account Book.]—A purchaser under the court, not being able to obtain an account book to which he was entitled, brought an action of trover against some parties to the cause. He was restrained by injunction. *Stubbs* v. *Sargon*, 4 Beav. 90.

8. Setting Aside Sale.

Want of Jurisdiction.]—A purchaser cannot take an objection that the court has miscarried in exercising its jurisdiction. *Waters* v. *Waters*, 36 L. J., Ch. 195; 15 L. T. 406; 15 W. R. 191.

General Principle.]—Principles on which court acts in suits to impeach purchases made under a decree. *Thornhill* v. *Glover*, 3 Dr. & War. 195.

Equitable Title.]—Upon a sale under the court, the purchaser will not be compelled to accept an equitable title without the legal estate being got in. *Freeland* v. *Pearson*, L. R. 7 Eq. 246.

Title by adverse Possession.]—A purchaser under a decree will be compelled to take a title which depends on adverse possession, under the statute of limitations, although such adverse possession is evidenced merely by affidavit in the master's office, and was not at issue in the suit. *Scott* v. *Nixon*, 2 Con. & L. 185; 3 Dr. & War. 388; 6 Ir. Eq. R. 8.

Delay.]—The court is forbearing towards a party selling under a decree, and will not let off the purchaser unless the delay is grievous. *Magennis* v. *Fallon*, 2 Moll. 584.

A sale under a decree, all necessary parties being before the court, not set aside after a lapse of time, the sale appearing to be properly conducted. *Lightburn* v. *Swift*, 2 Ball & B. 207.

In a creditor's action, the court refused to set aside the sale at the suit of a creditor who had acquiesced for four years on the ground of misdescription in the particulars. *Price* v. *North*, 2 Y. & C. 620; 7 L. J., Ex. Eq. 9.

Suit Defective as to Parties.]—Objection that suit was defective for want of parties. Plaintiffs informed purchaser that defect would probably be cured in three weeks. Four days after purchaser presented a petition to be relieved from his purchase, but the court refused to do so. *Sherwood* v. *Beveridge*, 3 De G. & Sm. 425; 13 Jur. 1042.

The purchaser under a decree having objected to the title for want of parties, an application of the plaintiff that the purchaser might be discharged refused. *Conyers* v. *Crosbie*, 7 Ir. Eq. R. 401.

Deterioration.]—A sale under a decree in a creditors' suit, subject to certain specified defects, deteriorating the value of the estates, but which the creditor had no means of getting rid of by any suit, not set aside. *Fisher* v. *Barry*, Beat. 139.

When difficulties delay the completion of a sale under a decree, and during the interval ordinary dilapidation takes place, that is a case for compensation; but a destruction of ornamental timber is a ground for the purchaser to be discharged. *Magennis* v. *Fallon*, supra.

Decree nisi.]—On a sale under a decree nisi A. was reported purchaser, and afterwards discharged on the ground of the decree not being absolute. On subsequent proceedings by vendor the decree was made absolute:—Held, that the purchaser having been once discharged, the contract could not be revived by the proceedings subsequently taken by the vendor. *Coster* v. *Turnor*, 1 Russ. & M. 311; 8 L. J. (O.S.) Ch. 98.

Excessive Price.]—A purchaser, who, in con-

sequence of a direction to his agent to bid one pound more than any other bidder, had been declared tenant at a very high rent, will not be discharged. *Mahon* v. *Hammond*, Sau. & Sc. 689.

A solvent person, who had directed his agent to bid 1*l.* more than any other person, will not be discharged from his bidding, although it may be much above the real value. An option was given to the applicant to have the lands set up again, without discharging him from his bidding, and subject to his making compensation for any difference between the two lettings. *Coote* v. *Coote*, Sau & Sc. 623 ; 2 Ir. Eq. R. 159.

Inadequate Price.]—On a sale for payment of incumbrances, part of the purchase money was applied in payment of interest accrued due during the possession of a tenant for life, and he also obtained a lease of part of the property. The court refused to set aside the sale, but referred it to the master to inquire if the sale was at an under-value, and if so, that the purchaser's representatives should pay the difference into court, and that the tenant for life should pay into court so much as the master should find had been applied as above stated. *Townsend* v. *Warren*, 1 Jo. & Lat. 221, n. ; 6 Ir. Eq. R. 620.

The court refused to discharge the solicitor in the cause from a purchase before the master, with the view of preventing a sale at under-value. *Nelthorpe* v. *Pennyman*, 14 Ves. 517.

Insolvency.]—Purchaser discharged on motion upon affidavit of imprisonment for debt and insolvency. *Hodder* v. *Ruffin*, 1 V. & B. 544.

Deposit Forfeited.]—Purchaser before a master submitting to forfeit his deposit, not bound to proceed in the purchase. *Savile* v. *Savile*, 1 P. Wms. 745. But see *id.* 747.

Sale to Receiver.]—Sales under a decree in trust as to part for the receiver set aside after confirmation. *Alven* v. *Bond*, Fl. & K. 196 ; 3 Ir. Eq. R. 365.

Title Defective—Sale in Lots.]—In general, objection of a purchaser of two lots to completion, on the ground that the title to one is bad, is not to be discussed upon motion. *Casamajor* v. *Strode*, Coop. t. Brough. 510.

Where title defective as to certain lots, a purchaser of other lots held under the same title, discharged. *Lewis* v. *Lewis*, 9 L. J., Ch. 176.

A purchaser of two lots, as to one of which the biddings were opened, released from his bidding for the other lot, upon his undertaking to pay the costs of the resale. *Gregg* v. *Glover*, 1 Ir. Eq. R. 211.

—— **Misrepresentation.**] —Parties interested in a sale were induced to consent to purchaser being discharged, it being represented that a good title could not be made ; they subsequently discovered they had been deceived. The court discharged the order, giving the purchaser his costs, and referring it to the master to inquire whether a good title could be made. *Butter* v. *Ommaney*, 1 Tam. 344.

—— **As to Part.**]—Where the vendor had no title to a small portion of the land, but such defect was not discovered till after the contract the court refused, with costs, a motion by the purchaser to be discharged, without giving the vendor an opportunity of acquiring a title to the portion. *Chamberlain* v. *Lee*, 10 Sim. 444.

After the purchaser under a decree had approved of the title, a deed was discovered, which showed that the plaintiffs could not make a title to more than a moiety of the estate. The court discharged the purchaser. *Ward* v. *Trathen*, 14 Sim. 82 ; 8 Jur. 303.

Purchaser under decree of two-sevenths of estate in one lot is not obliged to take one-seventh to which only title can be made. *Roffey* v. *Shallcross*, 4 Madd. 227 ; 20 R. R. 293.

—— **Defect Cured before Hearing.**] — Purchaser compelled to pay money into court after long delay : before conveyance a defect in title discovered, and on reference to the master, he reported against the title ; exceptions carried in and before hearing the defect cured :—Held, that the purchaser had a right to be discharged, and that a further reference ought not to be directed. *Dalby* v. *Pullen*, 1 Russ. & M. 296 ; 3 Sim. 29 ; 8 L. J. (o.s.) Ch. 74 ; 30 R. R. 123.

—— **Compensation.**]—The doctrine of compensation ought not to be extended. Jurisdiction has been exercised in giving compensation founded on the minuteness of the object compared with the estate sold. The purchaser of several denominations in one lot will be discharged, if the master reports that a good title cannot be made to one of the denominations. *Prendergast* v. *Eyre*, 2 Hog. 81.

A purchaser at a sale in bankruptcy will not be discharged on objections to title, which were expressly noticed in the abstract posted in the court :—Held, that where title cannot be made out to small portions, the purchaser will be entitled to compensation pro tanto only, unless he can show that the deficient portion was essential to the proper enjoyment of the whole, or that it constituted his main object in entering into the contract. *Gethin, Ex parte, Smith, In re*, Ll. & G. t. Plunk. 429.

Difference in practice between sales in bankruptcy and sales under decrees of courts of equity. *Ib.*

—— **Private Act—Copyholds.**]—Trustees of copyholds vested in them by a private act of parliament take a surrender from the tenants for life, and sell under a decree subject to certain leases, and petition for payment of the purchase money into court. The purchaser objects that they had not the legal estate, and the court had therefore no jurisdiction :—Held, that the act vesting the property in the trustees overrules the surrender, that the court therefore had jurisdiction, and no one could object to the sale but the purchaser, who would gain by it. But the costs must come out of the estate. *Dixon* v. *Wilkinson*, 1 Eq. R. 566 ; 22 L. J., Ch. 981 ; 1 W. R. 513.

—— **Root of Title.**]—Conditions of sale, settled by the court, provided that a conveyance on a sale made by B. in 1838 should be the root of title ; that no objection or requisition should be made with respect to earlier title, and that recitals in deeds twenty years old should be conclusive evidence of the instruments recited. That conveyance purported to recite the will, but stopped short of the final gift over, thus showing a good title to the fee in B. :—Held,

that a purchaser was not precluded from showing that B.'s title under the will was defective, and that he was entitled to be freed from his contract, and to get all his costs. *Else* v. *Else*, 41 L. J., Ch. 213; L. R. 13 Eq. 196; 25 L. T. 927; 20 W. R. 286.

—— **Reservation.**]—Lands were set up as held in fee-simple, and it appeared that they had been conveyed forty years before, reserving a right to cut turf and quarry limestone, although the right had never been since exercised:—Held, a good objection to the title, and the purchaser discharged. The rental at the sale contained an obscure statement, and the purchaser swore he had been misled:—Held, a sufficient ground for discharging the purchaser. *Martin* v. *Cotter*, 3 Jo. & Lat. 496; 9 Ir. Eq. R. 351.

—— **Knowledge of Purchaser.**]—When the purchaser of an interest under a decree acquires by that means a knowledge of a defect in the title to that interest, and afterwards buys up the estate of the person interested in taking advantage of that defect, the court will not allow him to rely on the doctrine that a purchaser is not obliged to take a doubtful title, in support of an objection to the title founded on that defect. *Sheppard* v. *Doolan*, 3 Dr. & War. 1; 5 Ir. Eq. R. 6. And see *S. C.*, Fl. & K. 598.

Quære, whether, if the objection was valid, the court will allow him to rely on it. *Ib.*

—— **Unsatisfied Judgments.**]—A purchaser cannot be compelled to accept a title without having judgments against the person in whom the legal estate is vested satisfied. Semble, even where a purchaser can get a clear legal estate, he will not be compelled to accept the title without having judgments entered after the execution of a deed, conveying such legal estate, satisfied: he having notice of such judgments. *Piers* v. *Piers*, Sau. & Sc. 379. Affirmed, 1 Dr. & Wal. 265.

To make title under a decree for a sale of lands in a judgment creditor's suit, every incumbrancer whose demand is prior to the last incumbrance provided for by the decree, must be satisfied or be brought before the court. *Ponsonby* v. *Ponsonby*, 2 Hog. 201.

This rule has now, by *Piers* v. *Piers* (supra), been extended to every judgment creditor puisne to those provided for by the statute. *Ib.* S. P., *Knight* v. *Pocock*, 27 L. J., Ch. 297; 4 Jur. (N.S.) 197.

Purchaser under decree, with notice of judgments intervening between incumbrances ordered to be paid, is bound by them, unless persons in whom they are vested are parties to cause, or come in and prove under decree. *Steele* v. *Philips*, 1 Hog. 49.

On sale in creditor's administration suit, the purchaser objected that there were unsatisfied judgments against the heir-at-law of the testator:—Held, that this was a good objection, the judgment creditors of the heir-at-law not being parties to the suit. *Parkinson* v. *Piper*, 8 Jur. 1111.

When it is ascertained that there are prior judgment creditors who will not come in and prove their demands under a decree, they ought to be made parties to the suit by supplemental bill, that their rights may be bound by the decree for a sale. *Johns* v. *French*, 1 Hog. 450.

Where, on default of payment, the vendor obtained a decree for resale in a suit for specific performance, and a judgment creditor prior to the decree refused to disclaim or release the premises, a decree was made against him that the estate be declared freed and discharged from all claims by him, and he was ordered to pay the costs. *Moscrop* v. *Sandeman*, 9 Jur. (N.S.) 1147; 9 L. T. 352.

A. agreed to sell land to B., who accepted the title, paid part of his purchase money, and was let into possession, but took no conveyance. A. subsequently obtained a decree against B. for sale of the property, and payment of the balance of purchase money out of the proceeds:—Held, that a purchaser under the decree could not be compelled to complete without the concurrence of the registered judgment creditors of B., whose judgments were prior to the decree, and who were not parties to the suit. *Grey Coat Hospital* v. *Westminster Improvement Commissioners*, 1 De G. & J. 531; 26 L. J., Ch. 843; 3 Jur. (N.S.) 1188; 5 W. R. 855.

A. devised his estate at H. to his second son, who survived him and afterwards died intestate, whereupon the estate descended to N., his elder brother. Pending a suit instituted by A.'s creditors, judgments were entered up against N., which remained unsatisfied when the estate at H., together with the testator's other estates, was sold under the decree in the suit for payment of his debts:—Held, that N.'s judgment creditors were necessary parties to the conveyance of the estate at H., and, as they could not be compelled to join in the conveyance, because they were not parties to the suit, that a good title could not be made to the estate. *Craddock* v. *Piper*, 14 Sim. 310.

The purchaser under a decree in a creditor's suit objected to the title, on the ground that there were certain outstanding judgments confessed by the defendant before the filing of the bill, which afterwards, pending the cause, were revived and re-docketed under Moore's Act, and that they were not bound by the decree. Upon exceptions to the report of good title:—Held, that the purchaser's objection to the title should therefore be allowed. *Newman* v. *Fitzgerald*, 6 Ir. Eq. R. 260.

Lands held under a lease for lives renewable for ever were, by marriage settlement, conveyed to trustees upon trusts in quasi tail. In 1842 a renewal of the lease was executed to the defendant, the quasi tenant in tail, against whom, pending a suit by children for portions, several judgments had been obtained, of which no notice had been taken. On sale in the suit the purchaser objected to the title because of those judgments:—Held, that the renewal of 1842 ought to have been to the trustees of the settlement, and that the judgments in question did not constitute a valid objection to the title. *Leake* v. *Leake*, 5 Ir. Eq. R. 361.

Trust to sell lands to repay loan and to pay the surplus and convey the unsold lands to the borrower. The lands having been sold:—Held, that a good title might be made without the concurrence of the creditors of the borrower by judgment confessed after the execution of the trust deed. *Alexander* v. *Crosby*, 1 Jo. & Lat. 666; 7 Ir. Eq. R. 445.

Where a deficient fund has been produced by a sale under a decree, and judgment creditors having a lien on the legal estate, puisne to the reported incumbrances, refuse to prove under the decree, or to release the lands; if the purchaser

who relies on those judgments as objections to the title will not consent to be discharged, the proper course is to apply for a reference as to title. *Barrett* v. *Bermingham*, Sau. & Sc. 419.

—— **Terms to Raise Portions.**] — Lands subject to two terms to secure portions were devised to A. for life, remainder to his sons in tail. A. being in possession, a bill was filed to raise the sums, to which a minor tenant in tail was made a party by supplemental bill. The lands were set up and sold for the residue of the two terms:—Held, on exceptions to the master's report of good title, that as the minor was a party, the decree was not erroneous, though it directed a sale for the payment of interest accrued during the possession of A., nor because it omitted to set off the interest which ought to have been paid by A. against his share of the portion, and a sum which was reported to A. charged on other lands directed to be sold by the decree:—Held, also, that, as it was clearly for the benefit of the minor that the terms should be sold together, the title was not objectionable on that ground:—Held, also, that, as the minor's estate was puisne to the terms, the omission to give him a day to show cause would not affect the purchaser. *Edgeworth* v. *Edgeworth*, 12 Ir. Eq. R. 81.

Errors and Irregularities.]—It is no objection on the part of a purchaser of land sold by a master, that more land is sold than is necessary for the purpose of the testator's will. *Lutwych* v. *Winford*, 2 Bro. C. C. 248.

A purchaser under a decree is not to be relieved from his purchase merely because there are irregularities in the decree, where there is no want of jurisdiction or parties. *Baker* v. *Sowter*, 10 Beav. 343; 16 L. J., Ch. 333. S. P., *Calvert* v. *Godfrey*, 6 Beav. 97; 12 L. J., Ch. 305.

A purchase under a decree, not impeachable when made, cannot become so from any irregularities in the subsequent conduct of the cause or errors in dealing with the purchase money. *Bowen* v. *Evans*, 1 Jo. & Lat. 178; 6 Ir. Eq. R. 569. Affirmed 2 H. L. Cas. 257.

A bill was filed by a remainderman to set aside a sale made under the decree of the court in a creditor's suit, for errors in the proceedings and fraud in the sale, the purchaser, B., having lent himself to acts whereby the estate was sold for payment of interest, properly payable by tenant for life. The tenant for life died in 1837, and the bill was filed in 1843:—Held, that although the sale was the result of a prearrangement, yet, as it was not fraudulent, and the purchase was made at full value, the sale could not be set aside, especially after so long a time. *Ib.* And see *Townsend* v. *Warren*, 2 H. L. Cas. 221, n.

Lands were devised in trust, with power to the trustee to sell, and give a discharge to the purchaser. In 1807 T., who was wrongly supposed to be the trustee, sold, and gave a receipt to the purchaser. The purchase money was paid, with T.'s consent, to the tenant for life, who appropriated it. The interests of the remainderman accrued in 1845, and in 1851 they filed their bill to set aside the sale:—Held, that the sale being bonâ fide and for full value, and the purchaser being discharged from seeing to the application of the purchase money, the court would not grant relief, it appearing that T.'s estate was sufficient to make good any liability that might be established in respect of the sale. *Hicks* v. *Sallitt* (3 De G. M. & G. 782) distinguished. *Hope* v. *Liddell*, 21 Beav. 183; 25 L. J., Ch. 90; 2 Jur. (N.S.) 105; 4 W. R. 145.

An estate being sold before a master, where the decree did not require it, the sale shall be set aside, although the reports were confirmed; but the purchasers must be fully reimbursed all their expenses out of pocket. *Prideaux* v. *Prideaux*, 1 Cox, 34. And see *S. C.*, 1 Bro. C. C. 287, where stated to have been reversed.

Purchaser of estates sold under a decree discharged, on motion, from his purchase, upon error in the decree being shown, though the parties are proceeding to rectify it. Whether he is entitled to his costs, quære. *Lechmere* v. *Brasier*, 2 J. & W. 287; 22 R. R. 130.

A purchaser under a decree shall not be affected by error in the decree. *Bennett* v. *Hamill*, 2 Sch. & Lef. 566.

A purchaser has a right to presume that the court has taken the steps necessary to investigate the rights of the parties, and that it has properly decreed a sale; but he ought to see that all proper parties to be bound are before the court, and that he does not take a title which can be impeached aliunde. *Ib.*

The purchaser of the estate of an insolvent debtor from his assignees, at a sale by auction, will not be affected by constructive notice of circumstances of negligence on the part of the assignees in conducting the sale, such circumstances being entirely collateral to any question of title. *Borell* v. *Dann*, 2 Hare, 440.

A decree for sale of lands did not direct them to be sold, subject to dower which one of the defendants had recovered at law, but the remembrancer himself set them up to sale so subject:—Held, sale not therefore irregular. *Eyre* v. *Lynch*, Hay. & J. 505.

Lands in settlement, with power to grant leases, are by decree directed to be sold subject to charges prior to settlement. Pending the suit, the tenant for life grants leases and charges annuities upon the lands, and they are sold subject to those charges:—Held, that the sale subject to such leases and charges is void. *Colclough* v. *Sterum*, 3 Bligh, 181; 22 R. R. 1.

A bidder at a sale under a decree, who is not a party to the cause, or interested in the estate, has no right to apply to set aside a sale to another bidder, on the ground of irregularity. Whether he may apply to be declared the purchaser in the place of the bidder reported to be the best purchaser, quære. *Hughes* v. *Lipscombe*, 6 Hare, 142. See also *Bass* v. *Wellsted*, 12 Jur. 347.

—— **Purchaser Misled.**]—A party, the highest bidder for a batch of some lots, and afterwards for the whole, was held to his bidding for the lots, though misled by the mode of selling. *O'Grady* v. *Brady*, 11 Ir. Eq. R. 440.

Trust Property.]—Where a purchaser alleged that part of the property was held on trust, which was denied:—Held, that the purchaser was only entitled to a reference to the master as to title. *Whitfield* v. *Lequeutre*, 3 De G. & Sm. 464.

And see *Hope* v. *Liddell*, supra.

Agreement for Lease.]—A purchaser was discharged on the ground of misrepresentation; lands stated to be held under written agreements

for leases being held only on parol agreements. *Bessonet* v. *Robins*, Sau. & Sc. 142.

Right to New Lease.]—A purchaser of lands, held under a lease that would expire on the 1st of June then next, discharged, it appearing that the tenant was entitled to a reversionary lease for four lives. *Lineham* v. *Cotter*, 7 Ir. Eq. R. 176.

Covenants in Lease broken by Vendor.]—Sale of leaseholds, conditions providing that the receipt of rent up to the time for completing, shall be conclusive evidence of the fulfilment of the covenants by the lessee. The vendors allowed a fire insurance (covenanted by the lease to be kept up) to drop by nonpayment of premiums from the date fixed for completion :—Held, that the purchaser must be discharged. Till completion, the vendor must preserve the title unimpeachable. *Palmer* v. *Goren*, 4 W. R. 688.

Occupation.]—The plaintiff put up a lot described as being in the occupation of C. C. was holding as tenant under another party, hostilely to the vendor. The court discharged the purchaser, and directed the plaintiff to pay his costs. *Lachlan* v. *Reynolds*, Kay, 52 ; 2 Eq. R. 713 ; 23 L. J., Ch. 8 ; 2 W. R. 49.

Lease—Suit to Alter.]—A purchaser bought a lease and entered into possession and paid the purchase money into court. Afterwards the lessors instituted a suit against the original lessee for altering the lease in a material particular :—Held, that the court would not compel the purchaser to complete the purchase until that suit was decided. *Bentley* v. *Craven*, 1 W. R. 401.

Taking Accounts.]—If an account to be taken in a suit to be instituted is necessary to complete the title to lands sold under a decree, the purchaser, if he desire it, must be discharged. He cannot be held until a subsidiary cause is brought, however speedily, to a determination. *Magennis* v. *Fallon*, 2 Moll. 561.

Practice—Service.]—Rule as to serving purchaser on the application to set aside a sale made by assignees. *Shepley, Ex parte, Wright, In re*, Mont. 353.

Defendants in a cause where there has been a sale under a decree ought to be served with the petition of a purchaser to be discharged from his purchase. *Sherwood* v. *Beveridge*, 3 De G. & Sm. 425 ; 13 Jur. 1042.

—— **Exceptions to Title.**]—Where conditions of sale are so obscurely worded that, taken with the particulars of sale, they are likely to mislead an ordinary purchaser, semble, the court will discharge the purchaser from his bargain on the argument of exceptions to the title. *Taylor* v. *Martindale*, 1 Y. & C. C. C. 658.

—— **Report Confirmed.**]—A purchaser at a sale before the master cannot move to be discharged from his purchase until the report has been confirmed. *M'Culloch* v. *Gregory*, 2 Eq. R. 1088 ; 23 L. J., Ch. 656 ; 2 W. R. 575.

—— **Sale in Lots.**]—In general, objection, of a purchaser of two lots, to completion, on the ground that the title to one is bad, ought not to be discussed upon motion. *Casamajor* v. *Strode*, Coop. t. Brough. 510.

Interest and Costs.]—Whenever a purchaser is discharged, he must also get interest and his costs. *Pleasants* v. *Roberts*, 2 Moll. 507.

A purchaser discharged with his costs, charges, and expenses, including the costs of his petition, to be discharged. *Calvert* v. *Godfrey*, 6 Beav. 97 ; 12 L. J., Ch. 305.

A purchaser discharged is entitled to interest on the one-fourth of the purchase money lodged from the date of the lodgment. *Gower* v. *Hill*, Hay. & J. 127. But see *Feely* v. *Kilkenny*, supra, col. 1401.

Purchaser on discovering misstatement in abstract concealing defect in title was discharged, but as his solicitor had neglected to examine the document :—Held, that he was not entitled to interest, and that he must pay the costs of all parties except the person who had the conduct of the sale. *M'Culloch* v. *Gregory*, 1 K. & J. 286 ; 3 Eq. R. 495 ; 24 L. J., Ch. 246 ; 3 W. R. 231.

A purchaser under a decree was discharged, and it was ordered that his deposit be paid back, without prejudice to his applying for the interest thereon, and his costs, when there should be a fund in court. He died before either the costs were taxed, or a fund for their payment was realised :—Held, on a fund being realised, his personal representative was entitled to be paid thereout the interest and costs. *Mackay* v. *Orr*, 2 Ir. Eq. R. 499.

A sale made before certificate in answer to inquiries directed by the decree was held invalid :—Held, that the discharged purchaser was entitled to the stock arising from his deposit, which had been paid into court and invested, with the dividends thereon, or the actual amount of deposit and the produce, with costs, charges, and expenses. *Powell* v. *Powell*, 44 L. J., Ch. 311 ; L. R. 19 Eq. 422 ; 32 L. T. 148 ; 23 W. R. 482.

And see cases, supra, col. 1399.

9. Substitution of Purchaser.

Motion for.]—One purchaser substituted for another upon motion with consent. *Matthews* v. *Stubbs*, 2 Bro. C. C. 391.

—— **Affidavit.**]—Upon a motion to substitute one purchaser for another, there must be an affidavit that no money has been paid for the substitution. *Vincent* v. *Going*, Fl. & K. 428. S. P., *Rigby* v. *M'Namara*, 6 Ves. 515. *Vale* v. *Davenport*, 6 Ves. 615.

Where Title Defective.]—The court, if the owners and the creditors interested in the produce do not object, will allow a party to apply to stand in the place of a purchaser discharged in consequence of bad title. *Piers* v. *Piers*, Sau. & Sc. 414. Affirmed, 1 Dru. & Wal. 265.

Where the purchaser has been discharged upon a report of bad title, it is the right of the inheritor to have the estate again set up to be sold ; and the court will not, against his desire, substitute in the place of the discharged purchaser a person who offers to take the estate at the same price, and not object to the title. *O'Connor* v. *Bernard*, 3 Ir. Eq. R. 496.

—— **Purchase by Agent.**]—A farm was put up for sale under the direction of the court. G. bought the property in his own name, and was certified as purchaser. He in fact bought

as agent for B., who was the owner of immediately adjoining property. B. refused to complete on the ground that there was no title to part which faced his other property:—Held, on appeal, that G., having only purchased as agent for B., could take any objection which B., had he been the nominal as well as the real purchaser, could have taken. *Arnold, In re. Arnold* v. *Arnold*, 14 Ch. D. 270; 42 L. T. 705; 28 W. R. 635—C. A.

Sub-Purchaser.]—The court will not grant an application by a sub-purchaser to be substituted as the purchaser of an estate sold by auction under an order of the court where neither the original purchaser nor the vendor consents to the application. *Goodwin's Settled Estates, In re*, 1 N. R. 46; 32 L. J., Ch. 70; 8 Jur. (N.S.) 1170; 7 L. T. 310; 11 W. R. 54.

—— **Re-sale at a Profit.**]—A purchaser in this court having resold with a profit before his purchase was confirmed, the person to whom he has sold it is to be considered as a substituted purchaser, and must pay the additional purchase-money into court for the benefit of the parties to the suit. *Hodder* v. *Buffin*, Tam. 341; 31 R. R. 104. S. P., *Pearce* v. *Pearce*, 7 Sim. 138.

Where a purchaser of a bankrupt's estate resells it before a conveyance is executed to him by the assignees, the court will, at his instance, order the assignees to convey the estate direct to the second purchaser if no imputation is thrown on the fairness of the first sale, notwithstanding the estate has been resold at a profit. *Anderdon, Ex parte*, 1 Deac. 585; 3 Mont. & Ayr. 698.

10. Completion of Sale.

a. Report.

General Rule.]—The court will not recognise a party as a purchaser at a sale made under a decree until the master has made his report. *M'Cullock* v. *Gregory*, 2 Eq. R. 1088; 23 L. J., Ch. 656; 2 W. R. 575.

The only proper evidence of a purchase is the master's report, which must be confirmed before a purchaser can apply to the court to be discharged from his contract. *Ib.*

—— **Deterioration.**]—A purchase before the master is not complete before confirmation of the report; therefore a loss by a fire after the report, but before confirmation, falls upon the vendor. *Minor, Ex parte*, 11 Ves. 59; 9 R. R. 247.

Interest.]—Sale of an annuity before the master takes effect from the confirmation of the report; and the sale being on the 11th August, and the report confirmed in Michaelmas term, interest was given upon the purchase money from the first seal before the term. *Twigg* v. *Fifield*, 13 Ves. 517.

Purchaser when Owner.]—Purchaser under decree considered only as owner from time he pays the purchase money, and not from confirmation of report by which he is declared the best bidder, he having taken objections to title. *Mackrell* v. *Hunt*, cited 2 Madd. 34.

Varying Certificate.]—After the expiration of eight days from the filing of the chief clerk's certificate upon the sale, the court will not entertain an application to discharge or vary the certificate without special circumstances. *Howell* v. *Kightley*, 25 L. J., Ch. 341; 2 Jur. (N.S.) 455; 4 W. R. 477.

Resale.]—Lands having been sold under a decree, W. became the purchaser, and his purchase was approved, and the certificate of approval signed by the vice-chancellor. More than eight days after signature of the certificate, but before any conveyance to W., he contracted to sell to M. at an advanced price:—Held, that W. might sell. *Dewell* v. *Tuffnell*, 1 K. & J. 324.

Part of Property Omitted.]—E. knowing the value of the timber on a lot purchased that lot, and agreed to take the timber at the price named by the auctioneer. The chief clerk confirmed the sale and filed his certificate. The value of some of the timber was omitted by mistake of the auctioneer:—Held, that the purchaser was entitled to hold the property without a valuation of the timber. *Griffiths* v. *Jones*, 42 L. J., Ch. 468; L. R. 15 Eq. 279; 21 W. R. 470.

General Inquiries.]—This court will not refer it to the chief remembrancer to report generally what proceedings should be taken as to certain lands. *Cottingham* v. *Whyte*, Hay. & J. 411.

Motion by purchaser under the court for a reference to inquire whether it would benefit the parties that the contract should be rescinded, on the ground that the executor had stated he was unable to comply with the conditions:—Held, irregular. *Stubbs* v. *Sargon*, 4 Beav. 90.

Confirmation.]—The master's report approving the contract should be confirmed by a special petition stating all the facts. *Bailey* v. *Todd*, 1 Beav. 95.

A plaintiff may obtain the order absolute to confirm a sale under the court though the order nisi has been obtained by the purchaser; but the application was refused, there having been great laches on the part of the plaintiff. *Lidbetter* v. *Smith*, 5 Beav. 377.

In a creditor's suit an application to confirm absolute the master's report of last purchaser, made by consent before the expiration of the time limited by the order nisi, refused. *Vernon* v. *Thellusson*, 10 Beav. 452.

A purchaser of lands sold under the court, pursuant to a rental, stating a demise for a term, is entitled to confirmation if it should appear that they are demised for a longer term; but he may waive his title thereto. *Horner* v. *Williams*, Jon. & C. 274.

One notice of motion to confirm the master's report of best purchaser, and to pay the purchase money into court, is irregular. *Duffield* v. *Elwes*, 13 Beav. 85.

Where a sale is had in the country under the 139th Order, the bidders are not entitled to have notice of the confirmation of it by the master. *O'Grady* v. *Brady*, 11 Ir. Eq. R. 400.

b. Enforcing Completion.

After Report.]—One reported the highest bidder compelled to complete his purchase. *Cunningham* v. *Williams*, 2 Anstr. 344.

Bidding by Agent.]—A person who bids in trust for another will be attached if the bidding is not completed. *Studdert's, In re*, 1 Hog. 320.

Bankruptcy.]—Purchaser of bankrupt's mortgaged estate sold upon petition in the bankruptcy, ordered to complete. *Gould, Ex parte*, 1 Glyn & J. 231.

Upon a sale of a bankrupt's mortgaged property, the court of review has jurisdiction to enforce a specific performance of the contract by the purchaser. *Sidebotham, Ex parte*, 4 Deac. & C. 693; 2 Mont. & Ayr. 146; 4 L. J., Bk. 27.

Before Confirmation.]—Motion that a person reported best purchaser should complete his purchase by a certain day refused, the report not being absolutely confirmed. *Anon.*, 2 Ves. J. 335.

Attachment.]—An application for an attachment against a party for not executing the purchase deed, should be on notice, and the order will be absolute in the first instance. *Brennan* v. *Carroll*, 7 Ir. Eq. R. 196.

A purchaser cannot be attached for not completing his purchase, until the master has reported that a good title can be made out. *Dick* v. *Barrett*, 1 Hog. 351.

Not having been served with a copy of a decree for a sale is a good cause against an attachment, for not executing the conveyance to a purchaser. *Keogh* v. *Wood*, Vern. & S. 118. *And see cases*, supra, col. 1403.

D. TITLE.

1. In General.

Implied Undertaking for.]—A simple sale of land implies a covenant that the vendor has a good title to the land; but it does not support a count stating a warranty that he had a good title free from all liabilities whatsoever. *Ballard* v. *Way*, 1 M. & W. 520; 2 Gale, 61; 1 Tyrw. & G. 851; 5 L. J., Ex. 207.

Duty of Vendor.]—A vendor is bound to use all reasonable diligence to make a good title; nor will the court, without the consent of the purchaser, excuse the vendor from making a good title, on the terms of discharging the purchaser from his contract. *Hawkins* v. *Shewen*, 1 L. J. (o.s.) Ch. 148.

Waiver by Purchaser.]—The right of a good title does not grow out of the agreement between the parties, but is given by law; but a purchaser may waive his right, by going on with the agreement after he has full notice that he is not to expect a good title. *Ogilvie* v. *Foljambe*, 3 Mer. 53; 17 R. R. 13.

If a contract is silent as to the title, the legal implication that the purchaser is entitled to a good title may be rebutted by evidence that, before the execution of the contract, the purchaser had notice of defects in the title. But if the contract provides that a good title shall be shown, the purchaser is entitled to insist on a good title. *Gloag and Miller's Contract, In re*, 52 L. J., Ch. 654; 23 Ch. D. 320; 48 L. T. 629; 31 W. R. 601.

A contract by purchaser to take such title as vendor has does not relieve vendor from the necessity of showing a bonâ fide title, and producing the best title he can from the materials in his power. *Keyse* v. *Haydon*, 9 Hare (App.) lix.; 1 W. R. 112. *And see cases*, infra, col. 1436.

Vendor not bound to Litigate.]—A vendor is ordinarily bound to take the steps within his power to complete his contract, but he is not bound to enter into litigation with an adverse claimant in order to perfect his title. *Williams* v. *Glenton*, 35 L. J., Ch. 284; L. R. 1 Ch. 200; 12 Jur. (N.S.) 175; 13 L. T. 727; 14 W. R. 294.

Meaning of "Good Title."]—When a decree has been made for specific performance, subject to the usual reference, the words "good title" mean not an absolutely good title, but a good title having regard to the terms of the contract. *Upperton* v. *Nicholson*, 40 L. J., Ch. 401; L. R. 6 Ch. 436; 25 L. T. 4; 19 W. R. 733—C. A.

Notice.]—The rule that a purchaser who does not inquire into his vendor's title is affected with notice of what appears upon it, applies equally to a yearly tenant as to the purchaser of a greater interest. *Wilson* v. *Hart*, 35 L. J., Ch. 569; L. R. 1 Ch. 463; 12 Jur. (N.S.) 460; 14 L. T. 499; 14 W. R. 748. Affirming 2 H. & M. 551.

By s. 3, sub-s. 1 of the Conveyancing Act, 1882, a purchaser shall not be prejudicially affected by notice of any instrument . . . . unless . . . . it would have come to the knowledge of his solicitor . . . . if such inquiries and inspections had been made as ought reasonably to have been made:—Held, that the expression "ought reasonably" means ought as a matter of prudence, having regard to what is usually done by prudent men of business in similar circumstances. Doctrine as to constructive notice in *Ware* v. *Egmont* (4 De G. M. & G. 460) approved. *Bailey* v. *Barnes*, 63 L. J., Ch. 73; [1894] 1 Ch. 25; 7 R. 9; 69 L. T. 542; 42 W. R. 66—C. A.

Failure to show Title according to Contract.]—Although a vendor who has no title to a property at the date of the contract can enforce the contract against the purchaser, if he is able to show a good title in himself at the time fixed for completion, he cannot impose on the purchaser a different vendor, or compel him to accept a different contract in substitution for that into which he has entered. *Bryant and Burningham, In re*, 59 L. J., Ch. 636; 44 Ch. D. 218; 63 L. T. 20; 38 W. R. 469—C. A.

—— **New Lease instead of Residue of Old Term.**]—Under a contract for the purchase of the residue of an old term a purchaser is not bound to accept a similar new lease, the residue of an old term being in many respects more advantageous. *Mason* v. *Corder*, 7 Taunt. 9; 2 Marshall, 332; 17 R. R. 427.

—— **Power of Sale not Exercisable.**]—Trustees and executors contracted to sell under a power of sale not then exercisable. They offered to make a title by obtaining the concurrence of the beneficiaries:—Held, that the purchaser could not be compelled to complete, and that the vendors must repay to him the deposit, with interest, and pay his costs of investigating the title. *Head's Trustees and Macdonald, In re*, 59 L. J., Ch. 604; 45 Ch. D. 310; 63 L. T. 21; 38 W. R. 657—C. A.

Title by Possession.]—A good title may be made to an estate, although the origin cannot be shown by any deed or will; but it must be shown that there has been such a long uninterrupted possession, enjoyment, and dealing with the property, as affords a reasonable presumption that there is an absolute title in fee simple. *Cottrell* v. *Watkins*, 1 Beav. 361.

A twelve years' possessory title can be forced on a purchaser though the vendor had no title at the date of the contract. Such a title can be proved in chambers by less than the strictest evidence if the purchaser does not raise an objection. *Games* v. *Bonnor*, 54 L. J., Ch. 517; 33 W. R. 64—C. A.

Where a lessee had been in possession of premises for twelve years, and then bought from the lessors:—Held, that a good possessory title was shown to all the premises, and that the lessee could not rescind on the ground that part did not belong to the lessors. *Groves* v. *Loomes*, 55 L. J., Ch. 52; 53 L. T. 593; 34 W. R. 94.

Vendor not able to Complete.]—If a vendor of newly-inclosed lands undertakes to convey them to a vendee, it is an undertaking to convey the legal estate; and the vendor having only an equitable interest previously to the assignment by the commissioners, the vendee is entitled to recover his deposit. *Cane* v. *Baldwin*, 1 Stark. 65.

Re-sale by Purchaser.]—A railway company, upon a sale of superfluous lands, arranged for the postponement of the purchase-money until a date, beyond the period prescribed for the sale of superfluous lands. The purchasers having contracted to sell to another person:—Held, on a summons under the Vendor and Purchaser Act, 1874, that the court would not compel the person to complete. Whether the sale by the railway was an absolute sale, quære. *Thackwray and Young, In re*, 58 L. J., Ch. 72; 40 Ch. D. 34; 59 L. T. 815; 37 W. R. 74.

Specific Performance—Ability to Complete.]—Whether the interest contracted for be freehold or leasehold, for a long term of years, or a short lease at rack-rent, the party who comes for a specific performance should be prepared to show that he is able to give what he seeks to compel the other to take. *Fildes* v. *Hooker*, 2 Mer. 424.

Acceptance of Title.]—Where a purchaser accepts the title, he is only bound to the extent to which he has been made cognisant of it. *Bousfield* v. *Hodges*, 33 Beav. 90.

A defendant admitted by his answer, his belief that at the time of the contract the plaintiff had a title:—Held, that it was not open to the defendant afterwards to show that plaintiff had no title. *Phipps* v. *Child*, 3 Drew. 709.

Pleadings.]—By the conditions of a sale the vendor was to deliver an abstract within fourteen days from the sale, and to deduce a good title; and the purchaser was to prepare the deeds of conveyance by the 10th of November:—Held, that no precise time was fixed within which the vendor was to deduce a good title, and therefore a declaration against him for failing to do so ought to aver that he had been allowed a reasonable time. *Sansom* v. *Rhodes*, 6 Bing. (N.C.) 261; 8 Scott, 544; 9 L. J., C. P. 132.

Where a vendor covenants to deduce a good title at A., B. or C., on or before a certain day, a plea that he was ready to deduce a good title at that time, without averring notice to the covenantee at which place he would be ready to deduce such title is insufficient. *Rippingall* v. *Lloyd*, 2 N. & M. 410; 5 B. & Ad. 742.

So a plea, that, in consideration that the defendant would deduce a good title and convey (after breach), the plaintiff agreed to accept such title and conveyance at a later day. *Ib.*

Decision of Court on Questions of Title.]—It is the duty of the court to decide doubtful questions of title, and when so decided they can no longer be considered as doubtful. *Bell* v. *Holtby*, 42 L. J., Ch. 266; L. R. 15 Eq. 178; 28 L. T. 9; 21 W. R. 321.

When a question of title involves a question of general law applicable to all similar cases, the court of appeal is bound to say one way or another what the law is. *Alexander* v. *Mills*, 40 L. J., Ch. 73; L. R. 6 Ch. 124; 24 L. T. 206; 19 W. R. 310. *And see cases*, infra, col. 1452.

Title, how Shown.]—Observations on clearing a title, by showing the non-existence of rights under a reservation, or onerous covenant not stated, and on the duty of being careful and explicit in preparing for a sale. *Martin* v. *Cotter*, 3 Jo. & Lat. 496; 2 Ir. Eq. R. 351.

—— **Implied Contract.**]—A vendor who contracts to make out a good title to mortgage lands, undertakes to make out such a title as the court would adopt for compelling specific performance, and as would be a good answer to an ejectment. *Jeakes* v. *White*, 6 Ex. 873; 21 L. J., Ex. 265.

—— **Contents of Abstract.**]—A title is first shown, when the abstract states all the matters which, if proved, make a good title. *Parr* v. *Lovegrove*, 4 Drew. 170; 4 Jur. (N.S.) 600; 6 W. R. 201, 709.

A title is made when the matters are proved. *Ib.*

The showing a good title is the delivery of the abstract, where the vendor is in a condition to prove everything necessary to establish his title, appearing on the face of the abstract. *Ib.*

Whatever a vendor puts upon his abstract he is bound to prove and verify. *Ib.*

Sale by Mortgagor Subject to Lease.]—A mortgagor, after mortgaging the legal estate, demised it to a lessee for a term of years, and afterwards, with the concurrence of the mortgagees, sold the reversion, describing the property as under lease for a term of years. The purchaser having objected to the title:—Held, that the title was sufficient, as by conveyance by the mortgagees of all their interest to the mortgagor, and by him afterwards to the purchaser, such an interest would be conveyed to the purchaser as would estop the lessee from denying the lease. *Webb* v. *Austin*, 8 Scott (N.R.) 419; 7 Man. & G. 701; 13 L. J., C. P. 203.

Purchaser from Mortgagee with Power of Sale.]—When the registered owner of land has granted a first mortgage with the statutory power of sale, and has also granted subsequent mortgages, a purchaser from the first mortgagee is entitled to be registered with an indefeasible title, just as if the subsequent mortgages had not been granted, and he had purchased from the mortgagor and mortgagee together. *Richardson's Purchase, In re*, 41 L. J., Ch. 221; L. R. 13 Eq. 142; 20 W. R. 163—C. A.

T. mortgaged a plot to S., and by memorandum of same date agreed to deposit the lease of another plot with S. as collateral security. Subsequently T. assigned a moiety of the entire premises to A., and then assigned all his estate

and effects for the benefit of his creditors. S. assigned both plots to H. subject to the equity of redemption, and with such power of sale as S. had. H. sold by conditions which stated that he sold as mortgagee, and that, as he had only an equitable interest in the second plot, the purchaser should accept such title as he was able to deduce and convey:—Held, that the assignment of the legal estate, and the memorandum of deposit of the lease, were one and the same transaction, and the lease was subject to the power of sale contained in the assignment, and, consequently, that T. would not be entitled to redeem the second plot. *Ashworth* v. *Mounsey*, 9 Ex. 175; 2 C. L. R. 418; 23 L. J., Ex. 73; 2 W. R. 41.

Held, also, that by the express terms of the conditions, the vendor contracted, with reference to that plot, to sell an equitable interest only. *Ib.*

Presumption as to Incumbrance.]—A purchaser is not compellable to accept a title to premises, formerly subject to an incumbrance, the discharge of which is shown only by presumption. *Barnwell* v. *Harris*, 1 Taunt. 430; 10 R. R. 564.

It is no objection to a title that a memorandum appears amongst the title deeds, showing that a former owner had raised money by way of equitable mortgage, and that there is no evidence that such charge has been released, other than the vendor's possession of the deeds and memorandum. *Nicholl* v. *Chambers*, 11 C. B. 996; 21 L. J., C. P. 54.

Limited Title.]—S. agreed to purchase from the plaintiff "the mill property, including cottages in Esher village—all the property to be freehold," and verbally agreed to take a limited title. Negotiations were carried on as to the title till the purchaser gave notice that he should require a good marketable title to the whole property, and if that were not shown within five weeks the contract would be rescinded:—Held, that the purchaser having agreed to accept a limited title, and the negotiations having gone on upon that footing, a complete title could not be demanded. *M'Murray* v. *Spicer*, 37 L. J., Ch. 505; L. R. 5 Eq. 527; 16 W. R. 332.

Construction—Gift to Unmarried Woman for Life—Remainder to Husband in fee.]—Trust to pay rents to daughters for life for their separate use, and after their decease to convey "unto and equally between the husbands of them, my daughters, to hold to them, and their respective heirs and assigns." Both daughters married. One died in the lifetime of her husband. Then the husband of the other died, having devised his interest in the estate to his wife absolutely:—Held, that the surviving daughter could make a good title to a moiety of the estate; for that a gift to an unmarried woman for life, with remainder in fee to her husband, gives an indefeasible vested remainder in fee to her first husband. And as the question turned on a general rule of construction, the title would be forced on a purchaser. *Radford* v. *Willis*, 41 L. J., Ch. 19; L. R. 7 Ch. 7; 25 L. T. 720; 20 W. R. 132.

—— **Marriage Settlement.**]—By a marriage settlement real estate was limited to the use of A. and B. successively during their respective lives, with remainder to the use of D., his heirs and assigns, upon trust to receive the rents and profits, and to pay the same to C. for her life for her separate use, and after the determination of that estate to stand seised of the said hereditaments upon such trusts as C. should appoint, and in default of appointment, to the use of the heirs and assigns of C. for ever. C. survived her husband, and entered into an agreement to sell the real estate in fee:—Held, that C. could make a good title to the fee. *Cooper* v. *Kynoch*, 41 L. J., Ch. 296; L. R. 7 Ch. 398; 26 L. T. 566; 20 W. R. 503.

Sale of Right of Entry—Vendor out of Possession—32 Hen. 8, c. 9, s. 2.]—Although 32 Hen. 8, c. 9, s. 2, cannot be said to have been repealed by 8 & 9 Vict. c. 106, s. 6, nevertheless since the passing of the latter statute a grant of lands to which the grantor has a title existing in fact, but of which he has never been in possession, and on which he is entitled only to a right of entry, will be valid, even although at the time of the grant a litigation is pending as to the title to the lands. *Jenkins* v. *Jones*, 51 L. J., Q. B. 438; 9 Q. B. D. 128; 46 L. T. 795; 30 W. R. 668—C. A.

—— **"Pretenced" Title to Land—Knowledge of Buyer.**]—In an action for a forfeiture under 32 Hen. 8, c. 9, s. 2, against the buyer of a right of entry, since 8 & 9 Vict. c. 106, s. 6, the onus is upon the plaintiff to prove not only that the title purchased was bad, but also that the buyer knew that it was "pretenced," i.e., fictitious, or bad in fact. The mere fact that the right purchased was barred by the Statute of Limitations at the time of the purchase does not necessarily render the title "pretenced" within the meaning of the 32 Hen. 8, c. 9. *Kennedy* v. *Lyell*, 1 Cab. & E. 584; 15 Q. B. D. 491; 53 L. T. 466.

Leasehold—Sale in Lots.]—When leasehold property which is sold in separate lots is held under one lease, it is incumbent on the vendor to state that fact in plain and distinct terms. *Sheard* v. *Venables*, 36 L. J., Ch. 922; 17 L. T. 10; 15 W. R. 1166.

—— **Lease more than Sixty Years Old.**]—In the case of a contract for the sale of leaseholds, where the lease is more than sixty years old; in the absence of a condition that the purchaser shall be satisfied with the recital of the lease, the vendor is bound to produce the lease or a copy of it, or prove its loss and that no complete copy of it exists. *Frend* v. *Buckley*, 10 B. & S. 973; 39 L. J., Q. B. 90; L. R. 5 Q. B. 213; 22 L. T. 170; 18 W. R. 680—Ex. Ch.

—— **Implied Undertakings.**]—A contract for the sale of an agreement for a lease does not imply an undertaking that the proposed lessor has title to grant the lease, and, in the absence of any express stipulation, it is no defence to an action upon such contract that the lessor has no title. *Kintrea* v. *Preston*, 1 H. & N. 357; 25 L. J., Ex. 287.

In every contract for the sale of leaseholds, there is, in the absence of an express stipulation to the contrary, an implied undertaking on the vendor's part to make out the lessor's title to demise. *Hall* v. *Betty*, 5 Scott (N.R.) 508; 4 Man. & G. 410; 11 L. J., C. P. 256.

——**Covenant that Lease for Lives is Subsisting.**]—By a deed, after reciting a lease from F. to the defendant, for the lives of A., B. and C., and the survivors or survivor of them, the defendant conveyed the premises to the plaintiff, to hold for the lives of A., B. and C., and the survivors or survivor of them, and covenanted "that the lease is a good, valid, and subsisting lease in the law, for the lives of A., B. and C., and the survivors or survivor of them, and is not forfeited, surrendered, or become void, or voidable":—Held, that the covenant only amounted to a covenant that the lease was still subsisting, and not to an implied covenant that the three lives were still in existence. *Coates* v. *Collins*, 41 L. J., Q. B. 90; L. R. 7 Q. B. 144; 26 L. T. 134; 20 W. R. 187—Ex. Ch.

Enfranchised Copyholds.]—Copyholder in fee takes an enfranchisement of his copyhold in the name of a trustee, and devises the lands to his younger son, who sells to A.; the heir-at-law of the copyhold recovers in ejectment, and A. brings his bill, and is decreed to hold and enjoy against the heir. *Dancer* v. *Evett*, 1 Vern. 392. S. P., *Parker* v. *Turner*. *Ib.*

Surrender.]—Upon a sale in court of copyhold, vendor coming for aid is compelled to surrender in person if it can be done conveniently. *Noel* v. *Weston*, 6 Madd. 50; 22 R. R. 235.

Purchaser of copyhold not obliged to accept of surrender by letter of attorney. *Mitchel* v. *Neal*, 2 Ves. Sen. 679.

Assignees in bankruptcy must surrender copyhold to purchaser. *Drury* v. *Man*, 1 Atk. 95.

Copyholder contracts, for valuable consideration, to sell to his son, and dies before actual surrender; the son held entitled to performance, and to compel the widow to surrender free bench. *Hinton* v. *Hinton*, 2 Ves. Sen. 631; Amb. 277.

Demise of copyholds to wife for life, with remainder to two sons as tenants in common in fee; the eldest son and customary heir was, by an arrangement, admitted to the copyhold in fee, and executed by deed a declaration of trust to the uses of his father's will. The brothers became bankrupts, and their assignees sold their reversion to the plaintiff:—Held, that the plaintiff was not, as against the tenant for life, entitled to compel such a surrender as would give him the legal reversion. *White* v. *Stock*, 6 Madd. 327.

Apportionment of Tithe.]—Part of the property comprised in a contract was, together with certain other property of which it had originally formed part, subject to tithe:—Held, that the vendor was not bound to obtain an apportionment of the tithe. *Ebsworth and Tidy, In re*, 58 L. J., Ch. 665; 42 Ch. D. 23; 60 L. T. 841; 37 W. R. 657; 54 J. P. 199—C. A.

Evidence of Title.]—Vendor of shares seeking specific performance insisted he was not bound to give evidence of title other than attested extracts from the cost books or registers of the mines. Demurrer by the defendant overruled, as the plaintiff was not precluded from giving other evidence, if necessary. *Curling* v. *Flight*, 5 Hare, 242. *S. C.*, 2 Ph. 617; 17 L. J., Ch. 359; 12 Jur. 423, infra, col. 1426.

Declaration of Title Act.]—When, upon a petition presented under the Declaration of Title Act, 25 & 26 Vict. c. 67, s. 6, the petitioner proves such possession and states such title as, if established, would entitle him to a declaration, a reference will be ordered to chambers to establish the title. *Roberts, In re*, 22 L. T. 262.

—— **Security — Notice.**]—The court, after investigation being satisfied with the title of a petitioner to a house in London, ordered, under the 25 & 26 Vict. c. 67, that the declaration establishing the title should be made at the end of three months, that the security required by s. 9 should be 40*l.*, and that notice of the order should be advertised three times, at three days' interval in three London newspapers. *S. C.*, 39 L. J., Ch. 888; L. R. 10 Eq. 402; 22 L. T. 699.

—— **Costs—Lien.**]—The costs of proceedings under the 25 & 26 Vict. c. 67, on behalf of an infant, together with the costs of a partition suit and of a suit to obtain a declaration of lien, are costs for which the solicitor has a lien on the fund recovered. *Pritchard* v. *Roberts*, 43 L. J., Ch. 129; L. R. 17 Eq. 222; 29 L. T. 883; 22 W. R. 259.

2. Proof of.

a. Sufficiency and Verification of Abstract.

What Abstract should set out.]—An abstract of title ought to set out every part of the documents abstracted which may affect the judgment of the purchaser, and the purchaser is entitled to consider that no part of the documents which is not so set out has any bearing upon the title. *Burnaby* v. *Equitable Reversionary Interest Society*, 54 L. J., Ch. 466; 52 L. T. 350; 33 W. R. 639.

Deed not in Vendor's Possession.]—A vendor is bound at his own expense to produce to the purchaser a proper abstract of title, either for the statutory period of forty years, or for such other period as may be agreed upon, and s. 3, sub-s. 6, of the Conveyancing Act, 1881, proceeds on the assumption that the vendor has produced such an abstract. Therefore, on an open contract the vendor must bear the expense of procuring an abstract of any deed forming part of the forty years title not in his possession. The word "abstract" in that sub-s. is to be distinguished from the "abstract" of title to which the purchaser is entitled. *Johnson and Tustin, In re*, 54 L. J., Ch. 889; 30 Ch. D. 42; 53 L. T. 281; 33 W. R. 737—C. A.

Certificate of Lessor's Surveyor.]—The certificate of the lessor's surveyor that the house has been finished to his satisfaction is not a "certificate" or "evidence" within s. 3, sub-s. 6 of the Conveyancing Act, 1881, the expense of obtaining which must be borne by the purchaser, but it is part of the title itself. *Moody and Yates, In re*, 54 L. J., Ch. 886; 30 Ch. D. 344; 53 L. T. 845; 33 W. R. 785—C. A.

Registry Searches.]—Where freehold or chattel real property is offered for sale under conditions which do not provide for the expense of the registry searches, the vendor is bound, notwithstanding s. 3, sub-s. 6, of the Conveyancing and Law of Property Act, 1881, to furnish such searches at his own expense. *Murray and Hegarty, In re*, 15 L. R., Ir. 510.

What is sufficient Abstract.]—A perfect abstract of title is one which shows such a title as enables the purchaser to complete his purchase. *Blackburn* v. *Smith*, 2 Car. & K. 561.

The delivery of an abstract is the furnishing by a vendor of a document which contains with sufficient fulness the effect of every instrument which constitutes part of his title. *Oakden* v. *Pike*, 34 L. J., Ch. 620; 11 Jur. (N.S.) 666; 12 L. T. 527; 13 W. R. 673.

A purchaser is not entitled to be furnished with an abstract of the title beyond the time he has dispensed with the proof of it. *Poppleton* v. *Buchanan*, 4 C. B. (N.S.) 20; 27 L. J., C. P. 210; 4 Jur. (N.S.) 414; 6 W. R. 372.

Where an abstract of title shows a good equitable title in the vendor, with power to get in the legal estate under the Trustee Acts or otherwise, it is unnecessary for the abstract to show the devolution of the legal estate. *Camberwell and South London Building Society* v. *Holloway*, 49 L. J., Ch. 361; 13 Ch. D. 754; 41 L. T. 752; 28 W. R. 222.

—— **Incumbrances.**]—Even before 22 & 23 Vict. c. 35, s. 24, and 23 & 24 Vict. c. 38, s. 8, a vendor was not justified in suppressing an equitable incumbrance, although it might have been subsequently discharged. *Drummond* v. *Tracy*, Johns. 608; 29 L. J., Ch. 304; 6 Jur. (N.S.) 369; 1 L. T. 364; 8 W. R. 207.

Notice of an incumbrance to a conveyancer who peruses a title on behalf of one party, is not notice to another purchaser on whose behalf the same conveyancer afterwards prepares a conveyance. *Brine* v. *Featherstone*, 4 Taunt. 869; 14 R. R. 689.

A legatee of a reversionary interest which had been paid into court became bankrupt, and then mortgaged his interest to J. and E. in succession. The plaintiffs purchased the interest of J., and of the trustee in bankruptcy, and contracted to sell to the defendant. The defendant required E.'s mortgage to be abstracted as an incumbrance:—Held, that the question of the priority of E.'s incumbrance was too doubtful to justify the vendor in omitting it from the abstract. *Palmer* v. *Locke*, 51 L. J., Ch. 124; 18 Ch. D. 381; 45 L. T. 229; 30 W. R. 419—C. A.

—— **Sale by Court—Jurisdiction.**]—Wherever there is a sale by the court, it is a necessary part of the title to show that the court has jurisdiction to sell; and the vendor, though he may by his conditions protect himself from producing the pleadings themselves, must set forth in his abstract so much of the proceedings in the suit as is necessary to show that the court had such jurisdiction. *Waters* v. *Waters*, 36 L. J., Ch. 195; 15 L. T. 406; 15 W. R. 191.

—— **Defect Suppressed.**]—A vendor is bound to disclose every fact within his knowledge relating to his title. Where a vendor has knowingly suppressed a defect in title, the court will not allow him to force the title upon the purchaser. *Edwards* v. *Wickwar*, *Brayne*, *In re*, 35 L. J., Ch. 48; 13 L. T. 428; 14 W. R. 79.

Conditions of sale provided that requisition upon title should be delivered within a certain time, and in default that all objections should be deemed to be waived. Quære, whether the benefit of the condition would not in equity be forfeited by a vendor, who designedly delivered an imperfect abstract of the title. *Morley* v. *Cook*, 2 Hare, 106; 12 L. J., Ch. 136.

—— **Requisitions.**]—Conditions of sale provided that requisitions upon title should be delivered within a certain time; and in default, that all objections should be deemed to be waived. The purchaser did not deliver any requisitions:—Held, that the onus lay upon the purchaser to show that the abstract was imperfect. *Ward* v. *Ghrimes*, 9 Jur. (N.S.) 1097; 8 L. T. 782; 11 W. R. 794.

—— **Mining Company.**]—The purchaser of shares in a mining company is entitled to such evidence of the constitution of the company, and of the nature of the title under which the mines are worked, as will show that the subject matter of the purchase is what it professes to be, and that the proposed form of transfer will give him a valid title. *Curling* v. *Flight*, 5 Hare, 242; 2 Ph. 613; 17 L. J., Ch. 359; 12 Jur. 423.

No Title to be Shown.]—The defendant sold and conveyed to the plaintiff some undivided shares in various properties. Disputes arising, they signed a written agreement that the plaintiff should pay the defendant 9,500*l.*, and that the defendant should execute such deeds as the plaintiff should require for the conveyance of the estates:—Held, that the defendant was not bound to deduce any title to the property. *Godson* v. *Turner*, 15 Beav. 46.

Partnership Property.]—Sale by the personal representatives of a deceased partner, who died intestate, of his moiety of the real property of the partnership to the surviving partner, with a stipulation that they would furnish him, at their own expense, with an abstract of their title to that moiety:—Held, that they were bound to furnish the usual abstract of title, and not merely the letters of administration. *Morris* v. *Kearsley*, 2 Y. & C. 139.

Title when Shown.]—Under the usual reference as to title, a good title is made out when it is proved, but is first shown when the facts necessary to make it out are specifically alleged on the abstract, and are within a vendor's power to prove. *Parr* v. *Lovegrove*, 4 Drew. 170; 4 Jur. (N.S.) 600; 6 W. R. 201, 709.

A title is first shown when the abstract states all the matters which, if proved, make a good title. *Ib.*

Condition as to Concurrence of Beneficiaries.]—Where a condition of sale was that the vendors, being trustees, should not be required to obtain the concurrence of any one interested in the proceeds of the sale, semble, that a true abstract of such title as the vendors had, indicating points calling upon the purchaser to make further requisitions, was an abstract of their title within the meaning of the condition, although the title was not such as the purchaser was bound to accept. *Want* v. *Stallibrass*, 42 L. J., Ex. 108; L. R. 9 Ex. 175; 29 L. T. 293; 21 W. R. 685.

Verification—At whose Cost.]—Upon the facts of the case the court held that the vendor entered into the negotiation only upon the footing that she should deliver an abstract of title, and verify it so far as she had the means in her

possession at her own expense, but that the purchaser should be at the expense of completing its verification. *Thomas* v. *Blackman*, 1 Coll. C. C. 301.

—— **Facts stated in Conditions.**] — Facts stated in conditions of sale as the ground of the conditions must be proved. *Symons* v. *James*, 1 Y. & C. C. C. 487.

—— **Joint Purchasers.**]—Semble, the acceptance of a title by a joint purchaser is no answer to the right of the other purchaser to have a good title proved. *Mackreth* v. *Dunn*, 10 L. J., Ch. 367.

Manor—Statutory Declaration.]—On sale by the lord of a manor of part of the waste, he furnished a statutory declaration that no copyholder or free tenant had exercised any right of common for forty years and upwards, and that no copyholder or free tenant existed, and that no quit-rents had been paid or services rendered or court baron held for forty years and upwards: —Held, that the title could be forced on the purchaser. *Bridges and McRae's contract, In re*, 30 W. R. 539.

Recitals — Missing Deeds.] — The abstract showed a seisin in fee in B. in 1798, and a devolution of the title both legal and equitable from him to the plaintiff, and uninterrupted enjoyment thereunder. In one of the deeds abstracted, dated in 1815, there was, however, a recital of seisin in A. in 1779, and that by mesne conveyances the premises came to B. The deeds recited were missing, but affidavits were produced verifying extracts from the account books of deceased solicitors who had been concerned in framing the recited deeds, in which charges were made for preparing those deeds, and for attending to witness their execution:—Held, that the recital coupled with the extracts was good secondary evidence of the execution and contents of the missing deeds. *Moulton* v. *Edmonds*, 1 De G. F. & J. 246; 29 L. J., Ch. 181; 6 Jur. (N.S.) 305; 8 W. R. 153.

Where a deed, dated sixty years back, contains a recital of the creation of a mortgage term, and a subsequent assignment of it in trust to attend the inheritance, and the term is not subsequently noticed in the title, it will be presumed to have been surrendered; and it is no objection to the title that the vendor cannot produce the deed creating the term, nor the assignment of it. *Townsend* v. *Champernown*, 1 Y. & J. 538; 30 R. R. 825.

—— **When Conclusive.**]—Under the Vendor and Purchaser Act (37 & 38 Vict. c. 78, s. 2), a recital in a conveyance more than twenty years old, that the vendor was seised in fee-simple, is sufficient evidence of that fact, and no prior abstract of title can be demanded except so far as the recital shall be proved to be inaccurate; and in such cases a forty years' title is not required. *Bolton* v. *London School Board*, 47 L. J., Ch. 461; 7 Ch. D. 766; 38 L. T. 277; 26 W. R. 549. And see *Marsh and Granville (Earl), In re*, infra.

b. Identity.

Condition as to Evidence.]—By the conditions of sale, no further evidence of identity was to be required than what was afforded by the abstract and the documents therein abstracted. The descriptions in the documents differed amongst themselves and from the description in the particulars of sale:—Held, that the purchaser was entitled to have further proof of the identity. *Flower* v. *Hartopp*, 6 Beav. 476; 12 L. J., Ch. 507; 7 Jur. 613.

General Description.]—Contract for the sale of the borough, lordship, and manor of H., and all the messuages, lands, tenements, and other hereditaments to the said borough, lordship, and manor belonging, as set forth and described in a particular referred to in the contract; the vendors derived title under a conveyance in 1809, by the general description of the borough, lordship, and manor of H., with all and singular the appurtenances thereunto belonging or appertaining, with a reference to preceding deeds, containing the same description, through which the title was traced in the same general manner to 1744; it appeared that some lands had been purchased since 1744, and therefore could not pass under the ancient and general description; the vendors thereupon produced abstracts of the title of such lands, and showed by stewards' books that the lands, ever since they had been purchased, had been annexed to and treated as part of the manor; and to obviate the difficulty they also obtained a confirmation of the conveyance of 1809. Exceptions to the master's report of a good title were overruled. *Townsend* v. *Champernown*, supra.

Freehold and Copyhold Lands—Supplemental Agreement.]—A. B. became the purchaser of a mansion-house and park under conditions of sale, which stated that the whole property was freehold except eight acres which were copyhold, but undistinguished except as to not including any of the buildings. Difficulties arising, a supplemental agreement was entered into, detailing what requisitions should be complied with. Among these requisitions was one: "Declaration of identity of lands mentioned in deeds to those now sold":—Held, that the supplemental agreement was a substitution for the original contract, and that A. B. was not entitled to demand that the vendor should distinguish the freehold from the copyhold parts of the premises. *Dawson* v. *Brinckman*, 3 Mac. & G. 53. Affirming 3 De G. & Sm. 376.

Freeholds and Leaseholds — Boundaries.] — A purchaser of lands under the description of "partly freehold and partly leasehold" is entitled to have the boundary dividing the freehold from the leasehold defined by reference to the instruments of title, or shown to be capable of being so defined; but the circumstance that the property is described in the agreement as partly freehold and partly leasehold, the boundaries distinguishing the one from the other not being therein, and having not theretofore been clearly defined, is not an objection to a decree for specific performance. *Monro* v. *Taylor*, 8 Hare, 51. Affirmed, 3 Mac. & G. 713; 21 L. J., Ch. 525.

Recital—When Conclusive.]—By a deed executed in 1858 (after the death of the settlor), the trustees conveyed the property to a purchaser for value. This deed contained a recital of a deed of 1845, and a recital that the trustees "in pursuance of the trust for sale conferred on them" by that deed had caused the property to

be put up for sale:—Held, that by virtue of s. 2 of the Vendor and Purchaser Act 1874, this recital, not being shown to be inaccurate, was conclusive evidence that the deed of 1845 had not been revoked. *Marsh and Granville (Earl), In re*, 24 Ch. D. 11; 48 L. T. 947; 31 W. R. 845—C. A. Affirming 52 L. J., Ch. 189. And see *Bolton* v. *London School Board*, supra.

—— **Copyholds — Surrender.**]—The presumption is, that a surrender will bar an estate tail in copyholds, until a contrary custom is shown. *Goold* v. *White*, Kay, 683; 2 Eq. R. 1100.

Copyholds having been sold, subject to a condition that all statements and recitals in any of the title deeds or muniments of title should be considered as satisfactory evidence of the facts stated or recited, the purchaser objected, that the first surrender on the abstract was by A., and J., his wife, which said J., it was therein stated, "had then lately been admitted there tenant in tail, according to the custom of that manor." Afterwards the purchaser required evidence that the custom of the manor warranted estates tail. The first surrender was dated in 1801, and was conditional only. In 1815 the same parties made an absolute surrender in fee, under which the possession had been enjoyed ever since:—Held, that the recital was conclusive evidence, under the conditions of sale, that J. had been admitted tenant in tail, and that the recital, coupled with the surrenders of 1801 and 1815, and the subsequent possession, consistently with that title, was sufficient evidence that the custom of the manor did warrant estates tail. *Ib.*

—— **Notice of Trust.**]—Property was mortgaged to W. in fee, there being nothing to show that he was not the beneficial owner of the mortgage money. He died, having by his will devised and bequeathed his real and personal, and also his trust and mortgaged estates to trustees. The widow alone proved the will, and alone acted as trustee, and obtained a decree absolute foreclosing the mortgage. In 1865 she, by a deed indorsed on the mortgage deed, conveyed the property, without any consideration to K., C. and B., in fee, as joint tenants. The conveyance contained a recital that the testator held the mortgage money on an account under which K., C. and B. were then solely entitled thereto, as was thereby acknowledged, whereby the widow, as trustee under the testator's will, was trustee only of the property for K., C. and B., and they had requested her to convey it to them. On a subsequent sale by persons who had purchased from K., C. and B., the purchasers required evidence of the truth of the recital in the deed of 1865 that K., C. and B. were entitled to the mortgage money:—Held, that it would be contrary to the practice of the court to go behind a recital evidently framed for the purpose of keeping notice of trusts off the conveyance, and that a good title had been shown by the vendors. *Harman and Uxbridge and Rickmansworth Ry., In re*, 52 L. J., Ch. 808; 24 Ch. D. 720; 49 L. T. 130; 31 W. R. 857.

Where Matter of Title.]—Identity is as much matter of title as devolution. *Brown* v. *Wales*, L. R. 15 Eq. 142.

Evidence from Title Deeds.]—A clause in an agreement for purchase that the purchaser is not to require any further proof of identity than that given by the title deeds exempts the vendor from producing further evidence; but he cannot force the title on the purchaser unless the evidence is complete upon the deeds. *Curling* v. *Austin*, 2 Dr. & Sm. 129; 10 W. R. 682.

Sale of Timber and Estate.]—Where, upon a contract for the sale of an estate, a separate and distinct contract is made for the sale of the timber upon it, the court will not enforce the latter unless the vendor can give the purchaser such possession and dominion over the timber as will entitle him to fell and remove it; but if an entire contract be made for the sale both of the estate and the timber, the vendor is only bound to make out his title to the land according to the contract, and the title to the land is the title to the timber upon it. *Crosse* v. *Lawrence*, 9 Hare, 462; 21 L. J., Ch. 889; 16 Jur. 142.

Sale in Lots—Mistake.]—Lessee granted underlease of a messuage, No. 7, to A., and after lessee's death his trustees sold No. 7. On investigating the title, it appeared that the parcels set out in the underlease were, by a clerical mistake, the parcels of No. 6. The trustees, after the sale, obtained an order to correct this mistake, by authorising an assignment to the tenant of No. 6, and a new underlease, with proper parcels, to the tenant of No. 7; and the court compelled the purchaser to complete the purchase. *Grissell* v. *Peto*, 2 Sm. & G. 39; 18 Jur. 591; 2 W. R. 178.

Lands whether included in Devise.]—Where there was a doubt as to whether part of lands agreed to be sold was included in a particular devise, the court would not, under its discretionary jurisdiction, compel the purchaser to accept the title. *Ashton* v. *Wood*, 3 Sm. & G. 436; 3 Jur. (N.S.) 1164.

c. Heirship and Descent.

Evidence as to Heirship.]—Evidence as to the heirship of daughters. *Hemming* v. *Spiers*, 15 Sim. 550; 11 Jur. 294.

A conveyance to a purchaser in 1793, from persons residing in B., of lands then in their possession, and to which, subject to an outstanding but satisfied mortgage term, they claimed title, under an entail created in 1732, through a descent recited in the deeds. A subsequent assignment of the mortgage term from the mortgagee to the purchaser, and an uninterrupted enjoyment under his conveyance, will not enable him to make a good title, if unsupported by extrinsic evidence of the pedigree recited in the deeds, or of possession prior to 1793, conformably to that pedigree. *Fort* v. *Clarke*, 1 Russ. 601.

A vendor taking title as heir is not bound to prove that the ancestor took as purchaser, but may rely on the statutory presumption, until some proof to the contrary is adduced. But he is bound to disclose any matters within his knowledge tending to rebut that presumption. *Dorling* v. *Claydon*, 1 H. & M. 402.

B. entered into a contract for the purchase of an estate, which stated that "N., the vendor, in 1848, entered into possession of the receipts of the rents of the estate, claiming as heir-at-law to his cousin, the last owner; that a copy of the pedigree on which such claim was based would be furnished to B., who should admit the right of N. as such heir-at-law." A pedigree was furnished, but it failed to show that N. was the heir-at-law

—Held, that the purchaser was bound to admit the title of N. *Nash* v. *Browne*, 32 L. J., Ch. 148; 9 Jur. (N.S.) 431; 7 L. T. 667.

Seisin.]—Where a title of more than sixty years commences with a will containing a general devise, and there is a subsequent deed of covenant by the devisee in fee to produce deeds of earlier date, that will and deed, coupled with continuous possession ever since, is sufficient evidence of seisin. *Parr* v. *Lovegrove*, 4 Drew. 170; 4 Jur. (N.S.) 600; 6 W. R. 201, 709.

Where a condition of sale provided that the vendors should not be required to commence the title prior to the will of E., but that the purchaser should be satisfied with a declaration of the seisin of E. in fee-simple of the property, free from incumbrances for a certain period:—Held, that the declaration must strictly comply with the terms of the condition. *Nott* v. *Riccard*, 22 Beav. 307; 25 L. J., Ch. 618; 2 Jur. (N.S.) 1038; 4 W. R. 269.

—— **Mistake as to Ownership.**] — A., who was heir in tail of a testator and so entitled to the whole estates, under a mistake as to her rights, sold to the defendant one-fifth of the estate (which was all she thought herself entitled to), and by the conveyance she conveyed to the defendant her one-fifth and all her estates and shares in the land, neither of them being aware of the earlier title. On discovering her rights she filed a bill to have the conveyance set aside and to be declared a tenant in tail of the whole:—Held, that the plaintiff was bound to show that the original testator was seised in fee of the freeholds claimed by her, and that as she had not done so, her bill must be dismissed. The defendant had conveyed his estate to mortgagees, and they, as purchasers for valuable consideration without notice, could not be interfered with. *Bulley* v. *Bulley*, 44 L. J., Ch. 79; L. R. 9 Ch. 739; 30 L. T. 848; 22 W. R. 779.

d. Will, Probate or Establishment of.

Where Validity of Will Doubtful.]—A purchaser of real property, the title to which is derived under a will, is not entitled to have the will established, or to have the concurrence of the testator's heir in the conveyance to him, unless some reasonable ground exists for doubting the validity of the will. *M'Culloch* v. *Gregory*, 3 K. & J. 12; 2 Jur. (N.S.) 1134.

On a sale by parties claiming under a devisee named in a will, which has been unsuccessfully disputed by parties claiming under a prior will, the purchaser has not in general a right to have the will established as against the heir. *Ib.*

Such a purchaser (the vendor having bought in the alleged rights, of the heir-at-law, has no right to put such vendor to any proof of the heirship of the party whose assumed rights had been so bought. *Ib.*

In a suit for specific performance by a vendor whose title was derived under a suspicious will, it appeared that the heir had failed in an action of ejectment, and afterwards, on a motion for a new trial, the master reported in favour of the title, and the vice-chancellor confirmed the report, and decreed specific performance, without requiring the plaintiff to establish the will. But the lord chancellor, on appeal, reversed that decision. *Grove* v. *Bastard*, 2 Ph. 619; 17 L. J., Ch. 351; 10 Jur. 385.

Title Derived from Heir.]—Where the title of an estate was derived from a person who entered as heir, under the impression that his ancestor's will was void, a purchaser has a right to production of the will, or evidence of its contents. *Stevens* v. *Guppy*, 2 Sim. & S. 439; 6 L. J. (O.S.) Ch. 164.

Proof in Equity.]—One articles to buy lands, and the title is under a will, not proved in equity against the heir, yet, in some cases, equity will compel the purchaser to accept the title. *Cotton* v. *Wilson*, 3 P. Wms. 190.

Construction of Will by Court of Chancery.]—Where a title depends on the words of a will, this is as properly determinable in equity as by a judge and jury at nisi prius. *Tanner* v. *Wise*, 3 P. Wms. 296; Cas. t. Talb. 284.

Decree against Heir Suppressing Will.]—A devisee obtains a decree to hold and enjoy against the heir, who it was supposed had suppressed the will; pending this suit, a third person gets an assignment of mortgage made by the testator, and then purchases the equity of redemption of the heir with notice of the will. The court would not admit the purchaser to dispute the justness of the decree, nor to try at law whether the will was not cancelled by the testator. *Finch* v. *Newnham*, 2 Vern. 215.

Misleading Abstract.]—In an abstract of a vendor's title, a will which formed part of it was represented as having been proved, which afterwards appeared not to have been done. The will was directed to be deposited with the master; the vendors were ordered to pay all costs. *Harrison* v. *Coppard*, 2 Cox, 318.

Probate in Consistory Court.]—An agreement having been entered into for the sale of certain securities upon tolls within the diocese of Lincoln, it appeared from the abstract of title that the will of one in the series of owners, had been proved only in the consistory court of the Bishop of Lincoln. The court declined either to force the title on the purchaser or to order the vendor to procure probate in the prerogative court of the Archbishop of Canterbury. *Williams* v. *Bland*, 2 Coll. C. C. 575; 15 L. J., Ch. 331; 10 Jur. 404.

Proof of Codicil.]—A testator, in 1836, devised all his real estate to his wife, and appointed her executrix. He afterwards purchased an advowson, and died. The widow proved this will, and sold the advowson. An objection being made that the after-purchased property did not pass, a search was made, and another testamentary instrument of 1847 was found, purporting to confirm a will of 1836:—Held, that the purchaser was entitled to the same amount of proof of the codicil of 1847 as would be necessary to establish it against the heir. *Weddall* v. *Nixon*, 17 Beav. 160; 22 L. J., Ch. 939; 17 Jur. 642; 1 W. R. 250.

3. PRODUCTION OF TITLE.

Copyholds—Enfranchisement.]—The vendor of a copyhold estate enfranchised under the 15 & 16 Vict. c. 51, is not bound to show the lord's title. *Kerr* v. *Pawson*, 25 Beav. 394; 27 L. J., Ch. 594; 4 Jur. (N.S.) 425; 6 W. R. 447.

After the 15 & 16 Vict. c. 51, but before 21 & 22 Vict. c. 94, an agreement was entered into for the sale of a copyhold estate, together with the timber and all appurtenances to the same hereditaments belonging, as soon as the same should become freehold, under an agreement of the vendor to use his best endeavours to enfranchise: an enfranchisement was made under the second act, reserving the minerals to the lord:—Held, that the purchaser must complete. *Ib.*

—— **Copy of Admission.**]—An equitable mortgage may be created of copyholds by deposit of the copy of court roll. A purchaser or mortgagee ought to require the vendor or mortgagor to produce an abstract of his title and the copy of his admission to the copyhold premises. *Whitbread* v. *Jordan*, 1 Y. & C. 303; 4 L. J., Ex. Eq. 38.

Sale of Freeholds Subject to Leases.]—A lord of a manor selling freehold lands of the manor subject to leases for lives granted by copy of the court roll must covenant to produce the court rolls up to the date of the conveyance. *Poulett (Earl)* v. *Hood*, 37 L. J., Ch. 224; L. R. 5 Eq. 115; 17 L. T. 486; 16 W. R. 323.

Sale of Leasehold.]—If the vendor of a leasehold interest means to sell, without producing his lessor's title, he ought to declare it. *Ogilvie* v. *Foljambe*, 3 Mer. 53; 17 R. R. 13.

On a suit for specific performance under an agreement, general as to title, the master cannot report a good title in vendor, unless he sets forth a good title in his lessor. *Purvis* v. *Rayer*, 9 Price, 488; 23 R. R. 707.

A contract for sale of the lessee's interest in a lease does not exonerate the vendor from the necessity of proving the lessor's title to grant the lease. *Fennelly* v. *Anderson*, 1 Ir. Ch. R. 706.

Whether without express stipulation a person under a contract with a lessee for years to purchase the term, can insist upon a production of the lessor's title, and whether the lessee can compel such production, quære. *White* v. *Foljambe*, 11 Ves. 337. S. P., *Fildes* v. *Hooker*, 2 Mer. 424.

—— **Bishop's Lease.**] — Objection to title between vendor and purchaser on the ground of non-production of lessor's title, overruled in the case of a bishop's lease. *S. C.*, 2 Mer. 430. S. P., *Fane* v. *Spencer*, 2 Madd. 438.

—— **Assignment by Indorsement.**]—On a contract to take an assignment of a lease the purchaser requested the vendor to prepare the assignment by indorsement totidem verbis with that to himself (the vendor):—Held, that the purchaser could not afterwards require the production of the original lessor's title. *Smith* v. *Capron*, 7 Hare, 185; 19 L. J., Ch. 322; 14 Jur. 686.

—— **Other Property Comprised in Lease.**]—An agreement to let for the term of sixty-one years the premises then occupied by the vendors as held under A., does not absolve the vendors from the duty of proving the title of their lessor, A. And on its appearing that A. was himself only a lessee for three lives with a covenant for perpetual renewal:—Held, that the fact of other premises being comprised in the lease to A. was a fatal objection to the title. *Leathem* v. *Allen*, 1 Ir. Ch. R. 683.

Underlease.]—If a lessee for a term of years underlet for a less term, and the under lessee sell by auction the lesser term, describing it as a lease, and one of the conditions of sale is that the lessor's title shall not be inquired into, the vendor's title being good, quære, whether the purchaser can refuse to complete, because there is a term imposed between the vendor's interest and the freehold. *Darlington* v. *Hamilton*, Kay, 550; 2 Eq. R. 906; 23 L. J., Ch. 1000.

Surrendered Lease.]—Upon the sale of a leasehold for lives, in consideration of the surrender of a prior lease, the title to the surrendered lease must be shown. *Hodgkinson* v. *Cooper*, 9 Beav. 304; 15 L. J., Ch. 160; 10 Jur. 39.

Receipt for Rent.]—Although under ordinary circumstances, upon the sale of leaseholds, the production of the last receipt for ground rent, without proof of the title of the person giving the receipt, is sufficient, yet where such title is bonâ fide in question, the court will not compel specific performance without proof of the reversioner's title. *Pegler* v. *White*, 33 L. J., Ch. 569; 10 Jur. (N.S.) 330; 10 L. T. 84; 12 W. R. 455.

—— **Underlease.**]—On the sale of an underlease the production of the ground landlord's receipt for rent paid by the vendor to the ground landlord under threat of distress for the ground rent, is not the "production of the receipt for the last payment due for rent under the underlease," within the meaning of the Conveyancing Act, 1881, s. 3, sub-s. 5. *Higgins and Percival, In re*, 57 L. J., Ch. 807; 59 L. T. 213.

—— **Peppercorn Rent.**]—The Conveyancing Act, 1881, s. 3, sub-s. 4, does not apply to a peppercorn rent so as by the production of a receipt for a peppercorn to relieve the vendors of a building lease from the obligation of showing that the covenants with the lessor have been performed. *Moody and Yates, In re*, 54 L. J., Ch. 886; 30 Ch. D. 344; 53 L. T. 845; 33 W. R. 785—C. A.

—— **Breach of Covenants.**]—A sale was made under condition that the last receipt for rent should be taken as conclusive evidence of the due performance of all covenants. Certain breaches of covenant had taken place, but the last receipt for rent was produced. Specific performance of the contract having been decreed, and a reference as to title which was not appealed from:—Held, that the vendor had made a good title in accordance with the contract which the purchaser was bound to accept. *Lawrie* v. *Lees*, 51 L. J., Ch. 209; 7 App. Cas. 19; 46 L. T. 210; 30 W. R. 285—H. L. (E.) *And see cases*, supra, col. 1230.

Waiver by Agreement.]—The vendor of a leasehold interest is bound to show the lessor's title to demise, unless it is otherwise stipulated in the contract of sale. *Souter* v. *Drake*, 3 N. & M. 40; 5 B. & Ad. 992; 3 L. J., K. B. 31.

No agreement to dispense with the production of the lessor's title will be implied from the circumstances of the term being nearly expired, the

small value of the property, and the absence of any premium. *Ib.*

A. agreed to sell to B. leases of a public-house and shop adjoining, and B. agreed to accept a proper assignment of the leases and premises without requiring the lessor's title :—Held, that the true meaning of this agreement was that the vendee was to purchase the two leases without inquiring into the title of the lessor. *Spratt* v. *Jeffery*, 10 B. & C. 249.

What Amounts to Waiver.]—It is not so universally the custom to call for the lessor's title as for that of the vendor of a fee simple, and therefore smaller circumstances will satisfy the court that the right to call for the lessor's title was waived. *Simpson* v. *Sadd*, 4 De G. M. & G. 665 ; 3 Eq. R. 263 ; 24 L. J., Ch. 562 ; 1 Jur. (N.S.) 457 ; 3 W. R. 118.

An objection on the ground of non-production of the lessor's title is not waived by a premature conditional approbation of the title, by the purchaser's counsel ; but the expense incurred in making out the title before this objection was taken, repaid. *Deverell* v. *Bolton (Lord)*, 18 Ves. 505.

Approbation of counsel not a waiver of all reasonable objections to the title. *Id.* 514.

—— **Objection Discovered after.**]—In a suit for specific performance of an agreement to accept a lease, the court, considering the defendant (the intended lessee), by his conduct, to have waived all objections to title, decreed a specific performance, and referred it to the master to settle the lease. In settling the lease, the original lease was produced and found to contain certain covenants unknown to the defendant. On exceptions to the report :—Held, that the court would not enforce a specific performance. The form of the decree in this case was followed in *Simpson* v. *Sadd* (supra), *Warren* v. *Richardson*, Younge, 1.

—— **Purchaser Making Draft.**]—Semble that where the purchaser, after transmission to him of the original lease, prepares a draft assignment, and makes various objections, but does not require production of the landlord's title, he will be considered to have waived its production. *Clive* v. *Beaumont*, 1 De G. & Sm. 397.

—— **Purchase of Adverse Interest.**]—When the plaintiff and defendant claim leaseholds under the same instrument, and the defendant purchases the plaintiff's share, he cannot object that the lessor's title is not shown. *Phipps* v. *Child*, 3 Drew. 709.

A defendant admitting by his answer that at the date of the contract the plaintiff was entitled, cannot at the hearing object that no abstract was delivered, and no title shown. *Ib.*

Purchaser of property of an insolvent sold as personalty, on investigation discovered it was realty and repudiated the contract. He then bought up the title of the heir :—Held, that he could not avail himself of this purchase to defeat his contract, but that he had thereby removed the objections to the title, and specific performance was decreed against him, allowing him the expenses of his purchase from the heir. *Murrell* v. *Goodyear*, 1 De G. F. & J. 432 ; 29 L. J., Ch. 425 ; 6 Jur. (N.S.) 356 ; 2 L. T. 268 ; 8 W. R. 398.

And see cases under next section.

4. WAIVER OF TITLE.

What is—After Notice of Defect.]—The right of a good title does not grow out of the agreement between the parties, but is given by law ; but a purchaser may waive his right, by going on with the agreement after he has full notice that he is not to expect a good title. *Ogilvie* v. *Foljambe*, 3 Mer. 53 ; 17 R. R. 13.

A. and B. agree to grant mutual leases upon terms stated in a letter by A.'s solicitor, and accepted by B.'s solicitor. A.'s solicitor sent B.'s a draft of a formal agreement, which was returned by B.'s unaccepted, as he considered the agreement already definite and binding. Both A. and B. had antecedent knowledge of the title, and B. appeared to have acted on his knowledge :—Held, that there was a waiver of objections to the title on the part of B., and that A. was entitled to specific performance. *Herring* v. *Miles*, 3 W. R. 127.

—— **Retaining Abstract.**]—A purchaser having retained the abstract for five months, made no objections to the title, but simply required the vendor to verify the abstract with the title deeds :—Held, that he must be deemed to have accepted the title. *Pegg* v. *Wisden*, 16 Beav. 239 ; 16 Jur. 1105 ; 1 W. R. 42.

B., the purchaser of an advowson, had an abstract delivered to him, and, after the date for completion, sent in requisitions, and received answers thereto, and made no further reply :—Held, that B. must be considered to have accepted the title. *Sweet* v. *Meredith*, 31 L. J., Ch. 817 ; 8 Jur. (N.S.) 637 ; 6 L. T. 413 ; 10 W. R. 402.

—— **Continuing Negotiations.**]—W. contracted to sell a dwelling-house to H., possession to be given on the 26th February ; H. wanted the house for immediate occupation. The purchaser did not enter into possession, but continued to negotiate for some time longer, when he gave a peremptory notice of abandonment of the contract :—Held, that there must be a decree for specific performance of the contract. *Webb* v. *Hughes*, 39 L. J., Ch. 606 ; L. R. 10 Eq. 281 ; 18 W. R. 749.

—— **Defect Shown on Abstract.**]—No objection to a purchaser that the defect of title appeared on the abstract delivered before he filed his bill. *Stapylton* v. *Scott*, 16 Ves. 272 ; 10 R. R. 179.

—— **When Verbal.**]—A purchaser, who in his written contract stipulates for a good title, cannot be required to complete upon a defective title on the ground of a verbal waiver of the stipulation. *Goss* v. *Nugent (Lord)*, 2 N. & M. 28 ; 5 B. & Ad. 58 ; 2 L. J., K. B. 127.

—— **Contesting Variations in Title.**]—Purchaser need not wait for a new title, but may call on the vendor to abide by the original abstract ; but if he goes on to contest variations made in the title, he waives the objection grounded on delay. *Magennis* v. *Fallon*, 2 Moll. 581.

Where a purchaser goes on contesting the title without a protest against delay, that is a waiver of that ground of objection. But if he protests against the delay, but, not being sure that his protest is valid, goes on to make the best

case he can, otherwise to be discharged, that goes only to costs, and does not amount to acquiescence. *Ib.* 578.

A party to a contract becoming aware of an objection to the validity of the contract, must forthwith state it as an objection; if, after such knowledge, he treats the contract as subsisting, he will be considered to have waived the objection. *Flint* v. *Woodin*, 9 Hare, 618; 16 Jur. 719.

Waiver in Part.]—Purchaser, having two distinct grounds, and contesting the right to enforce his contract upon one which failed:—Held, not to have waived the other, although he did not bring it forward for a considerable time after he became aware of it. *Magennis* v. *Fallon*, supra.

Delay.]—Circumstances of delay considered not to amount to a waiver of requisitions on title. *Cooch* v. *Walden*, 46 L. J., Ch. 639.

A delay of seven months held no waiver of an objection to the title, which turned upon a question of fact. *Martin* v. *Cotter*, 3 Jo. & Lat. 496; 9 Ir. Eq. R. 351.

Laches will not be imputed to a vendor on account of delay, however long, in filing his bill for specific performance, where negotiations respecting the title have been going on the whole time. *M'Murray* v. *Spicer*, 37 L. J., Ch. 505; L. R. 5 Eq. 527; 16 W. R. 332.

Taking Possession.]—Possession taken generally amounts to a waiver even of objections to title. *Fludyer* v. *Cocker*, 12 Ves. 27; 8 R. R. 275.

In a suit to compel the defendant specifically to perform an agreement to take a lease:—Held, that under the circumstances of the case the intended lessee had waived his right to call for the title of the intended lessor. *Simpson* v. *Sadd*, 4 De G. M. & G. 665; 3 Eq. R. 263; 24 L. J., Ch. 562; 1 Jur. (N.S.) 457; 3 W. R. 118.

The mere fact of taking possession does not, either in the case of vendor and purchaser, or in that of lessor and lessee, operate as a waiver of the purchaser's or lessee's right to call for the vendor's or lessor's title, though an intention to waive the right is less probable in the former than in the latter instance. *Ib.*

An agreement to sell the interest of A. in the lands of Whiteacre does not absolve A. the vendor, from the necessity of proving his lessor's title. Nor is there any waiver by the mere fact of the vendee having taken possession of the lands before production of the lessor's title. *Wright* v. *Griffith*, 1 Ir. Ch. R. 695.

Primâ facie taking possession after an abstract has been delivered, and not in pursuance of any provision in the contract, is a waiver of the objections appearing on the abstract, and it lies on the purchaser to rebut that presumption. *Bown* v. *Stenson*, 24 Beav. 631.

A purchaser had taken possession by his tenant, and not under the contract, after an abstract had been delivered, and he had made no objection to the title till long after, when a suit was threatened:—Held, that he had waived all objections arising upon that abstract; but that he had not waived any objection not arising on the abstract. *Ib.*

Agreement made for purchase of the equity of redemption in property, with a stipulation for immediate possession, and that the purchasers shall indemnify the vendors in respect of the mortgage money and interest. Possession is taken by the purchasers, and retained for upwards of two years, when the mortgagees take possession and sue the vendors upon the mortgage covenant:—Held, that the purchasers had waived objections to the title. Where immediate possession is stipulated in an agreement, and also delivery of an abstract, the mere act of taking possession does not amount to a waiver of the title. *Sibbald* v. *Lowrie*, 2 Eq. R. 485; 23 L. J., Ch. 593; 18 Jur. 141; 2 W. R. 89.

—— **On Sale by Court.**]—A purchaser under a decree, who takes possession without the order of the court, by an arrangement with the solicitor in the suit, accepts the title. *Wilden* v. *Andrews*, 4 L. J. (O.S.) Ch. 208.

—— **No Objection to Abstract.**]—Specific performance decreed against purchaser, without reference as to title, upon possession, and no objection made to abstract. *Fleetwood* v. *Green*, 15 Ves. 594. S. P., *Anspach (Margravine)* v. *Noel*, 1 Madd. 310; 16 R. R. 227.

—— **Title Accepted through Misrepresentation.**]—Consent to accept a title given under the influence of representations of the vendor, which turn out to be inaccurate, will not bind the purchaser. If a purchaser, entitled by agreement to possession, enters and exercises ownership, he is not thereby precluded from having a reference as to title, on objections not appearing upon any previous abstract delivered to him. *Johnes* v. *Claughton*, 2 L. J. (O.S.) Ch. 113.

—— **Right to Rescind.**]—Taking possession by a purchaser does not, in all cases, amount to a waiver of a requisition which has not been answered, and, therefore, where a purchaser took possession with leave of the vendor pending an answer to a requisition:—Held, that he was not thereby precluded from rescinding. *Turquand* v. *Rhodes*, 37 L. J., Ch. 830; 18 L. T. 844; 16 W. R. 1074.

—— **Assignment of Purchaser's Interest.**]—A party who had contracted for the purchase of the benefit of an agreement for a lease, and who before the lease was granted entered into possession and paid part of the purchase money, and after the lease had been granted assigned his interest in it as a security for money lent:—Held, to have waived all objections on the score of title. *Haydon* v. *Bell*, 1 Beav. 337; 2 Jur. 1008.

—— **Vexatious Objections.**]—Purchaser after long possession and vexatious objections to complete the purchase:—Held, to have waived his right to an investigation of the title. *Hall* v. *Laver*, 3 Y. & C. 191.

—— **Rents and Profits.**]—Where a party had been eight years in possession, and refused either to abandon the agreement or accept such title as the vendor could give, having paid no part of the purchase money and no rent; the court directed the agreement to be delivered up to be cancelled, and the rents and profits received by the purchaser to be accounted for. *King* v. *King*, 1 Myl. & K. 442. And see *Deller* v. *Simonds*, infra, col. 1440.

—— **Acts of Ownership.**]—A purchaser was held entitled to an investigation of the vendor's title, notwithstanding possession taken, acts of ownership incident to possession, and prepara-

tion of a conveyance. *Burroughs* v. *Oakley*, 3 Swanst. 159 ; 19 R. R. 188.

The purchaser entered into possession. While in possession he made improvements, cut down timber, sold timber, also part of the materials of the subject of the contract, built kitchens, &c. : —Held, that these acts did not amount to an acceptance of the title. *Fraser* v. *Bennett*, 1 Jur. 473.

Although a purchaser entering into possession, and dealing with the property in a manner contrary to the usage in good husbandry, may be a ground for compelling him to pay the purchase money into court, or for the appointment of a receiver, it will not be a ground to force the title on him. *Osborne* v. *Harvey*, 1 Y. & C. C. C. 116 ; 11 L. J., Ch. 42.

A purchaser of a share in a co-partnership does not waive objections to the title by taking possession of the property, and acting as a partner, when the contract stipulates that a good title shall be made by a specified day, and it appears to have been the intention that the purchaser should immediately have possession. *Stevens* v. *Guppy*, 3 Russ. 171 ; 6 L. J. (o.s.) Ch. 164 ; 27 R. R. 59.

—— **Approval of Abstract.**]—A purchaser who took possession under agreement, admitted by answer that an abstract of title had been delivered to him, and approved by counsel : —Held, that he had a right to a reference to the master, though he had all along continued in possession without taking any objection to title. *Boxhall* v. *Jackson*, 3 L. J. (o.s.) Ch. 100.

—— **Grant of Lease.**]—A purchaser who, in the full knowledge of objections to the title, grants a lease of the property to a third party, must be taken to have waived the objections. *Sidebotham*, *Ex parte*, 4 Deac. & C. 693 ; 2 Mont. & Ayr. 146 ; 4 L. J., Bk. 27.

—— **Knowledge of Defects.**]—If a purchaser, after the delivery of the abstract, on the face of which part of the estate appears to be subject to a right of sporting, not mentioned in the particulars of sale, enters into possession, he waives the objection. *Burnell* v. *Brown*, 1 J. & W. 168 ; 21 R. R. 136.

If a contract is silent as to the title which is to be shown, the legal implication that the purchaser is entitled to a good title may be rebutted by evidence that, before the execution of the contract, the purchaser had notice of defects in the vendor's title. But, if the contract expressly provides that a good title shall be shown, the purchaser is entitled to insist on a good title, notwithstanding that before the execution of the contract he had notice of defects in the vendor's title. If the contract contains no stipulation as to possession being taken by the purchaser before completion, and he takes possession with knowledge that there are defects in the title which the vendor cannot remove, the taking possession amounts to a waiver of the purchaser's right to require the removal of those defects, or to repudiate his contract. If, on the other hand, the defects are removable by the vendor, the taking of possession does not amount to such a waiver. *Glaag and Miller's Contract, In re*, 52 L. J., Ch. 654 ; 23 Ch. D. 320 ; 48 L. T. 629 ; 31 W. R. 601.

—— **Under Informal Agreement.**]—Possession taken under the terms of an informal letter, by which the plaintiff agreed to give up to S. all the deeds, and to sign and hand over all the necessary leases to enable S. to have and possess the whole and sole contract over the freehold, leasehold, and copyhold property of which the plaintiff was possessed or interested in. After possession, S. carried on the business, and received the rents of other parts of the property :—Held, that specific performance of the agreement must be decreed. *Deller* v. *Simonds*, 5 Jur. (N.S.) 997.

Held, also, that the right to an investigation of the title had been waived by the purchaser. *Ib.* And see *King* v. *King*, supra, col. 1438.

5. Reference.

a. In General.

General Rule.]—General rule that court will not decide upon a title without reference to master, unless unequivocally, and without fraud or surprise, waived ; a plaintiff seeking specific performance being entitled to opportunity of making a better title before the master, and the defendant having a right to further inquiry, upon principle that bill seeks relief beyond the law. *Jenkins* v. *Hiles*, 6 Ves. 646 ; 6 R. R. 14.

A decree for reference of title, on a bill for specific performance, should contain a declaration that the contract ought to be specifically performed. *Mole* v. *Smith*, Jacob, 495.

Court will not make absolute the common order nisi to dissolve injunction without master's report as to sufficiency of title, although objections are fully stated in defendant's answer. *Church* v. *Legeyt*, 1 Price, 301.

Suit against Vendor.]—The master's report on reference of title will not be suspended to await the event of a suit commenced against the vendor for recovery of part of the estate ; but the two suits may be heard together. *Osbaldiston* v. *Askew*, 2 J. & W. 539 ; 1 Russ. 160 ; 25 R. R. 21.

On a reference of title in a suit, for specific performance, the fact that a suit has been subsequently instituted, in which part of the lands is claimed adversely to the vendor, is not sufficient ground for reporting that a good title cannot be made. *Ib.*

Validity of Contract.]—Questions as to the validity of the contract, and as to whether it is inequitable to enforce its specific performance, must be determined at the hearing ; questions of title are referred to chambers. *Hood* v. *Oglander*, 34 Beav. 513 ; 6 N. R. 57 ; 34 L. J., Ch. 528 ; 11 Jur. (N.S.) 498 ; 12 L. T. 627 ; 13 W. R. 705.

Circumstances under which a question of title may be discussed at the hearing of a suit for specific performance. *Ib.*

In suits for specific performance where the contract is not disputed, it is the duty of the vendor to obtain an immediate reference for title so as to save unnecessary costs. *Phillipson* v. *Gibbon*, 40 L. J., Ch. 406 ; L. R. 6 Ch. 428 ; 24 L. T. 602 ; 19 W. R. 661.

In a suit for specific performance, when the first question is on the contract, and the court declares that the vendor is entitled to specific performance, and the purchaser then insists that no title has been shown, the court may proceed

to determine whether the purchaser is entitled to any further abstract; and if the purchaser is entitled, the cause must again stand over, affording him the opportunity of taking any objection that may arise on that abstract. *Keyes* v. *Heydon*, 9 Hare (App.) v.; 1 W. R. 112.

Declaration of Title.]—When, upon a petition presented under the Declaration of Title Act (25 & 26 Vict. c. 67), s. 6, the petitioner proves such possession and states such title as, if established, would entitle him to a declaration, a reference will be ordered to chambers to establish the title. *Roberts, In re*, 22 L. T. 262.

The court being satisfied with the title of a petitioner to a house in London, ordered, that the declaration establishing the title should be made at the end of three months, and the security required by s. 9 should be 40*l.* and that notice of the order should be advertised three times, at three days' interval, in three London newspapers. *S. C.*, 39 L. J., Ch. 888; L. R. 10 Eq. 402; 22 L. T. 699.

Order Dismissing Bill.]—Order to dismiss a bill for want of prosecution, not of course, pending a reference, the title alone being in question. *Biscoe* v. *Brett*, 2 V. & B. 377.

Bill for specific performance upon various objections to the title, dismissed in the first instance without a reference. *Omerod* v. *Hardman*, 5 Ves. 723. *See* 6 R. R. 19, n.

Order for Sale.]—Real estate ordered to be sold pending inquiries before the master. *Martin* v. *Hadlow*, 1 W. R. 101.

Court refused to make an order under act of parliament for sale of estate upon opinion of conveyancer merely approving the conveyance, without reference. *Newcastle (Duke), Ex parte*, 6 Ves. 454.

Laches of Vendor.]—Motion by a vendor for a reference as to title refused, because he had been guilty of laches. *Dorin* v. *Harvey*, 15 Sim. 49; 9 Jur. 648.

How Obtained.]—Motion for reference of title must be made on notice, if made by any of the parties to cause. *M'Cann* v. *O'Farrell*, 1 Hog. 121.

Reference having been made as to title on one motion, party cannot afterwards, by another motion, have reference as to delivery of abstract. *Hyde* v. *Wroughton*, 3 Madd. 279.

The court will not, by one order, direct a reference as to the propriety of a proposed reinvestment, and as to title, and for the completion of the purchase and for taxation and payment of costs. After the master has approved of the title and settled the conveyance, the matter must come again to the court for approval and further directions. *Duckle, Ex parte*, 16 Jur. 511.

—— **After Decree.**]—Decree made, defendant not appearing, for specific performance, without any reference as to title. Upon motion by the defendant, the court allowed a reference as to title to be inserted in the decree upon his paying the costs. *Hughes* v. *Jones*, 26 Beav. 24.

—— **After Discharge of Purchaser.**]—An estate having been sold, the parties believing that title could not be made consented to order discharging the purchaser; subsequently discovering that a good title could be made, the court discharged the order on paying purchaser's costs and ordered reference as to title. *Butter* v. *Ommanney*, Tam. 344.

—— **Before Answer.**]—Motion after bill filed, and before answer, for reference as to title, refused as there were other matters in question. *Mathews* v. *Dana*, 3 Madd. 470.

Reference of title before answer; vendor undertaking to do all such acts, as if the answer was in, and the cause brought to hearing; direction, if the report shall be against the title, for compensation; refused as to indemnity. *Balmanno* v. *Lumley*, 1 V. & B. 224; 12 R. R. 215.

—— **After Answer.**]—The court will not, without consent, on bill for specific performance, make an interlocutory order to refer a title, the validity of which is denied by answer, until the cause is brought to a hearing. *Bowyer* v. *Bright*, 3 Price, 300.

After answer submitting to perform contract, if good title can be made, reference was directed, on motion whether good title can be made, and whether it appears on the abstract. *Wright* v. *Bond*, 11 Ves. 39.

The practice to direct a reference upon title, on motion after answer, limited to the case where the title only is disputed. *Gompertz* v. ——, 12 Ves. 17. S. P., *Blyth* v. *Elmhirst*, 1 V. &. B. 1; 12 R. R. 182. *Morgan* v. *Shaw*, 2 Mer. 138; 16 R. R. 161.

On a reference as to title the court will not allow any inquiry to be added as to matters which have no reference to the title, and which are not admitted by the answer. *Bennett* v. *Rees* 1 Keen, 405.

—— **Compensation.**]—Reference before decree confined to the case of title; where there was a further subject of dispute, under a claim of compensation, it was refused with costs. —— v. *Skelton*, 1 V. & B. 516; 12 R. R. 183, n. S. P., *Lowe* v. *Manners*, 1 Mer. 19.

—— **Other Objections set up.**]—Reference as to title before decree refused where purchaser, on other grounds, resists performance of contract. *Paton* v. *Rogers*, 1 V. & B. 351. *See* 12 R. R. 183, n.

Defendants, in a vendor's specific performance suit, cannot on motion before the hearing have a reference as to title without prejudice to any question in the cause, where they have, by their answer, set up other defences beyond want of title. *Reed* v. *Don Pedro North Del Rey Gold Mining Co.*, 3 De G. J. & S. 593; 2 N. R. 473; 32 L. J., Ch. 773; 9 L. T. 132; 11 W. R. 935. Affirming 9 Jur. (N.S.) 865.

Where answer raises other objections beside defect of title, court will not, on motion for reference of title, after the answer, decide whether other objections are frivolous or not. Semble. *Withy* v. *Cottle*, 1 Sim. & S. 174; 1 L. J. (O.S.) Ch. 117; 23 R. R. 187. S. P., *Gordon* v. *Ball*, 1 Sim. & S. 178.

Receiver appointed on the motion of the vendor pending a reference of title. *Boehm* v. *Wood*, 2 J. & W. 236; 22 R. R. 109.

Although the court will not order a reference of title, on motion, when a purchaser resists the

performance of the contract on another ground, yet it will take care that the latter is substantial. Semble. *S. C.*, 1 J. & W. 419; 21 R. R. 213.

A reference of the title will not be ordered if the purchaser, in his answer, objects on the ground that the premises are subject to a right of foot-path. *Anon.*, 1 L. J. (O.S.) Ch. 177.

Reference as to title directed after answer, notwithstanding the purchaser stated that his requisitions on the abstract had not been complied with, although the time for completion had long expired, and he had given notice to rescind. *Wood* v. *Machu*, 5 Hare, 158.

—— **Construction of Contract.**]—Where the question was whether "acres" in the contract meant statutory or customary acres:—Held, that a reference of title would not be directed on motion. *Portman* v. *Mill*, 2 Russ. 570; 26 R. R. 175.

—— **At the Hearing.**]—The bill for specific peformance of an agreement to take an assignment of a lease, stated a covenant in the lease, not to assign without the license of the lessor, but did not aver that the plaintiff had or could obtain such a license:—Held, that the court at the hearing would not on such facts dismiss the bill, but would refer it to inquire whether the vendor could make a good title. *Smith* v. *Capron*, 7 Hare, 185; 19 L. J., Ch. 322; 14 Jur. 686.

Although a plaintiff is bound to prove his whole case at the hearing, yet if there be no failure of title, but an omission in the proof of it, the court may in its discretion direct a reference to the master to inquire into it. *M'Allister* v. *Walsh*, 8 Ir. Eq. R 250.

b. Extent of.

Meaning of "Good Title."]—When a decree has been made for specific performance, subject to the usual reference as to whether a good title can be made, the words "good title" mean a good title having regard to the terms of the contract, although the latter words are not inserted in the decree. *Upperton* v. *Nicholson*, 40 L. J., Ch. 401; L. R. 6 Ch. 436: 25 L. T. 4; 19 W. R. 733.

General Reference.]—Where the defendant expressed himself willing to accept the title, if a particular objection then referred to were removed, the court ruled that the reference to the master as to the title must be in general terms, and not confined to the particular objection. *Lesturgeon* v. *Martin*, 3 Myl. & K. 255.

When money in court is subject to a trust for investment in land, and the tenant for life enters into a provisional contract for the purchase of an estate, subject to conditions of sale, the court makes a general reference as to the title. *Meyrick* v. *Laws*, 34 Beav. 58.

Where land is purchased for immediate occupation the court will not direct a general inquiry as to title, so as to give the vendor an opportunity of making good defects which existed in the title when possession should have been given. *Hyde* v. *Warden*, 47 L. J., Ex. 121; 3 Ex. D. 72; 37 L. T. 567; 26 W. R. 201—C. A.

On reference of title, the reference may extend to all that concerns the title, but not to other matters; it may be extended, therefore, to inquire whether a good title appears on the abstract mentioned in the pleadings. *Jennings* v. *Hopton*, 1 Madd. 211. S. P., *Bennett* v. *Re s*, 1 Keen, 405, supra, col. 1442.

Tithe.]—No reference of title upon a question whether the estate was tithe-free, having been sold as such. *Wallinger* v. *Hilbert*, 1 Mer. 104.

Timber.]—The particulars stated that the timber would be included in the purchase. Title was not made out to the timber on a very small portion of the lands. The court referred it to the master to inquire whether the timber on that portion was material to the possession and enjoyment of the estate. *Stewart* v. *Conyngham* (*Marquis*), 1 Ir. Ch. R. 534.

As to Portion of Estate.]—Where the vendor entitled as to part for life, and as to other part absolutely, and as to the remainder it was doubtful if he had any title at all, contracted to sell the whole, a reference ordered to inquire whether the vendor could make a good title as to that part. *Graham* v. *Oliver*, 3 Beav. 124.

The defendant purchased an estate, having agreed with the plaintiff that, if he made the purchase, he would cede part to the plaintiff. The court directed a reference to chambers to ascertain what portion the plaintiff was entitled to, and decreed that the defendant should convey such portion to the plaintiff. *Chattock* v. *Muller*, 8 Ch. D. 177.

As to Foundation of Title.]—A reference will not be granted as to the fact on which the foundation of plaintiff's title rests; therefore, where the assignee of an insolvent omitted to prove that a fund which he claimed as having been fraudulently settled had ever been the property of the insolvent, a reference as to the fact was refused. *Holden* v. *Hearn*, 1 Beav. 445; 8 L. J., Ch. 260; 3 Jur. 428.

Partial Waiver of Title.]—Where the defendant has been guilty of delay, and other acts amounting to a partial waiver of his right to investigate the title, the court will refuse an inquiry as to the items waived, allowing it to proceed as to the rest. *Corless* v. *Sparling*, Ir. R. 8 Eq. 335.

A. contracts with B. to purchase an estate, and, after accepting the title, agrees to sell to C., who refuses to complete, on the ground of having discovered another will, not set forth in the abstract, but supposed to affect the title. Upon a bill by the original vendor against A., who admitted the title, by consent of both parties, a reference was directed to the master to inquire whether a good title could be made, regard being had to the will only. *Const* v. *Barr*, 2 Mer. 57.

Trustee—Successive Limitations.]—Semble, a trustee under an old trust creating successive limitations of equitable interests, some of which had failed, is entitled, before he can be required to convey, to have the equitable title of those who call for a conveyance ascertained by inquiry, and to have the deed of conveyance settled in the master's office. *Goodson* v. *Ellison*, 3 Russ. 583; 27 R. R. 127.

Title at Time of Contract.]—Where the title to a contract is made out by showing the title to the land which is the subject of the contract,

the court will enter into the question of the title to the land at the time of the contract; and if the party insisting on the contract makes out a good title to the land at that time, the court will direct a reference to the master as to the subsequent title. *Cator* v. *Croydon Canal Co.*, 4 Y. & C. 405; 13 L. J., Ch. 89.

Sale of Shares.]—A vendor, by public auction of shares in a company, incorporated by act of parliament, at the request of the purchaser, executed a transfer to a third party, who did not accept the transfer, or register himself as a shareholder. On a bill filed by the vendor against the purchaser for a specific performance, the court directed the usual reference as to title. *Shaw* v. *Fisher*, 2 De G. & Sm. 11; 12 Jur. 162.

Plea denying Title.]—The truth of a plea that the plaintiff is not executrix of her testator, must be tried under a reference, and not a replication. *Bourke* v. *Kelly*, 1 Hog. 172.

When Title First Made.]—Inquiry as to time when title could be made is the subject of further directions after report upon title, and is not to be combined with reference as to title. *Gibson* v. *Clark*, 2 V. & B. 103. S. P., *Lubin* v. *Lightbody*, 8 Price, 606.

Where it is not only a question of title, but other questions are made, the court will not direct an inquiry as to when the title was first shown. *Potter* v. *Crossley*, 28 L. T. 137; 5 W. R. 35.

Where the defendant disputed the contract, the court only gave the common inquiry as to title, refusing an inquiry as to when first a good title could be made. *Morris* v. *Wilson*, 5 Jur. (N.S.) 168.

On a reference of title, the master having reported that a good title could be made, order referring it back to the master to see whether such title could have been made prior to the filing of the bill. *Birch* v. *Haynes*, 2 Mer. 444.

Decree for a reference upon the title; after a report approving the title, the defendant is entitled to have an inquiry at what time a title could have been made. *Daly* v. *Osborne*, 1 Mer. 382.

The court will, for the future, add to the reference as to whether a good title can be made, a direction to inquire and report at what time a good title could have been shown, as interest on the purchase money will be payable from that date. *Enraght* v. *Fitzgerald*, 2 Dr. & War. 43; 1 Con. & L. 181; 8 Ir. Eq. R. 87.

Motion may be made on bill for specific performance, for reference as to title, and whether title was shown prior to filing bill. *Anon.*, 3 Madd. 495.

The defendant insisted that time was of the essence of the contract, and that the abstract had not been delivered within the time agreed on. A reference without prejudice was made on motion as to the title, and when it was first shown. *Foxlowe* v. *Amcoats*, 3 Beav. 496; 4 Jur. 1053.

Where there is a reference as to "whether the vendor can make a good title, and if so, when such title was first shown," the making and showing a good title are distinct matters. *Parr* v. *Lovegrove*, 4 Drew. 170; 4 Jur. (N.S.) 600; 6 W. R. 201, 709.

Where the answer stated that a good title could not be made, the court ordered the usual reference, and directed, that if a good title could not be made, the master should state when it was first shown that a good title could not be made, with liberty to state special circumstances as to the time when it was first shown that a good title could or could not be made. *Martin* v. *Jardine*, 7 L. J., Ch. 250.

An inquiry was directed as to the title, at what time the abstract was delivered, and whether it was sufficient, but the court would not decide upon any matter of relief. *Moss* v. *Mathews*, 3 Ves. 329.

Where specific performance is sought, and there is a reference to the master to look into the title, or to ascertain who the parties to the conveyance are, that reference enables the vendor to make good any defect in his own title, or to procure a conveyance up to the date of the master's report and of the decree; but when the court had come to the conclusion that there was no binding contract, and refused specific performance, the court declined to make any reference to the master. *Clay* v. *Rufford*, 5 De G. & Sm. 768.

Practice—Evidence.]—Order for a reference as to title ought to contain directions for production of deeds, &c., and examination of parties upon oath. *Winterbottom* v. *Ingham*, 9 Sim. 654.

On reference whether a good title can be made, the master proceeds on the abstract only, unless the purchaser requires the production of the deeds; and if he omits to make such requisition, he cannot except to the report, on the ground of the deeds not having been produced. *Poole* v. *Shergold*, 1 Cox, 160; 1 R. R. 37.

If a reference as to title is made on motion, the master has the same power to examine witnesses as if the reference had been made by decree. *Woodroffe* v. *Titterton*, 8 Sim. 238.

—— **Counsel's Opinion.**] — Quære, whether the master on a reference as to title can require the parties to procure the opinion of any conveyancer whom he shall select, upon the abstracts. *Flower* v. *Walker*, 1 Russ. 408.

6. Report.

a. Form of.

Counsel's Opinion.] — It is informal for the master to state on his report that he has founded his opinion as to the title upon the opinion of a conveyancer. *Collard, In re*, 10 Beav. 334.

Defects in Title not Stated.]—Report generally that a good title could not be made out, irregular. The master should state the precise points in which the title is defective. *Green* v. *Monks*, 2 Moll. 325.

It is informal to report a good title conditionally on performance of an undertaking to do certain acts. The master ought to give a reasonable time to do the acts, and afterwards make his report. *Magennis* v. *Fallon*, 2 Moll. 575.

Upon reference, a report that A., with the concurrence of C., &c., can make a good title, is an excess of his authority, being a report upon the conveyance rather than upon the fact, title or not. *Lewis* v. *Loxam*, 1 Mer. 179.

A report that good title cannot be made out to an integral part of an estate sold in one lot, is tantamount to a general report that a good title could not be made out. *Prendergast* v. *Eyre*, 2 Hog. 80.

Title reported good by deputy remembrancer

in creditors' suit, purchaser not bound to take it if only primâ facie title. *Eyton* v. *Dicken*, 4 Price, 303.

b. Exceptions to.

General Rule.]—Where a party objects to a master's report as to title, his proper course is to file exceptions, and set them down for hearing in the cause list. *Harwood* v. *Bland*, Fl. & K. 540.

A plaintiff cannot, after proceeding before the master on a reference as to title, rely on previous acts of the purchaser as binding him to his purchase, notwithstanding a report of bad title. *Ib.*

—— **Costs.**]—Where the master reported in favour of the title, but the court, on an exception by the purchaser, deemed the title doubtful, an order was made dismissing the bill without costs. *Willcox* v. *Bellaers*, Turn. & R. 491. S. P., *Robinson* v. *Milner*, 1 Hare, 578, n.

Reviewing Report.]—If, upon a question of title, the master is satisfied with the evidence before him, but, upon an exception to the report, the court thinks the evidence not sufficient, the court will refer it back to the master to review his report. *Andrew* v. *Andrew*, 3 Sim. 390; 30 R. R. 176. S. P., *Egerton* v. *Jones*, 3 Sim. 392; 1 Russ. & M. 694.

After exceptions allowed to report of good title in a suit for specific performance, the practice is, not to discharge the purchaser, but, at the request of the plaintiff, to refer it back to the master to review his report, and to inquire whether a good title can be made to the lands. *Stewart* v. *Conyngham* (*Marquis*), 1 Ir. Ch. R. 534.

Removing Objections.]—Where the report is in favour of the title, the court, on allowing exceptions to it, will give the vendor a reasonable time within which to remove the objection. *Portman* v. *Mill*, 1 Russ. & M. 696; 9 L. J. (O.S.) Ch. 193.

And see *Clay* v. *Rufford*, supra, col. 1446.

New Abstract.]—If exceptions taken to report of good title are overruled, other objections cannot be made; but if allowed, and new abstract be delivered, other objections may be brought in. *Brooke* v. ——, 4 Madd. 212; 20 R. R. 293.

New Objections.]—The chief clerk found the title good:—Held, on summons to vary the certificate, that the purchaser could not then raise a valid objection waived before suit. *Upperton* v. *Nicholson*, 39 L. J., Ch. 758; L. R. 10 Eq. 228; 23 L. T. 343.

If a vendor wishes to prevent a purchaser raising objections in chambers on the reference for title on the ground that they have been waived before suit, he must guard himself by insisting at the hearing on a special decree based on such waiver. *Ib.*

If the common decree for specific performance and for inquiry as to title are made, and no special directions, the purchaser may under it raise objections which he had abandoned before suit. *Curling* v. *Austin*, 2 Dr. & Sm. 129; 10 W. R. 682.

The court will not add any special inquiry on the subject to the decree, or direct the chief clerk to state special circumstances. *Ib.*

Exceptions how raised.]—Purchaser dissatisfied with report of title of premises sold under decree, must move for leave to file exceptions thereto; otherwise, the motion to confirm may be made absolute in the first instance, but on moving, if prepared, he may show exceptions instanter. *Eyton* v. *Dicken*, 4 Price, 303.

—— **Referring to Chambers.**]—Objections to chief clerk's finding as to title should be made and at once referred to the judge in chambers before certificate made, as the cheapest mode of deciding the question. *Parr* v. *Lovegrove*, 4 Drew. 170; 4 Jur. (N.S.) 600; 6 W. R. 201, 709.

New practice as to the consideration of the vendor's title in suits for specific performance. *Pegg* v. *Wisden*, 16 Beav. 239; 16 Jur. 105; 1 W. R. 43.

In a suit for specific performance, plaintiff directed to bring in objections to defendant's title before judge in chambers within one week, and vendor could then either remove them or argue them in open court. *Ib.*

Reversion in Fee not Disposed of.]—Exception to report in favour of title on ground that reversion in fee might have been disposed of, so as not to have descended to heir from whom the title was derived, overruled. *Sperling* v. *Trevor*, 7 Ves. 497.

As to Party to Suit.]—Bill by devisees in trust to sell, objection that the heir of the devisor is not a party to the suit, is not matter of exception to the report in favour of the title. *Wakeman* v. *Rutland* (*Duke*), 3 Ves. 234.

Non-production of Lessor's Title.]—Exceptions to master's report in favour of title of vendor of bishop's lease, on ground of non-production of bishop's title, overruled. *Fane* v. *Spencer*, 2 Madd. 438. S. P., *Fildes* v. *Hooker*, 2 Mer. 424.

Statement of Facts Disallowed.]—On a reference as to title, the master by his report stated that he had looked into certain documents and states of facts, and that no title had been made. The counsel who were before the master stated that the master had disallowed the state of facts. Exceptions to the report allowed. *Wilkinson* v. *Hartley*, 14 Jur. 187.

Ex parte Decision.]—Where the master in a proceeding before him to consider the suit decided against the vendors without hearing them:—Held, that the vendors were not bound by such ex parte decision, but that there ought to be a reference as to the title to the master. *Barrow* v. *Budd*, 4 Jur. 41.

When Irregular—Exception to Conveyance.]—Sale by trustees to whom mortgagee had assigned:—Held, on exceptions to title, because scheduled creditors were not parties, that the trustees could make a good conveyance, and that the exceptions ought not to have been made to title but to the conveyance. *Binks* v. *Rokeby* (*Lord*), 2 Madd. 227.

Devise to W. for life, with remainder to such of her children as should be living at her death, in equal shares. On sale in a creditor's suit three of the children being out of the jurisdiction, the highest bidder excepted to the master's report of good title, on the ground that the absent children were not bound and would not join in

the conveyance:—Held, that the exceptions were irregular being exceptions not to title, but to conveyance, but that the exceptant would not be compelled to complete as the objection for want of parties was fatal. *Oldham* v. *Wilkins*, 1 Ir. Eq. R. 59.

—— **Vendor taking Objection.**]—A vendor took an exception, which contested the validity of his own title:—Held, that it was irregular. *Bradley* v. *Munton*, 15 Beav. 460.

—— **Compromise—Infant.**]—Where a compromise was entered into affecting the interest of an infant, and in pursuance thereof a report and decree were made and the property sold:—Held, allowing exceptions to the master's report of good title, that the report and decree, being founded on a consent which the court had no jurisdiction to take, were erroneous, and the title under it was bad. *Weir* v. *Chamley*, 1 Ir. Ch. R. 295.

Pending an appeal from that decision, a deed of appointment was executed. On referring back the report to the master, he found that by this deed a good title could be made, but that the appointment was not bonâ fide and was void:—Held, that the title was too doubtful to be forced on a purchaser, and the exceptions to the master's further report of good title were also allowed. *Ib.*

—— **Sale before Report.**]—Decree directed the master to inquire and state what estates passed by the will, and that all the estates which the master should find to have passed should be sold with his approbation. The master having ascertained what estates passed, proceeded to sell them. The purchaser objected because the master had not made any report in pursuance of the first direction in the decree, but the objection was overruled. *Dykes* v. *Taylor*, 16 Sim. 563.

Waiving Objections.]—Where a purchaser moved for a reference to chambers, to inquire whether the vendor could make a good title, and that the reference should be without prejudice to any question in the cause:—Held, that the purchaser had waived a defence that the vendor had not made a good title in time. *Reed* v. *Don Pedro North Del Rey Gold Mining Co.*, 9 Jur. (N.S.) 865. Affirmed, 3 De G. J. & S. 593; 2 N. R. 473; 32 L. J., Ch. 773; 9 L. T. 132; 11 W. R. 935.

—— **Costs.**]—An estate, described as a freehold estate for three lives, with covenant for perpetual renewal, was sold under a decree. It was doubtful whether there was a covenant for perpetual renewal, but on appeal from the master's report that the title was not such as the purchaser could be compelled to take, the purchaser agreed to accept the title, being allowed his costs. *Sheppard* v. *Doolan*, 3 Dr. & War. 1; 5 Ir. Eq. R. 6.

Objection Concluded by Decree for Specific Performance.]—On a sale by a trustee, he stipulated that his receipt should be an effectual and conclusive discharge, and that the purchaser should not require the concurrence of the cestui que trust. A decree was made for specific performance and reference as to title. The master found in favour of the trustee; and upon exceptions the purchaser contended that the rule as to the concurrence of the cestuis que trustent being one for their protection, it was a breach of trust to stipulate that they should not concur; but the court held the point concluded by the decree. *Wilkinson* v. *Hartley*, 15 Beav. 183. *And see* infra, col. 1453.

7. Doubtful or Defective Title.

a. In General.

Doubtful Title.]—Specific performance will not be decreed where title is doubtful. *Collard* v. *Sampson*, 1 Eq. R. 262. S. P., *Cooper* v. *Denne*, 4 Bro. C. C. 80; 1 Ves. J. 565; *Price* v. *Strange*, 6 Madd. 159; 22 R. R. 266; *Roake* v. *Kidd*, 5 Ves. 647; *Hartley* v. *Pehall*, Peake, 178; 3 R. R. 668; *Wilde* v. *Fort*, 4 Taunt. 334; 13 R. R. 616.

The court will not compel a purchaser to take a title depending upon matter of fact, if the fact does not admit of satisfactory proof, or is not well proved. *Smith* v. *Death*, 5 Madd. 371; 21 R. R. 314.

Purchaser is not to be compelled to take a doubtful title, depending on the decision of certain legal questions. *Sloper* v. *Fish*, 2 V. & B. 145.

Where the ability of the vendor to make a good title to a portion of the premises sold depends upon a doubtful question of fact or of law, the title will not be deemed a good or sufficient title as between vendor and purchaser. *Simmons* v. *Heseltine*, 5 C. B. (N.S.) 554; 28 L. J., C. P. 129; 5 Jur. (N.S.) 270; 7 W. R. 133.

Purchaser not compelled to take a doubtful title even where the defect of title appeared on the abstract delivered before he filed his bill. *Stapylton* v. *Scott*, 16 Ves. 272; 10 R. R. 179.

A purchaser is not bound to take a doubtful title. Therefore, where the vendors derived title under an assignment made by a party for the benefit of his creditors, in itself an act of bankruptcy:—Held, that they could not compel the purchaser to accept the title, without proof that there was no creditor in a situation to sue out a commission against the assignor. *Pott* v. *Turner*, 4 M. & P. 551; 6 Bing. 702; 8 L. J. (O.S.) C. P. 282.

Marketable Title.]—Purchaser must get such a title as he can force down upon a repurchaser from him. *Magennis* v. *Fallon*, 2 Moll. 578.

Equity does not compel a purchaser to take such a title as a willing purchaser might be satisfied with. *Knatchbull* v. *Grueber*, 3 Mer. 140; 17 R. R. 35.

—— **Opinion of Court as to Title.**]—On a vendor's bill for specific performance, the opinion of the court was much in favour of the title; but the court, being unable to found that opinion upon any general rule of law, or upon reason so conclusive as to satisfy the court that the purchaser taking the title might not be exposed to substantial litigation, refused to decree a specific performance. *Pyrke* v. *Waddingham*, 10 Hare, 1.

The rule rests upon the principle that every purchaser is entitled to require a marketable title. *Ib.*

It is the duty of the court, on questions of title depending on the possibility of future rights arising, to consider the course which

would be taken if the rights had actually arisen, and were in course of litigation. *Ib.*

A marketable title is a title which at all times and under all circumstances may be forced upon an unwilling purchaser. *Ib.*

The bare possibility that another judge might think a title open to question is not a sufficient reason for refusing to compel a purchaser to complete, where the court itself entertains a strong opinion in favour of the title; but where there is an actual adverse decision, the court, though thinking the question free from doubt, will not compel a purchaser to take the title. *Mullings* v. *Trinder*, 39 L. J., Ch. 833; L. R. 10 Eq. 449; 23 L. T. 580; 18 W. R. 1186.

The principles laid down in *Pyrke* v. *Waddingham* (supra) approved of; but the decision disapproved of, and not followed under precisely similar circumstances. *Ib.*

To force a title on a purchaser, the opinion of the court must be so clear that it does not apprehend that another judge would form a different opinion. *Rogers* v. *Waterhouse*, 4 Drew. 329; 6 W. R. 823.

Though the court may entertain a strong opinion in favour of the title of a party, if it were a contest between him and another claiming title, that is not sufficient in a suit for specific performance. *Ib.*

The court will not enforce specific performance of a contract for sale against a purchaser, where a question of title has to be determined, upon which the court is not clearly in favour of the vendor. *Burnell* v. *Firth*, 15 W. R. 546.

In compelling a purchaser to take a title, the court formerly acted upon its own opinion; but now it will not compel him to take it if the point is doubtful. *Id.* 569.

Where, on a reference as to title the master reports in favour of the title, but the court holds it to be so doubtful that the purchaser should not be compelled to take it, the bill may be dismissed, without allowing the exceptions. *Robinson* v. *Milner*, 1 Hare, 578, n.

Where presumption in favour of title is so strong that a judge would feel himself bound to give a clear direction to a jury, the purchaser would be concluded thereby; but if the presumption would be left for a jury to determine, he would not be bound to take it. *Emery* v. *Grocock*, 6 Madd. 57; 22 R. R. 236.

Decision of Court.]—Observations on the duty of the court to decide doubtful questions of title as between vendor and purchaser. *Osborne* v. *Rowlett*, 49 L. J., Ch. 310; 13 Ch. D. 774; 42 L. T. 650; 28 W. R. 365.

It is the duty of the court to decide doubtful questions of title, and when so decided they can no longer be considered as doubtful, so as to entitle purchasers to resist specific performance. *Bell* v. *Holthy*, 42 L. J., Ch. 266; L. R. 15 Eq. 178; 28 L. T. 9; 21 W. R. 321.

Court of Appeal.]—Where the title to an estate is doubtful, and has been held bad by a judge of the court, the court of appeal will not force it on a purchaser. *Sykes* v. *Sheard*, 9 Jur. (N.S.) 1262; 9 L. T. 430; 12 W. R. 117.

In a suit for specific performance, a purchaser will be forced to take a title which appears to the court of appeal to be good, although the judge of the court below was of a different opinion. *Beioley* v. *Carter*, L. R. 4 Ch. 230; 17 W. R. 300.

Where a bill for specific performance by a vendor has been dismissed in the court below upon a question of title, it requires a very strong case for the court of appeal to force the title upon the purchaser. *Collier* v. *M'Bean*, 35 L. J., Ch. 144; L. R. 1 Ch. 81; 12 Jur. (N.S.) 1; 13 L. T. 484; 14 W. R. 156.

When a question of title involves a question of general law applicable to all similar cases, the court of appeal is bound to say one way or another what the law is. *Alexander* v. *Mills*, 40 L. J., Ch. 73; L. R. 6 Ch. 124; 24 L. T. 206; 19 W. R. 310.

Primâ facie Title.]—Title reported good by deputy remembrancer in creditors' suit: purchaser not compellable to accept it, if only a primâ facie title. *Eyton* v. *Dicken*, 4 Price, 303.

It is difficult to say what ground of defect of title is sufficient to induce the court to refuse a decree for specific performance. *Bull* v. *Hutchens*, 32 Beav. 615; 9 Jur. (N.S.) 954; 8 L. T. 716; 11 W. R. 866.

Title at Common Law.]—In a court of law every title which is not bad is marketable. *Romilly* v. *James*, 6 Taunt. 263; 1 Marshall, 592.

A court of law will adjudge a title to be either good or bad, having no middle term for it. *Maberley* v. *Robins*, 5 Taunt. 625; 1 Marshall, 258.

In an action to recover back the deposit on a purchase, upon the vendor's failure to make a good title, the courts of law will collaterally inquire whether the title is good in equity; for a contract to make a good title means a title good both at law and in equity. *Ib.*

In an action to recover a deposit on the ground of a defect of title, the party bringing the action must prove the title bad; and it will not be sufficient to show that the title has been deemed insufficient by conveyancers who have been employed to advise upon it. *Camfield* v. *Gilbert*, 4 Esp. 221. S. P., *Boyman* v. *Gutch*, 7 Bing. 379; 5 M. & P. 222; 9 L. J. (O.S.) C. P. 63.

Previous Decision on.]—Specific performance decreed with costs, in a case where the defendant, objecting to title, had been served with notice of a prior decision in a different cause, in favour of the same title, against a similar objection. *Biscoe* v. *Wilks*, 3 Mer. 456.

Validity depending on bona fides.]—Where the validity of a deed depends upon the bona fides of the transaction, to be collected from extrinsic circumstances, a court of equity will not compel a purchaser to accept a title under the deed, because neither the purchaser nor the court had adequate means of ascertaining the circumstances. *Hartley* v. *Smith*, Buck, 368.

Defective Title.]—Vendor filed a bill for specific performance, but, not being able to make a good title, his bill was dismissed, and he was ordered to return the deposit with interest. *Anson (Lord)* v. *Hodges*, 5 Sim. 227.

Acceptance or nonacceptance of title is the criterion of right of specific performance of contracts in equity. *Wyrill* v. *Exeter (Bishop)*, 1 Price, 296; 16 R. R. 727.

—— **Delay.**]—Even after great delay and acquiescence, the court will not compel a purchaser

to complete, if the title appears to be manifestly bad. *Blachford* v. *Kirkpatrick*, 6 Beav. 232; 12 L. J., Ch. 108.

—— **Acceptance by Directors.**]—Though an individual vendee may consent to accept a defective title, it is doubtful whether the directors of a railway company, acting on behalf of the company, can do so. Semble, *Eastern Counties Ry.* v. *Hawkes*, 5 H. L. Cas. 331; 24 L. J., Ch. 601; 3 W. R. 609. And see *Devenish* v. *Brown*, 26 L. J., Ch. 23; 2 Jur. (N.S.) 1043; 4 W. R. 783.

Strengthening Defective Title.]—If a purchaser on the completion of his purchase acquires a defective title, that defective title cannot afterwards be strengthened either by his own fraud or the fraud of any other person. *Heath* v. *Crealock*, 44 L. J., Ch. 157; L. R. 10 Ch. 22; 31 L. T. 650; 23 W. R. 95.

b. Objections.

i. *In General.*

And see cases supra, col. 1447.

What are.]—Objections to title mean such objections as can only be properly the subject of adjudication upon the investigation of the title, as where the dispute is as to the application of the conditions of sale, the propriety or validity of the conditions not being questioned. *Wood* v. *Machu*, 5 Hare, 158; 16 L. J., Ch. 21.

Mere suspicion, upon opinions in the abstract, &c., will not support an objection by a purchaser. *M'Queen* v. *Farquhar*, 11 Ves. 467; 8 R. R. 212.

Uncertain Stipulation.]—As between a vendor and purchaser, a purchaser cannot object to the vendor's title on the ground that he is under a stipulation to do an act, the nature of which is so uncertain that he could not, on bill filed, be compelled to do as stipulated. *Taylor* v. *Gilbertson*, 2 Drew. 391.

Vendor agreeing to Remove Objection.]—A vendor, after recognising an objection to the title, and undertaking to remove it, is, by his misconduct, precluded from insisting that the objection is untenable. *Ashton* v. *Wood*, 3 Sm. & G. 436; 3 Jur. (N.S.) 1164.

A party who has covenanted to pay off an incumbrance on premises subject to a trust for sale, will not be allowed to raise an objection to the sale of the property on the grouud of the existence of that incumbrance. *Roberts* v. *Bozon*, 3 L. J. (O.S.) Ch. 113.

Purchase advised by Solicitor—Sale to same Solicitor.]—A. purchased on the advice of his solicitor D. A. died, and his devisee sold the property to D. On a bill for specific performance by the vendor:—Held, that D. could not, on purchasing the property himself, set up an objection which he did not think important when advising his principal. *Beevor* v. *Simpson*, Tam. 69; 31 R. R. 67.

Liability to Maintain Fences.]—Lands were sold as fee-simple, but the owner was bound to raise and maintain the fences, and keep the drains and watercourses clear, &c.:—Held, that the purchaser could not be compelled to accept the title. *Larkin* v. *Rosse* (*Lord*), 10 Ir. Eq. R. 70.

Right to Pre-emption.]—A railway company having under their act the usual power to sell surplus lands, contracted to sell and afterwards offered them to the owners of the adjoining land. On this ground the purchaser objected to complete:—Held, that the objection was a question of conveyance and not of title, and that the purchaser must complete the contract. *London & Greenwich Ry.* v. *Goodchild*, 3 Railw. Cas. 507; 13 L. J., Ch. 224; 8 Jur. 455.

It is no defence to a suit for specific performance against trustees of a turnpike road, that the land they have contracted to sell is liable to pre-emption by the owner of the adjoining land under the General Turnpike Act, 3 Geo. 4, c. 126, s. 39, the purchaser being content to take such estate as the trustees could convey. *Barrett* v. *Ring*, 2 Sm. & G. 43.

Parties — Creditors.] — Mortgage debt and premises were assigned by mortgagee to trustees, with all the same powers as mortgagee had:—Held, on exceptions to title, because scheduled creditors were not parties to the bill, that the trustees could make a good conveyance, and that the exceptions ought not to have been made to title, but to the conveyance. *Binks* v. *Rokely* (*Lord*), 2 Madd. 227. And see *Oldham* v. *Wilkins*, supra, col. 1448.

Illegitimacy.]—Objection by a purchaser upon illegitimacy, upon the circumstances that the register of marriage could not be found, an inaccurate statement in a deed, and some particularity of description of a child in a will. Objection overruled upon a release reciting generally that objections were taken which bound the party to inquire into the nature of the objections. *Braybroke* (*Lord*) v. *Inskip*, 8 Ves. 417; 7 R. R. 106.

Conversion—Deed not Executed.]—It seems to be no objection to a title that a person, who sixty years back was the survivor of three trustees for sale, did not execute a conveyance purporting to be made by him and the parties beneficially interested, possession having gone under that conveyance, and the estate in equity being converted into personalty. *Townsend* v. *Champernown*, 1 Y. & J. 538; 30 R. R. 825.

Apportionment of Rent — Concurrence of Lessee.]—Case sent to law, whether purchaser of lot 2 would, by a conveyance of vendor alone, without the concurrence of the lessee, acquire the same rights and remedies against lessee, in respect of the apportioned rent of 40*l.* therein to be reserved to him, as he would acquire in case no rent were mentioned in such conveyance from a vendor, by a jury, for that part of the reversion comprised in lot 2. *Bliss* v. *Collins*, 4 Madd. 229.

Partnership Debt — Account.] — A. conveys lands on trust to sell, if the unsatisfied debt of a partnership should at a given time exceed 40,000*l.*; the trustees sell and convey by a deed which recites that the debts of the partnership exceeded the specific amount, and that A. had died intestate as to his real estate, and the heir-at-law of A. joins in that deed, and enters into a covenant for the title of the trustees, a covenant against all acts done by him or his father, and a covenant for further assurance. It afterwards appears to be uncertain

whether A. had not devised his real estate :—Held, that the purchaser is not entitled to have an account taken of the debts in order to establish the fact of their having exceeded the specified amount. *Hallet* v. *Middleton*, 1 Russ. 243.

Counterpart of Lease.]—Sale of reversion subject to a lease with a covenant on the part of the tenant to repair, the counterpart not being in the hands of the vendors, the court thought that such counterpart ought to be deposited for the benefit of all parties before it could compel the purchaser to take. *Shore* v. *Collett*, G. Cooper, 234.

Infant Customary Heir.]—A title to land in gavelkind depending on charters of feoffment by an infant customary heir, executed at the age of fifteen, will not be forced on a purchaser. *Maskell and Goldfinch's Contract, In re*, supra, col. 1104.

Restrictive Covenant.]—Vendor contracted to deduce a good title in fee-simple. A covenant not to use the property for the purpose of gasworks or a public-house :—Held, a fatal objection to the title. *Higgins and Hitchman's Contract, In re*, 51 L. J., Ch. 772 ; 21 Ch. D. 95 ; 30 W. R. 700.

Purchaser discharged from his agreement upon a doubt whether the land was not bound by a covenant of which he had not notice. *Bristow* v. *Wood*, 1 Coll. C. C. 480 ; 14 L. J., Ch. 50 ; 9 Jur. 99. *And see cases* supra, col. 1219.

—— **Condition Limiting Title—Objection to Anterior Title.**]—Conditions of sale of freehold property provided that the title should commence with a mortgage dated the 29th of July, 1852, and that the purchaser should, within fourteen days after the delivery of the abstract, deliver all his objections and requisitions as to the title, and that, subject thereto, the title should be deemed to be accepted. An abstract of title, commencing with the mortgage of the 29th of July, 1852, was delivered to the purchaser. More than fourteen days afterwards he issued a summons under the Vendor and Purchaser Act, for a declaration that a good title had not been shown in accordance with the particulars and conditions of sale, and later on filed an affidavit in support of his summons, in which he raised as an objection to the title the existence in a deed of the 3rd of March, 1847, containing a restrictive covenant which applied to part of the property. The purchaser discovered this deed by inquiries made of a third party :—Held, that the purchaser having acquired notice of the restrictive covenant, would be bound by it ; that it formed a valid objection to the title ; that he was not too late in raising the objection ; and that he was entitled to be relieved from his contract. *Cox and Neve, In re*, [1891] 2 Ch. 109 ; 64 L. T. 733 ; 39 W. R. 412.

Copyholds — Surrender.]—A., the owner of copyhold property, mortgaged it, and covenanted to surrender to the lords of the manor, to the use of the defendant, to sell in the event of default being made in payment of the mortgage money. A. made no surrender, but died, after devising all his real property to trustees. Subsequently to his death, the lords of the manor, at the nomination of the defendant, granted the property to certain persons upon the trusts mentioned in the deed of mortgage. The defendant sold under a condition that he should deduce a good title to the premises for the lives by which they were held under the lord, but that no earlier or other title should be deduced :—Held, that the defendant showed no title in himself, as no surrender had been made to his use by A., and that the vendee was not precluded by the conditions from taking his objection to the title. *Sellick* v. *Trevor*, 11 M. & W. 722 ; 12 L. J., Ex. 401.

Non-payment of Purchase Money.]—Proviso on sale of leaseholds that B. should not assign over till the purchase money was paid, the premises having been taken in execution for a debt of B., who had not paid the purchase money, were sold by the sheriff to D., who agreed to complete on having a good title :—Held, that the non-payment of the purchase money by B. was a sufficient objection to the title. *Elliott* v. *Edwards*, 3 Bos. & P. 181.

Concurrence of Remaindermen—Sale in Lifetime of Tenant for Life.]—Conditions of sale, after stating that the estate was limited to C. for life, with remainder to trustees in trust to sell for the benefit of her children, proceeded as follows : "And there being three such children only, all of whom have attained the age of twenty-one, such children or their trustees shall, if required, join in the conveyance to the purchaser, but no objection to the title of the vendors shall be made on account of the sale taking place during the life of C." Two of the children were married women, whose shares were settled with trusts for their infant children :—Held, that neither the children of C. nor the trustees could join in a conveyance, and therefore a purchaser was entitled to recover his deposit. *Mosley* v. *Hyde*, 17 Q. B. 183 ; 20 L. J., Q. B. 539 ; 15 Jur. 899.

Trust for Sale.]—Specific performance resisted, on the ground that antecedently to the contract a trust for sale had been created in the purchaser, an incumbrancer in possession. *Chambers* v. *Walters*, Coop. t. Brough. 91.

Ambiguous Document.]—A court of equity will not, at the end of half a century, fix upon a purchaser a difficult construction of an ambiguous instrument, which it might have done as between the original parties in case there had been no sale. *Thompson* v. *Simpson*, 1 Dr. & War. 259.

Settlement—Agreement Contrary to.]—Equity will not decree a specific performance of agreement which is contrary to the powers in a settlement. *Stratford* v. *Aldborough*, 1 Ridgw. 281.

—— **Sale by Tenant for Life.**]—Specific performance refused of agreement to sell in fee, by one who supposed himself absolute owner, being only tenant for life, under a settlement, with proviso empowering him to purchase an estate in fee-simple in possession, of equal or better value, and to settle same to him in lieu of settled estate, which was then to be his own. *Howell* v. *George*, 1 Madd. 1 ; 15 R. R. 203.

A tenant for life with an ultimate reversion to himself in fee, enters into an agreement as absolute owner to sell part of the settled land. This agreement the trustees of the settlement, who had a power to sell by the direction of the tenant for life, refused to adopt. The court refused a

decree against the tenant for life for such performance as was in his power, as it would be prejudicial to the other parties interested in the settlement. *Thomas* v. *Dering*, 1 Keen, 729; 6 L. J., Ch. 267; 1 Jur. 427.

—— **Special Occupant.**]—Testator devised all his real estate whatsoever, "except what is hereinafter mentioned and devised," in strict settlement, and gave annuities, which he charged upon a rectory held by him under a lease for lives; he gave part of his personal estate specifically, and directed the residue to be laid out in land, to be settled to the same uses as his real estate; the heir contracted to sell the lease of the rectory, and, upon a case, the certificate was, that the lease did not pass by the will, but devolved on the heir as special occupant; but the lord chancellor considered that title too doubtful to be forced on a purchaser; an act of parliament was therefore obtained. *Sheffield* v. *Mulgrave (Lord)*, 2 Ves. J. 525.

—— **Compromise by Infants—Malâ fide Appointment.**]—In an action the master found, upon the consent of the trustee of minors, that certain legacies and rent-charges were in equal priority, and that the finding was in the nature of a compromise, and beneficial to the minor. The report was confirmed by a final decree, and the lands were decreed to be sold:—Held, allowing exceptions to the master's report of good title, that the report and decree, being founded on a consent which the court had no jurisdiction to take, were erroneous, and the title under it was bad. *Weir* v. *Chamley*, 1 Ir. Ch. R 295.

Pending an appeal from the above decision, which was affirmed, a deed was executed appointing the rent-charge, and the master on review found that a good title could be made by reason of said deed; semble, that the appointment, having been made on an emergency, and not bonâ fide for the end designed by the donor of the power, was void:—Held, that the title was too doubtful to be forced on a purchaser, and the exceptions to the master's further report of good title were also allowed. *Ib.*

Contingent Remainders Destroyed.]—Specific performance decreed, though vendor's title was founded on destruction of contingent remainders. *Hasker* v. *Sutton*, 2 Sim. & S. 513. And see *Rake* v. *Kidd*, 5 Ves. 647.

Tenant in Tail—Recovery.]—Title depending on recovery suffered by tenant in tail, the reversion of which had vested in the crown by attainder of reversion:—Held, not such a title as purchaser is bound to accept. *Blosse* v. *Clanmorris*, 3 Bligh, 62.

Devise to trustees of a freehold for a term of years, to pay debts and legacies, and, after testator's decease, to his wife for life; then "to T. C., son of the late R. C., all that my estate where I now live, and all that other estate and premises thereto belonging, situate, &c., called or known by the name of W. estate, now in the holding of T., for his own use during his natural life, with remainder to the first son of the body of the said T. C. lawfully begotten, severally and successively in tail male of the name of C. And for want of such lawful issue of that name, either by my said grandson T. C., or my son J. C., then I give and devise the said estate where I now live, and the W. estate, amongst my daughters and their children, share and share alike, to hold unto them, his, her, or their heirs for ever as tenants in common, and not as joint tenants." T. C. suffered a recovery. He had no child:—Held, that the devisee could make a good title in fee. The question of title or no title being matter of opinion for the court, the purchaser is bound thereby, and cannot object to complete the purchase on the ground of the difficulty of the question on which the title depends. *Rushton* v. *Craven*, 12 Price, 599.

—— **Copyholds.**]—Devise of copyhold estates, the legal estate being outstanding, "to my son R., to be entailed upon his male heirs, and, failing such, to pass to his next brother, and so on from brother to brother, allowing 2,500*l.* to be raised upon the estates, for female children each"; whether a trust executed or executory; and, if the latter, whether an estate tail in R., quære. The point too doubtful to compel a purchaser to take the title. *Jervoise* v. *Northumberland*, 1 J. & W. 559; 21 R. R. 229.

Residence Clause.]—Devise to A. for life, remainder to trustees to preserve contingent remainders, remainder to sons of A. in tail, remainder over, with a proviso that the person entitled should live and reside on the estate; and for default thereof all the devised estates to go over to the person next in succession:—Held, in a suit by parties making title under a recovery suffered by A. and his eldest son, for specific performance, that it was too uncertain what the testator meant by "live and reside" for the court to determine that there had been a forfeiture, and a specific performance decreed. *Fillingham* v. *Bromley*, Turn. & R. 530; 24 R. R. 136.

Statute of Limitations.]—In 1763 B., C. and D. took possession of lands, to one-fourth of which A. was also entitled under marriage articles. In 1783 they levied a fine, and conveyed to a purchaser for value, and covenanted that they were seised in fee. There were several subsequent conveyances for value. In 1847 the lands were contracted to be sold:—Held, that the legal title of A. and her heirs to one-fourth of the lands was barred by the statute of limitations, as a court of law would not notice the executory trusts of the articles, and the several conveyances operated as disseisins. Semble, the equitable title of the heir of A., on failure of issue of B., C. and D., was also barred; but:—Held, that as a fine created no discontinuance in equity, the title was too doubtful to be forced on the purchaser. A conveyance of all her estate, &c., was obtained from the devisee of the heir-at-law of A., and was held to put an end to the objection. *Stewart* v. *Conyngham (Marquis)*, 1 Ir. Ch. R. 534.

Secret Purchaser—Glebe Land.]—A purchaser of land, formerly glebe, sold for redemption of land tax, not bound to complete when it appears that, upon the prior sale, the rector was the purchaser in the name of his curate. *Grover* v. *Hugell*, 3 Russ. 428; 27 R. R. 103.

Lease—Covenants.]—Lessee subject to covenants cannot compel specific performance of agreement to purchase, though he offers to

indemnify purchaser against performance of covenants. *Fildes* v. *Hooker*, 3 Madd. 193; 18 R. R. 214.

—— **Under-lease beyond Term.**]—L., having a term of ninety-nine years, with a covenant that he may within twenty years purchase the fee, demised to F. for ninety-nine years and a half, at a ground rent, and then acquired the fee. The ground rent was put up for sale as "a freehold ground rent issuing out of lands on lease, which will expire in December, 1922," being the expiration of the ninety-nine years and a half term:—Held, that the title was too doubtful. *Langford* v. *Selmes*, 3 K. & J. 220; 3 Jur. (N.S.) 859.

Under such a description the purchaser has a right to expect a power of entry and distress in case of non-payment. *Ib.*

—— **Covenant for Renewal.**]—D., being entitled to an undivided moiety of a lease for lives, containing a covenant for perpetual renewal, devised her interest to A.; the day after a renewal was granted by D. to the defendant, who was entitled to the other moiety, A. having contracted with the defendant to sell his (A.'s) moiety:—Held, on a bill by A. for specific performance, that A.'s was such a title as the court would compel a purchaser to take. *Poole* v. *Coates*, 2 Dr. & War. 493; 1 Con. & L. 531; 4 Ir. Eq. R. 497.

—— **By Administrator durante absentiâ.**]—Although a sale of leaseholds by an administrator durante absentiâ the person entitled to administration will be good if that person is living at the time of the conveyance, it is not such a title as the court will force upon a purchaser. *Webb* v. *Kirby*, 7 De G. M. & G. 376; 26 L. J., Ch. 145; 3 Jur. (N.S.) 73; 5 W. R. 189.

—— **Judgment in Ejectment — Reasonable Blot.**]—Lease to H. B., who deposited it with T. H. as security for an advance. The freeholder conveyed the land to J. S. in fee simple subject to the lease. J. S. recovered in an action for ejectment against H. B., who disappeared, and then J. S. conveyed to W. H. in fee simple, when the production of the judgment in ejectment was considered satisfactory as regarded the deposited lease. W. H. agreed to sell the land to H. in fee simple free from incumbrances. H. required that the lease to H. B. should be surrendered at W. H.'s expense, or at all events given up before completion. W. H. offered to indemnify H. against any claim which might be made under the lease:—Held, that this was not a reasonable blot on the title to which the court ought to give effect, and the vendor having offered to give an indemnity, the purchaser's objection must be declared sufficiently answered. *Heaysman's and Tweedy's Contract, In re*, 69 L. T. 89—C. A.

Title by Adverse Possession.]—After objections overruled but before the certificate had been signed, the purchaser discovered on a wall of the property a stone stating the title to be in the East India Company:—Held, that the vendor had not a good title when the bill was filed, for that there was no ground for holding a title to have been gained by possession adversely to the East India Company. *Phillipson* v. *Gibbon*, 40 L. J., Ch. 406; L. R. 6 Ch. 428; 24 L. T. 602; 19 W. R. 661.

Rule in Shelley's Case.]—Real estate was settled to the use of a trustee, his heirs and assigns, for a married women for life to her separate use, and after the determination of that estate to stand seised to such uses and upon such trusts as she should by will appoint, and in default of appointment to the use of the heirs and assigns of the married woman:—Held, that the legal fee was vested in the trustee; that all the subsequent limitations were merely equitable, and that, therefore, under the rule in *Shelley's case* (1 Rep. 93), the wife took an equitable estate in fee, and could, with the concurrence of the trustee after her husband's death, make a good title in fee to the property, and one which the court would force on an unwilling purchaser. *Cooper* v. *Kynoch*, 41 L. J., Ch. 296; L. R. 7 Ch. 398; 25 L. T. 566; 20 W. R. 503.

Where the question was whether A. B. took the legal or only an equitable interest for life in the property, so as to bring the title within the rule in *Shelley's case* (1 Rep. 93), the lord chancellor would not compel the defendant to accept the title. *Playford* v. *Hoare*, 3 Y. & J. 175.

Will.]—A purchaser not compelled to take a title depending upon the words of a will which were too doubtful to be settled without litigation. *Sharp* v. *Alcock*, 4 Russ. 374.

—— **Appointment.**]—Devise of stock in trust for A. for life, and after her death as to a moiety to her children then living, as to the other moiety between testator's sons; if all the sons predeceased A. then to transfer the whole stock to A. or as she should appoint. A. was alive (married), and there were four sons of testator alive:—Held, that the title was so doubtful as to the right of appointment in A. and when to be exercised, that the purchaser was not bound. *Hadley* v. *Robins*, 14 L. T. 100; 14 W. R. 387.

—— **Trust to Sell.**]—Devise to trustees and the survivor of them, and the heirs and assigns of such survivor, upon trust to sell, the surviving trustee having devised the trust estate to persons who sold. Semble, that the legal estate trust to sell passed by the devise, but the title was too doubtful to be forced on a purchaser. *Ashton* v. *Wood*, 3 Sm. & G. 436; 3 Jur. (N.S.) 1164. *And see cases* supra, col. 1101.

—— **Codicil.**]—Testator by his will, in his own handwriting, devised an estate to Ann Aspinall and her heirs, if she should be then living; but, if not, then to her issue and their heirs. He afterwards made a codicil: "This is a codicil to the last will and testament of me, S., and which will I some time since made in my own handwriting, and thereby devised to John Aspinall as therein mentioned." At the date of the codicil, Ann Aspinall had a son named John. An objection as to the presumption of a later will was overruled, as the will contained a gift which might take effect in favour of John Aspinall. *Howarth* v. *Smith*, 6 Sim. 161.

—— **Separate Use.**]—A title to real estate, accruing under a devise to trustees for an unmarried woman for her life, for her separate use, and on her death to convey it to her husband, is not too doubtful to be forced on an unwilling

purchaser. *Radford* v. *Willis*, 41 L. J., Ch. 19; L. R. 7 Ch. 7; 25 L. T. 720; 20 W. R. 132.

An estate was devised to a feme covert for her separate use. She entered into a contract for sale and died, having devised the estate to her husband. The court declined to compel a specific performance in the absence of the heir. *Harris* v. *Mott*, 14 Beav. 169; 15 Jur. 978.

Mistake as to Title.]—J., under the belief that he had the fee-simple in an estate, subject to a life interest in his mother, conveyed all his interest to trustees for the benefit of his creditors; the conveyance contained covenants for title, and for further assurance. The mother had the fee-simple, which, upon her death, descended to J. as heir-at-law:—Held, that J. was, in equity, bound to complete the contract. *Smith* v. *Baker*, 1 Y. & C. C. C. 223.

A., supposing he has a right, enters into an agreement to sell to B., who brings a bill for specific execution against A., and also against C., who appears to be the true owner, and so insists in his answer. This bill dismissed, as well against A. as C., and the decree of dismission was affirmed. *Cornwall* v. *Williams*, Colles' P. C. 117.

Concurrence of Necessary Party.]—Quære, whether the court, in the absence of express stipulation, or of conduct waiving the objection, will decree specific performance of a contract, where the execution by a necessary party can only be obtained under a power of attorney. *Beaufort* (*Duke*) v. *Glynn*, 3 Sm. & G. 213.

Bill by purchaser for specific performance ordered to be dismissed without costs, a necessary party not choosing to concur in conveying. *Lewis* v. *Loxham*, 3 Mer. 429.

Where the purchaser died intestate before completion, and a good title could not be made owing to an outstanding lease:—Held, that the purchaser could not have been compelled to perform the contract, and that the heir was not entitled to have it completed for his benefit. *Collier* v. *Jenkins*, Younge, 295.

Voidable Agreement.]—Contract to purchase an agreement for a lease which was voidable at the will of a third party who was, however, willing to confirm on conditions:—Held, that the purchaser was entitled to repudiate the contract. *Brewer* v. *Broadwood*, 52 L. J., Ch. 136; 22 Ch. D. 105; 47 L. T. 508; 31 W. R. 115.

Power of Exchange.]—Vendor thinking he can deal with purchase money as he chooses, and it turns out he has only power of exchange, the court will not decree specific performance against him. *Hood* v. *Oglander*, 34 Beav. 513; 6 N. R. 57; 34 L. J., Ch. 528; 11 Jur. (N.S.) 498; 12 L. T. 626; 13 W. R. 705.

Partnership—Accounts.]—The vendor of a share in a partnership filed a bill against the purchaser, who had taken possession, praying that he might be declared to have accepted the title, and might be decreed to perform the contract specifically: the court was of opinion that the title had not been accepted, and as a good title was not shown, a specific performance could not be decreed:—Held, that upon a record so framed no accounts nor inquiries could be directed. *Stevens* v. *Guppy*, 3 Russ. 171; 6 L. J. (O.S.) Ch. 164; 27 R. R. 59.

Bankruptcy — Subsequent Assignments — Priorities.]—A legatee of a reversionary interest which had been paid into court in an administration suit, presented a petition for liquidation in March, 1873, and a trustee was appointed. In July he assigned his interest in the legacy to J., who obtained a stop-order on the fund in court. In November, 1876, he assigned his interest to E., without notice of the liquidation, who also obtained a stop-order on the fund. Afterwards the trustee in liquidation obtained a stop-order. The plaintiffs purchased the interest of the trustee in liquidation and of J., and contracted to sell the legacy to the defendant. The defendant required E.'s mortgage to be abstracted as an incumbrance on the estate:—Held, that the question of the priority of E.'s incumbrance was too doubtful to justify the vendor in omitting it from the abstract. *Bright's Settlement, In re* (13 Ch. D. 413), considered. *Palmer* v. *Locke*, 51 L. J., Ch. 214; 18 Ch. D. 381; 45 L. T. 229; 30 W. R. 419—C. A.

Several Owners—Apportionment.]—Properties held partly by an absolute owner and partly by several sets of trustees under several trusts and for different persons were, by the vendors as a single body, agreed to be sold together in one lot for one undivided sum—which the absolute owner, and the trustees and their several sets of cestuis que trustent, afterwards apportioned by agreement amongst themselves, but not, as it appeared on any sufficient data—and with special conditions limiting the title, without, however, properly defining the portions of the properties affected by the limitations. The purchaser refused to complete the purchase, and the vendors filed a bill for specific performance of the contract:—Held, that the case was too doubtful to entitle them to relief. *Rede* v. *Oakes*, 4 De G. J. & S. 505; 34 L. J., Ch. 145; 11 Jur. (N.S.) 229; 11 L. T. 549; 13 W. R. 420.

Delivery up of Contract—Compensation.]—Under a bill to have a contract delivered up on the ground of defective title of defendant, the vendor, and for compensation, decree was made for delivering up the contract without prejudice to an action, instead of an inquiry before the master. *Gwillim* v. *Stone*, 14 Ves. 128.

Trustees unable to Transfer a Valid Licence.]—Devise of an inn to trustees for sale. After testator's death trustees took out a new licence in his name and then sold:—Held, that the trustees being unable to transfer a valid licence under which the business could be lawfully carried on, could not enforce the contract against the purchaser. *Cowles* v. *Gale*, 41 L. J., Ch. 14; L. R. 7 Ch. 12; 25 L. T. 524; 20 W. R. 70.

ii. *Defective as to Part.*

General Rule.]—Quære, how far the court will go in compelling a party to complete a purchase, when no title can be made to some part of the property. *Poole* v. *Shergold*, 1 Cox, 273; 2 Bro. C. C. 118; 1 R. R. 37.

Defect of title to a considerable part of the estate, though a good objection by the purchaser to a specific performance, is not by the vendor. *Western* v. *Russell*, 3 V. & B. 187; 13 R. R. 178.

Material Part.]—Specific performance refused of agreement to purchase, no good title being made to a small part which was essential to enjoyment of the rest. *Knatchbull* v. *Grueber*, 1 Madd. 153; 17 R. R. 35. Affirmed, 3 Mer. 124.

An estate was sold, some part of which, material to the enjoyment of the rest, was subject to a defect of title not disclosed by the abstract. The contract was rescinded with costs. *Edwards* v. *M'Leay*, 2 Swanst. 287; 14 R. R. 261. Affirming G. Cooper, 308. S. P., *Peers* v. *Lambert*, 7 Beav. 546; *Stapylton* v. *Scott*, 13 Ves. 425; 10 R. R. 179.

—— **Pew.**]—The particulars of sale described the property as a family residence, with a right to a pew in the middle aisle of the parish church. The title to the pew being defective:—Held, that it was not essential to the enjoyment of the property. *Cooper* v. ——, 2 Jur. 29.

—— **Exchange for another Part.**]—On sale according to a plan and description G. purchased from B. whose property was adjoining. No title could be made to a part which faced B.'s property, and which B considered essential. The vendors then agreed with the owners of this part to give it up on receiving another part of the property in exchange:—Held, that B. was entitled to the whole property, and not bound to accept this arrangement, and that he must therefore be discharged from his purchase. *Arnold, In re, Arnold* v. *Arnold*, 14 Ch. D. 270; 42 L. T. 705; 28 W. R. 635—C. A.

And see cases under PARTICULARS AND CONDITIONS, WHEN MISLEADING, supra, col. 1177.

As to One-seventh.]—A purchaser who had contracted for the entirety of an estate will not be compelled to take six undivided seventh parts of it. *Dalby* v. *Pullen*, 3 Sim. 29; 1 Russ. & M. 296; 8 L. J. (o.s.) Ch. 74; 30 R. R. 123.

Purchaser under decree of two-sevenths of estate in one lot is not obliged to take one-seventh, to which only title can be made. *Roffey* v. *Shallcross*, 4 Madd. 227; 20 R. R. 293.

As to Moiety.]—When vendors having agreed to sell the entirety of property could make a title to one moiety only:—Held, that the purchaser was entitled to have such moiety conveyed to him on payment of one moiety of the purchase money. *Bailey* v. *Piper*, 43 L. J., Ch. 704; L. R. 18 Eq. 683; 31 L. T. 86; 22 W. R. 943.

Sale in Lots.]—A person who purchases two lots is not justified in refusing to perform his contract for the purchase of one lot, because a good title is not shown to the other lot. *Lewin* v. *Guest*, 1 Russ. 325; 25 R. R. 58.

—— **Entire Contract.**]—Where a party became the purchaser of several lots at an auction, it was an entire contract; and, if the seller failed in making a title to any one, the purchaser might refuse to take the others. *Chambers* v. *Griffiths*, 1 Esp. 150.

Held, that where a man purchases at an auction two lots which adjoin, and which would be more conveniently occupied together, he was not obliged to go on with the purchase of either, unless the seller could make a good title to both. *Gibson* v. *Spurrier*, Peake's Add. Cas. 49; 4 R. R. 887.

Different Estates.]—By a written agreement the plaintiff agreed to sell, upon the terms stated, the L. estate, and the defendant agreed to sell the H. estate; and it was not expressed that the two contracts were to be dependent on each other. The defendant was unable to make good title to the H. estate:—Held, that the plaintiff was entitled to a specific performance of the contract as to the L. estate. *Croome* v. *Lediard*, 2 Myl. & K. 251; 3 L. J., Ch. 98.

Railway Company—Apportionment.]—A railway company takes land under s. 85 of the Lands Clauses Act, and subsequently enters into an agreement with the owners for the purchase of the lands so taken. To a portion of the land the owners cannot make title by reason of an outstanding legal estate. Upon petition for so much of the purchase money as represented the portion to which the vendors could make a title:—Held, that they were entitled to have the apportioned part of the fund transferred. Although the defect of title was such that in ordinary cases the contract must have failed, the taking and occupation of the land by the company rendered it impossible to annul the contract. *Perkes's Estate, In re*, 7 Railw. Cas. 605; 2 W. R. 24.

Vendor Acquiring Title.]—If A. agrees to sell an estate, and it is afterwards discovered that a small portion of it is the property of another person, the court will not discharge the purchaser from his contract without giving A. an opportunity of acquiring a title to that portion. *Chamberlain* v. *Lee*, 10 Sim. 444.

Right to Compensation.]—*See* supra, col. 1332.

iii. *Voluntary Deeds.*

Purchaser with Notice.]—A purchaser must take a title, though depending on the invalidity of a voluntary conveyance, as against a purchaser for valuable consideration with notice. *Butterfield* v. *Heath*, 15 Beav. 408; 22 L. J., Ch. 270.

The fact that the title of a vendor (who is himself a purchaser for value) is derived through a voluntary deed, is not of itself sufficient to enable a purchaser from him to repudiate his contract. *Noyes* v. *Paterson*, 63 L. J., Ch. 748; [1894] 3 Ch. 267; 8 R. 323; 71 L. T. 228; 43 W. R. 377.

Tenant in Tail—Election.]—Devise in trust for M. and C. for their lives, for their separate use; and in case both M. and C. should die without leaving issue, then over implied estates tail to M. and C., with cross-remainders in tail. M. died unmarried, and then C., before marriage, conveyed her estate, with the concurrence of her intended husband, by lease and release, to trustees in trust for herself for life, and then for her children, &c. There was issue of the marriage:—Held, that the trustees took a base fee, and that the husband was not tenant by the curtesy. Held, also, that after C.'s death, her eldest son, having elected to take against the settlement, and barred the entail, could make a good title to a purchaser. *Stanhouse* v. *Gaskell*, 17 Jur. 157; 1 W. R. 77.

Insurance Policy.]—A. insured his life, and afterwards assigned the policy to B. for a nominal consideration. B.'s executors then sold and

assigned the policy to D. for valuable consideration, and then D.'s executors sell it to E. :—Held, that they could make a good title to the policy. *Ashley* v. *Ashley*, 3 Sim. 149.

Voluntary Settlement.]—The court was of opinion that limitations in a marriage settlement to the brothers of the settlor and their issue were voluntary; but thought, under the circumstances, that a purchaser could not be compelled to take the title depending on the validity of those limitations. *Johnson* v. *Legard*, Turn. & R. 281; 18 R. R. 234.

The author of a voluntary settlement cannot file a bill for specific performance of a contract afterwards entered into by him to sell the settled estate. *Ib.*

—— **27 Eliz. c. 4.**]—In a suit for specific performance against a vendor and those claiming under a voluntary settlement made by him previously to the contract for sale, the court refused to declare that the settlement was void under 27 Eliz. c. 4. *Fletcher* v. *Ketteman*, 40 L. J., Ch. 624.

Copyholds—Admittance.]—A woman seised of a copyhold executed a surrender jointly with her husband to such uses as her husband should appoint, and in default of appointment to him in fee, but no admittance was entered. The husband then conveyed to a purchaser, but still no admittance was entered. The plaintiff, who claimed under the purchaser, filed a bill to restrain an action of ejectment by the copyhold heir of the wife, and to compel a surrender to complete his title :—Held, that the husband had no power to make perfect that title which he, as a volunteer and without consideration, took imperfectly. *Sowerby* v. *Gutteridge*, 18 L. J., Ch. 9.

—— **Post-nuptial Settlement.**]—A testator devised a copyhold estate in trust for his wife for life, with remainder in trust for such persons as she should appoint by will or deed, with remainder over. The wife married again, and she and her second husband, after marriage, by deed, appointed the estate, and directed the surviving trustee to surrender it to the use of a mortgagee in trust to secure a mortgage and interest, and subject thereto to the use of the husband and wife for their joint lives, with trusts in favour of children of the second marriage. A surrender was made to the mortgagee accordingly. The husband and wife afterwards sold the estate, and the mortgage was paid out of the purchase money; the husband and wife joined with the mortgagee in surrendering to the use of the purchaser, and they all released to him all their interest :—Held, that the purchaser could make a good title, by the assistance of the statute of 27 Eliz. c. 4, without showing there were no children of the second marriage. *Currie* v. *Nind*, 1 Myl. & Cr. 17; 5 L. J., Ch. 169.

Voluntary Settlement by Vendor.]—Purchaser objecting to title on the ground of a voluntary settlement made by the vendor, an exception to the master's report, approving the title, allowed. *Smith* v. *Garland*, 2 Mer. 123; 16 R. R. 154.

Acceptance of Title.]—When it appears from the abstract of title that the vendor has previously executed a conveyance—on the face of it voluntary—but without evidence of its being void as against a purchaser for value, the purchaser may refuse to accept the title, although he might have made the title good by acceptance. *Clarke* v. *Willott*, 41 L. J., Ex. 197; L. R. 7 Ex. 313; 21 W. R. 73.

—— **Possession.**]—The purchaser set up a voluntary settlement as an objection to the title, but said he was willing to complete on having a good title. He had been let into possession and paid part of his purchase money, and had paid off a mortgage and got a conveyance of the legal estate and possession of the title-deeds :—Held, that the vendor was entitled to a decree for completing the purchase. *Peter* v. *Nicolls*, L. R. 11 Eq. 391; 24 L. T. 381; 19 W. R. 618.

Semble, that the principle of *Smith* v. *Garland* (supra) does not apply to a defendant who says he is willing to complete on having a good title. *Ib.*

Sale by Trustees of Voluntary Settlement—Possible Avoidance by Bankruptcy.]—By a voluntary settlement certain freehold lands were conveyed to trustees on trust for sale, and to pay the income of the proceeds to the settlor for life, and, after his death, upon certain trusts for his issue. The trustees entered into a contract for the sale of the property :—Held, on a summons under the Vendor and Purchaser Act, 1874, that the purchasers would be "parties claiming under the settlement" within s. 47 of the Bankruptcy Act, 1883, and, therefore, that the title could not be forced upon them. *Briggs and Spicer, In re*, 60 L. J., Ch. 514; [1891] 2 Ch. 127; 64 L. T. 187; 39 W. R. 377; 55 J. P. 278.

Semble, that a good title might have been made by the settlor conveying to the purchasers and their paying the purchase money by his direction to the trustees, but held, that such a title could not be forced upon unwilling purchasers, because it could not be proved that the settlement was not, or had not, become a settlement for value. *Ib.*

And see *Fletcher* v. *Ketteman*, supra.

iv. *Bankruptcy.*

No Commission Issued.]—An act of bankruptcy a sufficient objection to title, without showing a debt upon which a commission could issue. *Lowes* v. *Lush*, 14 Ves. 547; 9 R. R. 344. S. P., *Foster* v. *Gould*, 3 L. J. (o.s.) Ch. 200.

Sale by Devisee subject to Debts.]—Where devisee of real estate, subject to debts, had contracted to sell estate to pay debts, and a bill was filed against her by legatees for administration and purchaser consented to reference as to title in that suit :—Held, he was not thereby bound to take equitable title, and as two commissions of bankruptcy had issued against devisee before contract, he was not bound to accept title. *Cann* v. *Cann*, 1 Sim. & S. 284; 1 L. J. (o.s.) Ch. 219.

By Assignees of Devisees.]—Residuary devisees and executors were bankrupt. More than forty years after testator's death, their assignees sold their interest. On objection that some of testator's debts might be still unpaid :—Held, that, in the absence of all evidence of any outstanding debts, the assignees had a full right to dispose of this property, and that the bankrupts were bound to join in the conveyance. *Bolton, Ex parte, Moxon, In re*, 1 Mont. D. & D. 667.

At a meeting of the bankrupts' creditors, a resolution was entered into by the majority then present, that if certain claims of the bankrupts for compensation should prove beneficial to the estate, the creditors would relinquish all right to the above property :—Held, that this was only a conditional arrangement, and did not prevent the assignees from selling. *Ib.*

Sale after Composition Accepted.]—When a debtor has filed a petition for liquidation, and resolutions accepting a composition are afterwards passed as provided by the act, such debtor remains absolute master of his property until the creditors take action under s. 126 of the Bankruptcy Act, 1869, and a purchaser from him is not entitled to any evidence whether or not the instalments under the composition have been duly paid. *Kearley and Clayton's Contract, In re*, 47 L. J., Ch. 474 ; 7 Ch. D. 615 ; 38 L. T. 92 ; 26 W. R. 324.

Assignee not bound by Decree for Sale.]—By marriage articles 1,000*l.* was secured to younger children. Subsequently by deed the husband charged lands at K. with a sum and subject thereto conveyed the lands to his sons in tail. On the husband's death, two bills were filed on behalf of younger children to raise the sum secured by the articles. G., the fourth son, entitled to an estate tail in remainder under the deed, became insolvent. He and his assignee were parties to the latter suit, but not in respect of that estate. A decree for the sale of the fee was pronounced for the sum due under the articles, and a part of the sum due under the deed. The abstract of title stated the insolvency of G., and that the heir of his assignee would join in the conveyance :—Held, on objections to title, that the assignment, though pendente lite, was valid, being made under the authority of a statute, and conveyed a base fee to the assignee, and, the decree not being binding on him, the title was defective ; that the defect could not be cured by the heir of the assignee joining in the conveyance, as he was a trustee for the creditors of G., who did not appear to have been paid, and were not bound by the decree. *Keogh* v. *Keogh*, 13 Ir. Eq. R. 284.

Deed of Assignment for Benefit of Creditors —Conveyance by Trustee under Deed of Assignment — Concurrence of Trustee in Bankruptcy.] — A trader unable to pay his debts executed a deed whereby he conveyed and assigned to a trustee for his creditors all his estate and effects, including his freehold dwelling-house and shop where he carried on his business, upon trust to permit him to carry on his business for the purpose of paying off his debts by certain instalments, which he thereby covenanted to pay ; and upon default in the payment of such instalments the trustee was empowered to enter into possession of the whole of the property, and sell the same, and pay the creditors rateably out of the proceeds ; and the trader thereby appointed the trustee his attorney for executing every document necessary or expedient for carrying into effect the trusts and provisions of the deed, which was registered under the Deeds of Arrangement Act, 1877. Five months after the date of the deed the trader made default in payment of the instalments, and the trustee entered into possession of the property comprised therein, and a month after such entry into possession by the trustee the trader was adjudged bankrupt. Two months after the trader's bankruptcy, the trustee under the deed sold the trader's house and shop by auction, and the purchaser required the concurrence of the trustee in bankruptcy in the conveyance of the property to him by the trustee under the deed. It was admitted that all the creditors of the trader did not assent to the deed :—Held, that, although the deed was not void under the statute of the 13 Eliz. c. 5, as there was nothing to show that the trader thereby intended to defeat, hinder, or delay his creditors, yet the purchaser was right in the contention that the concurrence of the trustee in bankruptcy in the conveyance to him was necessary to confer a good title to the property, as otherwise he would be liable to legal proceedings at the instance of such trustee. *Poppleton and Jones' Contract, In re*, 74 L. T. 582.

v. *Charges and Incumbrances.*

General Rule.]—When an estate is sold free from incumbrances, and the abstract shows that the estate is subject to a charge or incumbrance, the incumbrance does not afford an objection to the title, but is matter of conveyance only, even if the amount of the incumbrance be greater than the purchase money. *Townsend* v. *Campernown*, 1 Y. & J. 449 ; 30 R. R. 825.

Mortgage by Devisee—Accounts.]—Devise of real estate in trust to pay debts and legacies, and subject thereto to one of the devisor's coheirs, who was also residuary legatee : mortgage by her, and (several years after) bill filed against mortgagor and devisee in trust for foreclosure :—Held, on exceptions to title, by purchaser under decree in that cause, that the legatees who proved their legacies charged on the lands were not necessary parties ; that no account of testator's debts and legacies need be specifically directed ; and that the same person being residuary devisee and legatee, the account of the testator's personal estate was immaterial. *Magennis* v. *Fallon*, 2 Moll. 569.

Mortgage by Tenant for Life.]—A tenant for life mortgaged the inheritance. After his death B. became entitled to the mortgages. C., the tenant in tail, a minor, covenanted by marriage articles to convey the lands in trust to sell and pay off the debts then affecting them, and subject thereto for herself for life, remainder to her children, and a recovery was suffered on her majority. B. filed a bill and obtained a report, finding that arrears of rent and fines due in the life of A. and after were paid off by loan on mortgage ; and found this sum and the mortgages, with interest on them all before the death of A. to the time of the report, to be due, and a sale was decreed to pay them. B.'s assignee filed a bill, not making the trustee of C.'s settlement a party, and obtained a decree to carry the former decree into execution :—Held, that the first decree was erroneous, declaring the inheritance liable for interest, payable by the life estates of A. and C., and that a purchaser under the second decree, in which the inheritance was not represented, could not be held to his purchase. *Magawley* v. *Brady*, 9 Ir. Eq. R. 59.

Estates Specifically Charged.]—A testator devised his estates to his eldest son, and charged

some of them with legacies, specifically charging one upon one of the estates, and directed that his residuary property should be sold in payment of his debts, and in ease of his real estates. The estates charged with the payment of debts not being sufficient, the finding of the master, that that legacy was a charge subject to the judgment and bond debts, was confirmed. *Bouverie* v. *Norbury*, 3 Cl. & F. 247; 9 Bligh (N.S.) 611.

Annuities.]—A testator devised his real estates in fee, charged with certain annuities or annual rent-charges:—Held, on special case, that the annuitants took the annuities for life; and that a purchaser could not maintain an objection, upon the ground that the annuities were given in fee, and not for lives. *Nicholls* v. *Hawkes*, 22 L. J., Ch. 255; 1 W. R. 124.

Merger.]—The legal estate in a term of years was vested in A., B. and C., as trustees for D. and E., mortgagees and joint tenants. By an indenture executed by all parties except E., the term was merged, the mortgage money being expressed to be paid to D. and E., and D. alone signed the receipt:—Held, that the land was not discharged, and specific performance of a contract to purchase the land refused. *Matson* v. *Dennis*, 10 Jur. (N.S.) 461; 12 W. R. 926.

Lis Pendens.]—A registered lis pendens does not of itself create an incumbrance upon property, apart from the subject-matter in respect of which the lis pendens is registered. *Bull* v. *Hutchens*, 9 Jur. (N.S.) 954; 8 L. T. 716; 11 W. R. 866.

Judgment—Indemnity.]—Purchaser not to be compelled to take an indemnity against a judgment, amounting to half of the purchase money. *Wood* v. *Bernal*, 19 Ves. 221; 12 R. R. 173.

Old judgments existing against a former owner of leaseholds, who parted with the property in 1770, and to enforce which no steps have been taken, are no objection to the title. *Causton* v. *Macklew*, 2 Sim. 242.

—— **Tenant for Life.**]—Tenant for life and tenant in tail joined in conveying the estate to trustees, in trust to sell and to pay the purchase money among the two; and it was declared that the trustees' receipts should be sufficient discharges. The trustees contracted to sell, and afterwards judgments were entered up against the tenant for life:—Held, no objection to the title. *Lodge* v. *Lyseley*, 4 Sim. 70.

—— **Sale by Mortgagee without Notice.**]—A mortgagee took, on the execution of his mortgage in 1844, an assignment of a term to a trustee, and forbore to search for judgments. A judgment had been registered in November, 1843. The mortgagee sold in 1846, under a power of sale in his mortgage. During the proceedings the five years from the registration of the judgment expired, and it was not re-registered till 1850:—Held, that the purchaser could not be compelled to complete without the concurrence of the judgment creditor. *Freer* v. *Hesse*, 4 De G. M. & G. 495; 23 L. J., Ch. 338; 17 Jur. 703; 1 W. R. 242, 487.

—— **Searches made by Purchaser.**]—By a contract of sale S. agreed to purchase certain leasehold property, subject to the following condition: No requisition to be made in respect of the title prior to the conveyance of the 12th of May, 1869, being a deed of conveyance to the vendors' testator. S., having discovered through searches made by himself, two judgment mortgages registered in 1858 and 1859 against the property:—Held, that S. was not precluded from objecting to the title, on the ground that these judgment mortgages appeared on the registry searches. A condition so framed does not prevent the purchaser from showing aliunde that the title is in fact defective. *Davys and Saurin, In re*, 17 L. R., Ir. 334.

—— **Claim by the Crown—Compromise.**]—It is no objection to the title to an estate that an extent had issued from the crown against the owner, which remained in the hands of the sheriff unexecuted; it appearing that the lords of the treasury had, in fact, compromised the debt, though a writ of amoveas manus had not actually issued. *Poole* v. *Shergold*, 1 Cox, 160; 2 Bro. C. C. 118; 1 R. R. 37.

—— **Delay.**]—In 1842 the defendant contracted to purchase an estate: the vendors claimed under a testator who died in 1809, and subject to his debts: a creditors' suit had been instituted in 1813, and a decree for an account and sale made in 1817, since which nothing had been done, and no report of debts had been confirmed. After so great delay, no further time was given to the vendors to complete their title. *Fraser* v. *Wood*, 8 Beav. 339.

vi. *Outstanding Estates and Interests.*

Equitable Estate.]—Purchaser is not to be compelled to take an equitable estate. *Abel* v. *Heathcote*, 2 Ves. J. 100; 4 Bro. C. C. 278; 2 R. R. 171.

A person contracted to sell, and showed only an equitable title, and the purchaser required the vendor to get in the legal estate:—Held, that such requisition was as to a matter of conveyance only, and the vendor could not rescind under a condition empowering him to rescind if any objection to title were made which he was unable or unwilling to remove. *Kitchen* v. *Palmer*, 46 L. J., Ch. 611.

Presumption as to Legal Estate.]—Re-conveyance of the legal estate presumed under obscure circumstances after a great lapse of time, though the possession originally not adverse, but under a trust. *Hillary* v. *Waller*, 12 Ves. 239.

Outstanding Term.] — Outstanding term to attend the inheritance, the trusts being performed, may be an objection to the conveyance, not to the title. *Berkeley* v. *Dauh*, 16 Ves. 380.

Dower.]—Sale of an estate which, by deed, dated in 1841, was limited to the use of the vendor for life, without impeachment of waste, with a trust to bar dower, and after the determination of the trust term, to the use of the vendor, and his heirs and assigns for ever:—Held, that an objection by the defendant that he was entitled to a conveyance of any interest which might have become vested in the dower trustee was frivolous and vexatious. *Collard* v. *Roe*, 4 De G. & J. 525; 28 L. J., Ch. 560; 7 W. R. 623.

An attendant term having become vested in

the wife of the owner of the inheritance as administratrix of the trustee, and her husband becoming bankrupt, his assignees agree to sell the estate, and the husband dies:—Held, that the widow was not entitled to dower, that she was to assign the term to the purchaser, and that he was bound to accept the title. *Mole* v. *Smith*, Jacob, 490.

Whether the purchaser can be compelled to take an assignment of a term as a protection against dower, quære. *S. C.*, 1 J. & W. 665.

Concurrence of Necessary Party.]—When a necessary party to a title is neither in law nor equity under the control of the vendor, the master ought to report against the title, unless there is produced to him a legal or equitable obligation on the part of the stranger to join in the conveyance. *Esdaile* v. *Stephenson*, 6 Madd. 366; 23 R. R. 248.

A. agreed to demise certain premises to B.: there was an outstanding equitable interest vested in C.:—Held, that B. was bound to accept a demise from A., in which C. joined. *Reeves* v. *Gill*, 1 Beav. 375.

Objection of Conveyance — Title to Legal Estate.]—An abstract showed the equitable fee to be in the vendor and the legal estate to be in A., as a mortgagee for a term, and subject thereto in B. in fee. By a supplemental abstract it appeared that A. had become a trustee of the term for B., and had died, and the descent of the legal estate was traced:—Held, that the first abstract showed a complete title, the tracing of the title to the legal estate being matter of conveyance merely. *Ararne* v. *Browne*, 14 Sim. 303; 14 L. J., Ch. 30; 8 Jur. 1037.

—— **Fine not Levied.**]—By a decree in chancery a married woman was directed to convey a freehold estate to F., a purchaser: she afterwards, together with her husband, executed a conveyance, the husband covenanting with F. that he and his wife would levy a fine. No fine was ever levied. On a bill by a vendor, claiming under F.:—Held, that the objection that no fine had been levied was not one of title, but of conveyance, as the order in chancery was binding on the woman, and rendered her a trustee for the purchaser, and she was, therefore, compellable to complete the legal title. *Jumpson* v. *Pitchers*, 1 Coll. C. C. 13; 13 L. J., Ch. 166.

Settlement by Tenant in Tail—Confirmation.]—A tenant in tail on the marriage of his son conveyed the entailed lands as if he were seised in fee to trustees for a term to raise portions, and upon further trusts. No fine or recovery was ever levied or suffered by the father or by the son. A bill was filed to raise the portions, and a decree directed a sale of the term. After the decree, the eldest son of the marriage, his father and grandfather being dead, executed a disentailing deed, and conveyed the lands in fee to C., expressly subject to the term. C. afterwards conveyed the fee to the widow of the father, who was a party to the suit, and had allowed the decree to be made upon sequestration against her:—Held, that the acts of the son operated as a confirmation of the settlement, and that a good title to the term could be made. *Massey* v. *Batwell*, 4 Dr. & War. 56; 5 Ir. Eq. R. 382.

Held, also, that the widow, having acquired her title after the decree, was bound by it. *Ib.*

Held, also, that the judgments entered pending suit, against the son and his vendee, were not an objection to the title. *Ib.*

Trustee—Escheat.]—T., the executor of S., purchased the equity of redemption of an estate, subject to a mortgage in fee (which contained a power of sale), to A. and D. T. was illegitimate, and died unmarried and intestate. B. purchased the estate, which was conveyed to him in fee by A. and D., the mortgagees, and by the administratrix de bonis non of S. The deed recited that T. had purchased the estate in part with the money of S. B. died, and his estate was sold under the direction of the court. The master reported that a good title could not be made. Upon exceptions to this report:—Held, that the evidence of T., being a mere trustee, was not such that a purchaser could be compelled to take the title; that, assuming T. had a beneficial title, the equity of redemption had not escheated to the crown; that, as the equity of redemption might possibly be assets for the payment of the debts of T., no title could be made in the absence of the legal personal representative of T. The exceptions were therefore overruled. *Beale* v. *Symonds*, 22 L. J., Ch. 708; 1 W. R. 137.

Descent to Infant Heir.]—Where a contract is made, and during delay caused by the purchaser, the legal estate descends to an infant heir, the purchaser cannot avail himself of that difficulty in the title to protect himself from specific performance. *Gunter* v. *Halsey*, Amb. 586.

Freehold—Rents and Profits.]—Property was put up for sale as: Freehold estate, consisting of two tenements, together with several dwelling-houses and gardens attached, now or late in the occupations of H. R. and others. Also two extensive lime quarries, well situate for shipping. One of the conditions of sale provided that the purchaser should, on completion, be let into the receipt of "the rents and profits" of the premises. Part of the property was, at the time of the sale, out upon leases for lives:—Held, that, under the particulars and conditions of sale, the vendors were bound to show a title to an estate in fee simple in possession. *Hughes* v. *Jones*, 31 L. J., Ch. 83; 8 Jur. (N.S.) 399; 5 L. T. 408; 10 W. R. 139.

"Rents and profits" were held to mean ordinary rents and profits. *Ib.*

Fee Farm Rent—Proviso for Re-entry.]—Charles II. by letters patent granted some property in fee, subject to a fee farm rent, and to a proviso of re-entry in case of non-repair. The crown afterwards granted away the rent:—Held, that the proviso for re-entry formed no objection to the title. *Flower* v. *Hartopp*, 6 Beav. 476; 12 L. J., Ch. 507; 7 Jur. 613.

—— **Extinguishment.**]—It is no objection to title that two fee farm rents, created by letters patent by James I., are not shown to have been extinguished, it being proved that no claim has been made for the rents from 1706, and no proof of any claim previous. *Simpson* v. *Gutteridge*, 1 Madd. 609; 16 R. R. 276.

Copyholds—Title by Possession.]—The generality and vagueness of descriptions of copyhold property on the court rolls are so well known, that a vendor is not bound to show how the description on the court roll is to be applied to the present state of the property, if he prove that the property has actually been enjoyed, and passed under that description, for upwards of sixty years. *Long* v. *Collier*, 4 Russ. 267; 28 R. R. 79.

Semble, that in copyhold land, although the lord's title may be barred by adverse possession for twenty years, yet the commoner's title could not. And quære, what is a proper case for compensation, and what for avoiding a contract? *Perkins* v. *Ede*, 1 W. R. 10.

—— **Enfranchisement.**]—It is no sufficient objection to the title of a vendor of an enfranchised copyhold, that a mortgagee to whom a surrender had been made had not been admitted before the enfranchisement, the deed of enfranchisement having conveyed to the vendor all the rights of the lord. *Minton* v. *Kirwood*, L. R. 1 Eq. 449; 13 L. T. 751. Affirmed, 12 Jur. (N.S.) 970; 15 W. R. 116.

—— **Admittance.**]—In an agreement for sale of copyholds the vendors contracted to give such title as they possessed at the time of the agreement "to extend over twenty years." The vendors were assignees of an unadmitted devisee, and had a complete equitable title, but refused to get in the legal estate. A second term of the agreement was that "purchaser was to prepare his own conveyance and surrender at his own expense":—Held, that the purchaser was entitled to a surrender of the legal estate, and that vendors must pay all fines. *Whiteley* v. *Taylor*, 35 L. T. 187.

—— **Trustees for Sale.**]—A testator devised copyholds, subject to a power of appointment, to trustees upon certain trusts, and directed his trustees to sell as soon as conveniently might be:—Held, that the trustees could make a good title to a purchaser without being admitted. *Glass* v. *Richardson*, 2 De G. M. & G. 658; 9 Hare, 698; 22 L. J., Ch. 105; 17 Jur. 926.

—— **Heriot.**]—A copyholder contracted with a railway company for the sale of his tenement, which was subject to a heriot and to quit-rents and fines. The heriot was supplied by severance of the copyhold:—Held, that the vendor was not entitled to have the remaining part of his copyhold discharged from the heriot; and that he could not refuse to execute the conveyance on the ground that the company had not apportioned the rents and fines. *Parker* v. *S. E. Ry.*, 1 W. R. 316.

—— **Inclosure.**] — Where copyhold is sold under commission, good title is made by bargain and sale from commissioners to the purchaser direct. *Holland*, *Ex parte*, 4 Madd. 483.

Objection by purchaser having full notice of all the facts under an inclosure act, that the award of the commissioners was not made, overruled, the act containing a clause enabling a sale, and declaring the conveyance valid before the award. *Kingsley* v. *Young*, 18 Ves. 207.

An inclosure act directed certain allotments to be made, and reserved to the lord the seigniory and royalties. The act made no mention of any right of warren existing in the lord; but there was some evidence that S., the lord of the manor, had used part of the waste as a rabbit warren. The award gave an allotment to S. for his right of warren, and also allotments which were declared to be a full compensation for all his right and interest in the lands directed to be inclosed:—Held, that S.'s title of the warren allotment was not such as a purchaser could be compelled to take. *Casamajor* v. *Strode*, 2 My. & K. 706; Coop. t. Brough. 248.

—— **Reservations.**]—The omission in a rental of a reservation of mines, minerals, and of right of entry to search for them, is a valid objection to the title. *Barton* v. *Downes* (*Lord*), Fl. & K. 505.

In 1823, lands were conveyed to J. and his heirs, "saving and excepting out of the conveyance the manorial rights belonging or appertaining to the manor of C., of which manor the lands hereby released are parcel, and the tolls and duties of the fairs and markets thereof, as also any liberty of turbary or limestone heretofore granted therein or thereout by C. (a former owner), or his ancestors, to any of the tenants of the said manor, as expressed in their leases." Pursuant to a decree, the fee and inheritance in the lands was set up to be sold, under a recital, which did not advert to the reservation in the conveyance of 1823. It did not appear that any fairs or markets had ever been held for the manor, or any court, for the last twenty years; and although there was no open limestone quarry, nor anything in the nature of turbary save a surface or top-sod on the lands, yet it did not distinctly appear that there was not either limestone or turf on them:—Held, confirming the report, that the reservation of the liberty of turbary and limestone was a valid objection to the title, but not to the reservation of the manorial rights and tolls of the fairs and markets of the manor. *Martin* v. *Cotter*, 3 Jo. & Lat. 496; 9 Ir. Eq. R. 351.

Under an agreement by a copyholder for the enfranchisement and sale of a copyhold estate, and for making out and delivering a good title to the same:—Held, in the absence of any stipulation to the contrary, that the purchaser was bound to accept the title subject to the reservation of minerals and other rights contained in s. 48 of the 15 & 16 Vict. c. 51. *Kerr* v. *Pawson*, 27 L. J., Ch. 594; 4 Jur. (N.S.) 425; 6 W. R. 447.

Specific performance of a contract for sale of lands held under an inclosure act refused, it appearing that the right of the lord to the minerals had not been affected by the act. *Pretty* v. *Solly*, 26 Beav. 606.

Land was described in a contract as freehold, but it was shown by the abstract that it was formerly copyhold, and had not been enfranchised. A decree was made for specific performance, and a general inquiry directed as to title; the purchaser then for the first time objected that the minerals were reserved to the lord of the manor:—Held, that the objection was fatal to the title; but as the purchaser had taken the objection so late, he was not allowed his costs. *Upperton* v. *Nicholson*, 40 L. J., Ch. 401; L. R. 6 Ch. 436; 25 L. T. 4; 19 W. R. 733—C. A.

Tithes.]—On the sale of an estate as tithe free, the question whether tithe free is not a question of title. *Smith* v. *Lloyd*, 2 Swanst. 224, n.

Upon a decision of the court of exchequer,

that a presumption from non-payment of tithes cannot bar even a lay impropriator, the lord chancellor would not compel a purchaser to take such a title. *Rose* v. *Calland*, 3 Ves. 186. *See* 6 R. R. 19, n.

Leaseholds—Sale in Lots—Apportionment.]—On a sale, in lots, of premises, the particulars of which state them to be held under one lease, and that the purchaser of one lot is to be exclusively subject to the rent, the other purchasers cannot object to the title, on the ground of a clause of re-entry on non-payment contained in the lease. *Walter* v. *Maunde*, 1 J. & W. 181; 21 R. R. 141.

Landlord contracted to sell part of the demised estate, with an apportionment of part of the rent reserved for the whole estate, can make a good title without the consent of the tenant. *Ib.*

—— **Surrender.**]—Leasehold property was underlet to A., for twenty-one years from 1861, and was in 1864 again underlet to B. for twenty-one years, but A. never attorned to B., and subsequently surrendered his interest to the lessee:—Held, as against a purchaser of the original lease subject only to B.'s interest, that the surrender was valid, and a good title shown, *Edwards* v. *Wickwar*, 35 L. J., Ch. 309; L. R. 1 Eq. 403; 12 Jur. (N.S.) 158; 14 W. R. 363.

—— **Subject to Ground Rent.**]—Where leaseholds were sold under particulars and conditions of sale which made no mention of ground rents:—Held, that the purchaser led by the particulars to believe that they were not so subject, was entitled to be discharged. *Jones* v. *Rimmer*, 49 L. J., Ch. 775; 14 Ch. D. 588; 43 L. T. 111; 29 W. R. 165—C. A.

—— **Public-house—Indemnity.**]—A. paid a deposit upon a contract for the purchase of a public-house. The house was comprised with another in an original lease, under which the lessor had a right to re-enter for a breach of covenants in respect of either house:—Held, that A. was not bound to accept the title with an indemnity. *Blake* v. *Phinn*, 3 C. B. 976; 16 L. J., C. P. 159.

S., being in occupation of a public-house, contracted with W. to sell to him the residue of the lease, of which twelve and a half years at least were unexpired. The abstract of title showed that S.'s lessors had a right to determine the lease at the end of five years, and W. at once rescinded the contract:—Held, that W. was entitled to repayment of the deposit-money with interest. *Weston* v. *Savage*, 48 L. J., Ch. 239; 10 Ch. D. 736; 27 W. R. 654.

—— **Objection after Title Accepted.**]—Purchasers of the reversion agreed to purchase a leasehold interest granted by the vendor, the freeholder. They investigated and accepted the vendor's title, but afterwards made the discovery of an ancient lease which they alleged to be still outstanding. Specific performance decreed, and reference as to title refused. *Corbett* v. *Works and Public Buildings Commissioners*, 18 L. T. 548; 16 W. R. 889.

—— **Title Involving Litigation.**]—A court of equity will not decree the specific performance of a contract for the purchase of a lease, where, from pending and threatened litigation, it is impossible to ascertain to whom the ground-rent is payable, and the purchaser must be involved in immediate litigation. *Pegler* v. *White*, infra, col. 1477.

Under-lease.]—On the purchase of an under-lease it is not a valid objection to the title, that the under-lease may become forfeited by the non-performance of the covenants in the original lease. *Hayford* v. *Criddle*, 22 Beav. 477.

This objection may be cured, either by an insurance, for the whole residue of the term created by the sub-lease, or by making the representative of the original lease join in a covenant, that the purchaser shall be at liberty to insure in his name, and to deduct the annual premiums out of the rent. *Montresor* v. *Williams*, 1 L. J. (O.S.) Ch. 151.

Where upon the sale of a leasehold ground-rent by the mesne lessee, a part of the term assigned being reserved, and by the conditions, no title prior to the assignment was to be produced, and, by recital in the original lease, it appeared that the property out of which the rent issued had been originally demised with other premises at a rent, subject to the covenants, &c., in the original demise:—Held, that a good title could not be made, as upon failure of payment of the original rent it might become a subject to forfeiture. *Taylor* v. *Martindale*, 1 Y. & C. C. C. 658.

—— **Breach of Trust.**]—An under-lessee of premises bequeathed them to P. his lessor (whom he also appointed executor), in trust for L.; P. afterwards executed a deed, purporting to be an assignment of them to L., and by his will bequeathed the premises to his executors on certain trusts; on his death his executors demised the premises to L. for the then residue of the term:—Held, that L. could make no title, the legal estate being merged in the bequest to P., and the assignment by him, therefore, inoperative; and the demise by the executor being a breach of trust. *Law* v. *Urlwin*, 16 Sim. 377; 12 Jur. 1012.

—— **Sale as Lease.**]—Lease containing covenants and underlease of a portion not containing similar covenants. On sale by the under-lessee describing it as a lease, but that the lessor's title shall not be inquired into, the court will not compel a purchaser who has discovered the true state of the title aliunde to complete. *Darlington* v. *Hamilton*, 2 Eq. R. 906; Kay, 550; 23 L. J., Ch. 1000. *And see cases* supra, col. 1185.

vii. *Non-Performance of Covenants.*

Building Lease.]—Covenant by lessee of building lease to build houses, and at the determination of the term deliver up the same to the lessor or his assigns:—Held, on a sale by the assignees in bankruptcy of the lessee, that, although there had been a waiver by the lessor of the covenant to build, still the covenant to deliver up continued in force, and was a valid objection to the title; and that the purchaser could not be required to accept compensation or indemnity. *Nouaille* v. *Flight*, 7 Beav. 521; 13 L. J., Ch. 414; 8 Jur. 838.

Covenant by lessee to build two houses with the approbation of the lessor's surveyor, and to expend in such building 400*l.* With the surveyor's approbation he built five houses, no two of which were worth 400*l.*, though all together were worth much more:—Held, that the covenant

was substantially performed, and that there was no objection, under the circumstances, to the lessor's title. *Hume* v. *Bentley*, 5 De G. & Sm. 520; 21 L. J., Ch. 760; 16 Jur. 1109.

For Payment of Rent — Assignment for Creditors.]—An owner of leasehold premises covenanted to assign them to trustees, or as they should direct, upon trust to sell, and apply the proceeds for the benefit of his creditor. Upon a sale by the trustees:—Held, that the owner was entitled to a covenant of the purchaser for payment of the rent and performance of the covenants during the continuance of the lease. *Morley* v. *Clavering*, 29 Beav. 84; 7 Jur. (N.S.) 904.

—— **Indemnity.**]—Under a contract for assignment of a term, whether from the original lessee or a mesne assignee, the purchaser must covenant for indemnity against payment of rent and performance of the covenants. *Staines* v. *Morris*, 1 V. & B. 8.

Covenant to Indemnify Purchaser.]—Under the usual condition on sales that the largest purchaser shall take an assignment of the lease and execute under-leases to the other purchasers, he is bound to covenant to indemnify the other purchasers against any breach of covenants contained in the original lease. *Brown* v. *Paull*, 2 Jur. (N.S.) 317.

Lessee subject to covenants cannot compel specific performance of agreement to purchase the premises of him, though he offers to indemnify purchaser against performance of covenants. *Fildes* v. *Hooker*, 3 Madd. 193; 18 R. R. 214.

A., lessee, subject to payment of rent and performance of covenants, mortgages by assignment to B. A. becomes bankrupt, and his assigns agree to convey to B. the equity of redemption. The assignees cannot compel B. to accept an assignment with a covenant for indemnity against the rent and covenants reserved by the original lease. *Wilkins* v. *Fry*, 1 Mer. 244; 2 Rose, 371; 15 R. R. 110.

Receipt of last Rent Due.]—The vendors under an agreement for sale of leaseholds produced the last receipt for the ground rent, signed by agents; but it did not clearly appear on whose behalf it was so signed:—Held, that the court would not compel the purchaser to accept the title, although the vendors offered to indemnify him against six years' ground rent. *Pegler* v. *White*, 33 Beav. 403; 3 N. R. 557; 33 L. J., Ch. 569; 10 Jur. (N.S.) 330; 10 L. T. 84; 12 W. R. 455.

Upon an open contract for the sale of a lease the vendor produced a receipt for rent down to a year previously, but could not produce the last receipt, the lessor having refused to receive his rent, on the ground of alleged breaches of covenant. The vendor deposed that to the best of his knowlege and belief the whole of the covenants had been duly performed, and proved the execution of various repairs, and the purchaser offered no evidence that anything was wanting to complete the performance of the covenants:—Held, that there was such primâ facie evidence of the performance of the covenants as to constitute a sufficient answer to the requisition. *Ringer* to *Thompson*, 51 L. J., Ch. 42; 45 L. T. 580.

The conditions of sale stipulated that the production of the last receipt should be conclusive evidence that all covenants had been performed:—Held, that the production of such a receipt prevented the purchaser from objecting that the lease had been forfeited by reason of the dilapidated state of the premises. *Bull* v. *Hutchens*, 32 Beav. 615; 9 Jur. (N.S.) 954; 8 L. T. 716; 11 W. R. 866.

A leasehold public-house was sold subject to a condition that the production of the last receipt for rent paid should be taken as conclusive evidence of the due performance of the lessee's covenants or the waiver of any breaches up to the time of completion. The lease contained a covenant to use the premises for the business of a public-house only, and not to permit any other trade to be carried on on any part of the premises without the lessor's written consent. The particulars on which the contract of purchase was indorsed showed that parts of the premises were underlet to persons who carried on other trades, and it appeared that the lessors had received rent with knowledge of the underlettings, and the last receipt for rent was produced:—Held, that whether the breach of covenant was or was not a continuing breach the vendor had made a good title in accordance with the contract. *Laurie* v. *Lees*, 51 L. J., Ch. 209; 7 App. Cas. 19; 46 L. T. 210; 30 W. R. 185—H. L. (E.) *And see cases* supra, col. 1434.

Insurance.]—Owners of leaseholds holding under a covenant to insure, with forfeiture in default, entered into a contract to sell. The insurance would expire three weeks before the day appointed for completion, and the vendors renewed the insurance for one month, but never mentioned the subject to the purchaser. The insurance had expired before completion:—Held, that the insurance ought to have been continued at the expense of the purchaser, and that it was not the duty of the vendors to inform the purchaser of the expiration of the insurance. *Dowson* v. *Solomon*, 29 L. J., Ch. 129; 6 Jur. (N.S.) 33; 1 L. T. 246; 8 W. R. 123.

The vendors of a leasehold, subject to a covenant to insure it against fire, contracted for the sale to a purchaser within a given time. The contract was not completed by the specified time. There was no default on the part of the purchaser, but the vendors did not keep up the insurance after the date fixed for completion:—Held, that the purchaser ought to be discharged from his contract. *Palmer* v. *Goren*, 25 L. J., Ch. 841; 4 W. R. 688.

A purchaser of a leasehold may object to a vendor's title, on the ground that he has incurred a forfeiture by omitting for the space of a month to pay the premium of insurance, pursuant to his covenant, although it does not appear that the lessor has taken advantage of the forfeiture. *Wilson* v. *Wilson*, 14 C. B. 616; 2 C. L. R. 818; 23 L. J., C. P. 137; 18 Jur. 581; 2 W. R. 421. S. P., *Penniall* v. *Harborne*, 11 Q. B. 368; 17 L. J., Q. B. 94; 12 Jur. 159.

Leaseholds were sold under conditions of sale, which provided that possession under the lease should be conclusive evidence of performance or of waiver of any breach of covenant up to completion; there had been a breach of covenant to insure before sale, and the policy existing at the sale was afterwards allowed to drop:—Held, that the conditions covered the first breach of covenant. *Howell* v. *Kightley*, 7 Beav. 331; 25 L. J., Ch. 868; 2 Jur. (N.S.) 4

Held, also, that the breach of covenant after the sale was not provided for by the condition, and that a purchaser was not bound to take the title. *Ib.*

A covenant by the lessee to insure in the names of himself and the lessor, is so substantially performed by an insurance in the lessor's name alone, that the circumstance that the original lessee could not be found, and that no insurance could be effected in his name, is not an objection to the title of an underlessee. *Havens* v. *Middleton*, 10 Hare, 641; 22 L. J., Ch. 746; 17 Jur. 271; 1 W. R. 256. *And see cases* under COVENANTS, BREACH OF, supra, col. 1230.

8. TITLE MADE GOOD.

Before Decree.]—Where a person articles to sell an estate, and brings a bill for the execution of the agreement, though at the time of the agreement he cannot make a title to the purchaser, it is sufficient if he is able to do so when the decree or report is made. *Langford* v. *Pitt*, 2 P. Wms. 632. S. P., *Thompson* v. *Miles*, 1 Esp. 184.

Semble, that a vendor, who bonâ fide puts up a property for sale, believing himself absolute owner, when he has in fact only a partial interest, is entitled to enforce the contract if he can perfect the title. *Murrell* v. *Goodyear*, 1 De G. F. & J. 432; 29 L. J., Ch. 425; 6 Jur. (N.S.) 356; 2 L. T. 268; 8 W. R. 398.

Determined on a re-hearing to be sufficient if a party can make a good title in a bill for specific performance at any time before the final decree. *Bennet College* v. *Carey*, 3 Bro. C. C. 390.

Before Hearing.]—Where time is not essence of contract, and there is no unreasonable delay, the vendor, though not having a good title till hearing of cause, is entitled to specific performance. *Wynn* v. *Morgan*, 7 Ves. 202. S. P., *Hoggart* v. *Scott*, 1 Russ. & M. 293; Tam. 500; 9 L. J. (O.S.) Ch. 54; 31 R. R. 112.

If vendor can make a good title at hearing, on further directions, it is sufficient for specific performance, vendor paying costs. *Paton* v. *Rogers*, 6 Madd. 256.

Before Filing Bill.]—Vendor not making good title, when bill filed, pays costs up to time title reported good. *Harford* v. *Purrier*, 1 Madd. 532; 16 R. R. 260.

A plaintiff may rely on a title acquired in point of form after he had filed the bill, if it be not inconsistent with his original claim, and is capable of having relation back. *Doyle* v. *Callow*, 12 Ir. Eq. R. 241.

Additional Evidence of Title.]—The requiring additional evidence of title to be supplied by the vendor is consistent with the rule of not keeping the purchaser too long in the suspense of investigation, and the question always is whether it is the same title as existed at first that is followed up, or whether the vendor has been put to cast about for a new title. *Magennis* v. *Fallon*, 2 Moll. 580.

Alien—Grant from Crown.]—A person contracted to sell who at the time of the contract had no title, by reason of the alienage of a party through whom he claimed. The purchaser, with knowledge of the defect, continued negotiations. The vendor filed his bill for specific performance, and, pending the investigation of the title, obtained a grant of the estate from the crown:—Held, that he was entitled to a decree. *Eyston* v. *Simmons*, 1 Y. & C. C. C. 608; 11 L. J., Ch. 376; 6 Jur. 817.

Sale by Tenant for Life.]—Specific performance of a contract for sale of an estate in fee-simple decreed where vendor was (as purchaser knew) only tenant for life, but by consent of the remaindermen was able to make a good primâ facie title to the fee-simple at the hearing. *Salisbury* v. *Hatcher*, 2 Y. & C. C. C. 54; 12 L. J., Ch. 68; 6 Jur. 1051.

Real Owner willing to Concur.]—Vendor contracting to sell estate in which he has no title, purchaser not bound though real owner offers a title. *Tendring* v. *London*, 2 Eq. Ca. Abr. 680.

On a sale under a decree, the abstract stated that the vendor was devisee of A., who took as heir to B., though the vendor's solicitor knew that C. was the heir. The purchaser was discharged, though the vendor had obtained a release from C. *Dalby* v. *Pullen*, 3 Sim. 29; 1 Russ. & M. 296; 8 L. J. (O.S.) Ch. 74; 30 R. R. 123.

Repudiation—Freehold House—Minerals.]—Where the defendant agreed to purchase a freehold house, and on discovering that the plaintiff was not owner of the minerals, repudiated the contract:—Held, that the defendant was entitled to repudiate before the date for completion, although the plaintiff offered to purchase the minerals before that date. *Bellamy* v. *Debenham*, 60 L. J., Ch. 166; [1891] 1 Ch. 412; 64 L. T. 478; 39 W. R. 257—C. A.

—— **Lease.**]—The defendant having agreed to take part of a house, with right to a lease for twenty-one years, repudiated the contract upon discovering that the plaintiff could not fully perform the contract. After the bill was filed, but before the hearing, the plaintiff was in a position to perform the contract fully:—Held, that the defendant was not bound to wait; and the bill was dismissed with costs. *Forrer* v. *Nash*, 6 N. R. 361; 35 Beav. 167; 11 Jur. (N.S.) 789; 14 W. R. 8.

Where a person sells property which he is neither able to convey nor to enforce a conveyance from other proper parties, the purchaser may repudiate the contract, and is not bound to wait to see if the vendor can induce some third person to join in making a good title. *Ib.*

Purchaser Curing Defect.]—A specific performance of an agreement by a purchaser was decreed in equity, where he agreed with the vendor to buy if a good title could be made, and he afterwards bought up the claim of a stranger in his way. *Masters* v. *Cook*, Colles's P. C. 433.

Where the purchaser of an interest sold under the decree of the court acquires by that means a knowledge of a defect in the title to that interest, and afterwards buys up the estate of the person interested, the court will not allow him to rely upon an objection to the title founded upon that defect. Quære, whether, if the objection were valid, the court would allow him to rely on it. *Sheppard* v. *Doolan*, 3 Dr. & War. 1; 5 Ir. Eq. R. 6.

Application of Rule.]—The rule of compelling a purchaser to take the estate, where a title is

not made till after the contract, not to be extended. *Lechmere* v. *Brasier*, 2 J. & W. 289; 22 R. R. 130.

Title when Shown—Costs.]—Upon a bill filed by a vendor for specific performance, it appeared that he could make a good title before the commencement of the suit, but did not show a good title to the purchaser until afterwards:—Held, that though specific performance must be decreed, the purchaser was entitled to the costs of the suit generally. *Townsend* v. *Champernown*, 3 Y. & C. 505.

Cause Standing Over.]—In a suit for specific performance, where the vendor cannot make a good title, when the cause comes on to be heard on further directions, the court will not allow the cause to stand over, in order that he may be able to cure the defects in his title. *Boswell* v. *Mendham*, 6 Madd. 373; 1 L. J. (O.S.) Ch. 160; 23 R. R. 250.

Time Allowed Vendor.]—Where the vendor had no title to a small portion of the land contracted for, but such defect was not discovered till after the contract, the court refused, with costs, a motion by the purchaser to be discharged from his contract, without giving the vendor an opportunity of acquiring a title to the portion. *Chamberlain* v. *Lee*, 10 Sim. 444.

Purchaser cannot insist on being discharged upon a report of defective title, if capable of being made good within a reasonable time; as to which, the vendor will be put under terms. *Coffin* v. *Cooper*, 14 Ves. 205; 9 R. R. 274.

Recovery Necessary for Title.]—It being necessary, in order to make a title perfect, that a recovery should be suffered, the deed making the tenant to the præcipe, and the warrant for suffering the recovery, were executed before the filing of the bill for specific performance, but the recovery was not completed till a few days afterwards:—Held, that a good title was not shown before the commencement of the suit. *Lewin* v. *Guest*, 1 Russ. 325; 25 R. R. 58.

Exchange—Subsequent Consent by Party.]—A tenant for life of a settlement containing a power to trustees to exchange lands, conveys by way of exchange to B. B.'s heir afterwards contracts to sell such lands, and, after objection by the purchaser, procures certain deeds to be executed by the tenant for life and the surviving trustee and himself, which, if executed at the time of the exchange, would have given it validity:—Held, that the court would not compel the purchaser to take the title, but no decision was given as to whether the exchange was validated. *Cowgill* v. *Oxmantown (Lord)*, 3 Y. & C. 369; 3 Jur. 313.

Trustees' Consent when Obtained.]—Where the trustees of a will, with power to sell with consent of tenant for life, make a contract without having obtained the consent of the tenant for life, semble, that subsequent consent will not cure the defect. *Adams* v. *Broke*, 1 Y. & C. C. C. 627.

Where no Binding Contract.]—Where specific performance of a binding contract is sought, a reference to the master enables the vendor to make good any defect in his own title, or to procure a conveyance up to the date of the master's report and of the decree; but when the court had come to the conclusion that there was no binding contract, and that the assent of the proprietors was not proved at the hearing, the court declined to refer it to the master to inquire whether the required consent could be obtained. *Clay* v. *Rufford*, 5 De G. & Sm. 768.

Bankruptcy.]—The assignee in bankruptcy having filed, as vendor, a bill for specific performance, but it appearing, on a reference as to title, that the concurrence of the insolvent assignee was required, which was given in the master's office, the court gave specific performance without making plaintiff pay costs. *Sidebotham* v. *Barrington*, 5 Beav. 261.

—— Commission Superseded.] — Under a commission an estate is sold. The commission is afterwards superseded, on the ground that there was no good petitioning creditor's debt, and another commission issues, and the same assignees are chosen:—Held, that as the assignees had not a good title to the estate, they could not enforce the contract, nor retain the deposit. *Bartlett* v. *Tuchin*, 1 Marshall, 583; 2 Taunt. 259.

9. Conditions as to Title.

And see Particulars and Conditions of Sale, supra, col. 1166.

a. In General.

Usual Conditions.]—Quære, whether a vendor of a doubtful title is justified in selling under the usual conditions; that all objections not sent in within a limited time are waived; for rescinding the contract, and that no one but the vendor is to be required to join; or in not putting in his abstract matter tending to show that doubts had been raised. *Warde* v. *Dixson*, 28 L. J., Ch. 315; 5 Jur. (N.S.) 698; 7 W. R. 148.

Under such conditions a purchaser is not prevented from taking an objection which he has discovered aliunde after the time limited for taking objections. *Ib.*

Excluding Proof of Title.]—Conditions of sale which state certain facts, and represent that certain acts were done in error, and that the vendors could sell an absolute interest, will not preclude a purchaser from requiring proof of the title. *Johnson* v. *Smiley*, 17 Beav. 223; 1 Eq. R. 397; 22 L. J., Ch. 826; 1 W. R. 440.

Excluding known Defect.]—A condition of sale which does not fairly state the objection to the title against which it is directed is not binding on a purchaser. *Beioley* v. *Carter*, L. R. 4 Ch. 230; 17 W. R. 300.

On a sale where a condition as to the title did not point directly at the objection:—Held, that the purchaser was not precluded from taking the objection. *Cruse* v. *Nowell*, 25 L. J., Ch. 709; 2 Jur. (N.S.) 536; 4 W. R. 619.

Conditions of sale must express in distinct terms a difficulty of title, and therefore when a condition set out facts from which the conclusion in law was that the vendors showed no title, but this conclusion was one which would not occur to an ordinary purchaser, and was not stated in the condition:—Held, that the sale could not be enforced. *Williams* v. *Wood*, 16 W. R. 1005.

The defendant having sold and conveyed land to the plaintiff, suggesting that he had a title, and it afterwards appearing that he was not entitled to part, being an encroachment from a

common, a bill lies to set aside the conveyance, and for a return of the purchase money, and all expenses. *Edwards* v. *M'Leay*, G. Cooper, 308. Affirmed, 2 Swanst. 287; 14 R. R. 261.

Conditions provided that a declaration by the tenant should be produced to the purchaser that the farm was taken by him from E. in October, 1835, and had since been held by him of her and those claiming under her in succession. The condition provided that the purchaser should be satisfied with the title so made, without the production of any document previous to the will of E. in 1860, who should be assumed to have been seised of the property in fee simple in possession, free from incumbrances, up to and at her death. The condition expressly stipulated that no other title than as above should be required or inquired into. The purchaser, after an abstract of title had been furnished to him, discovered that E. was a mortgagee in possession, and had no title against the mortgagor except under the statute of limitations by adverse possession commencing in 1844; and that her executor in 1861 had paid legacy duty on the mortgage debt, and not succession duty on the estate. These facts were well known to the vendor:—Held, that the condition of sale was misleading, and that the purchaser was entitled to have a good holding title, or else to rescind his contract. *Banister, In re, Broad* v. *Munton*, 48 L. J., Ch. 837; 12 Ch. D. 131; 40 L. T. 828; 27 W. R. 826—C. A.

—— **Good Holding Title only.**]—Where the conditions on the face of them purport to give only a good holding title, the purchaser on being relieved from them is not entitled to have more than a good holding title. *Ib.*

—— **Leaseholds.**]—Particulars of a sale described the subject as a plot of ground held for a term of one hundred and eleven years from April, 1853, subject to the annual rent of 5*l.* One of the conditions of sale was, that the vendor should deliver an abstract of title, and deduce a good title to the premises from April, 1853, to the time of the sale; nor should the title of the lessor be questioned, nor the vendor be bound to go behind the same. The plot of ground was part of two properties, held under two distinct leases, made in 1845 to the vendor's lessor, by which rents of 31*l.* and 9*l.* were respectively reserved. The interest sold was under a lease made to the vendor, of portions of both properties, in July, 1853, subject to a rent of 5*l.*:—Held, first, that the title was bad. *Geohegan* v. *Connolly*, 8 Ir. Ch. R. 598.

Held, secondly, that the condition of sale was so ambiguous and uncertain as not to preclude the purchaser from objecting to the title. *Ib.*

Held, thirdly, that there had been a suppression of facts in the particulars of sale, which amounted to misrepresentation. *Ib.*

——**Voluntary Deed.**]—A contract entered into in 1882 for the sale of freehold estate provided that the title should commence "with an indenture dated the 18th of October, 1845," and made between persons whose names were mentioned, and that the earlier title should not be investigated or objected to. From the abstract of title it appeared that the deed of 1845 was a voluntary deed with a power of revocation by a person, who purported to convey freehold and leasehold property upon trusts:—Held, that the vendors ought to have stated in the condition of sale the nature of the deed; that the omission to state this rendered the condition a misleading one; and that the purchaser was not bound to accept a title commencing with that deed. *Marsh and Granville (Earl), In re*, 53 L. J., Ch. 81; 24 Ch. D. 11; 48 L. T. 947; 31 W. R. 845—C. A.

—— **Voidable Sale appearing on Title—Rescission.**]—A company purchased a public-house, under circumstances probably rendering the transaction voidable by its shareholders. A charge upon it was subsequently created in favour of debenture-holders. The company contracted to sell the public-house. By one of the conditions of sale the purchaser was precluded from making any requisition or inquiry with reference to a trust deed, as to which a memorandum which was stated to be of a certain character had been endorsed on one of the documents of title. The memorandum was not in fact sufficient, or of the character stated. In the course of the negotiations the company offered to obtain the concurrence of the shareholders and debenture-holders in the conveyance:—Held, that specific performance by the purchaser must be decreed; that, if the condition referred to was not binding on the purchasers, yet as it did not go to the length of title to be shown, or the root of title, this was not a ground for rescission; but the trust deed must be dealt with as if the condition did not exist. *Marsh and Granville (Earl), In re*, supra, distinguished. *Farnham Brewery Co.* v. *Hunt*, 3 R. 381; 68 L. T. 440.

—— **Purchase by Trustees.**]—Property was sold subject to conditions (inter alia), (6) that all requisitions should be sent within ten days after the delivery of the abstract otherwise waived by the purchaser, and time should be the essence of the contract; (8) that the purchaser shall not object to the sale of the premises to R., by assignment, dated the 29th January, 1870, but should assume that R. acquired under the deed a valid title to the premises; (9) that the purchaser should not object to the title because L., in 1858, as a trustee for B., purchased from the trustees of the then owners, B. being one of the last-mentioned trustees. The title was bad on the ground that R. had purchased the premises sold for X. and others, X. being one of the trustees for sale of the property so bought, and also on the ground that L., the assignee in the deed of 1858, had purchased for B. who was also a trustee for sale:—Held, first, that the eighth condition was so framed as to deceive the purchaser, and entirely throw him off his guard by unwarrantably suppressing and masking a fatal defect in the title. *Boyd* v. *Dickson*, Ir. R. 10 Eq. 239.

Held, secondly, that, having regard to the eighth and ninth conditions, the vendor could not avail himself of the sixth condition. *Ib.*

Opportunity of Inspection—Document affecting Title.]—A condition of sale which refers to a document as affecting the title and offers an opportunity of inspecting it, is not misleading, unless it so states the document as to lead to the belief that all that is material in it is disclosed. *Blenkorn* v. *Penrose*, 43 L. T. 668; 29 W. R. 237.

Objections not Precluded.]—Upon the sale of a property the contract provided that the pur-

chaser should assume that A. was at the time of his death seized in fee simple of a certain lot, and should not require the production of or investigate or make any objection in respect of the prior title to the lot. Before completion, the purchaser discovered from documents supplied by the vendor to a sub-purchaser that the lot was the purchaser's own property :—Held, that the purchaser was not precluded by the condition from raising the objection. *Jones* v. *Clifford*, 45 L. J., Ch. 809 ; 3 Ch. D. 779 ; 35 L. T. 937 ; 24 W. R. 979.

—— **Objection to Prior Title.**]—A condition that the title prior to a certain date "shall not be required, investigated or objected to" precludes the purchaser from taking an objection to the prior title, although such objection is based upon information obtained aliunde ; and in such a case the purchaser cannot recover the deposit. The dictum of Wood, V.-C., in *Darlington* v. *Hamilton* (infra, col. 1493), dissented from. *Marsh and National Provincial Bank of England, In re*, 64 L. J., Ch. 255 ; [1895] 1 Ch. 190 ; 13 R. 347 ; 71 L. T. 629 ; 43 W. R. 186.

A sale was made by the court under conditions which precluded the purchaser from objecting to the title prior to the document chosen as the root of the title, and made recitals in deeds more than twenty years old conclusive. A recital covered by this condition was so framed as to conceal a defect of title prior to the date fixed for the commencement of the title :—Held, that the sale being by the court the purchaser was not precluded by the conditions from raising the objection, and ought to be discharged from his purchase. *Else* v. *Else*, 41 L. J., Ch. 213 ; L. R. 13 Eq. 196 ; 25 L. T. 527 ; 20 W. R. 286.

—— **Time for Objections.**]—A contract for sale stipulated that the vendor should deliver an abstract to the purchaser, who should make all his requisitions within seven days, and that the purchaser should take such title as the vendor had :—Held, that, notwithstanding such a condition, if the vendor agrees to deliver an abstract, and stipulates that objections are to be taken within a specified time, that imports that objections may be taken. *Keyse* v. *Haydon*, 9 Hare (App.) lviii. ; 1 W. R. 73.

Requisitions on Title.]—A condition limiting the time for requisitions on title does not bind the purchaser where the abstract shows no title at all : *Want* v. *Stallibrass* (L. R. 8 Ex. 175). Assuming that the same rule does not apply where the vendor can show a good holding title, though not a title which the court would force upon a purchaser, the vendor cannot take this position after the purchaser has refused the title and demanded back his deposit. *Saxby* v. *Thomas*, 63 L. T. 695.

—— **When to be Delivered.**]—By the conditions of sale it was stipulated that all objections and requisitions in respect of the title should be delivered within fourteen days from the delivery of the abstract. An abstract of title was duly delivered. After the fourteen days had elapsed the purchaser made an objection as to construction :—Held, that the objection did not go to the root of the title, and the requisition being out of time failed. *Thompson* to *Curzon, In re*, 52 L. T. 498.

b. Special Conditions.

Limited Title—Accidental Disclosure.]—Freehold property was sold subject to a condition that the title should commence with a deed dated the 30th of December, 1867, and that no earlier or other title should be required or inquired into by the purchaser :—Held, that this did not preclude the purchaser from insisting on an objection to the prior title which was accidentally disclosed by the vendor. *Smith* v. *Robinson*, 49 L. J., Ch. 20 ; 13 Ch. D. 148 ; 41 L. T. 405 ; 28 W. R. 37.

But held, that the purchaser was only entitled to an inquiry whether the vendor could make a good holding title to the property. *Ib.*

Where there is a condition of sale that no title to the property sold shall be shown before a certain date, semble, that s. 24 of 22 & 23 Vict. c. 35, does not apply to the concealment of an incumbrance prior to that date. *Ib.*

—— **Notice of Prior Deed.**]—Special conditions of sale, limiting the extent of title :—Held, to be no excuse for a purchaser not insisting on the production of a deed beyond those limits of which he had notice. *Peto* v. *Hammond*, 30 Beav. 495.

—— **Leaseholds.**]—A condition of a contract for the sale of leaseholds was that the vendor should produce a good and marketable title commencing from the freeholder, but that no title should be called for prior to the lease. In the investigation of the title, it was stated, that the lease had been granted in pursuance of a prior contract :—Held, first, that the purchaser was entitled to investigate the dealings with the contract prior to the lease being granted ; secondly, that stipulations as to title in a contract between a vendor and a purchaser are to be construed favourably to the latter. *Rhodes* v. *Ibbetson*, 4 De G. M. & G. 787 ; 2 Eq. R. 76 ; 23 L. J., Ch. 459.

—— **Competency of Party to Deed.**]—Though a condition of sale that the title shall commence with a certain indenture leaves it open to the purchaser to show aliunde that the parties purporting to convey were not competent to do so, yet if this is not shown, their competency to convey must be assumed. *Osborn* v. *Osborn*, 18 W. R. 421.

—— **Sale by Trustees.**]—Conditions of sale stipulated that the vendors would deliver an abstract of title, commencing with a conveyance in 1800 from D. ; that the vendors would enter into a qualified covenant to produce the deeds retained by them ; but as the vendors had no beneficial interest they should only covenant that they had not incumbered, and no objection should be taken to the right of the vendors to hold, sell or convey the property now sold. The abstract traced the title from D. through his heirs in gavelkind. Upon an objection that a daughter of D. took a share under his will :—Held, that the vendee was debarred by the condition as to the right of the vendors to hold and sell. *Lethbridge* v. *Kirkman*, 25 L. J., Q. B. 89 ; 2 Jur. (N.S.) 372 ; 4 W. R. 90.

—— **Disputed Ownership.**]—A. agreed to buy B.'s interest in certain lands, in the event of an act of parliament which was to be applied for

being obtained. The contract provided, that B. should produce only the title from his vendor (C.) to himself. C. was one only of four claimants of the lands, but A. knew this when he entered into the contract. The act was passed, and A. took possession thereunder, but refused to complete. Upon a bill:—Held, that evidence aliunde to show want of title in C. was not admissible; and specific performance was decreed against B. on the ground that A. had bought such title or interest as B. might have under C. *Hume* v. *Pocock*, 35 L. J., Ch. 731; L. R. 1 Ch. 379; 12 Jur. (N.S.) 445; 14 L. T. 386; 14 W. R. 681.

—— **Sale of Manor.**]—By contract for the sale of a manor it was agreed that the defendant should purchase from the plaintiff all his interest in the property, and that he should "be called upon to produce only the title from B. to himself":—Held, that the defendant was precluded from inquiring into the title of B., but could only call upon the plaintiff to show a title from B. to himself. *Ib.*

—— **Sale by Mortgagee—Equitable Interest.**]—Where conditions of sale by a mortgagee stated that he sold as mortgagee, and that as he had only an equitable interest in one plot, the purchaser should accept such title as he was able to deduce and convey:—Held, that a purchaser could not object that the legal estate of this plot was outstanding as by the condition the vendor contracted to sell an equitable interest only. *Ashworth* v. *Mounsey*, 9 Ex. 175; 2 C. L. R. 418; 23 L. J., Ex. 73; 2 W. R. 41.

—— **Purchase from Railway Company.**]—The defendant purchased from a railway company land which, not being "superfluous," the company had no power to sell, and the plaintiff contracted to purchase the land from the defendant. One of the conditions of sale was that the title should commence with the conveyance from the company; another that the purchaser should not require the production of, or investigate or make any objection or requisition in respect of such conveyance. The plaintiff declined to complete and sued for the deposit:—Held, that the deposit could not be recovered. *Rosenberg* v. *Cook*, 51 L. J., Q. B. 170; 8 Q. B. D. 162; 30 W. R. 344.

—— **Will.**]—Upon the sale of an estate, one of the conditions was that the title to the beneficial ownership should commence with the will of C., and the purchaser must assume that C. was at his death beneficially entitled to the property in fee simple free from incumbrances. C. had contracted before his death for the purchase, but it was not till many years after his death that the title was made out, the property conveyed, and the purchase money paid:—Held, that the purchaser was not bound by the condition of sale. *Harnett* v. *Baker*, 45 L. J., Ch. 64; L. R. 20 Eq. 50; 32 L. T. 382; 23 W. R. 559.

A condition of sale which provides that the purchaser shall assume that the vendor derived a good title under a will, does not preclude the purchaser from showing that, upon the true construction of the will, a good title did not pass. *McVicker's Contract, In re*, 25 L. R. Ir. 307.

—— **Inclosure Act.**]—Where the conditions of sale stated that the premises were acquired under an award of commissioners under an inclosure act, and that the abstract would not contain any earlier title than such award:—Held, that the award made in general terms must be primâ facie evidence of the lands being freehold, and that the purchaser had no right to inquire as to the title to the lands given by vendor in exchange. *Cattell* v. *Corrall*, 4 Y. & C. 228; 9 L. J., Ex. Eq. 37.

—— **Private Act of Parliament.**]—In 1857 in chancery, it had been certified that a good title could be made to certain estates, and the estates were afterwards sold under the court, subject to a condition that the title should not be required prior to a private act of parliament which recited the certificate of good title:—Held, that the title up to the period for which it had been certified might be accepted without examination for registration. *Watney, In re*, 38 L. J., Ch. 57.

—— **Such Title as Vendor has.**]—Where condition was for sale of interest "under such title as vendor lately held the same, an abstract of which may be seen," &c.:—Held, that the purchaser could not object to title. *Freme* v. *Wright*, 4 Madd. 364; 20 R. R. 313.

Assent of Executor.]—Circumstances under which special conditions of sale precluded a purchaser from requiring evidence of the assent of executors to a bequest. *Jackson* v. *Whitehead*, 6 Jur. (N.S.) 133.

Satisfactory Title.]—A stipulation to give such a title as shall be satisfactory to the purchaser does not authorise the purchaser to make any other than the usual objections to the title. *Lord* v. *Stephens*, 1 Y. & C. 222.

Opinion of Counsel.]—Where it was agreed that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by a certain time, and counsel so advised, a bill by the purchaser for a specific performance with compensation was dismissed with costs. *Williams* v. *Edwards*, 2 Sim. 78; 29 R. R. 61.

Forged Deed—Verdict of Jury.]—The conditions of sale represented that a deed was a forgery, and that the vendor had made his affidavit to that effect, and, therefore, that the purchaser should not take any objection to the title by reason of that deed. The purchaser brought an action for his deposit, and obtained a verdict, the jury declaring the deed to be genuine:—Held, that in law the purchaser was precluded from rescinding on the ground that the statement of the vendor was untrue, and in equity that the vendor was entitled to specific performance of the contract, with costs. *Corrall* v. *Cattell*, 3 Y. & C. 413; 4 M. & W. 734; 8 L. J., Ex. 225.

Prior Voluntary Settlement.]—A purchaser may be precluded by a condition of sale from making any objection to title in respect of a voluntary settlement previously executed by the vendor, but he is entitled to proof that the settlement though voluntary in its inception, has not been set up by an ex post facto consideration. *Small* v. *Torley*, 25 L. R. Ir. 388.

Sale by First Mortgagees — Results of

Inquiry.]—One of the conditions of sale was, "the sale was made by the first mortgagees under a power of sale contained in a mortgage deed made to them, and no purchaser should be entitled to require any abstract or evidence of the incumbrances subsequent to that deed, although notice of such incumbrances might appear in the title to be shown." The power of sale allowed the mortgagees to sell after giving notice to the mortgagor; the sale was made without any notice having been given to the mortgagor, but he had waived the notice; and before the waiver, had mortgaged to several subsequent mortgagees, who had executed a deed purporting to ratify the sale to the purchaser:—Held, that the contract was, that the title depended only upon the result of an inquiry into the compliance with the stipulations of the mortgage deed; and that as the title offered depended upon the result of an inquiry into the validity of the waiver, and of the ratification by the subsequent mortgagees, the purchaser was entitled to rescind and to recover the deposit. *Forster* v. *Hoggart*, 15 Q. B. 155; 19 L. J., Q. B. 340; 14 Jur. 767.

Breach of Trust—Leases by Trustees.]—Trustees having no power of leasing granted leases, and offered the property for sale subject to the leases. The conditions of sale stated that the leases were made by the trustees without authority, and provided that the purchaser should make no objection in respect of them:—Held, that the conditions precluded the purchaser from objecting to the title on the ground of the leases. *Nicholls* v. *Corbett*, 3 De G. J. & S. 18.

"Longest Term He could Grant."]—One of the terms of a contract was that "the plaintiff should let to the defendants, or assign if preferred, for the longest term he could grant":—Held, that the defendants were bound to take such title as the plaintiff had at the time of the agreement, and were not entitled to call upon the plaintiff to show his lessor's title. *Molloy* v. *Sterne*, 1 Dr. & Wal. 585.

Acceptance "without Dispute."]—Purchaser agreed to accept vendor's title "without dispute"; the purchaser afterwards objected that at the date of the agreement there was a flaw in the vendor's title:—Held, that the purchaser was precluded, by the terms of his contract, from insisting on the objection. *Duke* v. *Barnett*, 2 Coll. C. C. 337; 15 L. J., Ch. 173; 10 Jur. 87.

Will — Gift by Implication — Release of Testamentary Power.]—By his will dated May 25, 1875, a testator devised premises to which he was entitled in remainder in fee simple expectant on the determination of a life estate, subject to that life estate, to his four sisters (one of whom was the vendor) as their sole and separate property, and provided that in the event of any of his sisters dying, her share should be divided among the survivors; and by a codicil he directed that each of his said four sisters should have power to leave by will amongst any child or children they might have any property they might derive under his will or codicil, and that in default of issue or such will same should revert to the survivors. One of the sisters predeceased the tenant for life, leaving issue, but intestate. After the death of the tenant for life, by an indenture dated September 25, 1883, two of the surviving sisters and their respective husbands conveyed to the third sister (the vendor) all right, title, &c., of each of them respectively, to hold in fee simple. The vendor put up the premises for sale by auction, describing them in the particulars as being held in fee simple, and stating the facts above mentioned in the conditions of sale. One of the conditions bound the purchaser to admit that after the death of the tenant for life and the deceased sister, the entire interest in the premises became vested in the surviving sisters, and that the conveyance of September 25, 1883, vested in the vendor a good title to the premises for an estate in fee simple. The condition did not state, though the fact was so, that one of the surviving sisters who had conveyed to the vendor had children living, nor did it state that it was the vendor's contention that the conveyance by the sisters operated as a release of the testamentary power of appointment given them by the will and codicil. The purchaser objected that a good title was not shown by the vendor, that under the will and codicil the sisters only took life estates with a power of appointment amongst their children, and that the condition binding the purchaser to admit that the vendor had vested in her an estate in fee simple was bad and misleading, and issued a summons asking for a declaration that title had not been shown by the vendor, and for return of the deposit paid:—Held, that there was no implied gift to the children of the testator's sisters, that on the death intestate of the deceased sister the gift over to the survivors took effect, that the testamentary power of appointment given by the codicil to the survivors was capable of being released, and that it was released or extinguished by the conveyance, and that therefore a good title was shown by the vendor. Per Lord Ashbourne: The condition was not misleading. Per Fitzgibbon, Barry, and Walker, L.JJ.: The condition was not binding. *Lyons and Carroll's Contract, In re*, [1896] 1 Ir. R. 383—C. A.

Freehold and Copyhold Sold Together.]—On a contract for the sale of lands described as partly freehold and partly copyhold, and the timber thereupon (the latter at a specified valuation), upon a condition that the vendor should not be required to distinguish the freehold land from the copyhold, nor the respective boundaries thereof:—Held, that the purchaser was bound to pay for the timber at a valuation, notwithstanding that it might be wholly upon the copyhold land. *Crosse* v. *Lawrence*, 9 Hare, 462; 21 L. J., Ch. 889; 16 Jur. 142.

Jurisdiction.]—Where a condition of sale, under a decree of the court, stipulates that all documents dated more than twenty years ago shall be conclusive evidence of all matters referred to in or implied by them, and that all deeds and proceedings in chancery shall be at the expense of the purchaser, the vendor is only bound to set forth in his abstract so much of the pleadings in the suit as show that the court had jurisdiction. *Waters* v. *Waters*, 36 L. J., Ch. 195; 15 L. T. 406; 15 W. R. 191.

A reversionary legacy, in which infants were interested, was sold by an order of the court. There was a special condition that the purchaser should make no objection on the ground of want

of jurisdiction :—Held, that the condition of sale was fair and reasonable, and that the purchaser was bound by it. *Nunn* v. *Hancock*, 40 L. J., Ch. 700 ; L. R. 6 Ch. 850 ; 25 L. T. 469 ; 19 W. R. 1041.

Defective Title Admitted.]—A contract for sale of superfluous land of a railway company, which had been conveyed by the company to the vendor, contained a stipulation that the purchaser should assume that everything was done by the company to enable them to sell the land as surplus land. The purchaser discovered that the prior owners had not waived their right of pre-emption ; and brought an action for the deposit and damages. The vendor then sold to one of the prior owners :—Held, that the purchaser was bound by the stipulations to admit the title of the company to sell to the vendor, and could not maintain the action. *Hamand* v. *Best*, 48 L. J., Ch. 503 ; 12 Ch. D. 1 ; 40 L. T. 769 ; 27 W. R. 742—C. A.

Purchaser, Owner of the Property.]—In an agreement for sale of freehold and leasehold property there was a condition that the purchaser was to assume that "M. was at the time of his death seised in fee simple of the premises," and should "not make any objection in respect of the prior title to the lot, whether such prior title is or is not referred to in any abstracted document." The purchaser discovered that M. was not at the date of his death seised of the hereditaments, but that he, the purchaser, was entitled to the same :—Held, that this condition did not preclude the purchaser from acquiring such knowledge aliunde, and on that ground refusing to carry out the contract. *Jones* v. *Clifford*, 45 L. J., Ch. 809 ; 3 Ch. D. 779 ; 35 L. T. 937 ; 24 W. R. 979.

Lease subject to Covenants.]—The subject of sale was described in the conditions "as a leasehold ground-rent of 23*l*.," reserved by a mesne lease in 1812, and assigned apart from the reversion by an indenture of 1817, and one of the conditions was, that no title prior to the assignment, or the title of any ground or mesne landlord, was to be produced. From a recital in the deed of 1817, it appeared that the land out of which the rent issued had been demised, with other lands, to the original lessee at a rent of 10*l*., and subject to certain covenants and conditions :—Held, that the purchaser might take an objection on this ground. *Taylor* v. *Martindale*, 1 Y. & C. C. C. 658.

Lease for Lives.]—Under a contract to make out a good title to a lease for lives renewable for ever, a vendor must show who are the lives in existence at the time of the contract. *Anderson* v. *Higgins*, 1 Jo. & Lat. 718.

Title of Lessor.]—The court will not make it a condition of sale of an interest under a lease that a purchaser shall not be at liberty to object to the title of the lessor to make the lease. A purchaser shall not require the plaintiff to show that the lessor had power, but may object aliunde. *Willes* v. *Latham*, Sau. & Sc. 441.

A condition of sale, that the purchaser shall not be at liberty to investigate the right of the lessor to grant a lease for lives renewable for ever, will not be granted. But the court will refer it to the remembrancer to settle a condition of sale, that the purchaser shall not require the production of the title of the lessor. *Lahey* v. *Bell*, 6 Ir. Eq. R. 122.

By the conditions of sale of leasehold premises, the vendors stipulated that they should not produce the lessor's title. The purchaser on investigating the title found it defective, and refused to complete :—Held, that the purchaser was not precluded from inquiring aliunde into the lessor's title. *Shepherd* v. *Keatley*, 4 Tyrw. 571 ; 1 C. M. & R. 117 ; 3 L. J., Ex. 288.

—— **Covenant to Build.**]—A condition, on the sale of leasehold property, that the title of the lessor would not be shown, and should not be inquired into :—Held, to be binding, and the purchaser compelled to perform his contract, although in the investigation before the master a serious defect in the lessor's title was discovered. *Hume* v. *Bentley*, 5 De G. & Sm. 520 ; 21 L. J., Ch. 760 ; 16 Jur. 1109.

Covenant in lease to build two houses worth 400*l*. ; five houses built, worth in the aggregate more than 400*l*., but no two being worth that sum :—Held, that the covenant had been substantially performed, and the court decreed specific performance. *Ib.*

—— **Equitable Title.**]—On the sale of leasehold premises, one of the conditions stated that the premises "were mortgaged by the late Mr. H. to H. and M., the trustees of his wife's marriage settlement, to secure part of the trust funds ; and the lease was granted to them, subject to such redemption as the said Mr. H. was entitled to under the said mortgage. Upon the death of Mr. H., Mrs. H., his widow, executrix, and universal legatee, became beneficially entitled to both the mortgage money and the premises ; and the vendors, her executors, are also the legal personal representatives of Mr. H. They will, within seven days from the day of sale, deliver to the purchasers an abstract of the said lease and the wills of Mr. and Mrs. H. ; but they are not to be called upon to deduce the lessor's or any earlier title, nor shall the subsistence of the lease be questioned, and the purchaser shall be satisfied with an assignment from them of the beneficial interest" :—Held, that the purchaser was, under this condition, entitled to an assignment of the legal estate which was outstanding in H. and M., and not merely to the assignment of such beneficial interest as the vendors had. *Smith* v. *Ellis*, 14 Jur. 682.

—— **Agreement for Lease.**]—A vendor stipulated that he would show title under an agreement for a lease. The vendor and lessee produced a paper, signed only by the lessee, and alleged that he had taken possession under this agreement :—Held, that the purchaser could not be compelled to take an equitable title, but was entitled to strict evidence that such an agreement had been entered into. *Houghton* v. *Bankart*, 5 L. T. 307.

—— **Objections to.**]—A condition provided that the purchaser shall not require any evidence of the title of lessors ; or object by reason of incumbrances affecting the title ; nor require the production of any title deeds prior to the lease, but shall admit that the lease has been duly executed by all the parties thereto, and be satisfied with same being handed over, and the title deduced therefrom to the owners :—Held, that this condition did not preclude the purchaser rejecting the title on the ground of objections

to the lessor's title. *Musgrave* v. *M'Cullagh*, 14 Ir. Ch. R. 496.

Lessees for lives renewable for ever granted to L., his heirs and assigns, at a rent. L.'s estate did not answer the description of a lease for ever. *Ib.*

Leasehold premises were put up for sale on the condition that the title should commence with a deed dated in 1869, being an underlease from W. S.; "and no requisition or inquiry shall be made respecting the title of the lessor or his superior landlord, or his right to grant such underlease." A purchaser discovered that W. S., before 1869, had mortgaged the premises:—Held, that he was not precluded by the condition from taking the objection; and that he was not bound to complete the purchase. *Waddell* v. *Woolfe*, 43 L. J., Q. B. 138; L. R. 9 Q. B. 515; 23 W. R. 44.

—— **Covenant to Insure.**]—Leasehold property was sold, subject to a condition that possession under the lease should be deemed conclusive evidence of the due performance or sufficient waiver of any breach of the covenants in the lease up to the completion of the sale. A covenant to keep the premises insured was broken on two occasions, one before and one subsequently to the sale:—Held, that the condition precluded any objection on the ground of the former breach of covenant, but not of the latter, and that the purchaser was not bound to take the title. *Howell* v. *Kightley*, 21 Beav. 331; 25 L. J., Ch. 868.

—— **Two Houses in One Lease.**]—Two houses, held under one lease, were sold separately to A. and B. The lease was produced, and inspected at the sale by the purchasers' solicitors. The conditions of sale provided for the apportionment of the rent between the two purchasers, but did not notice covenants to insure, &c., and a proviso for re-entry on non-performance contained in the lease:—Held, that though A. might be evicted by the default of B., still he was, under the circumstances, bound to complete. *Paterson* v. *Long*, 6 Beav. 590; 13 L. J., Ch. 1; 7 Jur. 1049. *And see cases*, supra, col. 1478.

—— **Underlease.**]—Where an under-lessee described his property in the particulars and conditions of sale as held under a lease, and stipulated that the purchaser should not require proof of his, the vendor's, title:—Held, that the purchaser having discovered, aliunde, that the property was with others held under one lease and liable to forfeiture could not be compelled to complete. *Darlington* v. *Hamilton*, 1 Kay, 550; 2 Eq. R. 906; 23 L. J., Ch. 1000.

c. Condition as to Rescission.

When Waived.]—A condition of sale provided, that if the purchaser should raise objections to the title which the vendor should not be able or willing to remove, the vendor should be at liberty to rescind the contract, and that all objections which should not be taken in writing within ten days after the delivery of the abstract should be considered as waived:—Held, that the condition referred to the first delivery of objections, and if the vendor expressed his willingness to answer them, he could never afterwards rescind the contract. *Tanner* v. *Smith*, 10 Sim. 410; 4 Jur. 310.

Where under a similar condition the vendor had answered objections:—Held, that he had waived the condition:—Held, also, that such a condition ought to be discouraged, and ought not to receive a construction oppressive on the purchaser; and that the vendor's right to rescind the contract under the condition must be co-extensive with the purchaser's right to object to the title under the same condition. *Morley* v. *Cook*, 2 Hare, 106; 12 L. J., Ch. 136; 7 Jur. 79.

Costs and Damages.]—A condition, that if any objection or requisition should be made which the vendor should be unable or unwilling to remove, it should be lawful for him to rescind, and that in that case the purchaser should be entitled to a return of his deposit without interest, but should not be entitled to any costs or damages, does not entitle the vendor, after making numerous attempts to remove an objection, to return the deposit only, but the vendor must pay interest upon the deposit and the costs of the purchaser. *M'Culloch* v. *Gregory*, 1 K. & J. 286; 3 Eq. R. 495; 24 L. J., Ch. 246; 3 W. R. 231.

Vendor not answering Requisitions.] — A condition that the vendor shall be at liberty to rescind the contract, if the purchaser should "show any objection of title, conveyance, or otherwise, and should insist thereon":—Held, not to authorise the vendor to rescind the contract, without attempting to answer the requisitions, although some of them were untenable. *Greaves* v. *Wilson*, 25 Beav. 290; 27 L. J., Ch. 546; 4 Jur. (N.S.) 271; 6 W. R. 482.

Held, also, that he was bound to answer them, and give the purchaser an opportunity of either waiving or insisting upon them. *Ib.*

Semble, that he might rescind on account of requisitions which would be tenable in the absence of any condition as to rescinding, even though he might be able to satisfy them, if such requisitions should be of an unreasonable character. *Ib.* S. P., *Turpin* v. *Chambers*, 29 Beav. 104; 30 L. J., Ch. 470; 7 Jur. (N.S.) 459; 9 W. R. 363.

Whether Proper Condition.]—Semble, that a condition of sale giving the vendor a right to rescind the contract, in the event of his being unable or unwilling to comply with a purchaser's requisition as to conveyance, is not in general a proper condition. *Hardman and Child, In re*, 54 L. J., Ch. 695; 28 Ch. D. 712; 52 L. T. 465; 33 W. R. 544.

Notice.]—Where a condition provides that if the purchaser makes any requisition which the vendor is unable or unwilling to comply with, the vendor may, by notice in writing, annul the sale, the vendor may, if the purchaser insists upon a requisition, after being informed that the vendor is unable to comply with it, rescind the sale by notice, and need not give the purchaser a time within which to waive his requisition. *Duddell* v. *Simpson*, 36 L. J., Ch. 70; L. R. 2 Ch. 102; 15 L. T. 305; 15 W. R. 115.

Where an agreement was made subject to a condition that if the purchaser should insist on any requisition which the vendor should be unable to remove, the vendor should be at liberty to annul the sale:—Held, that a notice to annul the sale must be served within a reasonable time. *Ker* v. *Crowe*, Ir. R. 7 C. L. 181.

Contract to sell under a condition that if the purchaser should "make any objection to or requisition on the title" which the vendors should be "unable or unwilling to remove or

comply with" the vendors might by notice in writing annul the contract. Requisitions were sent in, and thereupon the vendors, without attempting to answer them, served a formal notice on the purchaser, annulling the contract:—Held, that the right to rescind arose directly the requisitions were made; that the vendors were not bound to state their reasons for rescinding; that though the word "unwilling" ought to be interpreted "reasonably unwilling," yet on a general statement that the rescission was bonâ fide, and in the absence of any evidence of mala fides, the court ought not to infer that the vendors were acting unreasonably. *Starr-Bowkett Building Society and Sibun, In re*, 58 L. J., Ch. 651; 42 Ch. D. 375; 61 L. T. 346; 38 W. R. 1—C. A.

Valid Objection.]—By conditions of sale, all objections to the title were to be taken within twenty-eight days from the delivery of the abstract; and if they were not removed within fourteen days, the vendor was to be at liberty to annul the contract, on payment of the deposit, but without costs. The purchaser having made an objection which was not removed, the vendor gave notice to annul the contract. The objection being held valid, the court considered the vendor entitled to avail himself of the condition. *Page* v. *Adam*, 4 Beav. 269; 10 L. J., Ch. 407; 5 Jur. 793.

After Action for Specific Performance.]—A vendor put up for sale an absolute reversion, with conditions that any objections to title should be made within ten days after delivery of the abstract, and that the vendor, in case he should be either unable or unwilling to meet any objection, might rescind the contract upon return of the deposit without interest or costs. The vendor filed a bill for specific performance, and the case came on upon motion for decree:—Held, that, notwithstanding the expiration of the time allowed for making objections to title, the purchaser was entitled to raise objections in respect of matters not disclosed upon the face of the abstract, which he had subsequently discovered, and which would render the title bad or doubtful. *Warde* v. *Dixson*, 28 L. J., Ch. 315; 5 Jur. (N.S.) 698; 7 W. R. 148.

Held, also, that the vendor could not rescind the contract under the condition without first dismissing his bill with costs, and cannot rescind at all if the cause comes to hearing. *Ib.* S. P., *Gray* v. *Fowler*, 42 L. J., Ex. 161; L. R. 8 Ex. 249; 29 L. T. 297; 21 W. R. 916. And see *Gardom* v. *Lee*, infra, col. 1499.

Compensation.]—The particulars of sale (erroneously, but without any fraud) described a part of the property as customary leasehold. This property proved to be holden only for the residue of a lease, without any customary right of renewal. One of the conditions of sale enabled the vendor at any time after the delivery of objections, to vacate the sale. Another condition provided, that the purchaser should accept the existing lease and the assignment to the vendor as a sufficient title, and a further condition stipulated, that any error or mis-statement should not vitiate the sale, but the vendor or purchaser should allow or pay compensation:—Held, that the purchaser was entitled to specific performance of the contract, with compensation within the last-mentioned condition: that the power reserved to the vendor of vacating the sale must be construed to apply only to an objection of title: that the claim of the purchaser for compensation, in respect of the absence of any customary right to renew the lease, was not an objection to the title. *Painter* v. *Newby*, 11 Hare, 26; 1 Eq. R. 173; 22 L. J., Ch. 871; 17 Jur. 483; 1 W. R. 284. S. P., *Hoy* v. *Smythes*, 22 Beav. 510; 2 Jur. (N.S.) 1011.

In a contract for sale of lands containing valuable quarries, there was a clause reserving to the vendors power to rescind if any objection should be persisted in, and another providing that compensation should be given for any error in the description of the property or of the vendor's interest therein. The purchaser insisting that the quarries were vested in a third party the vendors exercised their power of rescinding:—Held, that the question between the parties was one of title, and that the rescission was therefore justifiable. *Mawson* v. *Fletcher*, 40 L. J., Ch. 131; L. R. 6 Ch. 91; 23 L. T. 545; 19 W. R. 141.

Repairs.]—Part of property sold was in the occupation of a tenant under a lease, by which the vendor agreed to repair. The repairs not being done, the tenant instituted a suit against both vendor and purchaser. The purchaser sent in an objection and requisition in respect of the repairs not being done:—Held, that such an objection was not an objection to title in respect of which the vendor was entitled to rescind the contract under a condition applying to objections to the abstract. *Sale* v. *Lambert*, 43 L. J., Ch. 470; L. R. 18 Eq. 1; 22 W. R. 478.

Whether Available after Judgment.]—One of the conditions of sale provided that if the purchaser should insist on a requisition which the vendors should be unable or unwilling to comply with, the vendor should, notwithstanding any previous negotiation or litigation, be at liberty, on giving notice in writing, to annul the sale, without interest, costs, or compensation:—Held, that "notwithstanding litigation" meant "notwithstanding pending litigation," and that notice to annul could not be given after an order declaring the title bad. *Arbib and Class. In re*, 60 L. J., Ch. 263; [1891] 1 Ch. 601; 64 L. T. 217; 39 W. R. 305—C. A.

Vendor Getting in Legal Estate.]—A person contracted to sell property, and showed only an equitable title, and the purchaser required the vendor to get in the legal estate:—Held, that such requisition was as to a matter of conveyance only, and the vendor could not rescind the contract under a condition empowering him to rescind if any objection to title were made which he was unable or unwilling to remove. *Kitchen* v. *Palmer*, 46 L. J., Ch. 611.

Incumbrance—Sale by Mortgagee.]—At a sale by a mortgagee under a power, one condition of sale was that for the purpose of requisitions the abstract was to be deemed to be perfect if it supplied the information suggesting the same, and if the purchaser should insist on any requisition which the vendor should be unable or should decline to comply with, he should be at liberty to rescind the contract. An abstract was delivered, but it did not show the real state of the title. The purchaser's solicitors were informed by mortgagees that the property had been mortgaged by deposit of an underlease to them. The vendor was required to pay the amount due to

the mortgagee, but refused and rescinded :—Held, that the vendor was not entitled to rescind. *Jackson and Oakshott, In re*, 49 L. J., Ch. 523 ; 14 Ch. D. 851 ; 41 L. T. 719 ; 28 W. R. 794.

—— **Perpetual Rentcharge.**]—A railway company contracted to sell some superfluous land, "free from incumbrances," for 868*l*. The contract provided that, if the purchaser should decline to waive any valid objection to the title, the company might at any time rescind the contract, without paying the purchaser any costs or compensation. The abstract of title showed that the land was subject to a perpetual rent-charge of 63*l*. issuing out of it. The purchaser required the company to procure the release of the land from the rent-charge. This they declined to do, but offered to indemnify him against it :—Held, that the company were entitled to rescind under the condition. *G. N. Ry. and Sanderson, In re*, 53 L. J., Ch. 445 ; 25 Ch. D. 788 ; 50 L. T. 87 ; 32 W. R. 519.

Stamp.]—At a sale one of the conditions was, that an abstract of title should be delivered within ten days ; and another was, that if any requisition should be made with which the vendor should be unwilling to comply, he should be at liberty to rescind the contract. A. purchased two lots of the property, and within ten days an abstract of the title was sent, and subsequently another abstract was sent, on which A. objected that a deed had no ad valorem stamp. The vendors then rescinded the contract :—Held, that the vendors were entitled to rescind ; but that as they failed in giving a full abstract within ten days, A. was entitled to damages, though only of nominal amount. *Steer* v. *Crowley*, 14 C. B. (N.S.) 337 ; 32 L. J., C. P. 191 ; 9 Jur. (N.S.) 1292 ; 11 W. R. 861.

Refusal of Necessary Parties to Concur.]—A vendor entitled to an underlease for a term of twenty-four years, less three days, put up the property for sale, as held under a lease for twenty-four years, relying on the promise of the persons entitled to the three days to concur. They afterwards refused to concur :—Held, that the vendor could rescind under a condition that if the purchaser makes any requisition that the vendor is unable or unwilling to comply with, the vendor may annul the sale. *Duddell* v. *Simpson*, supra.

Previous Contract on Register.]—Conditions of sale provided that in case the purchaser should make any objection to or requisition on title, which the vendor should be unable or unwilling to remove, he might annul the sale. A purchaser objected to an entry on a register of titles of a previous contract for the sale of the same property. The vendor denied this contract, and proceeded to have the entry removed, but was unable to obtain a speedy removal, and annulled the sale :—Held, that the vendor was entitled to annul the sale, provided he acted bonâ fide. *Woolcott* v. *Peggie*, 59 L. J., P. C. 44 ; 15 App. Cas. 42 ; 61 L. T. 845 ; 38 W. R. 465—P. C.

Death of Purchaser—Repayment of Purchase Money.]—A person contracted to purchase real estate, subject to a condition that if he made any requisition which the vendor was unable or unwilling to comply with the vendor should be at liberty to rescind the contract. He made several requisitions and died intestate without completing the contract, and after death the vendor rescinded it on account of his alleged inability to comply with one of the requisitions, which if not complied with might have given the purchaser a right to compensation, but would not have entitled him to annul the contract :—Held, that the heir-at-law of the purchaser was entitled to have the amount of the purchase money paid to him out of the intestate's personal estate. *Hudson* v. *Cooke*, 41 L. J., Ch. 306 ; L. R. 13 Eq. 417 ; 26 L. T. 180 ; 20 W. R. 407.

Sale before Certificate.]—Condition on sale by the court, that if the purchaser should make any objection the vendor should be unable or unwilling to comply with, the latter should be entitled to rescind, and the deposit should be returned. The sale took place before the chief clerk had made his certificate, and the court decided in a suit between the vendor and the purchaser of another lot, that the purchaser was entitled to be discharged :—Held, that the condition did not apply, and that the purchaser was entitled to the return of his deposit with interest and all his expenses. *Powell* v. *Powell*, 44 L. J., Ch. 311 ; L. R. 19 Eq. 422 ; 32 L. T. 148 ; 23 W. R. 482.

Deeds not in Vendor's Possession.]—Condition of sale, that if any purchaser should insist on any requisition which the vendors should consider themselves unable, or unwilling, to comply with, the vendors might by writing annul the sale. Purchaser required a copy of plans, an abstract of certain deeds recited in an abstracted deed, and a copy of the schedule to another deed to be furnished. The deeds were not in the vendor's possession, and as the purchaser insisted on these, the vendors gave notice rescinding the contract :—Held, that the conduct of the vendors was not unreasonable or capricious, that they were not bound to state reasons when answering the requisitions, and that they had the right to rescind. *Glenton* to *Haden, In re*, 53 L. T. 434 ; 50 J. P. 118—C. A.

Purchaser Withdrawing Requisitions.] — Land was sold under a condition that "if the purchaser should take any objection or make any requisition" which the vendor was "unable or unwilling to remove or comply with," the vendor might rescind the contract. The purchasers made requisitions, and the vendor declined to comply with them. The purchasers insisted, and the vendor served them with notice that he rescinded the contract. The purchasers in reply withdrew their requisitions, and stated that they were willing to complete :—Held, that the contract had been duly rescinded. *Dames and Wood, In re*, 54 L. J., Ch. 771 ; 29 Ch. D. 626 ; 53 L. T. 177 ; 33 W. R. 685—C. A.

Unwillingness to answer Requisitions—Unfair Delay in Exercising Right.] — A vendor, who, in an agreement for sale, reserves to himself the right of rescinding the contract on the purchaser's refusing to withdraw a requisition which the vendor is unwilling or unable to answer, must exercise such right fairly and honestly. Where there has been undue delay on the part of the vendor in exercising his power of rescission after it has arisen, and he has acted in the meantime as if he had rescinded, or was about to rescind, the purchaser may treat the contract as rescinded. *Smith* v. *Wallace*, 64

L. J., Ch. 240; [1895] 1 Ch. 385; 13 R. 201; 71 L. T. 814; 43 W. R. 539.

No Title to Part.]—Vendors agreed to sell a piece of land, containing about four acres, under conditions that the vendors might rescind if they could not comply with any requisition. They could make out a title only to three and a half acres of land:—Held, that they were entitled to rescind the contract. *Heppenstall* v. *Hose*, 51 L. T. 589; 33 W. R. 30; 49 J. P. 100.

Vendor having no Title.]—A condition that, if the purchaser shall make any objection or requisition which the vendor shall be unwilling to comply with, the vendor may annul the sale, does not enable the vendor to rescind where he fails to show any title at all. *Bowman* v. *Hyland*, 47 L. J., Ch. 581; 8 Ch. D. 588; 39 L. T. 90; 26 W. R. 876. And see *Terry and White, In re*, supra, col. 1180.

No Requisition Made.]—A condition that if any objection or requisition should be made and insisted upon which the vendors should be unable or unwilling to comply with, the vendors should be at liberty, by notice in writing, to rescind the sale. The purchaser sent the conveyance to the vendors for approval, they inserted a recital that the property was sold subject to a restrictive covenant in a deed prior to the commencement of title, and which did not appear on the abstract. The purchaser objected and asked for a copy of the deed. The vendors then gave notice that they rescinded:—Held, that there was no requisition made or insisted upon, and that the vendors must specifically perform, the conveyance to be according to the purchaser's draft. *Monckton* to *Gilzean*, 54 L. J., Ch. 257; 27 Ch. D. 555; 51 L. T. 320; 32 W. R. 973.

Costs.] — Land sold under conditions. (7.) If any purchaser make any objections or requisitions, the vendors shall be at liberty, at their election, either to answer such objections and comply with such requisitions, or to rescind the contract for sale on repaying the deposit alone and without interest for the same, and without incurring any liability to pay any expenses for investigating the title. (8.) That such right of the vendors to rescind, shall not be waived, or affected by any negotiation as to any objections or requisitions, or attempt to obviate or comply with the same. The purchaser objected that the vendors had no power to sell, but the vendors insisted they had power. The purchaser thereupon incurred expense in investigating the title, and it turned out that the vendors had no power to sell: — Held, that there was no negotiation or attempt to obviate objections within the eighth condition, and the vendors having elected to insist on a specific performance could not rescind, and were liable to pay the expenses of investigating the title. *Gardom* v. *Lee*, 3 H. & C. 651; 34 L. J., Ex. 113; 11 Jur. (N.S.) 393; 12 L. T. 430; 13 W. R. 719.

See RESCISSION AND ABANDONMENT, supra, col. 1239.

10. COSTS OF INVESTIGATING TITLE.

Perpetuating Testimony.] — Costs of perpetuating testimony of will allowed to purchaser. *Machrell* v. *Hunt*, cited 2 Madd. 37.

Waiving Objections.]—Upon a bill praying a specific performance, "if a good title could be made," the master reported that such title could not be made, and the plaintiff then consented to waive all objections to title:—Held, that he might do so, but, being aware at the hearing of the objections, he must pay the costs of going on to investigate the title. *Bennett* v. *Fowler*, 2 Beav. 302.

Verifying Title.]—Bill by a purchaser praying specific performance upon the terms of the vendor deducing a good title, at her own expense, dismissed, the court being of opinion, upon the facts, that the vendor only contracted to deliver an abstract of title and verify it so far as she had the means in her possession at her own expense, but that the purchaser should be at the expense of completing its verification. *Thomas* v. *Blackman*, 1 Coll. C. C. 301.

Words construed so as to have some meaning taken rather than rejected: therefore, vendor proposing a price clear of all expenses, construed that the purchaser should bear the expense of making out the title, the law imposing on him the expense of the conveyance. *Stratford* v. *Bosworth*, 2 V. & B. 341.

—— **Deducted from Purchase Money.**]—When plaintiff neglects to make out title to purchaser, the latter will be allowed to make it out himself, and deduct expense from purchase money. *Harding* v. *Middleton*, 1 Hog. 80.

—— **Sale of Two Estates.**]—By the same instrument, the plaintiff agreed to sell an estate to the defendant, and the defendant agreed to sell another estate to the plaintiff. The defendant could not make a good title. On a reference as to the plaintiff's title, the master found that plaintiff could make a good title; but he did not find that he could make such title before the filing of the bill:—Held, that the defendant was liable to the costs of investigating the title in the master's office. *Croome* v. *Lediard*, 2 Myl. & K. 293; 3 L. J., Ch. 98.

—— **Evidence.**]—Construction of a contract that a reference of the expenses was confined to the expense of the conveyance; but the evidence of the attorney was admitted for the defendant to prove the intention of both parties, according to verbal instructions, that the plaintiff should also pay the expenses of making out the defendant's title. *Ramsbottom* v. *Gosden*, 1 V. & B. 165; 12 R. R. 207.

Bankrupt's Estate.]—In the case of purchasers from the assignees of a bankrupt, the rule as to the costs of investigating the title is similar to that governing scales under decrees of courts of equity. *Page, In re*, 1 Dr. & Wal. 31.

Deeds not in Vendor's Possession.]—Where title deeds are in the hands of persons residing in the country, the vendor must bear the expense of the purchaser's solicitor sending a clerk to compare the abstract with the deeds. *Hughes* v. *Wynne*, 8 Sim. 85. Affirmed, 1 Jur. 720.

Counsel's Opinion.]—A purchaser, discharged by reason of bad title, is entitled to the cost of counsel's opinion on the title, and of the preparation of the case for counsel. *Barton* v. *Downes*, Fl. & K. 633; 4 Ir. Eq. R. 607.

Title not Shown on Abstract.]—Title estab-

lished before master, not being clear on abstract, vendor pays costs. —— v. *Collinge*, cited 3 V. & B. 143, n.

Costs to a purchaser; the vendor having established his title before the master after contest, upon a different ground from that in the abstract delivered. *Fielder* v. *Higginson*, 3 V. & B. 142; 13 R. R. 167.

Perusal and Execution.]—The conditions of sale requiring purchaser to pay the expenses of all assignments and surrenders of terms, &c.:—Held, that the purchaser must pay the expenses of perusal and execution. *Johnson* v. *George*, 2 Jur. 886.

Incomplete Abstract.]—Where a vendor has not furnished a complete abstract until after a general reference as to title, he will have to pay costs of the reference, although no defect of title is discovered upon the inquiry, except such as was already known to the purchaser. *Wilson* v. *Williams*, 3 Jur. (N.S.) 810.

Title first Shown after Decree.]—Objection to complete on ground of inadequacy of value. Decree for specific performance and a reference to master, who found that a good title was first shown a year after decree:—Held, that the vendor was entitled to the costs of the reference to the master. *Abbott* v. *Sworder*, 22 L. J., Ch. 235.

A decree for specific performance of a contract to purchase with a reference as to title having been made against the purchaser:—Held, that he was bound to pay the costs of having the title investigated in chambers. *McNichol* v. *Kay*, 4 W. R. 801.

Mortgage by Vendor—Production of Deeds.]—A vendor agreed to sell a house "and the inheritance thereof in fee simple in possession, free from incumbrances"; and the contract provided that the vendor, and "all other necessary parties if any," should make and execute to the purchaser a proper assurance, and that "such assurance, and every other act and thing required by the purchaser for perfecting or completing the vendor's title or otherwise," should be "prepared, obtained, made, and done at the expense of the purchaser." When the abstract of title was delivered, it appeared that the property was subject to a mortgage effected by the vendor:—Held, that under sub-s. 6 of s. 3 of the Conveyancing Act, 1881, the costs of the production and inspection required by the purchaser of the deeds and documents in the abstract referred to, which were in the possession of the vendor's mortgagee, were thrown upon the purchaser, and that there was nothing in the terms of the contract to bring the case within the exception contained in sub-s. 9 of the same section; and that the costs of obtaining the concurrence of the mortgagee were clearly within the terms of the contract. *Willett and Argenti, In re*, 60 L. T. 735.

And see *Stuart & Olivant's Contract, In re*, supra, col. 1349.

—— **Parties Concurring.**]—On a sale by first mortgagees under a power of sale contained in their mortgage deed:—Held, that the costs occasioned by the concurrence of the mortgagor and the second mortgagee must be paid by the vendors. *Thompson and Holt, In re*, 59 L. J., Ch. 651; 44 Ch. D. 492; 62 L. T. 651; 38 W. R. 524.

11. Covenants for Title.

See supra, col. 1197.

E. Vendor and Purchaser Act, 1874.

1. Jurisdiction.

Question of Law or Fact.]—The summary jurisdiction created by s. 9 of the Vendor and Purchaser Act, 1874, is not intended to apply to cases where there are questions of controverted fact, but is intended for the settlement of short points of law or construction. *Popple, In re*, 25 W. R. 248.

On a summons under the Vendor and Purchaser Act, 1874, the court has power to direct a covenant to be inserted in a conveyance, and to settle the terms of the covenant. But, semble, the court has no power in such a summons to determine a preliminary question of fact. *Gray and Metropolitan Ry., In re*, 44 L. T. 567.

Evidence Admissible.]—On a summons under s. 9, the parties are placed in the same position, and the court has exactly the same powers, and can receive the same evidence as in the case of a reference to chambers as to title. *Burroughes and Lynn's Contract, In re*, 46 L. J., Ch. 528; 5 Ch. D. 601; 36 L. T. 778; 25 W. R. 520.

Evidence, therefore, by affidavit and cross-examination thereon, is admissible as to the vendor's title, and it is open to the purchaser to show that the vendor has no title. *Ib.*

Specific Performance.] — Where, on a summons under the Vendor and Purchaser Act, 1874, objection is taken that the contract, if valid, is not one of which specific performance can be obtained, the court will express an opinion upon the construction of the contract, and will decide any question raised at the hearing of the summons which, if left undecided, could be raised again in an action for damages. *Lander and Bagley's Contract, In re*, 61 L. J., Ch. 707; [1892] 3 Ch. 41; 67 L. T. 521.

Costs of Investigating Title.]—On making an order under the Vendor and Purchaser Act, 1874, declaring that the vendor has not shown a good title, the court has jurisdiction to order the vendor to pay the purchaser's costs of investigating the title, and to charge them upon the vendor's interest in the property. *Higgins and Hitchman's Contract, In re* (supra, col. 1175), followed. *Yeilding and Westbrook, In re*, 55 L. J., Ch. 496; 31 Ch. D. 344; 54 L. T. 531; 34 W. R. 397.

And see *Davis and Cavey, In re*, supra, col. 1175.

Return of Deposit.]—Per Lord Ashbourne and Barry, L.J.: Where as the natural consequence of the order of the court on a summons under the Vendor and Purchaser Act, 1874, it would be just to order the return of the deposit to the purchaser, the court has jurisdiction so to order. *Lyon's and Carroll's Contract, In re*, [1896] 1 Ir. R. 383—C. A.

—— **Interest.**]—In exercising the summary jurisdiction given by s. 9 of the Vendor and Purchaser Act, 1874, the court has power not only to answer the question submitted to it, but to direct such things to be done as are the natural consequence of the decision. Therefore, where the court decided that the vendor had not shown a good title or answered the requisitions, the court ordered the vendor to return the deposit, with interest at 4 per cent. from the day

when it was paid, and to pay the purchaser's costs of the investigation of the title. *Higgins and Hitchman, In re* (supra), and *Yeilding and Westbrook, In re* (supra), approved. *Hargreaves and Thompson, In re*, 56 L. J., Ch. 199; 32 Ch. D. 454; 55 L. T. 239; 34 W. R. 708—C. A. S. P., *Smith and Stott's Contract, In re*, 48 L. T. 512; 31 W. R. 411.

Whether the court has jurisdiction under the Vendor and Purchaser Act, 1874, to order interest which has been erroneously paid by a purchaser to be repaid to him—quære. *Young and Harston's Contract, In re*, 54 L. J., Ch. 1144; 31 Ch. D. 168; 53 L. T. 837; 34 W. R. 84; 50 J. P. 245—C. A.

Damages.]—The purchaser cannot, on a summons under the Vendor and Purchaser Act, 1874, recover damages for loss occasioned to him by the delay in completion of the purchase. *Wilson and Steven's Contract, In re*, 63 L. J., Ch. 863; [1894] 3 Ch. 546; 8 R. 641; 71 L. T. 388; 43 W. R. 23.

Rescission.]—Application under Vendor and Purchaser Act, 1874, for rescission of contract by vendor. *Jackson and Oakshott, In re*, 49 L. J., Ch. 523; 14 Ch. D. 851; 41 L. T. 719; 28 W. R. 794.

—— **Validity of Notice.**]—Upon a summons under the Vendor and Purchaser Act, 1874, the court had jurisdiction to determine the validity of a notice given by a vendor to rescind his contract for sale. *Jackson and Woodburn, In re*, 57 L. J., Ch. 243; 37 Ch. D. 44; 57 L. T. 753; 36 W. R. 396.

—— **Sale by Tenant for Life—Consent of Assignee for Value.**]—A tenant for life contracted to sell the settled estates free from incumbrances. His wife, who claimed to be an assignee for value of his life interest, was not a party to the contract, and refused to consent to the sale. The purchaser took out a summons under the Settled Land Acts and the Vendor and Purchaser Act, asking for a declaration whether her consent was necessary, and that, if it was necessary, he was entitled to rescind the contract or to have specific performance, with compensation:—Held, that she had been improperly served with the summons, and must be dismissed from the proceedings. *Ailesbury Settled Estates, In re*, 62 L. J., Ch. 1012; 3 R. 704; 69 L. T. 493; 42 W. R. 45.

Resale by Purchaser before Completion.]—A railway company agreed to sell superfluous lands in a manner not authorised by the powers of the company. The purchaser from the railway having agreed to sell to B.:—Held, on a summons under the Vendor and Purchaser Act, 1874, that the court could not compel B. to complete. *Thackwray and Young, In re*, 58 L. J., Ch. 72; 40 Ch. D. 34; 59 L. T. 815; 37 W. R. 74.

Married Woman—Payment of Purchase Money to.] — A married woman contracted to sell a leasehold vested in trustees for her under a will. The purchaser objected to the title on the ground that she was by the will restrained from anticipation. On a summons under the Vendor and Purchaser Act, 1874:—Held, on appeal, that as the question did not concern the purchaser, the court had no jurisdiction to decide it on a vendor and purchaser summons; but the court gave the vendor leave to amend the summons so as to make it an originating summons, the proper parties being before the court. *Tippett and Newbould, In re*, 37 Ch. D. 444; 58 L. T. 754; 36 W. R. 597—C. A.

Voluntary Grant.]—The tenant for life of lands, of which the tenant in tail in remainder was an infant, was desirous of making a voluntary grant of part thereof as a site for a church:—Held, that the Vendor and Purchaser Act, 1874, did not apply to a voluntary grant, but that this defect might be cured by the admission of a contract for a nominal consideration. *Salisbury (Marquis), In re*, 45 L. J., Ch. 250; 2 Ch. D. 29; 34 L. T. 5; 23 W. R. 824. And see *Briggs and Spicer, In re*, supra, col. 1466.

Sale under Power by Legal Personal Representative of Mortgagee.]—Section 4 of the Vendor and Purchaser Act, 1874, does not enable the legal personal representative of a deceased mortgagee of real estate to convey upon a sale under a power in the mortgage. *White's Mortgage, In re*, 51 L. J., Ch. 856; 29 W. R. 820. And see *Spradbery's Mortgage, In re*, 49 L. J., Ch. 623; 14 Ch. D. 514; 43 L. T. 82; 28 W. R. 822, supra, col. 1105.

Section 2, Sub-s. 1.]—This section does not alter the rule as to notice to a lessee. *Ib.* And see *Thornewell* v. *Johnson*, and *Patman* v. *Harland*, supra, col. 1225.

Recitals in Conveyances.]—Under the Vendor and Purchaser Act, 1874, s. 2, a recital in a conveyance more than twenty years old, that the vendor was seised in fee simple, is sufficient evidence of that fact, and no prior abstract of title can be demanded except so far as the recital shall be proved to be inaccurate; and in such cases a forty years' title is not required. *Bolton* v. *London School Board*, 47 L. J., Ch. 461; 7 Ch. D. 766; 38 L. T. 277; 26 W. R. 549.

A deed of 1858 contained a recital of a deed of 1845, and a recital that the trustees "in pursuance of the trust for sale conferred on them" by that deed had caused the property to be put up for sale:—Held, that by s. 2 of the Vendor and Purchaser Act, 1874, this recital, not being shown to be inaccurate, was conclusive evidence that the deed of 1845 had not been revoked. *Marsh and Granville (Earl), In re*, 53 L. J., Ch. 81; 24 Ch. D. 11; 48 L. T. 947; 31 W. R. 845.

Costs.]—A requisition as to the competency of a married woman to give a discharge for a legacy, on a sale of land charged with the legacy, having been brought under the Vendor and Purchaser Act, 1874, the judges ordered each party to pay his own costs. *Coward and Adams' Purchase, In re*, 44 L. J., Ch. 384; L. R. 20 Eq. 179; 32 L. T. 682; 23 W. R. 605.

The question of costs as between vendor and purchaser where the title is disputed considered. *Osborne* to *Rowlett*, 49 L. J., Ch. 310; 13 Ch. D. 774; 42 L. T. 650; 28 W. R. 365.

—— **Sale under Power in Mortgage—Evidence of Subsistence of Security.**]—Mortgage by conveyance of the fee simple to trustees upon trust, to sell the property, and discharge the debt, &c., out of the proceeds, and to pay the residue to the mortgagor, his executors, administrators, or assigns. The deed contained provisions render-

ing unnecessary the concurrence of the mortgagor or his heirs in any conveyance. The deed, however, did not contain any provision exonerating a purchaser from inquiring whether default had been made in payment of principal or interest, nor as to whether anything was owing on the security. The vendors sold as mortgagees, in pursuance of the trust contained in the mortgage. On a summons under the Vendor and Purchaser Act, 1874, by the vendors asking for a declaration that a good title had been shown :—Held, that, without the concurrence of all the persons at present entitled to the equity of redemption, it was necessary, in order to enable the vendors to make a good title to the property, that they should, by obtaining statutory declarations, furnish evidence of the subsistence of the mortgage from the death of the mortgagor down to the date of the sale :—Held, also, that in the present case the proper order would be that the vendors' expenses in procuring and furnishing the purchasers with the evidence of payment of the interest on the mortgage should be considered as part of the vendors' costs of the summons, and that no costs of the summons should be given to either side. *Edwards and Green, In re*, 58 L. T. 789.

2. PRACTICE.

Trustee Disclaiming Freeholds of Bankrupt.]—The trustee of a bankrupt owner of freeholds, burdened with onerous covenants, disclaimed them, and subsequently he and the bankrupt purported to convey the lands :—Held, on a summons under the Vendor and Purchaser Act, 1874, that after the disclaimer the subsequent conveyance was inoperative. *Mercer and Moore, In re*, 49 L. J., Ch. 201 ; 14 Ch. D. 287 ; 42 L. T. 311 ; 28 W. R. 485.

Custody of Title Deeds—Retention by Vendor as "Part of an Estate."]—A mortgagee of freehold land and policies on the life of the mortgagor under one deed, who, during the life of the mortgagor, in exercise of the power of sale contained in the mortgage, sells the land, but retains the policies, does not retain "part of an estate" within rule 5 of s. 2 of the Vendor and Purchaser Act, 1874, and is therefore not entitled to retain the mortgage deed, but must deliver it to the purchaser on completion. *Fuller and Leathley's Contract, In re*, 66 L. J., Ch. 543 ; [1897] 2 Ch. 144 ; 76 L. T. 646 ; 45 W. R. 454. *And see* cases, supra, col. 1347.

Objection to Title.]—Where conditions of sale stipulated that all objections and requisitions should be sent in within ten days from the delivery of the abstract :—Held, that, although the ten days had expired, the purchaser was entitled to raise the objection, by summons under the Vendor and Purchaser Act, 1874 ; that the vendors had no power to sell. *Tanqueray-Willaume and Landau, In re*, 51 L. J., Ch. 434 ; 20 Ch. D. 465 ; 46 L. T. 542 ; 30 W. R. 801. And see *Cowe and Neve, In re*, supra, col. 1455.

Sale by Devisee of Trustee.]—A testator devised and bequeathed his real and personal estate to his wife for life, and from and after her decease to A. and B., "their heirs, executors, and administrators, upon trust to sell and dispose thereof at such times and in such manner as they my said trustees shall deem expedient." A. and B. both predeceased the tenant for life, B., the surviving trustee, having devised his trust estates. Upon the death of the tenant for life :—Held, upon a summons under the Vendor and Purchaser Act, 1874, that B.'s devisees could make a good title, and one which the court would force upon a purchaser. *Osborne* to *Rowlett*, 49 L. J., Ch. 310 ; 13 Ch. D. 774 ; 42 L. T. 650 ; 28 W. R. 365.

Legal Estate in Whom Vested.]—A testator, after directing his debts to be paid, devised and bequeathed all his real and personal estate to his four daughters to be divided equally between them, provided as follows—that the share of his wife should be divided after her death between his four daughters or the survivors and their children ; and the testator appointed his wife and T., his executors, to act jointly in carrying out all the intentions of his will :—Held, upon an application under the Vendor and Purchaser Act, that the legal estate in freeholds was vested in the executors who could make a good title to a purchaser. *Davies* to *Jones*, 52 L. J., Ch. 720 ; 24 Ch. D. 190 ; 49 L. T. 624.

Requisitions.]—A purchaser made the following requisition :—"Is there to the knowledge of the vendors or their solicitors any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract?"—Held, that neither the vendors nor their solicitors were bound under the Vendor and Purchaser Act, 1874, to answer any part of the requisition. *Ford and Hill, In re*, 48 L. J., Ch. 327 ; 10 Ch. D. 365 ; 40 L. T. 41 ; 27 W. R. 371.

Specific Performance Barred.]—A purchaser who has availed himself of the provisions of the Vendor and Purchaser Act, 1874, and has thereby obtained an order on summons which has disposed of every objection which he thought fit to raise, and under which the vendor has been ordered to make compensation, is not entitled to bring an action for specific performance of the contract for sale and damages. If a vendor does not comply with the order made on the vendor and purchaser summons, the purchaser should apply in chambers to get it enforced. *Thompson* v. *Ringer*, 44 L. T. 507 ; 29 W. R. 520.

Judgment to be Given in Court.]—On a summons under the Vendor and Purchaser Act, 1874, heard in chambers, judgment ought to be given in court if the purchaser desires it. *Coleman and Jarrom, In re*, 46 L. J., Ch. 33 ; 4 Ch. D. 165 ; 35 L. T. 614 ; 25 W. R. 137.

Appeal.]—The time within which an appeal can be brought from an order under the Vendor and Purchaser Act, 1874, s. 9, is twenty-one days. *Blyth and Young, In re*, 13 Ch. D. 416 ; 41 L. T. 746 ; 28 W. R. 266—C. A.

E. E. H. B.

VENUE.

See PRACTICE (TRIAL).

VERDICT.

See PRACTICE.

VESTED, CONTINGENT AND FUTURE INTERESTS.

[By Wm. A. G. WOODS.]

A. Meaning of the Word "Vest" when used by Settlor.

1. *When Construed Literally*, 1510.
2. *When Construed Indefeasible or Payable*, 1515.
3. "*Vest*" *and* "*Payable*" *used Interchangeably*, 1518.
4. *Gifts to Children Surviving their Parents, with Directions as to Vesting*, 1519.
5. *Gifts Over before Vesting*—*See* Will.

B. Vesting of Interests in Real Estate.

1. *In General.*
   - *a.* Gift "at," "when," "if," "until," a Person attains a Certain Age, 1521.
   - *b.* Gifts to Children who attain a Certain Age, and to a Class at a Certain Age, 1525.
   - *c.* Estate to Arise on a Contingency after a Prior Particular Estate or Interest, 1529.
   - *d.* Estate to Arise on Determination of a Prior Estate by Marriage, 1533.
   - *e.* Gifts to Children without Directions as to Vesting, 1536.
2. *Words of Contingency. Whether Extending to a Series of Limitations*, 1537.
3. *Estates or Interests Limited in Clear Terms of Contingency. Events do not Happen*, 1541.
4. *Divesting of Vested Interests where Events do not Happen or Contingent Clauses Fail*, 1545.
5. *Cross Remainders.*
   - *a.* Implication of in Wills, 1548.
   - *b.* Implication of in other Instruments, 1555.
6. *Contingent Remainders.*
   - *a.* General Principles, 1557.
   - *b.* Trustees to Preserve Contingent Remainders, 1567.
   - *c.* Destruction of Contingent Remainders.
     - i. In General, 1571.
     - ii. Liability of Trustees, 1572.
     - iii. Order on Trustees to Convey, 1573.
   - *d.* Insertion of Trustees to Preserve in the Case of Executory Trusts—*See* Trust and Trustee.
   - *e.* In Copyholds—*See* Copyhold.
7. *Executory Devises.*
   - *a.* In General, 1574.
   - *b.* Failure of Prior Gift. Effect on Executory or Substituted Gift, 1579.
   - *c.* Failure of Executory Gift Over. Effect on Prior Gift, 1582.
   - *d.* Estates in Fee Simple Cut Down to Estates Tail.—*See* Will.
   - *e.* Clear Gifts not Cut Down by Doubtful Expressions—*See* Will.
   - *f.* Construction of Gift Over in Particular Events—*See* Will.
   - *g.* Devises on Condition—*See* Condition.
   - *h.* Executory Trusts Generally—*See* Trust and Trustee.
8. *Shifting Clauses.*
   - *a.* Construction and Operation, 1584.
   - *b.* Right to Intermediate Income, 1592.
   - *c.* Name and Arms Clause—*See* Condition.
9. *Assignment of Interests*, 1594.
   - *a.* When Devisable—*See* Will.
   - *b.* Assignments of Contracts to Purchase—*See* Vendor and Purchaser.
   - *c.* Sale of Reversions—*See* Vendor and Purchaser.
   - *d.* Reversions Passing by Will—*See* Will.
   - *e.* Heirs Expectant and Reversioners—*See* Fraud.
   - *f.* Equitable Assignments—*See* Assignment.
10. *Intermediate Rents and Profits.*
   - *a.* Under Shifting Clauses—*See* ante, B. 8.
   - *b.* Effect of Gift of on Vesting—*See* post, C. 2. and D.
   - *c.* Acceleration of Remainders—*See* Will.
   - *d.* Where Interests Vested Subject to a Gift Over—*See* Will.
   - *e.* Gifts to a Class. Rights of Members who attain Vested Interests—*See* Will.
   - *f.* Between Death of Testator and Birth of Issue—*See* Will.
   - *g.* In Other Cases—*See* Rents and Profits, and Cross References there—Will.

C. Vesting of Legacies Payable out of Personal Estate.

1. *In General.*
   - *a.* General Principles, 1597.
   - *b.* Legacy on an Uncertain Event, or at an Indefinite Time, 1598.
   - *c.* Gift with Direction to Pay at a Fixed Time, 1601.
   - *d.* Gift at a Future Time without Direction as to Payment, 1606.
   - *e.* No Gift but in the Direction to Pay and Divide.
     - i. In General, 1607.
     - ii. Where Gift Preceded by a Life Interest, 1610.
   - *f.* Effect of a Gift Over on Vesting, 1619.
   - *g.* Gift to a Class on Attaining a Certain Age, 1623.
   - *h.* Gift to Children Surviving their Parents, 1627.
   - *i.* Gift to Persons "then Living," 1629.
   - *j.* Gifts to Survivors in General—*See* Will.

2. *Effect of Gift of Interim Income.*
a. Gift of Interest, 1636.
b. Mixed Gift of Interest and Principal, 1637.
c. Immediate Severance of Principal, 1639.
d. Gift of Income followed by Gift of Principal, 1642.
e. Income Expressly Given for Maintenance, 1645.
f. Fixed Sum Given for Maintenance, 1652.
g. Part of Income Given for Maintenance, 1653.
h. Power or Discretion to Apply Whole or Part of Income for Maintenance, 1654.
i. Power to make Advances, 1658.
3. *Words of Contingency, whether Extending to a Series of Limitations*, 1660.
4. *Interests Limited in Clear Terms of Contingency*, 1662.
5. *Divesting of Vested Interests*, 1664.
6. *Cross Executory Limitations in Personal Estate*, 1670.
7. *Executory Bequests.*
a. Failure of Prior Gift. Effect on Executory or Substituted Gift, 1674.
b. Failure of Gift Over. Effect on Prior Gift, 1678.
8. *Remainders and Gifts Over of Personal Property.*
a. Gift of Chattels by Way of Remainder, 1680.
b. Chattels Quæ Usu Consumuntur, 1680.
c. Interests Given to Persons in Succession, 1682.
d. Limitation of Terms—*See* SETTLEMENT.
e. Gift Over of Undisposed-of Interests. *See* WILL.
f. Limitation of Heirlooms—*See* SETTLEMENT.

D. LEGACIES CHARGED ON REAL ESTATE.
1. *In General. Not Vested*, 1683.
2. *Contrary Intention*, 1685.
3. *Legacies Charged on a Mixed Fund*, 1689.
4. *Lapse by Death of Donee of the Charge*—*See* WILL.
5. *Lapse by Death of Donee of Land Charged*—*See* WILL.
6. *Title to Charges which Fail or are Undisposed of*—*See* WILL.
7. *Vesting of Charges by Deed*—*See* post, E.

E. PORTIONS AND OTHER INTERESTS CREATED BY DEED.
1. *When Charged on Land*, 1692.
2. *Gifts to Children Contingent on Surviving their Parents.*
a. In General, 1694.
b. Effect of word "Such," 1701.
c. Contingency Running through the Whole Class, 1702.
d. Gift Over, 1704.
e. Decisions arising under Wills—*See* ante, B., 6.
3. *Gift of Interest for Maintenance*, 1709.
4. *Other Cases*, 1711.
5. *Meaning of the word "Vest" when used by Settlor*—*See* ante, A.
6. *Vesting under Powers*—*See* POWERS.
7. *As to Fluctuation between Eldest Child and Younger Children*—*See* YOUNGER CHILDREN.
8. *As to Portions generally*—*See* PORTIONS.

F. OTHER MATTERS.
1. *Interests of Bankrupt*—*See* BANKRUPTCY.
2. *As to Husband's Power of Disposition over Future Property of Wife*—*See* HUSBAND AND WIFE.
3. *Vesting of Interests of Donees under Powers*—*See* POWERS.
4. *Effect of Powers of Appointment on Vesting or Divesting of Legacies, &c.*—*See* POWERS.
5. *Bequests to a Class void for Remoteness as to any Member*—*See* PERPETUITY.
6. *Payment of Contingent Legacies*—*See* EXECUTOR AND ADMINISTRATOR.
7. *Acceleration of Remainders*—*See* WILL.
8. *Gifts over of Undisposed-of Interests in Personal Estate*—*See* WILL.
9. *Gifts Over. In General*—*See* WILL.

A. MEANING OF THE WORD "VEST" WHEN USED BY SETTLOR.

1. WHEN CONSTRUED LITERALLY.

In General—To be Vested at Twenty-one.]—Testator, after making a provision for the maintenance of his children, gives "all the rest, residue, and remainder of his real and personal estate" to his son T., "to be a vested interest on his attaining the age of twenty-one," and "if he shall happen to die before" then to his daughter E., with remainders over. The rents and profits are to accumulate until T. attains the age of twenty-one, or dies under that age. *Glanvill* v. *Glanvill*, 2 Mer. 38; 16 R. R. 142.

A testator devised certain freehold premises to his wife during widowhood, remainder to his nephew R. B. R. for life, and, after his decease, unto and equally between all and every the children of his said nephew R. B. R., their heirs and assigns, as tenants in common; but in case there should be no child of his nephew R. B. R. living at the time of the decease or marrying again of the testator's wife, then over: and he devised the residue of his real estate to certain other persons in fee; and, by a codicil of even date, he directed as follows, "that neither the said R. B. R., nor any or either of his issue, shall, by virtue of this my will, take or be considered as entitled to, a vested interest or interests, unless and until they shall respectively attain the age of twenty-one years;" with benefit of survivorship in case of the death of any one or more of such children under such age. R. B. R., during the life of the testator's widow, attained the age of twenty-one, and, upon her decease, took possession of the devised

premises; and, at his death, left several children, all under the age of twenty-one:—Held, that the devises to the children were contingent, and, therefore, in the event failed; and that the heir-at-law was entitled to the devised estate. *Russel* v. *Buchanan*, 7 Sim. 628; 5 L. J., Ch. 122. *And see* 2 C. & M. 561; 3 L. J., Ex. 194; 4 Tyrw. 384.

—— **Vested Interest at Twenty-one or Marriage—No Gift Over.**]—W. gave one third of the residue of his personal estate to trustees to invest, and pay so much of the interest as might be necessary for the maintenance of his two granddaughters, and to accumulate the surplus until the younger of them should attain the age of twenty-one; and after that event, upon trust to pay and divide the principal moneys equally between them, share and share alike; and he declared that each of his granddaughters should have a vested interest on her attaining twenty-one or marriage; and if either of his grandchildren should happen to depart this life before she should have attained a vested interest, then he gave her share to the survivor. There was no gift over:—Held, that neither of the grandchildren took a vested interest until they attained twenty-one or married; and that, therefore, in the events which had happened, viz., the death of both of them under twenty-one without being married, the interests of both—i.e., of the grandchild who died first, and of the survivor—formed part of the testator's undisposed-of personal estate. *Wakefield* v. *Dyott*, 4 Jur. (N.S.) 1098; 7 W. R. 31.

—— **To be Vested at Twenty-five.**]—Devise of real estate with the residue of the personal estate upon long limitations in strict settlement, including persons unborn: a subsequent direction, that none of the devisees shall take or come into possession before the age of twenty-five, was held confined to the actual possession, and not to operate by way of revocation; and therefore upon the death of the first tenant for life under twenty-five the accumulation belonged to his personal representative. *Montgomerie* v. *Woodley*, 5 Ves. 522.

A testator devised his real estate to trustees in fee for T. for life, with remainder to the trustees to preserve contingent remainders, with remainder to the first and other sons of T. in tail male with other remainders over, with a proviso that the real estate should not vest in any person thereby made tenant for life or in tail until he should have attained twenty-five, and the rents and profits were in the meantime to form part of the personal estate:—Held, that the direction in reference to vesting amounted to a limitation void for remoteness, and that the direction was not modified by a provision for maintenance in the meanwhile. *Lushington* v. *Penrice*, 18 L. T. 597; 16 W. R. 836.

Bequest in trust for all the children (then unborn) of A., to be vested at twenty-five for sons, and at that age or marriage for daughters, with a subsequent direction that, if only one child, the whole should be paid to that child at twenty-five, or marriage with consent, if a daughter:—Held, that the vesting, and not the payment only, was postponed till twenty-five or marriage, and that the bequest was void for remoteness. *Griffith* v. *Blunt*, 4 Beav. 248; 10 L. J., Ch. 372.

Bequest to a living person for life, and afterwards to his children, followed by a declaration that these interests should be considered a vested interest at the age of twenty-five, and a gift over to the issue of any dying under twenty-five:—Held, too remote. *Rowland* v. *Tawney*, 26 Beav. 67.

—— **Provision for Maintenance.**]—A gift by will, of real and personal estate to trustees, upon trust, to pay half the income to E. for life, and after her death to her child or children equally; the shares of sons to be vested in them on attaining twenty-five, and of daughters on attaining that age or day of marriage, which should first happen, and in the meantime to be applied for their maintenance, with survivorship in case of the death of any child before twenty-five or marriage respectively, with a similar gift to S. and her children of the other moiety, and a gift over in case of the death of either E. or S. without leaving issue, or leaving such and they should all die under twenty-five:—Held, that the limitations to the children of E. and S. were void for remoteness. *Pickford* v. *Brown*, 2 K. & J. 426; 25 L. J., Ch. 702; 2 Jur. (N.S.) 781; 4 W. R. 473.

Held, also, that the direction for maintenance was altogether void. *Ib.*

Bequest to A. for life, and afterwards to her children equally "to be vested" on such as should attain twenty-five, and "to be payable" as soon as might be after that age should be attained, with powers of maintenance and advancement out of their "vested or expectant portions," with a gift over to B. if no child should attain twenty-five:—Held, first, that the gift to the children was too remote; and, secondly, on A.'s death without having been married, that the gift to B. could not take effect, as an alternative limitation to a person in esse at the date of the will. *Thatcher's Trust, In re*, 26 Beav. 365.

Where a testator, after giving certain sums in certain shares among the six children of A., naming them, to be vested and payable at twenty-five with certain provisions for their maintenance until then, afterwards gives another sum of 6,000*l.* subject to certain life interests, to all the children then born or thereafter to be born, to be vested and payable at twenty-five, and with the like trust for maintenance, and subject to the like provisions and conditions, as the legacies before given to the children then born and named:—Held, that the legacy of 6,000*l.* was void for remoteness as to all the children, both those then born and also the unborn. *Comport* v. *Austen*, 12 Sim. 218. And see *Edmondson's Estate, In re*, post, col. 1516.

—— **Portions to be Vested Two Years after Testator's Decease.**]—Devise upon trust, by mortgage, or out of the rents and profits, to pay debts, and afterwards to raise portions for the testator's daughters, "such portions to become due, and be considered as vested at the expiration of two years next after my decease, if my debts shall be then paid." This is a condition precedent to the portions becoming vested; and, one of the daughters having died while her portion remained unpaid, upon a question between her representative and the persons who would be entitled in the event of the portion not having become vested in her lifetime, an inquiry was directed as to the time when the debts were, or might have been, paid. *Bernard* v. *Montague*, 1 Mer. 422. *See* 11 Ves. 508, n.

A testator gave his residuary real and personal estate to his daughter for life, and afterwards he directed his trustees to pay, transfer, and divide his residuary estate between his children, and to (by substitution) the issue of such as should have died in his lifetime leaving issue living at his decease. He subsequently authorised his trustees, in their discretion, if they should think fit, to pay the male issue their shares at any time between attaining twenty-one and thirty, with power of maintenance and advancement in the meanwhile; but he directed that the shares of female issue should be vested at twenty-one :—Held, that the shares of the issue vested on the death of the daughter. *Barnet* v. *Barnet*, 29 Beav. 239.

A testator devised and bequeathed certain freehold and leasehold property upon trust, inter alia, to pay two annuities to J. A., to whom he also bequeathed a legacy of 1,000*l*., payable out of his personal estate, and by a subsequent clause in his will the testator directed that the bequest by annuity and legacy for J. A. should not become payable or vest in him until he should have attained the age of twenty-one years, nor then, unless he should have conducted himself to the satisfaction of the trustees of the will, who were empowered in the meantime to pay and advance such part of the provision so made for J. A., either out of the annuities or principal of the legacy, for his maintenance, education, and advancement, as they might think fit, and the testator directed that J. A. should be brought up a Protestant; and that, in the event of misconduct on his part, or of his not continuing a Protestant, the annuities and legacy, or such portion thereof as should remain undisposed of and unappropriated, and save such portion thereof as should be necessary for his actual support, should go over upon certain charitable trusts therein mentioned. The testator also directed that J. A. should not have any power to dispose of or incumber the said bequests or legacies until he should have attained twenty-five and have become otherwise entitled to them as aforesaid. J. A. survived the testator, and attained twenty-one, but died under twenty-five years of age :—Held, upon the construction of the will, that the word "vest" must be interpreted in its primary meaning, and could not be construed as referring merely to the time of payment; and that the gifts of the legacy and of the annuities, even so far as they were payable out of personal estate, were contingent on J. A.'s attaining twenty-five. *Creeth* v. *Wilson*, 9 L. R. Ir. 216.

—— **Share to be Absolutely Vested on Death of Parent.**]—A father left to his trustees 6,000*l*., on trust, as to one moiety, for his daughter J., for life, and as to the other, for his daughter A., for life, and after the decease of each of them leaving lawful issue or other lineal descendants her or them surviving, to pay, assign, and transfer the principal trust moneys . . . of her or them so dying unto her or their child or children, or other lineal descendants respectively, to be equally divided between them, if more than one, share and share alike, such child or children or other lineal descendants to take per stirpes and not per capita, such principal trust moneys to be paid to them respectively, when and as they respectively should attain the age of twenty-one, with a provision for maintenance in the meantime, "but nevertheless the shares of the child or children of and in the principal trust moneys shall be absolute vested interests in him, her, or them, immediately on the decease of his, her, or their respective parent or parents, and transmissible to his, her, or their executors or administrators respectively." Then followed a gift over, in case of either J. or A. dying without issue or lineal descendants, of her share to the survivor for life, with remainders to the children or other lineal descendants of such survivor, with various remainders over in the event of both J. and A. dying without leaving issue or other lineal descendants. A. had seven children, three of whom died in her lifetime :—Held, that the interests of the children did not vest till the death of the tenant for life, and that, accordingly, the fund was divisible into fourths, and not into sevenths. *Selby* v. *Whittaker*, 47 L. J., Ch. 121; 6 Ch. D. 239; 37 L. T. 514; 26 W. R. 117—C. A.

Settlement Limitations—Gift to a Class.]—Trust funds were settled, subject to life interests in the husband and wife, as portions for the children of the marriage, to be vested interests in them at twenty-five if sons, or at twenty-five or marriage if daughters; and to be payable at the same times if after the death of tenants for life; and if not, then immediately on the death of tenants for life. Survivorship between the children in case of their death before twenty-five, or twenty-five or marriage respectively. Maintenance to be given out of the annual income of shares before they should become payable :—Held, that the shares did not vest till twenty-five, and the gift therefore too remote. *Morse's Settlement, In re*, 21 Beav. 174; 25 L. J., Ch. 192; 2 Jur. (N.S.) 6; 4 W. R. 148.

An express direction in a settlement that shares should vest in the members of a class at their ages of twenty-four years :—Held, to be not controlled by other expressions, e.g., by a provision for maintenance out of the income of "the expectant or presumptive share" of each. *Blakemore's Settlement, In re*, 20 Beav. 214.

Limitations of a term to trustees, upon trust to raise portions for the children of A. surviving A. and B., "to vest in and to be paid and payable to" them at their ages of twenty-four, with maintenance, &c., meanwhile, out of the expectant or presumptive shares, and a gift over on the death of all before their share should become vested :—Held, void for remoteness. *Ib.*

By a marriage settlement funds were settled upon the wife for life, with remainder to the children of the marriage in equal shares, "to be a vested interest at their ages of twenty-one years," with a gift over to the husband in the event of all the children dying under twenty-one, and a reversion to the settlor in the event of there being no child born, but no clause of survivorship and accruer as to shares of children dying under twenty-one. There were five children, of whom four attained twenty-one, and the fifth died an infant :—Held, that the whole fund vested in the four children who attained twenty-one. *Colley's Trusts, In re*, L. R. 1 Eq. 496; 14 W. R. 528.

—— **"Payable" meaning "Vested"—Shares "to be Paid" at Twenty-one—Gift over on Death before Shares "Payable."**]—By a marriage settlement lands were conveyed upon trust for husband and wife successively for life, and after

the death of the survivor "to levy out of the said lands and premises . . . the sum of 3,000*l*. . . . to be divided among all the children of the said intended marriage, save and except such child and children as under the limitations aforesaid shall succeed to the enjoyment of the lands and premises hereby conveyed . . . in equal shares and proportions as tenants in common and not as joint tenants, the share of such child or children as shall be a son or sons to be paid to him or them upon his or their respectively arriving at the full age of twenty-one years, and the share or shares of such of them as shall be daughters to be paid upon their respectively arriving at their full age of twenty-one years, or day or days of marriage, whichever shall first happen; provided always that such marriage during minority shall be had by and with the consent and approbation of 'the parents,' or the survivor of them; with interest for the same by way of maintenance at the rate of 6*l*. by the hundred: to be computed from the day of the death of the survivor of 'the parents,' with benefit of survivorship to the survivors or survivor of such children if any of such children shall die before his, her, or their share or shares shall become payable, unmarried, and without leaving issue as aforesaid, it being the true intent and meaning of these presents that none of the children of the said intended marriage, who under the limitations herein contained shall become entitled to an estate in possession in any part of the lands and premises hereby conveyed . . . shall be entitled to any part of" the said sum. A son attained twenty-one and died in the lifetime of his father:—Held, that there being no words indicating a clear intention to make the vesting of children's shares contingent on their surviving both parents, the rule laid down in *Emperor* v. *Rolfe* (1 Ves. sen. 208) applied, and the son took a vested interest in his share on attaining twenty-one. *Wakefield* v. *Maffet*, 55 L. J., Ch. 4; 10 App. Cas. 422; 53 L. T. 169.—H. L. (Ir.)

2. When Construed Indefeasible or Payable.

To be Vested as Sons should Attain Twenty-one respectively.]—Testator gave lands to his four sons as tenants in common in fee, to be vested, as to one moiety, as they should respectively attain twenty-one; and as to the other moiety, when his youngest son for the time being should attain twenty-one; and in case of any son dying before his share should be vested as aforesaid, then he gave the "unvested share" to the other and others of his said sons, to be vested, &c., in the same manner as the original shares. The personal estate was given to the trustees to get in and invest, and hold upon trusts, in terms almost identical, only after "vested," the testator used the expression "payable and transferable":—Held, that the property vested immediately in the four sons as tenants in common, subject to be divested in the events named. *Poole* v. *Bott*, 11 Hare, 33; 1 Eq. R. 21; 22 L. J., Ch. 1042; 17 Jur. 688; 1 W. R. 276.

—— **Proviso against Marriage or Illegal Cohabitation.**]—The will contained a proviso, that in case any of the testator's sons should intermarry or illegally cohabit with any of their cousins, the share of such son was to go over to the persons who would have taken if he had died under twenty-one; and the testator declared that it should not be lawful for his trustees to pay to his sons the amount thereby bequeathed, or to permit them to enter upon the realty until they should respectively execute a bond to the said trustees in 20,000*l*. to observe this direction:—Held, that one of the sons who had arrived at twenty-one could acquire payment of his one-fourth without entering to such a bond. *Ib.*

A testator gave the residue of his property in trust for his mother for life, with remainder to all the younger children of his two sisters, to be a vested interest on their attaining twenty-one. There was also a clause of survivorship upon any of the children dying under twenty-one:—Held, that those children were alone entitled who were born previously to the death of the tenant for life. *Berkeley* v. *Swinburne*, 16 Sim. 275; 17 L. J., Ch. 416; 12 Jur. 571. And see *Emmet's Estate, In re, Emmet* v. *Emmet*, 13 Ch. D. 484.

After Decease of Tenant for Life to Pay Children — Shares to be Vested Interests at Thirty.]—M., by her will, in pursuance of a power, appointed 1,000*l*., charged on real estate, to trustees, upon trust to invest the same, and to pay the dividends thereof to her daughter A. for life; and from and after the decease of A. to pay, apply, and dispose of the capital and interest unto, between, or amongst all and every the child or children of A. in equal shares; and if but one, the whole to that one child, to be a vested interest or vested interests on their respectively attaining the age of thirty years; and if any child or children of A. should die under the age of thirty without lawful issue, the share or shares of such child or children, original or accruing, should go to the survivor or survivors of them:—Held, that the word "vested" meant indefeasible, so that the share of each child who attained thirty was no longer to be defeasible by the executory bequest; held, also, that the original bequest to the children gave them a present vested interest; and that the executory bequest, on the death of any under thirty without issue, was void by remoteness. *Taylor* v. *Frobisher*, 5 De G. & Sm. 191; 21 L. J., Ch. 605; 16 Jur. 283.

—— **Shares of Daughters "to be Vested" at Twenty-one, of Sons at Twenty-five.**]—A testator, after giving life interests to R. and her husband, gave the principal fund to their children in equal shares, the shares of daughters "to be considered a vested interest" at twenty-one, the shares of sons at twenty-five, with provisoes of survivorship and accruer, and a gift over in case of the death of all the children without having attained a vested interest:—Held, on an examination of the whole will, that "vested" meant "indefeasible"; and that the shares should be vested in the legatees on the death of the testator, subject to be divested on their not attaining the specified ages, and that, in the case of sons, the gift over was void for remoteness. *Baxter's Trusts, In re*, 4 N. R. 131; 10 Jur. (N.S.) 845; 10 L. T. 487. And see *Edmondson's Estate, In re*, infra.

A testatrix bequeathed her residue, consisting wholly of personalty, upon trust, as to one-fifth share, to pay the income to her great-nephew H. for life, and at his decease to pay the share unto and among all and every the

children and child of H., if more than one, equally; as to the other four-fifths, upon like trusts for the benefit of the testatrix's great-nieces and nephews, R., P., T., and A., and their children respectively. In the event of the death of any one or more of them, H., R., P., T., and A., without leaving issue, she directed that the share or shares of him, her, or them so dying should be in trust for the survivor or survivors of them, and the income and capital be paid and divided in the same manner as was directed as to the original shares. She then directed that none of the shares should be so paid to or become vested interests in any of the children of H., R., P., T., and A., until he, she, and they attained the age of twenty-five respectively; and that in the meantime it should be lawful for the trustees to pay any part of the income from "such shares respectively towards the maintenance and education of such children respectively." The will then contained a proviso (which was void for remoteness) that if any of the children of H., R., P., T., and A. should die before attaining twenty-five, the shares or share of him, her, or them so dying should accrue to the survivors and survivor. The testatrix then declared that, in case of the death of any other of the children "before such accruing or surviving shares shall become vested as aforesaid," every such accruing or surviving share should again be subject to the same condition of accruer; provided, nevertheless, that, in case any of such child or children should have left issue, such issue should take such share in the trust funds as his, her, or their deceased parent or parents would have had if living; and such share or shares to be paid to such issue at such age or time as thereinbefore was directed with respect to the payment of their parents' original shares:—Held, that the word "vested" must be construed as meaning "indefeasible"; and that the remainders to the children of H., R., P., T., and A., vested in such of the said children as were alive at the death of the testatrix, or were born afterwards. *Edmondson's Estate, In re*, L. R. 5 Eq. 389; 16 W. R. 899.

A testatrix bequeathed the residue of her personal estate to trustees to invest it and pay the income to her three daughters, and the survivors, so long as they should continue unmarried, with similar directions on their deaths or marriage to go over for the benefit of the other five daughters. She also provided that in case the last survivor of her daughters should die without having been married, then immediately after her decease the residue should be "in trust for all my daughters who should have been married, in equal shares and proportions; but in case any one or more of my last-mentioned daughters shall be then dead," as well the original as any other share or shares of her so dying, should be in trust for the children or child of such daughter or each of such daughters respectively in equal shares, if more than one, to be vested at twenty-one. A child of one of the married daughters attained twenty-one, and died unmarried:—Held, that her share went over for the benefit of the other daughters of the testatrix. *Kearsley's Trusts, In re*, 21 L. T. 294.

To be Absolutely Vested at Twenty-one or Marriage.]—A testator directed the trustees of his will to hold a fund in trust "for my child (if only one), or for all my children (if more than one), in equal shares, and so that the interest of a son or sons shall be absolutely vested at the age of twenty-one years and of a daughter or daughters at that age or marriage":—Held, that the shares of the children were on the death of the testator vested in interest though subject to be divested. *Armytage* v. *Wilkinson*, 47 L. J., P. C. 31; 3 App. Cas. 355; 38 L. T. 185; 26 W. R. 559—P. C.

The word "vest" may, if the context of the will is in favour of that construction, be read as importing only that the interest previously vested is at a specified time to become absolute and indefeasible. *Ib.*

To be Vested Interests Immediately on Execution of Will.]—A declaration in a will that shares of legatees shall be vested interests immediately upon the execution of the will does not prevent a lapse on death before testator. *Browne* v. *Hope*, 41 L. J., Ch. 475; L. R. 14 Eq. 343; 27 L. T. 688; 20 W. R. 667. And see *Featherstone's Trusts, In re*, 52 L. J., Ch. 75; 22 Ch. D. 111; 47 L. T. 538; 31 W. R. 39.

3. "VEST" AND "PAYABLE" USED INTERCHANGEABLY.

To Vest at Twenty-one or Marriage—Not Payable until Death of Annuitants.]—Upon a devise of lands in trust to pay annuities to testator's widow and eldest son, the surplus to accumulate until the death of the survivor, to form part of his personal estate, and subject thereto in trust for his first and other sons in strict tail, remainder over with like limitations to his daughters, &c., with a direction that no one of the parties to whom the estates were so limited should come into possession so long as any precedent limitations should remain in contingency. His personal estate he directed to be transferred equally between his grandchildren, except an elder son, or as any should become such, their shares to vest at twenty-one, or marriage of daughters, but not to become payable until the death of the surviving annuitants, but in the meantime the interest of such grandchildren's presumptive share to be applied for their maintenance, including the eldest, the surplus to accumulate and be divisible and payable with their respective shares when become vested and transmissible:—Held, first, that the eldest did not take a vested interest in the personal estate, but was entitled to maintenance before and after attaining twenty-one; secondly, that the other grandchildren took vested interests, although liable to be partially divested by the birth of others, and that the latter were also entitled to maintenance. *Ellis* v. *Maxwell*, 3 Beav. 587; 10 L. J., Ch. 266. See also *S. C.* 12 Beav. 104.

A testatrix gave a legacy of 4,000*l.*, payable at the decease of A. to a class of persons, to be equally divided amongst them, share and share alike, the shares to be vested interests on majority or marriage, and the income, in the event of A.'s death in the meantime, to be paid towards the maintenance and education of such persons. There was no gift over. Two of the class survived A., and died under twenty-one:—Held, that the word "vested" meant "vested in possession," and that the shares of the deceased minors passed to their legal personal representatives. *Simpson* v. *Peach*, 42 L. J., Ch. 816; L. R. 16 Eq. 208; 28 L. T. 731; 21 W. R. 728. S. P.,

Thruston's Estate, In re, 17 Sim. 21; 18 L. J., Ch. 437.

A husband gave the residue of a mixed fund (after a life interest to his wife) among the children of his three brothers who should be living at the death of his wife or his own death, which events should happen last, to be paid and vested in them at twenty-one, or if females on marriage. One of the nieces survived the testator and his wife, but died under twenty-one, unmarried:—Held, that she took a vested interest. *Parr's Trusts, In re*, 41 L. J., Ch. 170. And see *Lucas* v. *Carline*, 2 Beav. 367.

—— **Payment Postponed until Youngest Child Attained Twenty-one.**]—H. gave his residuary real and personal estate to trustees upon trust for conversion, and to invest and accumulate until his youngest grandchild attained twenty-one, or until such time as, if living, he would have attained twenty-one, and then to divide amongst his four grandchildren therein named equally, share and share alike, and their respective executors, administrators, and assigns. And in case any one or more of them should attain twenty-one and afterwards die previously to the time of distribution, his or their share or shares to be vested, but the actual payment to be postponed to the time above mentioned. There was no gift over, nor provision for maintenance out of the shares. One of the grandchildren died a minor:—Held, that his share did not vest, and was undisposed of by the will. *Horsfall's Trusts, In re*, 25 L. T. 197.

Gifts Over before Receipt or Payment when Construed before Vesting.]—*See* WILL.

4. GIFTS TO CHILDREN SURVIVING THEIR PARENTS, WITH DIRECTIONS AS TO VESTING.

Vested and Transferable Interests at Twenty-one.]—Bequest to A. for life, with remainder to her children living at her death, and their issue, the issue to take the share of a deceased parent, followed by a declaration that the children should take vested and transferable interests at twenty-one, or leaving lawful issue at the time of his decease before that age. A child attained twenty-one, and died in the life of A. without having had any issue:—Held, that her representatives took no share. *Payne, In re*, 25 Beav. 556.

—— **Not to be Transferred until after Mother's Death.**]—A testator gave his residuary personalty to a niece for life, and directed his trustees after her death to pay and divide it unto and amongst all and every the children of his niece who should be living at the time of her decease, if more than one, equally; and if only one, then wholly to such only child, "the same to be a vested interest in him or them respectively on their respectively attaining the age of twenty-one, but not to be transferred until after the death of my niece," with maintenance clauses:—Held, that the representatives of children of the niece who attained twenty-one, but died in her lifetime, took no share, for that the words, "but not to be transferred until after the decease of my niece," were not contradictory to the previous expression confining the class to children who survived the niece, and being in any view of the case surplusage, could not be held to modify the definition of the class. *Williams* v. *Haythorne*, *Williams* v. *Williams*, L. R. 6 Ch. 782.

Vested Interests at Twenty-one or Marriage.]—A testator bequeathed residuary personal estate for A. for life, with remainder to the children of A. who should be living at her death, and who, being sons, should attain twenty-one, or, being daughters, attain that age or marry. By a subsequent proviso he declared that the children of A. who attained, or should attain, twenty-one, or die before that age, leaving issue, or, if a female, should have married under that age, should be deemed to have attained a vested interest:—Held, that the proviso introduced a new gift, and having regard also to other provisions in the will, that children of A., who attained twenty-one, but predeceased her, were entitled to share. *Williams* v. *Russell*, 10 Jur. (N.S.) 168.

A will contained a gift to children and the issue of deceased children in language which clearly did not vest it in any till the youngest should have attained twenty-one. In a subsequent part there was a declaration as to the vesting of the shares, expressed with much obscurity, and partially inconsistent with the language of the gift:—Held, that it must be rejected, and the clear gift must take effect; consequently that the shares did not vest till the period prescribed, and the representatives of a child who died before the youngest attained twenty-one took nothing. *Bickford* v. *Chalker*, 2 Drew. 327; 2 W. R. 502.

A testator gave a moiety of residue unto and amongst all the brothers and sisters of his wife that should be living at her death, and he declared that the bequest to them, "who were then nine in number, should be deemed vested interests in them":—Held, that only two of them who survived the testator's wife were entitled. *Draycott* v. *Wood*, 5 W. R. 158.

To be Payable and Vested Interests at Twenty-one.]—Bequest of 4,000*l.* to A. for life, and afterwards, if she shall "leave" any children, upon trust to divide it equally amongst all "such children," to be payable and become vested interests at twenty-one, and in case there shall be only one "such child" who shall attain twenty-one, then to pay it unto such only child. There was a power of maintenance during minority, and also of advancement, not exceeding "such presumptive share" and a gift over, if the daughter should "have" no child who should arrive at twenty-one:—Held, that a daughter of A., who attained twenty-one and married, but died in the life of A., took no share. *Sheffield* v. *Kennett*, 27 Beav. 207. Affirmed, 4 De G. & J. 593.

Gift by will to "all and every the child and children of the testator's daughter who should be living at the time of her decease," to be paid to and become vested in "such child or children," in the case of sons at twenty-one, and in the case of daughters at twenty-one or marriage; but if such times for payment should happen in the lifetime of the testator's daughter and her husband, or the survivor, then after the decease of such survivor; but nevertheless the shares of "all and every such child or children" to be vested and transmissible on their attaining twenty-one or marriage, although such respective times should happen before the decease of the survivor of his said daughter and her husband:—Held, that a child who attained twenty-one and died in the lifetime of its mother took a vested interest. *Dalton* v. *Hill*, 6 L. T. 446; 10 W. R. 396.

Portions for Children.]—The rule that the

court will lean to a construction which gives portions to all of a class of children who may live to require them, is not confined to settlements, but extends also to wills. The rule will be applied so as to modify express words of gift, though the instrument contains no necessary implication to that effect. *Jackson* v. *Dover*, 2 H. & M. 209 ; 4 N. R. 136 ; 10 Jur. (N.S.) 630 ; 10 L. T. 489 ; 12 W. R. 855.

Gift of residue upon trust for testatrix's adopted daughter A. for life, then upon trust to pay to all the children of A. living at her decease equally, at twenty-one or marriage, unless such day of payment should happen in the lifetime of A., and then the payment to be postponed till the death of A., but to be a vested interest in each of the children at twenty-one or marriage :—Held, that a son who attained twenty-one, and died in A.'s lifetime, was entitled to share. *Ib.*

And see post, C. 1. h, *and* E. 2.

Gifts Over before Vesting.]—*See* WILL.

B. VESTING OF INTERESTS IN REAL ESTATE.

1. *In General.*
   a. Gift "at," "when," "if," "until," a Person attains a Certain Age, 1521.
   b. Gifts to Children who Attain a Certain Age, and to a Class at a Certain Age, 1525.
   c. Estate to Arise on a Contingency after a Prior Particular Estate or Interest, 1529.
   d. Estate to Arise on Determination of a Prior Estate by Marriage, 1533.
   e. Gifts to Children without Directions as to Vesting, 1536.
2. *Words of Contingency. Whether Extending to a Series of Limitations*, 1537.
3. *Estates or Interests Limited in Clear Terms of Contingency. Events do not Happen*, 1541.
4. *Divesting of Vested Interests where Events do not Happen or Contingent Clauses Fail*, 1545.
5. *Cross Remainders.*
   a. Implication of in Wills, 1548.
   b. Implication of in other Instruments, 1555.
6. *Contingent Remainders.*
   a. General Principles, 1557.
   b. Trustees to Preserve Contingent Remainders, 1567.
   c. Destruction of Contingent Remainders.
      i. In General, 1571.
      ii. Liability of Trustees, 1572.
      iii. Order on Trustees to Convey, 1573.
7. *Executory Devises.*
   a. In General, 1574.
   b. Failure of Prior Gift. Effect on Executory or Substituted Gift, 1579.
   c. Failure of Executory Gift Over. Effect on Prior Gift, 1582.
8. *Shifting Clauses.*
   a. Construction and Operation, 1584.
   b. Right to Intermediate Income, 1592.
9. *Assignment of Interests*, 1594.

1. IN GENERAL.

a. Gift "at," "when," "if," "until," a Person attains a Certain Age.

Lands Vesting subject to Divesting on Death before Twenty-five.]—By his will the testator purported to charge an annuity of 100*l.* per annum on the lands of T., in favour of his wife for her life, and devised other land (C.) to his son Thomas on his attaining the age of twenty-five ; and should he not live to attain that age, to his son Patrick on his attaining the same age. The testator, on the same date, executed a codicil, which was as follows :—"As a codicil to my said will, in case I have not the power to charge the annuity to my wife on the lands of T., then I charge the same on the lands of C. devised to my son Thomas ; and I charge the said lands of T. with an annuity of one hundred pounds for my said son Thomas, to be payable to him during the life of my said wife out of said lands" :—Held, that (the testator having no power to charge the lands of T. in favour of his wife) the words of the codicil showed a clear intention that the lands of C. devised by the will should vest in Thomas instanter, liable to be divested on his dying before the age of twenty-five. *L'Estrange* v. *L'Estrange*, 25 L. R. Ir. 399.

The testator directed the residue of his property to be invested in land and given to S., who was not to be of age to receive this until he attained his twenty-fifth year, and to be entailed to him and his heirs male :—Held, that S. took a vested estate tail in the land, subject to be divested if he should not attain twenty-five, and that the rents and profits were applicable to his benefit during his minority. *Snow* v. *Poulden*, 1 Keen, 186.

A testator devised his real estate to his executors upon trust to pay the rents for the support of his wife and his present or future grandchildren during the life of his wife, and upon her decease upon trust to convey the property to his present or future grandchildren as they should attain the age of twenty-five, to hold the same unto his said grandchildren, their heirs and assigns, for ever, as tenants in common :—Held, that the devise was void for remoteness. *Blagrove* v. *Hancock*, 16 Sim. 371 ; 18 L. J., Ch. 20 ; 12 Jur. 1081.

If a father devise lands to trustees and their heirs till his son attain twenty-five years, a mortgage thereof by the son when of twenty-one years is void. *Spencer* v. *Chase*, 9 Mod. 30.

—— **Restriction on Alienation.**]—The testator gave an estate to A., "to become his property on attaining the age of twenty-five years, with an injunction never to sell it out of the family ; but if sold at all, it must be sold to one of his brothers" :—Held, that the estate was vested subject to be divested in case of A.'s death before he attained twenty-five, and that the restriction on alienation was inoperative. *Attwater* v. *Attwater*, 18 Beav. 330 ; 23 L. J., Ch. 692 ; 18 Jur. 50 ; 2 W. R. 81.

Estate to be Conveyed at Twenty-three.]—Devise in trust for A. for life of real estate, with remainder to any of his children, as he should appoint. At the date of the will A. had no child, but at the death of the testator he had a son B., three years old. A., by will, appointed to trustees and their heirs, in trust for B. and his heirs, and to be conveyed to him at twenty-three, with a gift over to other sons if B. died under twenty-one ; and he directed the rents to be accumulated until B., or such other sons, should attain twenty-three, and then to pay them over :—Held, that the gift was not too remote, and that the direction to accumulate was valid,

Peard v. *Kekewich*, 15 Beav. 166 ; 21 L. J., Ch. 456.

A testatrix devised real estate to trustees in trust for J. F. for life, remainder to his first and every other son in tail male, with several remainders over, and she devised the residue of her property to J. F. By a codicil, after reciting that she had, by her will, limited her estates to trustees upon trust for the life use of J. F., with remainder to his issue in tail, and divers remainders over, and that since the making of her will J. F. had died, leaving an only child, A. F., who under the will would, as she believed, take an estate tail on her death, the testatrix declared it to be her will that the said A. F. should not become entitled to or take the estate so limited to him until he should have attained the age of twenty-three years ; and she bequeathed a portion of the accumulations of the rents to J. F.'s sister, and directed that she should succeed to the estates next in remainder after the last remainder in the will :—Held, that A. F. took a vested estate at the death of the testatrix, and was entitled to the rents from that period. *Dennis* v. *Frend*, 14 Ir. Ch. R. 271.

Life Estate—Attainment of Twenty-one—Condition Subsequent.]—Devise of real estate to A. for life, and after her decease to B. and C. and D. and E. (an infant), "provided she lives to attain twenty-one" :—Held, that this was a condition subsequent, and the tenant for life having died during the minority of E., that she was entitled to her share of the rents until she attained twenty-one. *Simmonds* v. *Cock*, 29 Beav. 455 ; 7 Jur. (N.S.) 718 ; 9 W. R. 517.

A testator devised real estate to trustees, upon trust, after life interests, to receive the rents during the minority of A., and apply them for his maintenance and education, and accumulate the residue, and to convey the property to A., his heirs and assigns, so soon as he should have attained twenty-one ; and he also devised a rent-charge upon trusts for the benefit of B., his heirs and assigns, declared by reference to the trusts in favour of A. The will contained a declaration, that in case the trusts should determine or become incapable of taking effect, the hereditaments should form part of the residue. B. survived the testator, and died under twenty-one :—Held, that he took an absolute estate in fee in the rent-charge. *Mottram, In re*, 10 Jur. (N.S.) 915 ; 10 L. T. 866.

Devise to trustees, in trust, to lay out the rents and profits for the maintenance of two nephews, and when they attain twenty-one, to be to them and their heirs :—Held, to be an immediate gift vested in the nephews, with a trust to be executed for their benefit during their minority. *Goodtitle* d. *Hayward* v. *Whitby*, 1 Ken. 506 ; 1 Burr. 228. And see *Warter* v. *Hutchinson*, 1 B. & C. 721 ; 5 Moore, 143 ; 3 D. & R. 58. *See* 25 R. R. 551.

—— **Vested Estate in Fee Liable to be Divested.**]—Devise to T. during his natural life, and from and after his decease unto his eldest son if he should have arrived at the age of twenty-one years, and in default of his having a son, then over. T. died leaving an eldest son a minor :—Held, that on the death of T. the eldest son took an estate in fee liable to be divested on his death under the age of twenty-one with an executory devise over in that event to T. in tail. *Andrew* v. *Andrew*, 45 L. J., Ch. 232 ; 1 Ch. D. 440 ; 34 L. T. 82 ; 24 W. R. 329—C. A.

—— **Void Life Estate—Remainder—Acceleration.**]—Gift to the testator's daughter of real and personal estate "during her lifetime, and after her decease the property to be equally divided between her children on their becoming of age" : —Held, that, as regarded the real estate, the gift to the children was strictly a remainder, and that the construction as to the personalty followed the same rule as the realty ; and, therefore, that, the gift to the daughter being void on account of her having attested the will, the gift to the children was accelerated, and took effect immediately. *Jull* v. *Jacobs*, 3 Ch. D. 703 ; 35 L. T. 153 ; 24 W. R. 947.

Held, also, that the remainder to the daughter's children created vested interests. *Ib.*

Effect of Gift Over — Vested Interest Liable to be Divested.]—A testator gave all his real and personal estate to trustees ; and as to his lands at W., which he held in fee simple, he directed that the trustees should stand seised thereof in trust to convey the same to G. H. A. "when and as soon as he should attain the age of twenty-one years" ; but in case he should die before he attained that age without leaving issue of his body, then that the said lands at W., given and devised to him, should sink into the residue of the testator's real and personal estates ; and he then gave the residue to J. G. At the testator's death G. H. A. was only twelve years of age :—Held, that an equitable estate in fee in the lands at W. vested in G. H. A. immediately on the testator's death, liable to be divested in the event of his dying under twenty-one without leaving issue of his body. *Phipps* v. *Ackers*, 9 Cl. & F. 583 ; 6 Jur. 745—H. L. (E.) Affirming 5 Sim. 44 ; 1 L. J., Ch. 96. S. P., *Hepworth* v. *Scale*, 1 Jur. (N.S.) 698.

Testator devised all his real estates to trustees in trust to convey his lands in W. to A. when and so soon as he should attain twenty-one ; but in case he should die under that age, and without leaving issue, then over ; and when B. should attain twenty-four, in trust to convey the rest of the real estates to him on his giving security for the annuities given by the testator and executing certain deeds to the satisfaction of the trustees ; but in case B. should die before he attained twenty-four without leaving issue, then over. A. and B. were both infants at the testator's death :—Held, that A. took a vested interest in possession in the lands in W., but that B.'s interest in the rest of the estates was contingent on his attaining twenty-four and doing the acts required, and that B. took a vested estate in the intermediate rents, the direction as to his giving security not being a condition precedent. *Ackers* v. *Phipps*, 3 Cl. & F. 665 ; 9 Bligh (N.S.) 430—H. L. (E.)

A gift of residuary real and personal estate upon trust to sell and invest, and pay "the said property and interest arising therefrom to A. on his attaining the age of twenty-four ; but in case of his not attaining that age, or leaving male issue, I give, devise, and bequeath the said properties to other persons" :—Held, that A. took an absolute vested interest in the testator's residuary estate, liable to be divested in the events mentioned in the will. *Whitter* v. *Bremridge*, 35 L. J., Ch. 807 ; L. R. 2 Eq. 736 ; 14 W. R. 912.

A testator gave real and personal estate to H., her heirs, executors, administrators, and assigns absolutely, if she should be living at the death of his wife ; but in case H. should die in the lifetime

of his wife without leaving issue her surviving, then over :—Held, that H. took an absolute interest, liable to be divested only in the event of her death in the lifetime of the widow without leaving issue. *Finch* v. *Lane*, L. R. 10 Eq. 501.

Testator devised his estate at E. to trustees upon trust to apply the rents for the maintenance and support of B. till she should attain the age of twenty-five or marry with consent, and to lay out the surplus of such rents in Government securities, that the same might accumulate for the uses and purposes of his will; and from and after the said B. should attain twenty-five, or marry with consent, then to pay her the whole of the rents for her life; and after her decease, upon trust for her children. The testator then gave his estate at S. to the same trustees upon trust, in case the said B. lived to attain twenty-five, or married with such consent as aforesaid, to let her receive the rents for her life; and after her decease, upon trust for her children in manner before mentioned. Provided that, in case B. should marry without consent, the testator revoked all the devises and bequests in favour of her and her issue. All the residue of his real and personal estate, and likewise his estate and premises thereinbefore devised for the benefit of B., in case she should die under twenty-five unmarried, and without issue, the testator devised and bequeathed to the trustees in trust for X., Y., and Z. B. attained twenty-five, and married with consent. Between the death of the testator and her attaining twenty-five there was an accumulation of the surplus rents of the E. estate, after providing for her maintenance, and an accumulation of the rents of the S. estate :—Held, that she was entitled for her life to the income of the former accumulation, as to which the court did not further declare the right, and absolutely entitled to the latter accumulation. *Greene* v. *Potter*, 2 Y. & Coll. C. C. 517; 7 Jur. 736.

Devise to trustees and their heirs in trust to receive the rents, &c., until A. shall attain twenty-one; and immediately after he shall attain twenty-one to convey to the use of A. for life, and from and after the determination of that estate by forfeiture or otherwise in his life, to trustees and their heirs during his life upon trust to preserve the contingent uses; and after his decease to the use of his first and other sons in tail male; and for default of such issue, or in case of the death of A. before twenty-one, upon a similar trust for other persons. A. takes a vested remainder for life after an estate in the trustees for so many years as his minority may last. *Stanley* v. *Stanley*, 16 Ves. 491.

—— **Contingent Remainder subject to be Divested.**]—A testator devised real estate to his widow for life, and after her death to the child or children of H., "if he leave any him surviving; but in case he leave no child or children him surviving," to the child or children of W. H. survived the widow :—Held, that the remainders to the children of H. and W. were contingent, and failed. *Price* v. *Hall*, 37 L. J., Ch. 191; L. R. 5 Eq. 399; 16 W. R. 642. And see *Jackson* v. *Marjoribanks*, 12 Sim. 93; 5 Jur. 885.

And see post, C. 1.

b. Gifts to Children who Attain a Certain Age, and to a Class at a Certain Age.

Estate for Life—Children attaining Twenty-one, or Marrying.]—A testator devised real estate unto and to the use of three trustees, their heirs and assigns, upon trust, to pay the rents to a married woman, for her separate use for her life, and, after her death, in trust for all her children, who being sons should attain twenty-one, or being daughters should attain that age or marry, and their heirs and assigns for ever :—Held, that the trustees took the whole legal fee, and that all the children of the tenant for life living at her death, minors and not minors, took vested interests, in equity, in the estate, subject, as to the share of any minor, to be divested in the event of his or her dying under twenty-one. *Riley* v. *Garnett*, 3 De G. & Sm. 629; 19 L. J., Ch. 146; 14 Jur. 236. S. P., *Doe* d. *Roake* v. *Nowell*, 1 M. & S. 327. Affirmed, 5 Dow, 202—H. L. (E.) And see *Abbiss* v. *Burney*, *Finch*, *In re*, 50 L. J., Ch. 348; 17 Ch. D. 211; 44 L. T. 267; 29 W. R. 449—C. A.

A testator directed his trustees to hold and apply the residue of his estate for behoof of his nieces and their children in certain proportions, viz., one-third to A. in life rent, and her children in fee; one-third to B. in life rent, and to her children in fee; and one-third to C., D., E., and F., equally among them in life rent, and to their children equally among them per stirpes in fee. He further provided that in case A. and B. died unmarried, or without issue, or in the event of such issue existing, but afterwards deceasing before attaining the years of majority, or being married, then the two-third shares destined to them and their issue should fall and accrue to C., D., E., and F. and their children respectively in life rent and in fee, and equally among them per stirpes as provided with respect to their own shares of the residue. A. and B. died without issue. C. died leaving one child, married, and of age, but who had died without issue before A. and B. :—Held, that the representatives of the child of C. were entitled to participate in the division of the fee of the two-third shares which were life-rented by A. and B. *Taylor* v. *Graham*, 3 App. Cas. 1287—H. L. (Sc.) And see *Carlton* v. *Thompson*, L. R. 1 H. L. Sc. 241.

On a devise to the use of A. for life, remainder, in default of appointment, to the use of all and every the children of A. who being sons should live to attain twenty-one, or being daughters should live to attain that age or be married; but in case A. should leave no child, who being a son should live to attain twenty-one; or being a daughter should live to attain that age, or be married, then over. Quære, whether the remainders were vested or contingent. *Styan*, *Ex parte*, Johns. 387. And see *Rhodes* v. *Whitehead*, 2 Dr. & Sm. 532; 12 L. T. 601; 13 W. R. 800.

Quære, whether the distinction between a remainder to a class if they shall attain twenty-one and one to all of a class who shall attain twenty-one can be sustained. *Ib.*

Words of contingency in a gift have no stronger or more uncontrollable force when applied to the description of a person than when applied to the description of an event. *Browne* v. *Browne*, 3 Sm. & G. 568; 26 L. J., Ch. 635; 3 Jur. (N.S.) 728; 5 W. R. 777.

Devise to trustees upon trust for the testator's grandson S. for life, and after his decease in trust for all and every the child and children of S. who being a son or sons should attain the age of twenty-one, or being a daughter or daughters should live to attain that age or be married, equally to be divided between them, if more than

one, and their heirs and assigns; and if there should be only one such child, then in trust for such only child, his heirs and assigns; but in case S. should die without leaving lawful issue, then upon similar trusts for others of his grandchildren and their children successively, with an ultimate trust for the testator's right heirs. The trustees were empowered, immediately after the death of the first tenant for life of the estates, to apply the rents for the maintenance of the person or persons next beneficially entitled thereto. S. died, leaving an only child, an infant, him surviving:—Held, that such child was, under the limitations in the will, devisee of an estate in fee simple, determinable in case of his dying under the age of twenty-one. *Festing* v. *Allen* (12 M. & W. 279; 13 L. J., Ex. 74. *S. C.*, 5 Hare, 573, post) commented on. *Ib.*

But see *Holmes* v. *Prescott*, 3 N. R. 559; 33 L. J., Ch. 264; 10 Jur. (N.S.) 507; 12 W. R. 636, post.

The rule laid down in *Festing* v. *Allen* (supra) that in a devise to the children of A. "who shall attain the age of twenty-one" the words "who shall attain the age of twenty-one" are part of the description of the devisees, gives way to a contrary intention expressed in the devise. *Muskett* v. *Eaton*, 45 L. J., Ch. 22; 1 Ch. D. 435; 33 L. T. 716; 24 W. R. 52.

Therefore, where a testator devised real estate to M. for his life, and in the event of his leaving a lawful son born or to be born in due time after his decease who should live to attain the age of twenty-one, then to such son and his heirs; but in case he should die without leaving a son who should attain the age of twenty-one, then over:—Held, that the words, "or to be born in due time after his decease" showed that the testatrix meant the estate to vest in a son of M. at his birth, and that J., a son of M., who was seven years old at the death of M., took a vested interest in the devised estate, subject to being divested on his death under twenty-one. *Ib.*

Devise to such Children of Tenant for Life "as either before or after her Decease" attain Twenty-one.]—A father devised to his daughter N. an estate for life, and after her decease to her child or children who, either before or after her death, should attain the age of twenty-one or die under that age leaving issue at his, her, or their death, in fee simple as tenants in common; and in case there should be no child of N. who should attain twenty-one or die under that age leaving issue, he gave the estate to the child or children of his daughter G. who, either before or after her death, should attain twenty-one, or die under that age leaving issue living at his, her, or their death, in fee as tenants in common. N. had no child. At the death of N. two children of G. had attained the age of twenty-one. Other children attained twenty-one subsequently:—Held, that the two children were entitled to the estate. *Brackenbury* v. *Gibbons*, 2 Ch. D. 417.

A testatrix devised a freehold estate to her granddaughter E. during her life, and from and after her death to such of her children living at her death "as either before or after her decease" should, being males, attain twenty-one, or, being females, attain that age or marry, in fee simple as tenants in common; and if there should be no such child, then over. E. survived the testatrix, and died leaving seven children, of whom five had attained twenty-one at the time of her death, and two, a son and a daughter, were infants, the daughter being also a spinster:—Held, that the five children took vested interests liable to open to let in the two other children on their fulfilling the conditions of the will. *Brackenbury* v. *Gibbons* (supra) not followed. *Leehmere and Lloyd*, *In re*, 18 Ch. D. 524; 45 L. T. 551. And see *Miles* v. *Jarvis*, 52 L. J., Ch. 796; 24 Ch. D. 633; 49 L. T. 162.

—— **Vested Remainder subject to being Divested.**]—S. devised hereditaments of which he was seised in fee simple to his son R. S. for the term of his natural life, and "from and immediately after his decease unto and to the use of all and every his children who shall then be living, and of their respective heirs and assigns for ever as tenants in common"; and in case his son R. S. should happen to die without leaving lawful issue, or leaving such, and all of them should happen to die under the age of twenty-one years without issue, then to his son T. S. and to his two daughters and their respective heirs and assigns for ever as tenants in common; and he devised all other his real estate whatsoever and wheresoever to his son R. S., and his heirs and assigns for ever. R. S. survived the testator, and married in July, 1826. In January, 1827, he demised by lease and release all his estate in the devised hereditaments. On the 3rd June, 1827, a son of the marriage was born:—Held, that the son so born, as soon as he was begotten, took a vested remainder liable to open and let in the interests of after-born children, and subject only to be divested in the event of his death under the age of twenty-one, and that the life estate of R. S. and his remainder in fee did not emerge so as to extinguish the intermediate estate of the children. *Sulley* v. *Barber*, 59 L. T. 824.

—— **Attaining Twenty-three—Remoteness.**]—In a devise of real estate upon trust for the daughter of the testator for her life, and from and after her decease to convey such estate unto and equally between and among all and every the child and children of the daughter who should live to attain the age of twenty-three years, and to his, her, and their heirs and assigns for ever; and in case there should be no such child or children, or being such, all of them should die under twenty-three without issue, then over, with power to apply for maintenance the interest of such child's share, notwithstanding such child's share should not then be absolutely vested:—Held, that the limitation to the children of the daughter, and the limitations over, in default of such children, are void for remoteness. *Bull* v. *Pritchard*, 5 Hare, 567; 1 Russ. 213; 16 L. J., Ch. 185; 11 Jur. 34. But see *Doe* d. *Dolley* v. *Ward*, 9 A. & E. 582; 1 P. & D. 568; 8 L. J., Q. B. 154.

—— **Attaining Twenty-four.**]—A devise, after a life estate to testator's son A., in these words, "to all and every my grandchildren, the children of my said son A., and three daughters, B., C. and D., who shall attain the age of twenty-four years":—Held, void for remoteness, although there were no grandchildren not born in the testator's lifetime. *Newman* v. *Newman*, 10 Sim. 51; 8 L. J., Ch. 354.

—— **Attaining Twenty-five.**]—A testator devised property to trustees for the maintenance of his four children until they severally attained twenty-five, at which time he devised "unto

such of his said children as should attain that age" one-fifth of the property, to hold to them and their heirs. There was a gift over to the "survivors or survivor" if any died before attaining twenty-five and left no issue, or if they should die after attaining twenty-five and should leave no lawful issue:—Held, first, that their interests did not vest until twenty-five; and, secondly, that the words "survivors or survivor" were not to be read "other or others." *Stead* v. *Platt*, 18 Beav. 50.

Unless there is in a will, or some codicil thereto, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised until they attain twenty-five, but that some other person is to have that enjoyment; or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five, as to induce the court to hold that, as to the previous rents and profits, there has been an intestacy; the court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five. *Gosling* v. *Gosling*, Johns. 265; 5 Jur. (N.S.) 910.

—— **Accumulations.**]—Expressions in a codicil of a testator's devise that real and personal property given by his will should not be enjoyed by any of the successive devisees until twenty-five, and a direction to accumulate in the meantime:—Held, inoperative, there being no gift over. *Ib.* And see *Montgomerie* v. *Woodley*, 5 Ves. 522.

And see post, C. 1. g.

c. Estate to Arise on a Contingency after a Prior Particular Estate or Interest.

Gift of Rents of Estates at Twenty-one—For Life—Period of Vesting.]—A testator, by his will, after giving certain legacies and annuities, gave unto J. the sum of 10*l.* per year for clothes until he attained twenty-one; then he ordered his executors in trust to pay him out of his property the further sum of 30*l.*; and he gave and bequeathed unto the said J. when he attained twenty-one the rents of his estates, called by the names of, &c. (naming them), and the interest of what money was placed in government securities, during his natural life, but subject to the said annuities; and after his death to the child or children of the said J. lawfully to be begotten; if more than one equally to be divided between them, share and share alike; and in case of the death of the said J. without any child or children, then he gave and bequeathed the rents of his estates as aforesaid, and the interest of his money, between his (the testator's) brothers, &c. The estates of the testator mentioned in his will consisted of both freehold and personal estates:—Held, that J. was entitled to the rents and income from the time of the testator's death. *Tapscott* v. *Newcombe*, 6 Jur. 755.

A testator by his will made the following devise: "It is my will that the rents and profits of my freehold estate at E. shall be applied, in the first place, towards the maintenance of J. until he shall arrive at the age of twenty-one years, and that the residue thereof shall accumulate until that event, and that, when he shall attain that age, the same be paid to him for his benefit, and that, after the expiration of the leases subsisting, the freehold shall become the absolute property of J., to hold to him, his heirs and assigns, for ever":—Held, first, that the fee of the property at E. vested in J. at the death of the testator; and, secondly, that the rents of the property between J.'s attaining his majority and the expiration of the leases belonged to J. *Bird* v. *Bird*, 11 L. J., Ch. 390; 6 Jur. 1030.

Life Estate—Remainder—Lands to be Conveyed at Twenty-one.]—A devise of two farms to the father and mother for their lives, remainder to trustees till A. and B. respectively come of age, and then to convey one farm to A., and the other to B. A. died before the time came for the conveyance. A. being to have had an estate in fee, the conveyance shall be made to his heir. *Hook* v. *Taylor*, 2 Vern. 561.

—— **Youngest Child Attaining Twenty-one.**]—Testator gave in trust to his brother E. the remainder of his property of whatsoever kind, to assist him to bring up, educate, and provide for the children of his late brother J., whom he named. "When my youngest nephew attains his age of twenty-one years, it is my will, that all my property be equally divided amongst my nephews or their lawful issue, share and share alike; the division, however, is not to take place, although my youngest nephew have attained the age of twenty-one years, until the decease of my wife, my sister J., and my brother E.":—Held, that the interests of the nephews were not contingent on their living until the youngest of them should attain twenty-one, but vested on the testator's death; and that the word "or" was to be construed conjunctively, and consequently that the nephews took estates tail in their shares of the testator's real property, and absolute interests in their shares of his personal property. *Parkin* v. *Knight*, 15 Sim. 83; 15 L. J., Ch. 209; 10 Jur. 23.

Where a testator devised to trustees his "estate and interest" in farms of which he was seised, for lives renewable for ever, in trust, after paying certain annuities, &c., to permit and suffer his nephew A. to enjoy the same for his life; and from and after his decease, to permit such son of his as should attain twenty-one to enjoy said lands, and on failure of such remainder, to his nephew B. for his life, remainder to his first son as before:—Held, that a son of A.'s who attained the age of twenty-one, and died in the lifetime of his father, took the absolute interest in these premises. *Kirby* v. *O'Hea*, 2 Ir. Eq. R. 424.

Where the testator bequeathed the whole of his property in trust to pay the income to his wife for the support of herself and the children until the youngest should attain twenty-one, and then to be divided into five shares, one to the wife and the others to each of his four children, and which were to vest on the youngest attaining twenty-one: and in case of either of his children dying without leaving issue, then to the children of the other daughters:—Held, to apply only to such shares as were vested, and that, as to the share of one dying under twenty-one, there was an intestacy. *Bastin* v. *Watts*, 3 Beav. 97; 7 Jur. 791.

—— **Estate to be Divided at Twenty-four.**]—Residuary devise of real and personal estate to all the issue, child or children, of M. F., as should be alive at the time of the decease of the survivor of two successive tenants for life, equally amongst them, if more than one to be divided,

share and share alike, when, and as they should respectively attain the age of twenty-four years, and to their respective heirs, executors, administrators, and assigns for ever, as tenants in common :—Held, the children living at the death of the tenants for life took absolute vested interests in the personal as well as in the real estate. *Farmer* v. *Francis*, 2 Sim. & S. 505 ; 4 L. J. (o.s.) Ch. 154.

By certain articles of agreement, it was provided that the interest of a fund which was vested in trustees should be paid to Lady C. for her life, and after her death the principal to go amongst the then unmarried children of herself and her husband, as the husband should by deed or will appoint ; and in default of appointment, equally among the children who should be living at the death of the husband. The fund having been invested in lands, pursuant to a trust in the articles, the husband by his will appointed the lands among his sons as follows :—Ballygriffin to John, Gurtaneelig to George, Knuttery to Henry, and Gneeve to Nelson, to go to them immediately from and after the decease of Lady C., with a clause of survivorship among the brothers, if any of them should die before they became respectively entitled thereto. The testator, by two subsequent deeds of appointment, irrevocably appointed Ballygriffin to John, and Knuttery (which he had by his will given to Henry) to George, and by a codicil (in which these two deeds were recited) he revoked the appointment of Knuttery to his son Henry in the will contained, and instead thereof appointed to him Gurtaneelig. Henry died after the testator, but before the death of Lady C. :—Held, that the period at which the estates given by the will were to be considered as vested, was the death of Lady C., and not the death of the testator. *Charitable Donations Commissioners* v. *Cotter*, 2 Dr. & Wal. 615 ; 2 Ir. Eq. R. 196.

—— **Contingent Remainder, or Absolute Gift subject to Life Interests.**]—The testatrix by her will gave certain real estate to trustees upon trust to pay to or otherwise permit E. S. to receive the rents and profits thereof for her life, and after her decease upon trust to pay to or otherwise permit A. B. to receive the rents and profits thereof for her life, if she should be living at the time of the decease of the said E. S., but if she should be then dead, upon trust for two nieces of the testatrix's late husband, whom she named, absolutely as tenants in common ; and the testatrix gave all the residue of her estate to the said A. B. absolutely. E. S. survived the testatrix, and A. B. survived E. S., and consequently her life interest took effect. She was now dead, the two nieces being now living, and the question was raised whether the estate went to the two nieces, or whether, inasmuch as A. B. did not die in the lifetime of E. S., the gift to them failed, and the estate went to A. B.'s representatives, being given to her absolutely by the joint operation of the gift of the life interest and of the residue :—Held, that the property went to the two nieces, the gift to them not being a contingent remainder, but an imperfect expression of the testatrix's intention that, subject to the two life interests, the nieces were to take absolutely. *Martin, In re, Smith* v. *Martin*, 54 L. J., Ch. 1071 ; 53 L. T. 34.

Remoteness — Gift on Attaining Twenty-five.] — Freehold and leasehold estates were devised upon trust, after certain trusts that failed, to receive the rents and pay them for the benefit of the testator's daughter's son R., and all other sons she should leave, until he and they should attain the age of twenty-five years ; and on attaining that age, in trust for the heirs, executors, administrators, and assigns of the said R., and all other such sons as the daughter should leave who should attain the age of twenty-five years ; but if the daughter should leave no sons, or they should die without attaining that age, then in trust for other objects :—Held, that the gift to R. and the other sons of the testator's daughter was well vested in them, though liable to be divested in case of death under the age of twenty-five. *James* v. *Wynford* (*Lord*), 1 Sm. & G. 40 ; 22 L. J., Ch. 450 ; 17 Jur. 17 ; 1 W. R. 61. *S. C.*, on another point, 2 Sm. & G. 350 ; 23 L. J., Ch. 767 ; 18 Jur. 868 ; 2 W. R. 607.

Observations on *Porter* v. *Fox* (6 Sim. 485), how far it is consistent with *Leake* v. *Robinson* (2 Mer. 203 ; 16 R. R. 168). *Ib.*

Other freehold and leasehold estates were devised upon trust to receive the rents and pay them to the testator's daughter for life, and after her decease to apply the rents, or so much thereof as should be necessary, for the maintenance of the daughter's son R. and all other sons she should leave, until they should attain twenty-five ; and on their attaining that age, in trust for R. and such other sons for life, as tenants in common ; and after their decease for the eldest son of R. and the eldest of all and every of the sons of the testator's daughter and their heirs male in tail as should survive her, with trusts over in default of issue :—Held, that the eldest son of R. and the sons of the daughter other than R. were presently entitled as tenants in tail male in remainder as to the freehold estates, and that, the freehold and leasehold lands being given together, the estate in the freehold being vested in tail, the estate in the leasehold must vest absolutely in the first tenant in tail. *Ib.*

Semble, a gift by will to an individual named and known to the testator does not fail because there are words superadded which include a class to take with him, as to which class the gift must wholly fail, because as to some of them it might be too remote ; secus, where an individual is named as one of a class. *Ib.*

Testator gave his real and personal estates to trustees, and directed them to invest his personal estate in the purchase of land, and to pay the rents, subject to certain annuities, to his son for life ; and in case his son should die leaving behind him no legitimate issue, then he directed the trustees to pay the rents to his (the testator's) widow for life ; but in case his son should die leaving behind him legitimate issue, then, at the end of six months after the eldest male child then living of his son should have attained twenty-five, or in default of male issue the eldest female child then living of his son should have attained twenty-one, to convey all the estates to the eldest male child, or in default of male issue to the eldest female child, and to his or her heirs of his or her body lawfully begotten, absolutely for ever. The testator then, in case his son should die during the minority of such eldest male or female child, provided for their maintenance, and then declared that, in case his son should not die during such minority, his estates should continue on the trusts aforesaid until six

months after his son's death, and then pass to his son's eldest male or female child in manner before expressed; and in case his son should die leaving no legitimate issue, then after the death of the testator's wife the estates to be conveyed to other persons. The testator's son married, and had a son born after the testator's death. The court, holding the trust for the grandson not to be void for remoteness, and the grandson having survived his father and attained twenty-one (but being under twenty-five), and all the annuitants being dead, ordered the estates to be conveyed to him. *Jackson* v. *Marjoribanks*, 12 Sim. 93; 5 Jur. 885.

The doctrine laid down in *Leake* v. *Robinson* (2 Mer. 363; 16 R. R. 168) as to the remoteness applies to real as well as to personal estate. *Walker* v. *Mower*, 16 Beav. 365.

Devise and bequest of real and personal estate to trustees for A. for life, and afterwards "to convey and assure" equally between all A.'s children on their respectively attaining twenty-one, with a gift over on A.'s death without "leaving any child." There was one child who survived A., and died an infant:—Held, first, that such child did not take a vested interest; and, secondly, that the gift over did not take effect. *Ib.*

See also *Catlin* or *Cattlin* v. *Brown*, 11 Hare, 372; 1 Eq. R. 550; 1 W. R. 533.

Maintenance—Accumulations until Twenty-one—Gift on Death without Issue.]—A testatrix devised to trustees freehold premises in trust to receive the rents, and after paying thereout all proper outgoings and applying thereout, if they thought fit, any money towards the maintenance of S., to let the residue accumulate until S. should attain twenty-one, and then to pay such accumulations to him; but if he should die under such age without leaving issue living at his decease, then such accumulations should be for the benefit of the person to whom and in like manner and form as the premises were limited in the like event, and when S. should have attained twenty-one, then the trustees were to stand seised of the premises in trust for him in fee; but if he should not leave any issue living at his decease, then the trustees should stand seised of the premises in trust for A. in fee, and if A. should not leave any issue living at her decease, then over. S. attained twenty-one, and died without ever having had issue:—Held, that the premises vested in S. in fee on his attaining twenty-one, subject to be divested in the event of his dying without issue, which event having happened, the limitation over in favour of A. took effect. *Smith* v. *Spencer*, 6 De G. M. & G. 631; 3 Jur. (N.S.) 193; 5 W. R. 136. And see *Manfield* v. *Dugard*, 1 Eq. Ca. Abr. 194; Gilb. Eq. Rep. 36.

d. Estate to Arise on Determination of a prior Estate by Marriage.

Estate for Life or until Marriage—Gift Over on Marriage only.]—Where a will contains a gift of an estate for life or until marriage, followed by a gift over in terms depending on marriage only, the gift over will be construed to take effect on the determination of the previous estate, whether by death or marriage. And there is no difference in this respect whether the first estate is limited to a widow or to any other persons. *Walpole* v. *Laslett*, 1 N. R. 180; 7 L. T. 526. S. P., *Luxford* v. *Cheeke*, 3 Lev. 125.

If the gift over be in favour of a class to be ascertained on the determination of the previous estate by marriage, the class will, nevertheless, be ascertained at the time when the previous estate determines either way. *Ib.*

Bequest to A. during widowhood, and immediately after her death or second marriage, whichever event should first happen, to trustees to sell and divide between several persons named, or such of them as should be living at the death of A. A. married again:—Held, that the property thereupon became immediately distributable. *Bainbridge* v. *Cream*, 16 Beav. 25. And see *Lancaster* v. *Varty*, 5 L. J. (O.S.) Ch. 41.

A. devised his house, &c., to his wife for life, upon this express condition only, that if she should marry again, then his will and meaning was, that his house, &c., was to go forthwith to his eldest son and his issue; and if all his issue male should die, &c., remainder over. Lord Hardwicke held, that it was not a vested remainder in the son, but a contingent limitation, to take effect only if the wife of the testator should marry again. It was contended to be a devise to the wife during her widowhood, in which case the devise over would have been vested to take effect either on the marriage or death. But Lord Hardwicke thought that, upon the whole will, the devise over was contingent, and to take effect only on the widow's marrying again. *Sheffield* v. *Orrery* (*Lord*), 3 Atk. 284.

A testator gave the produce of his real estate to his daughter E. for life so long as she should remain single; but in case she should marry, then he gave one-half of the income to his daughter E. and one half to his daughter M. (a married woman with children); and after the death of M., he gave one-half of the trust moneys to her children and the other half to the children of E.; and if M. should die without leaving children, then the whole for E.'s children; and if E. should die without children, the whole to M.'s children; and if both should die without children, then over. E. never married:—Held, that upon her death the children of M. took the whole corpus and income, subject only to be divested if M. should die without having any children. *Eaton* v. *Hewitt*, 2 Dr. & Sm. 184; 1 N. R. 10; 8 Jur. (N.S.) 1120; 7 L. T. 496; 11 W. R. 76.

Under a devise of a copyhold estate to testator's wife, during her life, provided she continued single; but in case she did not, then unto A. B. when he should attain the age of twenty-three years:—Held, that though the widow married before A. B. attained that age, she was entitled to the estate until that event; and that the heir-at-law was not entitled to it. *Doe* d. *Westminster* (*Dean*) v. *Freeman*, 2 Chit. 498.

Power of appointment in tenant for life subject to condition of her remaining sole and unmarried, which condition was qualified by a proviso that a marriage with consent of A., B. and C. should not determine that power:—Held, a condition subsequent, and becoming impossible by death of A., B. and C.; marriage of tenant for life after their death, without their consent, did not determine the power. *Aislabie* v. *Rice*, 3 Madd. 256; 8 Taunt. 459; 18 R. R. 230.

Devise of land to A. in trust for E. for life, with a proviso that if E. should marry, then the testatrix devised the land to W.:—Held, that upon E.'s death without having married the gift to W. took effect. *Meeds* v. *Wood*, 19 Beav. 215.

—— **Taking Effect on Death.**]—Where there is a devise or bequest to a woman for life or until she marries again, followed by a gift over upon her marriage, the gift over takes effect upon the determination of her estate by death. *Pile* v. *Salter* (11 Sim. 411) disapproved. *Underhill* v. *Roden*, 45 L. J., Ch. 266; 2 Ch. D. 494; 34 L. T. 227; 24 W. R. 574.

A testator directed the rents of his real estate to be paid to his wife for the maintenance of herself and her children until his eldest son attained twenty-five or until she should marry again, whichever should first happen, and when his children attained twenty-five he directed the rents of the residue of his estate (after raising certain sums) to be paid to his wife if she should then be unmarried, but in case she should marry again he directed that the trustee should pay the residue of his estate (subject to an annuity to the wife) to his children. The widow died during the infancy of the children without having married again:— Held, that, apart from other indications in the will leading to the same conclusion, the general rule applied, and the gift over took effect upon the death of the widow. *Ib.*

A testator bequeathed to his daughter M., so long as she should remain single, 120*l.* a year, and directed that on the day of her marriage the principal should be divided amongst his children, the shares of his daughter M. and of another daughter being given to trustees upon trust for the daughters for life, with certain remainders. The question was, whether the gift over on M.'s marriage took effect on her death:—Held, that the balance of authority being now strongly against *Pile* v. *Salter* (5 Sim. 411), the ordinary rule prevailed, and, although the gift over on marriage included a life tenancy in one-third of the original sum, it took effect on death. *Scarborough* v. *Scarborough*, 58 L. T. 851.

Gift during Widowhood—Gift Over on Death—Remarriage.] — Gift by will to testator's widow A. during her life provided she remained a widow; and from and after her death or remarriage, to B. absolutely, with provisions for maintenance in case B. should not have attained twenty-one at the death or remarriage of A. In the event (which happened) of B. dying during the lifetime of A., then at the death of A. the property was given over to testator's brothers and sisters who should be living at A.'s death. B. died an infant, and afterwards A. married again:—Held, that upon such remarriage the gift over in favour of testator's brothers and sisters took immediate effect, and was not postponed until A.'s death. *Stanford* v. *Stanford*, 56 L. J., Ch. 273; 34 Ch. D. 362; 55 L. T. 765; 35 W. R. 191.

A. for Life or until Marriage—Gift over to Children living at A.'s death—Remarriage.]—A testator bequeathed a fund upon trust for a widow for her life or until she should marry again, and directed his trustees from and immediately after her decease or marrying again to stand possessed of the fund upon trust to pay and divide the same equally between all her children "living at the time of their mother's decease," and the issue of any deceased child, such issue taking the parent's share. The widow married again:—Held, that thereupon her children took immediate vested interests. *Bainbridge* v. *Cream* (supra) followed, but doubted. *Tucker, In re, Bowchier* v. *Gordon*, 56 L. J., Ch. 449; 56 L. T. 118; 35 W. R. 344.

Life Estate of Widow determinable on Several Events—Gift Over on those Events alone.]—Testator gave to trustees all his real and personal estate, upon trust to suffer his widow to receive the rents and dividends for her life, provided she kept his property in repair and insured the same against loss or damage by fire, and provided further that she remained a widow and did not cohabit with any other man; and in case she made default in repairing or insuring his said property, or married again, or cohabited with any other man, then, in either of the said cases, upon certain trusts in favour of his children or their issue. The woman died without having committed any of the acts or defaults on which her life estate was determinable:—Held, the gift over took effect on the determination of the prior estate by death as well as on the other events. *Cane, In re, Ruff* v. *Sivers*, 60 L. J., Ch. 36; 63 L. T. 746.

e. Gifts to Children without Directions as to Vesting.

Period of Vesting—Birth of Children.] — A testator gave freehold and leasehold property in trust for his widow for life, with remainder to his niece for life; and on her decease, for all and every the child and children of the niece, and for their respective heirs, executors, and administrators, as tenants in common, the children to become beneficially interested on the death of their parent:—Held, that the children of the niece took vested interests on their respective births. *M'Lachlan* v. *Tait*, 2 De G. F. & J. 449; 6 Jur. (N.S.) 1269; 3 L. T. 492; 9 W. R. 152. Affirming 28 Beav. 407.

A. devised all his freehold estates in three several parishes to trustees, to hold to them, their heirs and assigns for ever, upon trust to receive the rents till C., his daughter, came of age, with a provision for her maintenance, and to account for and pay the surplus rents upon her coming of age; from that period "as to his said estates" to the use of the trustees, their heirs and assigns, upon trust during the life of C. to preserve contingent remainders, C. and her assigns to receive the rents nevertheless during her life; after her death to the use of all and every the children of C., share and share alike, as tenants in common; in case C. should die under twenty-one, and without issue, the trustees were to account with and pay the balance of the trust account unto and to the use of such person as should by the will be next in remainder, and entitled to the "aforesaid estates and hereditaments" after the death of C.; in case C. should die before she attained twenty-one, or surviving should die without lawful issue, then as to the aforesaid estates to the use of F. in tail male with remainders over in default of such issue. C. attained twenty-one, married, and had six children. E., one of the children, contracted to sell her undivided sixth share in the estates, expectant upon the death of C.:—Held, that there was a remainder in fee to the children of C., which vested at their birth, and that E. could make a good title to her share, which she had contracted to sell. *Hawker* v. *Saunders*, 2 L. T. 132; 8 W. R. 332.

A testator devised an estate to his daughter for life, and after her decease to all and every

the children of the body of his daughter lawfully begotten (in case she should leave more than one child), their heirs and assigns, for ever, as tenants in common; but in case his daughter should have only one child, then he devised the estate to such one child in fee; but in case his daughter should die without leaving any issue of her body, then he devised the estate to all such children of his body as he should leave or have living at the decease of his daughter, in fee. The testator's daughter had two children, both of whom died during her life:—Held, that the two children of the testator's daughter took absolute and devisable estates in remainder under the will, and their devisees were consequently entitled. *Tookey's Trust, In re, Bucks Railway Co., In re*, 21 L. J., Ch. 402.

—— **Death of Survivor of Annuitants.**]—A testator being seised in fee of Whiteacre and Blackacre, charged both with an annuity of 500*l.* for his wife for her life, and devised to trustees two annuities of 200*l.*, one to issue out of Whiteacre, the other out of both estates, for the separate use of his daughters respectively, and limited those two annuities to his son F. in remainder for his life, with a condition of forfeiture on alienating them; and devised Blackacre, subject to the annuities charged upon it, to the trustees upon trust to receive the rents until his grandson J. should attain twenty-one, and to invest the same in stock, "for the purposes of the will," and subject thereto, upon trust for J. in tail male. The testator devised Whiteacre to the trustees in trust to permit F. to receive thereout an annuity of 100*l.* for the life of his mother, and after her death an annuity of 200*l.* for his life, with a condition of forfeiture on alienation. The testator next directed that the rents of Whiteacre should be invested in stock for the purposes of his will; and that Whiteacre should be held upon further trust upon the death of his wife and daughters, and subject to the annuities charged thereon, to permit F. to receive the rents during his life, with a condition of forfeiture on alienation; and from and after his death or forfeiture to his first and other sons in tail male, and in default of such issue, then to permit and suffer J. to receive the rents during his life, with remainder over. Out of the funds to be accumulated as above mentioned by the trustees, the testator directed them to pay and assist in paying the annuities given to his wife, daughters, and F., should those annuities be in arrear for four months, and out of the next moneys which should come to their (the trustees') possession to replace the sums so advanced. The testator charged several legacies also upon the accumulated fund. The testator died, F. having died afterwards without issue, and leaving the other annuitants, viz., his mother and sisters, surviving him:—Held, that the estate for life in remainder in Whiteacre limited to J. did not vest in possession upon the death of F., and would not so vest in the lifetime of any of the annuitants, viz., his mother and sisters, surviving him. *Fitzpatrick* v. *Knaresborough*, 13 Ir. Eq. R. 338.

See also post, 7, and post, C.

2. WORDS OF CONTINGENCY. WHETHER EXTENDING TO A SERIES OF LIMITATIONS.

To Children at Twenty-one.]—A contingency affecting a gift by will to a parent is not to be extended to a gift to his issue, which is an independent bequest; and the court will construe such a gift as vested if the words will at all permit of that construction. *Applebee's Trusts, In re*, 28 L. T. 102; 21 W. R. 290.

A father gave property to his two daughters in equal moieties for their respective lives, with benefit of survivorship, remainder over to the respective children of such daughters, and the issue of deceased children as the daughters should appoint, and failing appointment among such children and issue equally, or (if only one child of either) the entire moiety to go to that one child "at twenty-one years." Failing issue by either daughter (the event which happened), the whole was given over to the children and issue of the other daughter without mention of twenty-one years, as their mother should appoint, and failing appointment amongst such children and issue equally, or (if only one child of such surviving daughter) the entire moiety to go to that one child "at twenty-one years":—Held, that the variances in the descriptions of the legatees must be read in their strict and natural sense, and that, therefore, the attainment of the age of twenty-one was not to be imported into the second gift where it was not expressed. *Ib.*

Survivorship.]—Survivorship held to apply not only to the original, but to the substituted class. *Atkinson* v. *Bartrum*, 28 Beav. 219.

A., seised in fee, has a son B., and a sister C., &c., and devises his lands to his son in tail general; and if his son B. should die without issue, and his wife should survive him, then the wife to have the premises for life, remainder to C. in fee; B., the son, dies without issue, but testator's wife dies before him: C. is not entitled to the remainder in fee, because the contingency is annexed to all the devises over. *Davis* v. *Norton*, 2 P. Wms. 390.

"Likewise."]—A testator devised an estate to his son until he attained twenty-one, and to the testator's widow for life, in case his son died under twenty-one. This was followed by a gift of the produce of the estate to his nephews, which commenced with the word "Likewise":—Held, upon the context, that the gift to the nephews was governed by the same contingency as that to the widow, and the son having attained twenty-one, that the gift to the nephews failed. *Paylor* v. *Pegg*, 24 Beav. 105.

Double Contingency—Dying under Twenty-one and without Issue.]—A testator devised two estates at S. and H. to the use of trustees and their heirs upon trust for R. and the heirs of his body; but in case he should die under twenty-one and without issue, H. estate should be in trust for A. and the heirs of her body, but in case she should die under twenty-one and without issue, upon the same trusts as were thereinafter declared of S. estate; and if R. should die under twenty-one and without issue, as to S. estate, for the testator's son and daughter-in-law during their lives; and subject to the trusts thereinbefore thereof declared, in trust for other persons named. Both R. and A. attained twenty-one, and died without issue:—Held, that H. estate was to go over in the double event of R. dying under twenty-one and without issue, which not having happened the limitation over did not take effect; nor were the ultimate trusts of S.

estate applicable to H. estate. *Doe* d. *Usher* v. *Jessep* (12 East, 288; 11 R. R. 380) and *Brownsword* v. *Edwards* (2 Ves. 242) discussed. *Pearson* v. *Rutter*, 3 De G. M. & G. 398; 1 Eq. R. 352; 1 W. R. 421. Affirmed, nom. *Grey* v. *Pearson*, 6 H. L. Cas. 61; 26 L. J., Ch. 473; 3 Jur. (N.S.) 823; 5 W. R. 454. And see *Sheffield* v. *Coventry* (*Earl*), 2 De G. M. & G. 551; 22 L. J., Ch. 498.

By a will, real and personal estate were devised and bequeathed to trustees, upon trust for the testator's wife for her life, and after her decease, in trust for his daughter, M. U., and all his other children who should be living at his decease, their respective heirs, executors, administrators, and assigns, as tenants in common, but he declared that no division should be made while any child should be under the age of twenty-two years; and as to M. U.'s share, subject to the proviso thereinafter contained: that proviso was, that in case M. U. should survive his (the testator's) wife, the said trustees should stand possessed of her share, upon trust for her separate use for life, and after her decease, for her children; and in case M. U. should have no children, her share should go to the others of the testator's children, in the same manner as their original shares. The testator then provided for the shares of the other children going over, in the event of their dying under twenty-one without leaving issue. M. U. survived the testator, but died in the lifetime of his widow, and never had a child. All the testator's children attained twenty-one:—Held, that M. U.'s share went over to the testator's other children, and did not belong to her administratrix as part of her estate *Doutty* v. *Laver*, 14 Jur. 188.

J. devised all his lands, &c., to his daughter, B., for life, remainder to trustees to preserve, &c., remainder to the use of the first son of B., remainder to the heirs male of the body of said first son, with divers remainders over, and in case of the death of B. without issue of her body living at her decease, then testator devised said lands to his trustees, until his cousin, C., should attain the age of twenty-one; and in case of the death of C., under twenty-one without issue, then to D. for life, remainder to his first, &c., son in tail, remainder to E. for life, remainder to his first, &c., son in tail, remainder over. The court inclined to confine the contingency in the will of J., of B.'s dying without issue of her body living at her death, to the death of C. under twenty-one, and that the subsequent limitations to C. after attaining twenty-one, and to D. and E., are not contingent but vested remainders. *Lethieullier* v. *Tracy*, 3 Atk. 775; Amb. 204. *And see* 2 Ken. 40.

Gift Over on Marriage.]—A testator gave the produce of his real estate to his daughter E. for life, so long as she should remain single; but in case she should marry, then he gave one-half of the income to his daughter E., and one-half to his daughter M. (a married woman with children); and after the death of M., he gave one-half of the trust moneys to her children, and the other half to the children of E.; and if M. should die without leaving children, then the whole for E.'s children; and if E. should die without children, the whole to M.'s children; and if both should die without children, then over. Eliza never married:—Held, that upon her death, the children of M. took the whole corpus and income, subject only to be divested if M. should die without having any children. *Eaton* v. *Hewitt*, 2 Dr. & Sm. 184; 1 N. R. 10; 8 Jur. (N.S.) 1120; 7 L. T. 496; 11 W. R. 76.

Testator devised his real estates to trustees upon trust that his daughter M. should, until twenty-one, if sole and unmarried, receive thereout an annuity of 60*l.*, and that she should thereafter and until thirty-one, if sole and unmarried, receive a further annuity of 40*l.*; but in case his said daughter should marry without the consent of his trustees, then she should only receive an annuity of 50*l.*, and the said estates should immediately upon such marriage be in trust for the children of M., as tenants in common in tail; and for default of such issue, in trust for the testator's sister S.: provided, that if M. should marry with the consent of the trustees, it should be lawful for them to settle the estate upon M. and her husband for their joint lives and the life of the survivor, with remainder to the children of the marriage, under the same limitations as before. M. married with the consent of the trustees and died without issue:—Held, that the remainder to S. was conditional, depending on M.'s marriage without consent; consequently, that M. having married with consent, the remainder to S. failed, although M. died without issue. *Tolderey* v. *Colt*, 1 Y. & Coll. 621; 5 L. J., Ex. Eq. 25. And see *S. C.* at law, 1 M. & W. 250; 1 Tyrw. & G. 324.

Testator gave his real and personal property to trustees, their heirs, &c., upon trust to pay and divide the same unto and amongst all and every his children who might be living at his decease, share and share alike, for their lives; "and in case any of my said children, being daughters, shall marry, and shall happen to depart this life in the lifetime of her or their husband or husbands, I direct that the share or shares of her or them so dying shall go to her or their respective husband or husbands for his or their life or lives, and from and after his or their decease then to be equally divided amongst all and every the child and children of my said daughter and daughters then living, and in default of any such child or children then I direct such share or shares shall go and be divided equally to and amongst all and every my said children who shall be then living." The testator left a son and seven daughters; one of the daughters died unmarried:—Held, that the gift over of the shares applied only to the shares of daughters marrying, and that the share of the daughter who died a spinster was undisposed of after her death. *Lett* v. *Randall*, 10 Sim. 112.

If Absent Person should Claim.]—A testator bequeathed his leasehold estates to trustees, out of the rents to pay an annuity to his daughter, and he proceeded: "And I direct, that if my son Henry, now absent, shall within five years make his claim to my trustees, he shall be entitled to and receive one moiety of my leasehold estate, subject however, together with the other moiety thereof, in favour of my son William, to the annuity and trust before mentioned":—Held, that William was entitled to a moiety of the leasehold, subject to the annuity, and that the gift to him was not contingent on Henry's claiming. *Partridge* v. *Foster*, 35 Beav. 545.

And see post, C. 3.

—— **In Gifts Substituting Children for their Parents.**]—*See* WILL.

3. ESTATES OR INTERESTS LIMITED IN CLEAR TERMS OF CONTINGENCY. EVENTS DO NOT HAPPEN.

Marriage or Death of Widow after Death of Son without Issue.]—A testator devised one moiety of his property to his wife during widowhood, and the other moiety upon certain limitations for the benefit of his son and his issue, with the like devise to the son and his issue as to the widow's moiety in the event of her death or marriage in her son's lifetime, and directed that if the son should die during the widowhood of his mother without leaving lawful issue, then that his share should go to the widow for life; and, "in case of the marriage or death of his present wife, his said son being dead and leaving no lawful issue," he gave the whole to J. B. The son survived the mother, and then died without issue:—Held, that the contingency was too clearly confined to the marriage or death of the widow, after the death of the son without issue, to allow of the gift over taking effect, and the heir-at-law of the testator was entitled. *Dicken* v. *Clarke*, 2 Y. & C. 572.

Portion to be Paid to Son within Six Years after Father's Death.]—A., the father, and B., the eldest son, resettle an estate, to the use of A. for life as to part, then to trustees for two hundred years, to raise 1,100*l.* to be paid to the second son within six years after A.'s death, or as soon after as the same could be raised, and in the meantime interest from A.'s death, for and towards his maintenance, remainder to B., the eldest, &c.; C. died indebted, and two years after him A. died; from whom a good estate came to B. The creditors cannot have this portion raised, the contingency upon which it was payable never happening. *Bradley* v. *Powell*, Cas. t. Talb. 193.

Marriage or Twenty-one.]—Devise of houses to executors in trust to receive the rents for the support, clothing, maintenance and education of the testator's children until they should respectively attain twenty-one or marry, and from and after which, to A., B., and C., or such of them as shall be then living:—Held, that the devise to A., B., and C. did not take effect in possession until after all the children attained twenty-one or married. Quære, whether there was an intestacy as to the surplus rents beyond what was necessary for the maintenance and education of the children during their minorities. *Farran* v. *Smith*, 11 Ir. Eq. R. 254.

Limitation Over—Condition—If Person should come to the Possession of Estate.]—Where an estate has been plainly given in a will, it is not from the use of subsequent words to be treated as given upon a condition, if those subsequent words are capable of being interpreted, not as a condition imposed, but as a mere description of the event on which the gift is to come into existence. *Edgeworth* v. *Edgeworth*, L. R. 4 H. L. 35; 17 W. R. 714.

W. devised to his brother C. for life, and in default of C. having issue at the time of his death to his next brother, F. B., for life, and, in default of F. B. having issue living at the time of his death, to his youngest brother P. in fee. The testator then described how C.'s children should take (namely, in tail male), and went on thus: "And in case F. B. should come to the possession of the said estate hereinbefore limited to him, and should die leaving issue, said issue to take in like manner" as before limited to the issue of C. F. B. died in the lifetime of C., leaving a son. C. died some years afterwards:—Held, that the words "should come to the possession" did not constitute a condition which, not having happened, prevented F. B.'s son from taking under the will, and so created an intestacy, but that he took under the force of the limitation created in favour of his father. *Ib.*

—— **Gift Over in Default of Issue and in Case of Death.**]—Testator gave properties to his daughter and her issue, "and in default of such issue, and in case of her death," he gave them over. These are words of double contingency—default of issue and death; and the limitation will accordingly take effect on her dying without children at any time. *Gawler* v. *Cadby*, Jacob, 346. And see *Maddison* v. *Chapman*, 3 De G. & J. 536; 28 L. J., Ch. 450; 5 Jur. (N.S.) 277; 7 W. R. 214. Affirming 4 K. & J. 709.

—— **Death without leaving Issue.**]—A testator gave certain property to all his children who should be living at a certain time after his death; and added a proviso that, in case of the death of any child before that time without leaving issue, then the share which such child would have taken if living at that time should go to A. One of the testator's children living at the date of his will predeceased him, leaving issue who survived the testator:—Held, that A. took no interest in the property under the proviso. *Groome* v. *Dell*, 3 N. R. 26.

A testator gave real and personal property to trustees for his son John for life, and after his death for his children in equal shares; but if his son John should die under twenty-one without leaving lawful issue living at his decease, he directed the property to be in trust for his other children in equal shares. And after further gifts, he gave the residue of his property for his four sons, Matthew, Thomas, John and Christopher; but in case no child of his should live to attain twenty-one, or if none of them should leave lawful issue at his or her death, or respective deaths, then he gave the residue to other persons. In 1863 he died, leaving one daughter, Jane, and the four sons named in his will surviving. All the testator's children attained twenty-one. John, who attained twenty-one in 1864, died without issue in 1868;—Held, that the property of which trusts were declared in favour of John and his children did not on John's death pass under the gift over to the other children of the testator, but fell into the residue; and that under the residuary gift the three surviving sons and the representative of the deceased son took indefeasible interests. *Imray* v. *Imeson*, 26 L. T. 93. And see *Brown* v. *Walker*, 2 L. J. (O.S.) Ch. 82.

—— **Marriage, and Children of Marriage who should attain Twenty-one.**]—Testator gave certain fee farm rents and stock in the funds to trustees upon trust to pay the annual produce and dividends to his two nieces, M. and N., for their lives, and the life of the survivor, and after the decease of the survivor of them unmarried, to convey or transfer the rents and the stock to

the children of B.; with a proviso, however, that if his nieces, or either of them, should marry, the trustees should have power to settle the share of the party marrying for her benefit, and that of her husband and children; and that in the event of a marriage, and children of the marriage who should attain twenty-one, but not otherwise, the limitations over in favour of B.'s children should be void; and the testator gave the residue of his property to M. and N. absolutely. M. and N. both married, but had no children, and their settlements provided that in the event of their having no children the persons interested under the will should take:—Held, that the children of B. were entitled. *Doyne* v. *Cartwright*, 1 Coll. C. C. 482.

—— **Death without Issue Male before Life Tenant.**]—A testator, after giving various life estates in his real and personal property, directed that if M. H. should, after the death of J. and certain other first tenants for life, die before N. H., the last tenant for life, leaving issue male, then his trustees should convey one moiety of his real estate to trustees, to the use of the first and other sons of M. H. successively, in tail male, with remainder to N. H. for life, with remainder to his sons in tail male; and he directed one moiety of his personal estate to be invested in the purchase of real estate to be settled to the same uses. The testator then gave corresponding directions with regard to the other moiety, in the event of N. H. dying before M. H. And in case M. H. and N. H. should both die without issue male, then the testator directed his trustees to convey his real estate to such persons as would be his right heirs at the death of the survivor of M. H. and N. H., and to transfer his personal estate to such persons as would be his next of kin. M. H. died without issue in the lifetime of J. On J.'s death, N. H. claimed an absolute interest in the personal estate, and suffered a recovery of the real estate, and afterwards died without issue:—Held, that, although M. H. died in the lifetime of J., and although from the circumstance of M. H. dying in the lifetime of N. H., the events in which the estate was limited to the issue of N. H. did not take place; still, under the terms of the will, N. H. became entitled, on the death of J., to both moieties; and that he took the personal estate absolutely, and an estate tail in the real estate. *Franks* v. *Price*, 3 Beav. 182; 9 L. J., Ch. 383. And see *S. C.* at law, 5 Bing. (N.C.) 37; 6 Scott, 710.

—— **Gift to Issue, whether Substantive or Substitutive.**]—Gift to a niece for life, and afterwards to her children, and in default to the niece's mother for life; and, on such default, and after the death of both, to the children of A. A. (deceased) "then living," and the issue then living of any child of A. A. "dying in the lifetime of the niece," such issue to take the parent's share:—Held, first, that the words "then living" referred to the period of distribution. Secondly, that the issue of the children of A. A. took as objects of the gift, and not by substitution for their parent. Thirdly, that no child of A. A. could take who did not survive both the niece and her mother. Fourthly, that issue of a child who survived the niece did not take, they not fulfilling the condition of being issue of a child "dying in the life of the niece." Fifthly, that the issue of a child of A. A. who was dead at the making of the will would take "if then living." *Coulthurst* v. *Carter*, 15 Beav. 421; 21 L. J., Ch. 555; 16 Jur. 532. And see *Pride* v. *Fooks*, 3 De G. & J. 252; 28 L. J., Ch. 81; 5 Jur. (N.S.) 158; 7 W. R. 109; and *Murthwaite* v. *Jenkinson*, 2 B. & C. 357; 3 D. & R. 765; 26 R. R. 384, 391.

Gift Over on Two different Events.]—Devise of lands to be sold in aid of personal estate, "and after death of my wife, the estates not sold and the personal not applied, to be subject as aftermentioned; the rents and produce to be carried on in accumulation of 3 per cent. as aforesaid, during her life, and also for five years after her death; and to be laid out in land; then if my son M. shall be living, and any lawful issue of his body, and if my son G. shall be living, and any lawful issue of his body, to them for life, as tenants in common, then to their issue in moieties; if only issue of one, to that issue, if but one, to that one"; with power of settlement: "my wife to receive such provision as aforesaid neat and clear, and the residue only to be subject to the devise over to take place after her death; and if both my said sons shall be dead without issue," then to his daughter for life; after her death to her son, his heirs, &c.; and if she should have any other issue, to them, their heirs, &c., on failure of issue of his sons and grandson. The devise over is attached to the single event of both sons being dead with issue at the death of the wife, or five years after at most; and one son being alive at that time, though without issue, it never took effect. But the son is not entitled to the estate absolutely on account of the contingent interest in his issue. *Graves* v. *Bainbrigge*, 1 Ves. 562.

A testator gave to his wife a house during her life, and at her death to go to his two children, the rent to be equally divided between the two, and at their death to go to their children; but in case that either one of them should die without children, that share to go to the other. Both the children survived the wife, and died without children:—Held, that on the death of the child who died first, the other became entitled to the entire house. *Drennan* v. *Andrew*, 36 L. J., Ch. 1; 15 L. T. 259—L. C.

A testator possessed of real and personal estate, and also devisee of Whiteacre for life, with remainder to his children, gave one-fourth of his residuary real and personal estate to a married daughter for life, with remainder to her children. The testator then directed his said daughter to sell her share of Whiteacre to his eldest son, at a fixed price, and in case she should refuse to do so, he gave her share of his residuary real and personal estate over to his eldest son. The testator further directed his said daughter to settle certain real property, and also the purchase moneys of Whiteacre, upon certain trusts, and in case she should refuse to make such settlement, he gave the property given to her by the will over to his other children. On the death of the testator the daughter not only declined to sell her share of Whiteacre, but also at the same time declined to settle the property above mentioned:—Held, that as the testator had not provided for the simultaneous breach of both conditions, the gift to his daughter and her children took effect as if no clauses of forfeiture had been contained in the will. *Ormerod* v. *Riley*, 12 Jur. (N.S.) 112; 13 L. T. 571—L.JJ.

See also post, C. 4.

4. Divesting of Vested Interests where Events do not happen or Contingent Clauses Fail.

Share to be Transferred to Survivor in Event of Grandchild Dying in Daughter's Lifetime.]—Devise of real estate to three daughters for life, and after their decease to three grandchildren as tenants in common in fee; and in case of either of the grandchildren dying in the lifetime of the daughters, the share of them so dying to be "transferred" to the "survivors," and if only one should be living, then to him or her so "surviving." The survivor of the daughters outlived the three grandchildren:—Held, that the survivorship had reference to the death of the last tenant for life and not to a survivorship between the grandchildren, that the divesting clause never took effect, and that, on the decease of the survivor of the three daughters, the heirs of the three grandchildren took as tenants in common in fee. *Littlejohns* v. *Household*, 21 Beav. 29.

A testator declared trusts of his estate to be for his wife for life, and after her death he gave the same estate to his first cousins by his mother's side and the issue of such of them as might happen to be dead per stirpes, and to their heirs, executors, administrators and assigns for ever as tenants in common:—Held, that the period for ascertaining the class to take was the death of the testator's widow. *Baldwin* v. *Rogers*, 3 De G. M. & G. 649; 22 L. J., Ch. 665; 17 Jur. 267.

Held, also, that the first cousins ex parte maternâ, living at the death of the testator, took vested interests, subject to open so as to let in all other first cousins ex parte maternâ born before the period of distribution. *Ib.*

Gift to Children — Gift Over in Default of Issue.]—The court may supply words in a will, where the context shows, by a necessary implication, what are the words omitted, and unless they are supplied there would be an intestacy. *Hope* v. *Potter*, 3 K. & J. 206; 5 W. R. 389.

So where there is a gift by will, and then a gift over, not commensurate with the original gift, the court will curtail the general words of the gift over, by supplying words of reference; as where the first gift is to A.'s children and the gift over is in default of issue A. The court will read the gift over as though it were in default of "such" issue. *Ib.*

—— **Death without leaving Issue.**] — But where there was a devise of a particular property to the testator's daughter, A., her heirs and assigns, and if she should die under the age of twenty-five years, "without having left any child or children," over, and subsequently, a devise of other real estate to trustees in fee, in trust for A., for her separate use; and after her death, in trust to convey the same "unto and equally amongst such children of A., as tenants in common, the rents and profits in the meantime to be applied for their maintenance; and in case A. should die without leaving any child or children, or leaving such child or children, all should die under twenty-one," over:—Held, that the court could not, after "such children of A.," supply the words "as should attain twenty-one," but was at liberty, as against the testator's heir, to construe the word "such," as relating to all the children of A., as they had been mentioned in the previous limitation. *Ib.*

A testator devised all the residue of his real estate in trust for his six younger children, and directed that in case any one or more of his six younger children should happen to die in his lifetime leaving issue living at his decease, and which issue, being issue male, should live to attain the age of twenty-one years, or, dying under that age, should leave issue surviving, or being issue female, should live to attain that age or be previously married; then in such case the share to which such child so dying would, if he or she had survived the testator and had attained the age of twenty-one years, have become absolutely entitled, should be held upon trust for such issue:—Held, that the two infant children of one of the six younger children of the testator who had died in the testator's lifetime took a vested interest in the share of their deceased parent liable to be divested on their death under the age of twenty-one years. *James' Settled Estates, In re*, 51 L. T. 596; 32 W. R. 898.

Devise to William, and Mary, his wife, and the survivor of them, during their lives; then to M. their daughter, or if more children by Mary, equal between them; and in case they leave no children, then to their heirs and assigns for ever:—Held, that this last remainder became vested when the survivor of William and Mary (namely William), died, leaving no children by their marriage. *Doe* d. *Nesmyth* v. *Knowls*, 1 B. & Ad. 324; 9 L. J. (o.s.) K. B. 78.

Testator gave all his real and personal property to his wife for life, and at her death, if he left issue, to the child or children he might leave at his decease; but if he died without leaving issue, then he gave all his property in equal proportions to his brothers and sister, Thomas, Anthony, John, and Jane; and if any of them should die without leaving issue he gave such share or shares to the survivors or survivor of them; but if issue he gave such share to their children. The testator died without issue. John died a bachelor in his lifetime. Jane died in the lifetime of his widow, leaving one child and several grandchildren, the issue of a deceased child. Thomas survived the widow, and died leaving children. Then Anthony died a bachelor:—Held, that the share intended for John belonged absolutely to Thomas, Anthony, and Jane; that Jane's share belonged to her child, Thomas's to his children, and Anthony's to his real and personal representatives. *Benn* v. *Dixon*, 16 Sim. 21; 11 Jur. 812.

A testator gave all his real and personal estate to his two sons and daughter in equal shares absolutely, and if his daughter should die without leaving issue, he gave the property bequeathed to her to the survivors or survivor of his said sons:—Held, that the survival of the sons was part of the contingency raising the gift over; and therefore, the sons having predeceased the daughter, the latter's estate became indefeasible, although she died without leaving issue. *Jones* v. *Davies*, 28 W. R. 455.

—— **To Daughters if no Issue Male Living at Mother's Death.**]—A testator provided that if his daughter should have no issue male of her body living at her death, or no such issue male as should be entitled by the true meaning of that his will to his real estates thereby limited, then and in either of those cases he devised his estates to the daughters of his daughter living at her death:—Held, that the daughters of the daughter did not take any estate under the limitations in

the will, for that the words "living at her death" applied to both branches of the proviso, and that the contingency on which the daughters were to become entitled determined at the death of their mother. *Eden* v. *Wilson*, 4 H. L. Cas. 257; reversing *S. C.* nom. *Wilson* v. *Eden*, 12 Beav. 454. And see *S. C.* at law, 5 Ex. 752; 20 L. J., Ex. 73; 19 L. J., Q. B. 104; 14 Jur. 616.

—— **Child's Share on Death "during Continuance of Trusts" of Will.**] — A testator, who died in 1876, by his will gave a freehold house to trustees upon trust, as soon as conveniently might be after his death, to let the same upon certain terms; and until the granting of a lease the trustees were to permit the business at the house to be carried on by the testator's son R. and his daughter M. for the benefit of his estate. Subject thereto the testator gave the house and all his residuary real and personal estate to his trustees upon trust to sell and convert "as soon as conveniently might be after his death," and to hold the proceeds in trust for all his children equally: provided that if any child of his should die in his lifetime, "or during the continuance of the trust hereinbefore declared," leaving issue, such issue should take by substitution the parent's share; and if any son of his should die in his lifetime, "or during the continuance of the trusts hereinbefore declared," leaving a widow and no issue, such widow should take the share of her deceased husband for her life, and after her death the share should form part of the testator's residuary estate. The trustees had full powers as to mode, time, and place of sale, of any of the property directed to be sold. In 1878 the trustees let the freehold house. In 1881 one of the sons died intestate, and without issue, leaving a widow. The question was whether, on the death of the son, his interest in the residuary property was divested:—Held, that the absolute interests given to the testator's children became indefeasible at the latest when the lease of the house was completed, and the business was no longer carried on for the benefit of the estate; and that the share of the deceased son would devolve, subject to his funeral and testamentary expenses and debts, as to one moiety to his widow, and as to the other to his next of kin. *Teale, In re, Teale* v. *Teale*, 53 L. T. 936; 34 W. R. 248.

Gift to pay Debts and to convey residue to Son absolutely—Death of Son leaving Children.] —Testatrix gave all her real and personal estate to trustees in trust to pay all her debts, &c., and certain annuities, and then as to the residue of her estate directed them to convey, assign, or otherwise assure the same unto and to the use of her son, his heirs, executors, &c., absolutely. And if her son should marry, and should die leaving children who should live to attain the age of twenty-one years, the trustees were to convey, &c., the residue to such children equally, as tenants in common absolutely, but if her son should die in her lifetime, without leaving children or a child surviving, then the trustees were to convey, &c., the residue to the persons named, for their absolute use and benefit. The son married after the date of the will in the lifetime of the testatrix, survived the testatrix, and had children living:—Held, that death leaving children meant death in the lifetime of the testatrix, and that that not having happened, the son became, subject to the payment of debts and annuities, entitled absolutely to the residue. *Luddy, In re, Peard* v. *Morton*, 53 L. J., Ch. 21; 25 Ch. D. 394; 49 L. T. 703; 32 W. R. 272.

And see post, C. 5.

Period of Defeasibility in Gifts Over in General.]—*See* WILL.

5. CROSS REMAINDERS.

a. Implication of in Wills.

Devise to Two or More as Tenants in Common in Tail — Gift Over in Default of such Issue.] —Whether cross remainders are to be implied or not is a question of construction; and wherever there are limitations in tail male, "and in default of such issue," a gift over, the presumption is, that that means in default of all such issue male. *Taaffe* v. *Conmee*, 10 H. L. Cas. 64; 8 Jur. (N.S.) 919; 6 L. T. 666.

A testator, by will, in 1823, after bequeathing real estate to his nephew D. for life, with remainder to his first and other sons in tail male, proceeded as follows: "And for default of such issue male in D., then to the use of my nieces, and the survivor of them, for the term of their natural lives, as tenants in common, and not as joint tenants, without impeachment of waste; and from and after their decease to the use of their first and every other son and sons lawfully begotten on their bodies, and the heirs male of their bodies, successively, in equal proportions, the elder of such sons of each of my nieces, and the heirs male of their bodies, being always preferred and to take before the younger and the heirs male of their bodies; and for default of such issue male, then to the daughters of my nieces; and for default of such issue, male or female, to the use of my own right heirs for ever." The nephew died without issue. One niece died leaving a daughter, the others having sons:—Held, that the three nieces were entitled as tenants in common for life, with remainder to the survivors and survivor of them, with remainder to the eldest sons of the three nieces as tenants in common in tail male. The daughter of the niece could take no estate until the prior limitations to the sons of the other nieces were exhausted. *Ib.*

Where by a very obscure and illiterate will, property was left to devisor's four grandsons, "and to the heirs male of the said grandsons, and then to the grandsons' heirs males that part that belonged to their father, and then to the last liver to the heirs males of the said grandsons, and for want of issues males of the grandsons," over; the court implied cross remainders. *Doe* d. *Southouse* v. *Jenkins*, 5 Bing. 469; 3 M. & P. 59; 7 L. J. (O.S.) C. P. 182; 30 R. R. 700. And see *Holmes* v. *Meynel*. T. Raym. 452; T. Jones, 172. *Brooke* v. *Turner*, 2 Bing. (N.C.) 422; 2 Scott, 611.

In order to raise an implication of cross remainders, there must be a devise to two or more persons as tenants in common in tail. *Sharp, In re*, 2 N. R. 54. *S. C.* nom. *Tharp's Estate, In re*, 2 N. R. 253; 33 L. J., Ch. 59; 8 L. T. 559; 11 W. R. 763. And see *Woodhouse* v. *Herrick*, 1 K. & J. 352; 3 Eq. R. 817; 24 L. J., Ch. 649; 3 W. R. 303.

A testator devised to three persons in equal shares, and the heirs of their bodies respectively lawfully begotten, with a gift over in fee in

default of such issue "of any of them":—Held, that cross remainders should be implied between the tenants in tail, notwithstanding the words "of any of them" in the devise. *Powell* v. *Howell*, 16 W. R. 1116.

Question as to cross remainders in will. *Eastland* v. *Reynolds*, Dick. 317.

A. devised lands to his wife for life, and then to his son and daughter, to be equally divided between them and the respective issues of their bodies, and for want of such issue, to his wife in fee. This will not create a cross remainder, which can only be raised by an implication absolutely necessary, which is not here the case, for the words "several of the respective" effectually disjoin the title. *Davenport* v. *Oldis*, 1 Atk. 579.

Cross remainders have never been adjudged to arise merely upon these words, "in default of such issue." *Ib.*

Devise by very general and extensive words, restrained upon the apparent intention. Devise to the first and other sons in tail male, and for want of such issue to the daughter and daughters, her and their heirs, as tenants in common, and for want of such issue to three nieces, and their several and respective heirs for ever as tenants in common, and for want of such issue to the testator's right heirs. As to the estate of the niece, the prior limitations having failed, and the implication of cross remainders, quære. *Green* v. *Stephens*, 12 Ves. 419. See further 17 Ves. 64. And see *Phipard* v. *Mansfield*, 1 Dougl. 53 n.; Cowp. 797, and *Doe* d. *Gorges* v. *Webb*, 1 Taunt. 234; 9 R. R. 754.

Under a devise in trust to settle on the devisor's children in equal shares and proportions undivided, for and during their respective lives, with remainder to their issue, severally and respectively in tail general, with cross remainders over, there being two daughters, cross remainders implied not only among the several children of each, but also as between the two families. *Horne* v. *Barton*, 19 Ves. 298; G. Cooper, 257.

Implication of cross remainders under a direction in default of such issue to go over. *Ib.*

Devise to first and other sons, and in default to daughters as tenants in common, and in default of such issue over, raises cross remainders between the daughters. *Wright* v. *Englefield*, Amb. 468; 2 Eden, 239.

Where estates tail are devised to more than two persons as tenants in common, and it is manifest that the testator did not intend that any part of the estate should go over, unless there were a failure of issue of all the devisees, there the devisees take cross remainders. Where estates tail are given to two persons only as tenants in common, there cross remainders between them will be implied, although there is no expressed intention that no part of the estate should go over until the failure of issue of both, unless the limitation to them be successively, severally, or respectively. *Livesey* v. *Harding*, 1 Russ. & M. 636; Tam. 460.

Devise to trustees and their heirs in trust to receive and pay over rents and profits to A., a feme covert, for life for her separate use; and after her decease to convey to her daughters as tenants in common in tail, remainder over. A. takes an equitable estate for life, and may, by lease and release, make a tenant to the præcipe for an equitable recovery; each daughter takes a vested estate when she comes in esse, subject to be divested as the number increases; the conveyance in execution of the trust need not wait the death of A. Personal estate not exempted from the debts, &c., by a charge upon the real. Cross remainders implied. *Burnaby* v. *Griffin*, 3 Ves. 266.

Testator devised freehold fee-simple estates in possession to all and every the child and children of his daughter, S., for life; and after the decease of such child and children, to the lawful issue of such child or children, to hold to such issue, his, her, and their heirs as tenants in common, and in default of such issue over. S. had nine children, four in testator's life and five after:—Held, that the nine took under the devise as tenants in tail with cross remainders. *Mogg* v. *Mogg*, 1 Mer. 654; 15 R. R. 185.

Devise in trust for the testator's daughters M. and C., for their lives, for their separate use; and in case both M. and C. should die without leaving issue, then over implied estates tail to M. and C., with cross remainders in tail. *Stanhouse* v. *Gaskell*, 17 Jur. 157; 1 W. R. 77.

Devise and bequest of freehold and leasehold estates to trustees upon trust, after paying certain annuities, to settle the same, so that, as nearly as the rules of law and equity would permit, the testator's six younger children should receive the rents and profits in equal shares during their lives, with benefit of survivorship if any of them should die without leaving issue, and, if any should die leaving issue, that the child or children of him or her so dying, during the lives of his said other children, and of the survivor, should take the share of him or her so dying of the said rents and profits, and that upon the death of all his said other children, as to the leasehold estates, the same to go and belong to the issue of his said other children for their respective lives in equal shares, with benefit of survivorship, and, as to the freehold estates, the issue of his said children to take the rents, profits, and proceeds thereof for their respective lives in equal shares, with benefit of survivorship in case of the death of any of such issue without leaving issue, and, if any of such issue of his said children should die leaving issue, the child and children of him or her so dying during the lives of such issue of his said children, and of the survivor of them, should take the share of him or her so dying; and after the death of all the issue of his said children, then, as to the said leasehold estates, the same to go and belong to the child and children of such issue absolutely as tenants in common; and as to the said freehold estates, in case the issue of his said children, or any of them, should leave issue living at the decease of the last survivor of the said issue, then that the same should be to the use of the child and children of the bodies of the issue of his said children, and of the heirs of the body and respective bodies of such child and children, and, if more than one, equally to be divided amongst them as tenants in common; and if there should be a failure of issue of the body or bodies of any such child or children, then, as to the original and accrued shares of such child or children, whose children should so fail, to the use of the remaining and other and others of the said children, and the heirs of the body or bodies of such remaining and other children, and, if more than one, equally as tenants in common; and in default of such issue of the issue of his said children, to the use of the right heirs of the testator. The six younger children of the testator survived him. Some of them had children at the

time of his death, and some had children born after his death:—Held, that the six younger children of the testator took life interests in both the freehold and leasehold estates, with remainder as to the freeholds to the children of such younger children as tenants in common in tail, with cross remainders between and among them, and the ultimate remainder to the testator's right heirs; and, semble, that the same children of such younger children (after the decease of the last survivor of their respective parents, the tenants for life) take absolute interests in the leaseholds. *Williams* v. *Teale*, 6 Hare, 239.

Testator empowered his trustees to purchase freehold land to the amount of 1,500*l.* for the use of T. during his life, and then to be divided among his issue, if any:—Held, that T. was entitled for life, with remainder to his children as tenants in common in tail, with cross remainders between them in tail, and reversion to T. in fee. *Hadwen* v. *Hadwen*, 23 Beav. 551.

—— **Cy Près.**]—The testator by his will gave all his real estate to his daughter, J. K., for life, remainder to trustees to preserve, &c.; and after her decease to the use of all and every the child or children of A., male or female, begotten or to be begotten, and their assigns, for their respective lives, and, after the decease, and respective deceases, of such child or children of A., to all and every the child or children of all and every such child or children of A., male or female, to be begotten, and the heirs of his, her, and their respective body and bodies, as tenants in common; and in case of the death of any of the said children of such child or children of A., and failure of issue of his, her, or their body or bodies respectively, then as well the original as the accrued share of such of them so dying without issue to go to the survivors or survivor, others or other of them, as tenants in common, if more than one; and for default of such issue over. A. had three children born in the lifetime of the testator and living at his decease, and another was born after the testator's death; one of the three born in his lifetime died during the life of A., without issue:—Held, that the children of A. took as tenants in common, and not as joint-tenants; that, inasmuch as the children of the afterborn child of A. could not take as purchasers, the devise would be supported according to the rule of cy près, or approximation by giving an estate tail to the afterborn child of A.; that the rule of cy près, being an arbitrary principle of construction, introduced to effect the intention of a testator in the exigency of a particular case, was not to be applied, except when the necessity of the case required it, and that therefore, although the devise was to the children of A., as a class, the children of A., born in the testator's lifetime, would take estates for life, and the estates devised to the children of the afterborn child would alone be altered; that cross remainders were to be implied between the children of A., and, therefore, that the three children of A. who survived or left issue took according to their respective estates the share of the child of A. who died without issue, and that the inequality among the devisees, some of them being tenants in tail, and others tenants for life with remainder to their issue in tail, was no objection to the implication of cross remainders among them. *Vanderplank* v. *King*, 3 Hare, 1; 12 L. J., Ch. 497; 7 Jur. 548.

Testator devised all his manors, messuages, lands, &c., to trustees in trust for A. for his life, with remainders to his first and other sons in tail male, and, for want of such issue, he devised all the same manors, &c., to his daughters and granddaughters respectively during their lives, and after their decease to the heirs male of their bodies, to take as tenants in common, and on failure of such issue he devised the remainder of his whole estate to his own right heirs. The devise will create cross remainders amongst the daughters and granddaughters. *Staunton* v. *Peck*, 2 Cox, 8.

Devise to A., B., and C., &c., share and share alike, for their lives, remainder to their respective children for their lives, and so to be continued, from issue to issue, for life; but, if any of them die, leaving no issue, their shares to go to the survivors for their lives, and the issue of such of them as shall be dead, and for default of any issue then over:—Held, that A., B., C., &c., take estate tail with cross remainders. *Mortimer* v. *West*, 2 Sim. 274; 29 R. R. 104. And see *S. C.* on another point, 3 Russ. 370; 5 L. J. (o.s.) Ch. 181; 27 R. R. 98.

The case of *Humberston* v. *Humberston* (1 P. Wms. 332) is not applicable, as in this case the trust is not executory, but the devisees take by direct devise to themselves. *Ib.*, 282.

—— **Gift in Trust for Devisees for their Lives and their Issue for their Lives for ever.**]—Devise in trust for A. for life, with remainder in trust for B., C., and D., and the survivor, for their lives and the life of the survivor, and for the issue of them respectively for their lives for ever, as tenants in common, with a gift over on their death without issue, or in case of the death of all their issue; and a direction that the before stated entails to B., C., and D., and their respective issues, were to be equally divided amongst the daughters as well as the sons of them and their issue:—Held, that B., C., and D. took equitable estates in remainder for their lives and the life of the survivor, with cross remainders between them, and that, on the death of the survivor, all the children of B., C., and D. took equitable estates as tenants in common in tail, with cross remainders between them in tail. *Parfitt* v. *Hember*, L. R. 4 Eq. 443.

The doctrine of cy près, established by *Humberston* v. *Humberston* (1 P. Wms. 332) is applicable to such a devise, and not merely to a will of an executory character. *Ib.*

Testator devised an estate to A. for life, remainder to trustees to preserve, &c., remainder to all the children of A., as tenants in common, and not as joint tenants, and, for want of such issue, to B. for life, remainder of trustees to preserve, &c., remainder to all the children of B. as tenants in common, and not as joint tenants, and for want of such issue, to C. in fee:—Held, that the children of A. took estates for life, with cross remainders between them, for life, with remainder to B. for life, with remainder to her children, as tenants in common, with cross remainders between them for life, with remainder to C. in fee. *Ashley* v. *Ashley*, 6 Sim. 358; 3 L. J., Ch. 61.

Devise of estates to testator's son and four daughters, "and their lawful issue respectively in tail general, with benefit of survivorship to and amongst their issue respectively, as tenants in common;" but such issue, "being sons," not to have vested interests until they attained twenty-

one, or "being daughters," until twenty-one or marriage; with power to the trustees, after the death of his son or daughters respectively, to advance such issue during minority, to the extent of one-half the presumptive share of "each child"; and in case his son or daughters or any or either of them should die without leaving lawful issue, or with lawful issue, and such issue being a son or sons, should not attain twenty-one, or being a daughter or daughters, should not attain that age, or be married, then the part or share of him or her so dying to be for the benefit of the survivors and their issue, in same manner as their original shares":—Held, that the testator's children took estates for life, as tenants in common, with remainder to the grandchildren in tail general, in the shares of their respective parents, with cross remainders in tail between such grandchildren respectively, to the survivors or survivor, others or other of the parents, in equal shares for life, with remainder in tail to their children; the shares accruing to such survivors, &c., to be subject to the same limitations and such benefit of survivorship as the original shares. *Cursham* or *Cunham* v. *Newland*, 2 Beav. 145. And see *S. C.* at law, 2 Bing. (N.C.) 58; 2 Scott, 105; 4 M. & W. 101; 5 L. J., C. P. 137; 7 L. J., Ex. 212.

Cross Remainders expressly Limited in a given Event.]—When cross remainders between persons are expressly limited by a will to take effect in a given event, the court will not imply cross remainders, between the same persons, in a different event. A gift of real and personal estate to trustees, upon trust as to one-fifth for each of the testator's five children for life, and after his or her decease, for his or her children, which he or she should leave at his or her decease; and if he or she should leave none, in trust for the other children for life, and after the death of all the children, in trust, as to the corpus, for all the grandchildren of the testator per capita. One child died leaving a child who died before the last of the testator's children:—Held, such child took an estate for his life only, that that one-fifth was undisposed of until the death of the surviving child, and that cross remainders were not, in the event which had happened, to be implied. *Rabbeth* v. *Squire*, 4 De G. & J. 406; 28 L. J., Ch. 565; 7 W. R. 657—L. C.

—— **Accrued Shares.**]—The court will not imply cross remainders in a devise, for the purpose of passing accrued shares in a certain event, where the testator has expressly stated what shall be done with the original shares in the same event. *Dutton* v. *Crowdy*, 33 Beav. 272; 3 N. R. 234; 33 L. J., Ch. 241; 10 Jur. (N.S.) 28; 9 L. T. 630; 12 W. R. 222.

A testator gave a moiety of his estate to the children of R. and the other moiety to the children of B. The will contained a single clause of survivorship and accruer applicable to all the children, and not in terms distributive, with a gift over if there should be no children of A. and B., "or of either of them," or being such, all such children should die without having attained a vested interest:—Held, that there were no cross remainders between the two classes of children, and that on the death of A. without having been married, the children of B. would not take the first moiety. *Edwards* v. *Tuck*, 23 Beav. 268. And see *Horne* v. *Barton*, supra, col. 1549.

In Default of Issue by Granddaughters.]—A testator devised certain estates to his four granddaughters, by name, for their respective lives, in equal shares, with remainder to trustees to preserve contingent remainders, "with remainder in equal shares to the children of my said four granddaughters, and the heirs of their bodies, such children of my said granddaughters taking their mother's share as tenants in common in tail, remainder to the survivor of such children, and in default of issue by my said granddaughters," then over. There was a devise of residuary real estate in similar terms, except that the remainder next following that to the children of the granddaughters as tenants in common in tail was thus expressed: "To the survivors or survivor of such children and the issue of their, his, or her body in tail":—Held, that under the words, "in default of issue by my said granddaughters," the four granddaughters, and not their children, took by implication, subject to the prior limitations, estates tail in both classes of property, with cross remainders between them in tail. *Atkinson* v. *Holtby*, 10 H. L. Cas. 313; 32 L. J., Ch. 735; 9 Jur. (N.S.) 503; 8 L. T. 583; 11 W. R. 544.

Cross Remainders Expressly Given—"Survivors or Survivor" read "Others or Other."]—Lands held in fee-simple were, by settlement made in 1752, conveyed to trustees, to the use of the settlor for life, remainder to the use of his three daughters for their lives, as tenants in common; remainder to the use of trustees to preserve; remainder, as to the share of each daughter, to the use of her first and other sons successively in tail male; remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivors or survivor, during their or her respective lives or life, as tenants in common; in case of two survivors, with remainder in like manner, as to the original share, to the use of the first and other sons of such surviving daughters or daughter in tail male; remainder, in case all the daughters should die without issue male, as to the share of each, to the use of their daughters, as tenants in common in tail; and in case one or two of the settlor's daughters should die without issue, the share or shares of such daughter or daughters to go to the use of the daughters of the survivors or survivor as tenants in common in tail general; and in case all three should die without issue, then remainder over, with ultimate remainder to the use of the settlor in fee. He died soon after without disposing of the reversion:—Held, that the limitation, in case of the failure of issue generally of any of the daughters, to the daughters of the survivors or survivor, was a good contingent remainder, and, therefore, not void for remoteness; and also, that the words "survivors or survivor" were to be read "others or other," and, consequently, the limitation over to the daughters of one of the settlor's daughters, who had issue, was not defeated by the death of that daughter in the lifetime of another, who subsequently died without issue, but that limitation took effect as a good cross remainder. *Cole* v. *Sewell*, 2 H. L. Cas. 186; 12 Jur. 927. And see *S. C.*, 2 Con. & L. 344; 4 Dr. & War. 1; 6 Ir. Eq. R. 66.

—— **Gift over on Failure of Issue at Particular Period—"Survivor" not read "Other."**]—A testator by will, in 1826, gave real and personal

estate to trustees in fee, in trust for his four nieces, M., B., S., and J., for their respective lives, as tenants in common, and on the death of any of them, then in trust as to the share of her so dying, to stand possessed of and interested in such share for the child or children of such of them as should have died, and if any of them should die without issue, then he directed the share or shares of her or them so dying to go to the survivor or survivors of them and their heirs, and to be conveyed to them and their heirs accordingly. B. and J. died leaving children. M. died a spinster. S. was a spinster and over sixty:—Held, first, that the equitable fee was given to the children of the nieces. *Maden* v. *Taylor*, 45 L. J., Ch. 569.

Held, secondly, that seeing that S. was past the age of child-bearing, she was entitled to her own one-fourth share in fee, under the gift over to the survivor of the nieces. *Ib.*

By codicil of the same date, the testator devised freehold estate on trust for M., B., S., & J., for their respective lives, as tenants in common, and on death of all or any of them, then as to the part of her or them so dying, in trust for all and every the child and children of them respectively, and the heirs of their bodies; and if any of them should die without leaving issue living at her death, then in trust for the survivors and survivor of them and the heirs of her and their bodies, and if all except one shall die without leaving lawful issue, then in trust for such only or surviving niece and the heirs of her body, and in case of a total failure of issue of them, then in trust for his heirs. B. died, having had four children, three of whom died infants and unmarried. J. died, having had three children, one of whom died an infant and unmarried. Then M. died, a spinster. S. was a spinster, and over sixty:—Held, first, the cross remainders in tail were to be implied between the children of the tenants for life. *Ib.*

Held, secondly, that "survivor" was not to be read "other," but that S. took M.'s share. *Ib.*

Held, thirdly, that S., being past the age of child-bearing, was entitled to her own one-fourth share in tail under the gift over to the survivors and survivor of them. *Ib.*

Appeal against Decree.]—A decree declared A. and B. to be entitled for their lives as tenants in common, with cross remainders between them. Upon the death of A., which took place more than five years after the decree, one of the parties entitled in remainder applied for leave to appeal against the declaration as to cross remainders:—Held, that as the proper time for deciding whether there were cross remainders had not arrived when the decree was made, leave to appeal ought to be granted. *Walmsley* v. *Foxhall*, 1 De G. J. & S. 451, 605; 2 N. R. 252; 8 L. T. 559; 11 W. R. 792.

b. Implication of in other Instruments.

Implication—Marriage Articles.]—Articles on marriage, for settling land to be bought with money, on all the children of the marriage and their respective issues, and for default of such children and their issue, over:—Held, there should be cross remainders by implication. *Twisden* v. *Locke*, Amb. 668.

Marriage articles carried into execution, by limiting estates in strict settlement to A. and B. respectively, with cross remainders between B. and the issue of A., with power to A. to appoint both estates among his children. The will of A., referring to the estate, but not to the power, declared a good execution of the power, to the extent of limiting estates tail to the children. The excess reformed to effectuate the general intention of the articles. *Dillon* v. *Dillon*, 1 Ball. & B. 77. *See* 14 R. R. 241 n.

By marriage articles a father covenanted to convey an estate to trustees for the benefit of his son T. during his life, with remainder for the use and benefit of the issue of T. by M., his intended wife, their heirs and assigns for ever. The husband and wife both died, leaving a son and two daughters:—Held, that the settlement ought to be framed so as to give an estate tail to the son, with remainder to the daughters as tenants in common in tail, with cross remainders between them. *Phillips* v. *James*, 3 De G. J. & S. 72; 11 Jur. (N.S.) 660; 12 L. T. 685; 13 W. R. 934.

Leaseholds for life were settled by a deed on the parents for life, with remainder to the children of the wife equally and the heirs of their bodies, and if but one child then to such child and the heirs of his body, and in default of such issue to the heirs of the wife:—Held, that there were no cross remainders between the children, and that on the death of a child without issue and without having made any disposition, his share went to the heir of the wife. *Bainton* v. *Bainton*, 34 Beav. 563. And see *Cole* v. *Levingston*, 1 Vent. 224.

—— **Settlement—Accruing Shares.**]—Cross remainders cannot be implied in a deed, and are not created as to accruing shares by a limitation of the entire estate to an only surviving child and his issue, or by a gift over of the entire estate in remainder after the failure of all issue, or by an express creation of cross remainders, as to the original shares. *Edwards* v. *Alliston*, 4 Russ. 78; 6 L. J. (O.S.), Ch. 30; 28 R. R. 9. But see *Doe* d. *Clift* v. *Birkhead*, 4 Ex. 110; 18 L. J., Ex. 441.

—— **Executory Trust.**]—Testatrix by her will gave 500*l.* to each of her two nieces to be settled as she should thereinafter describe, and directed that the provision therein made for her nieces should not be subject to the control of any husbands they might marry, but should remain vested in her executors in trust until a proper settlement was made. And by a codicil she directed that if either of her nieces should die without leaving issue, the legacy given to her should devolve to the other niece and her children, with a gift over if both should die without issue:—Held, that this was an executory trust, and that the nieces took life interests with remainder to their children and cross remainders between them. *Holloway* v. *Collier*, 1 W. R. 266.

Testator devised his estates to trustees, in trust to settle and convey the same to the use of or in trust for G. R. (who had then no issue) for life, without impeachment of waste, with remainder to his issue in tail male in strict settlement:—Held, that the words "in tail male" were descriptive, not of the issue, but of the interest that they were to have; and that the estates ought to be settled on G. R. for life, without impeachment, &c., with remainders to his sons successively in tail male, with remainder to his daughters as tenants in common in tail male,

with cross remainders in tail male. *Trevor* v. *Trevor*, 1 H. L. Cas. 239. Affirming 13 Sim. 108; 11 L. J., Ch. 417; 6 Jur. 863.

A testator directed his trustees to purchase lands in certain counties, to be settled, on the death of the eldest son of S. without issue (which happened), to the use of every son of S. then living or who should be born in the testator's lifetime, and the assigns of such son during his life, with remainder to trustees to preserve contingent remainders; but to permit such son and his assigns to receive the rents during his life, and after his death to the use of such son's first and every other son successively in tail male, and on failure of such issue to the use of the testator's right heirs:—Held, that the younger sons of S. took as tenants in common for life, with remainder as to each son's share to his first and other sons in tail male, with cross remainders over. *Surtees* v. *Surtees*, L. R., 12 Eq. 400; 25 L. T. 288; 19 W. R. 1043.

Execution of a direction by will to convey lands to be purchased, by raising cross remainders among more than two upon the intention by implication; without regard to the words "several and respective" in the limitation to the heirs. *Green* v. *Stephens*, 17 Ves. 64.

Distinction on this subject between devises by a general description to a class of persons, not ascertaining the number, and to individuals named. *Ib.*

Devise to trustees, as soon as his three daughters attained their respective ages of twenty-one, to convey to them and the heirs of their bodies as joint tenants: this not a joint estate, but to be construed as near as it may be; so that the conveyance must be at twenty-one respectively, with cross remainders. *Marryat* v. *Townly*, 1 Ves. sen. 102.

And see post, C. 6.

In Deeds.]—*See* ESTATE, Vol. VI., col. 355.

6. CONTINGENT REMAINDERS.

a. General Principles.

Contingent or Vested Remainder.]—That a remainder is contingent, when uncertain, whether it would take effect or not, is by no means the true legal definition of it; for if an estate be limited to A. for life, remainder to B., and the heirs of his body, this is a vested remainder, notwithstanding B. may die without heirs of his body, before the death of A., and the remainder may never take effect in possession. *Smith* v. *Packhurst*, 3 Atk. 138; 2 Str. 1105.

All contingent remainders may be reduced to two heads: first, where a remainder is limited to a person not in being, and who may never exist: and, secondly, where a remainder depends upon a contingency collateral to the continuance of the particular estate. *Ib.*

It is a settled rule of the common law, in all cases where it can be done, to construe a remainder as vested, in preference to contingent, in order to prevent the destruction of the estate. Therefore where a devise was to trustees, for the use and benefit of them and the testator's daughter, and "from and after her death, unto the heirs of her body, share and share alike, their heirs and assigns for ever":—Held, that the remainder vested in a son of the devisee, living at the time of the testator's death, immediately on that event, and was subject to open and let in all children subsequently born: that all these children took vested remainders, and that these, unless disposed of by them, at their death descended upon her heir-at-law. *Right* d. *Shortridge* v. *Creber*, 5 B. & C. 866; 8 D. & R. 718; 4 L. J. (O.S.) K. B. 324; 29 R. R. 444. And see *Doe* d. *Bills* v. *Hopkinson*, 5 Q. B. 223; 13 L. J., Q. B. 85.

Under a devise to A. for life, remainder to the right heir male of the testator, in fee, the remainder vests upon the death of the testator in the person then answering the description of heir male. *Doe* d. *Pilkington* v. *Spratt*, 5 B. & Ad. 731; 2 N. & M. 524; 3 L. J., K. B. 53. And see *Winter* v. *Perratt*, 9 Cl. & F. 606—H. L. (E.), and *Chamberlayne* v. *Chamberlayne*, 25 L. J., Q. B. 187; 2 Jur. (N.S.) 258; 4 W. R. 403. Affirmed, 4 W. R. 616.

Henry T. devised real estate to K. and others during the life of the testator's son Henry, in trust for him; and after his decease the testator devised the property to the heirs of the body of Henry, and in default of such issue to the testator's nephew, Henry, for life, and after his decease, to the testator's own right heirs of the name of Henry T., if any such there should then be, for ever:—Held, that the devise to the testator's right heirs of the name of Henry, was a contingent remainder to the testator's heir-at-law if named Henry T., and that the testator's heir-at-law at the death of the second life estate not being named Henry, the contingent remainder failed, and the testator's heir-at-law was entitled to the property in preference to a Henry T., who, although in the line of descent from the testator, was not his heir-at-law. *Thorpe* v. *Thorpe*, 32 L. J., Ex. 79. And see *Foster* v. *Hayes*, 4 El. & Bl. 717; 3 C. L. R. 576; 24 L. J., Q. B. 161; 1 Jur. (N.S.) 515; 3 W. R. 168—Ex. Ch.

Devise, after limitations in strict settlement, in default of such issue, then to the devisor's next heir-at-law, is a limitation of the reversion, not a contingent remainder to the heir, at the time of failure of issue, as a purchaser. *O'Keefe* v. *Jones*, 13 Ves. 413.

Devise of land to A. for sixty years, if he so long live, and, from and after the death of A., to his eldest son B. in tail. Whether this be a vested or contingent remainder, quære. *Beverley* v. *Beverley*, 2 Vern. 131.

One devises lands to his executors for and until payment of his debts; this is but a chattel interest. One seised of the manors of A. and B. devises these manors to C. for life, and if C. shall have issue male, then to such issue male and his heirs for ever, and if C. should leave no issue male, then the manor of A. to J. S. in fee, and the manor of B. to J. N. in fee. C. suffers a recovery of these manors; this will bar the contingent estates limited to J. S. and J. N. *Carter* v. *Barnadiston*, 3 Bro. P. C. 64; 1 P. Wms. 509; 2 Eq. Cas. Abr. 224, pl. 5, 6. And see *Doe* d. *Herbert* v. *Selby*, 2 B. & C. 926; 4 D. & R. 608; 26 R. R. 585.

Devise of freehold and copyhold surrendered to the use of the will to trustees and the survivor and his heirs in trust to pay debts and legacies, an annuity to the testator's son, and for other purposes; then on the marriage or attaining twenty-one of his granddaughter to convey to her for life, remainder to trustees, &c., remainder to her first and other sons in tail male, remainder to her daughters in tail general, remainder to such persons, for such estates,

and subject to such charges and conditions as he should by any deed or instrument, with two or more witnesses, appoint. The next day, by deed-poll, with two witnesses, reciting his will, and that he had reserved a power of disposing of his estate farther, he directed his trustees, immediately after the death of his granddaughter and failure of her issue, to convey all his real estate to the first and other sons of his sons in tail male, then to his daughters in tail general, then to the right heirs of the survivor of his trustees, his heirs and assigns for ever. No conveyance was made. The granddaughter died without issue; then the son died without issue, leaving one trustee surviving. The last limitation is a contingent remainder to the heir of the surviving trustee; and a conveyance was directed, with an insertion of trustees to support that remainder as to the copyhold: the rents and profits of the copyhold, during the life of the trustee, and all the freehold, to go to the heir of the testator. *Habergham* v. *Vincent*, 2 Ves. 204; 4 Bro. C. C. 353.

Contingent Remainder after an Executory Devise.]—Contingent remainders may be supported after an executory devise, though there are no trustees inserted. *Hopkins* v. *Hopkins*, 1 Atk. 580; 1 Ves. sen. 269; Cas. t. Talb. 44.

Where a remainder in tail is vested, subsequent contingent remainders are not regarded. *Winnington* v. *Foley*, 1 P. Wms. 537.

Copyholds.]—To support a contingent remainder in a freehold, there must be a tenant of the freehold against whom a præcipe may be brought; otherwise as to a copyhold, for there no præcipe can be brought, being parcel of the manor only, and the freehold in the lord. *Lovell* v. *Lovell*, 3 Atk. 12.

A dormant surrender of a copyhold (that is, a surrender to A., on condition to perform the will of the surrenderor) would vest an estate in the dormant surrenderor, sufficient to support the contingent remainders of the surrenderor's will, without the interposition of trustees for the purpose. *Gale* v. *Gale*, 2 Cox, 136.

Contingent Remainder or Springing Use.]—It is a certain rule of law, that if such a construction can be put upon a limitation as that it may take effect by way of remainder, it shall never take place as a springing use, or executory devise. *Carwardine* v. *Carwardine*, 1 Eden, 27.

A limitation in a settlement "to trustees to the use of A., the settlor for life, remainder to B., his intended wife, for life, (except as thereafter excepted,) remainder to the heirs of the body of A., begotten on B., remainder to A. and his heirs, with a proviso, that if A. should die, and leave such issue as aforesaid, without making any provision for such child or children in his lifetime, the said trustees should stand seised of one moiety, from and after the decease of A., to the use of such child":—Held, a contingent remainder, and not a springing use, and therefore barred by a fine levied by A. and B. *Ib.*

No case of a springing use ever introduced in the middle of a limitation, but it always comes in afterwards, and determines the first gift in fee; and whenever it happens to arise, it displaces the first gift, and changes the uses in favour of other persons. *Ib.*

No instance where equity has considered an estate as not executed at the same time that law would have considered it as executed. Limitation to trustees to stand seised, and receive rents and profits to the use of A. is an estate executed in A. *Ib.*

Every contingent remainder, even of a real estate, depends upon the event, whether good or void. *Gower* v. *Grosvenor*, 5 Madd. 341.

If an estate is given to A., remainder to the right heirs of B., and A. dies before B., it is void by the event. *Ib.*

Where after an estate tail there is a limitation over, which does not depend on a contingency, the limitation is void, nor can any subsequent event make it better or worse. *Ib.*

Limitation of personal chattels to go as heirlooms with real estate; the chattels shall follow that estate into a contingent remainder falling in. *Ib.*

Contingent Remainder or Executory Devise.]—If in a will there are two contingencies, and one good, and that falls out, the devise over will be good though the other contingency be bad; for the bad subsequent contingency, where he makes two, could never have touched the limitation over upon trust. *Ib.*

Though a gift over may as to one alternative, operate as an executory devise it will not necessarily do so as to another; and if the second is that which in fact occurs, the gift may be treated as a good contingent remainder. *Doe* d. *Evers* v. *Challis*, 7 H. L. Cas. 531; 29 L. J., Q. B. 121; 5 Jur. (N.S.) 825; 7 W. R. 622.

The invalidity of one alternative will not necessarily defeat the other. *Ib.* And see *Watson* v. *Young*, 54 L. J., Ch. 502; 28 Ch. D. 436; 33 W. R. 637.

Devise to E. for life, "and from and after her decease to such child or children as she may have, if a son or sons, who shall live to attain the age of twenty-three, and, if a daughter or daughters, who shall live to attain the age of twenty-one, as tenants in common, &c."; and in case of the death of any son under twenty-three, or daughter under twenty-one, the share to go to the survivors attaining those ages. And in case E. has only one son to attain twenty-three, or a daughter to attain twenty-one, to such son or daughter. "And also, in case E.'s children shall die under" the ages mentioned, "or if she has none," then to J. A. and S. for life, and afterwards to their sons and daughters on attaining the above ages respectively. There were similar devises to J. A. and S., but in the devises to J. and S. nothing was said as to total absence of issue; in that to A., the words used were "and farther, in case A. shall die without issue." E. first and A. afterwards died without ever having had a child:—Held, that on the death of A. the gift over in favour of a daughter of J., who had attained twenty-one, took effect as a contingent remainder, because no prior estate was divested or displaced, and when the particular estate (the life estate of A.) determined the contingency on which the remainder was to take effect had occurred. *Ib.*

Remoteness.]—Held also, that though the gift over, on the death of E.'s sons under twenty-three, was void for remoteness, the gift over on her death, without having had issue, was not thereby affected. *Ib.*

A. died without ever having had issue:—Held, that though in the devise to her the not having

issue was not expressed, it was necessarily implied in the provision as to her dying without children who should attain twenty-three or twenty-one, and therefore on her death without ever having had issue, the gift over took effect. *Ib.*

Remoteness does not affect the validity of contingent remainder. *Cole* v. *Sewell*, 2 Con. & L. 344; 4 Dr. & War. 1; 6 Ir. Eq. R. 66. Affirmed, 2 H. L. Cas. 186; 12 Jur. 927. *See* ante, col. 1554.

A. has a contingent remainder in fee, and conveys it to B. as a security. The contingent remainder is afterwards barred by A.'s mother, who acquires the fee, and by her will devises her real estates to trustees, upon trust to sell, and invest the money, and pay two-thirds of the dividends to or for the benefit of A., for his life, with a similar trust as to two-thirds of the rents of the estates not sold:—Held, that the interest of A. is bound by the security given to B. *Brown* v. *Blount*, 9 L. J. (O.S.) Ch. 74.

Estate for Life.—Contingent Remainder in Fee.]—Where there is a gift to a person for life, with remainder to children not *in esse*, with a gift in default to the parent, no remainder is vested in the parent until after the contingency is determined. *Crofts* v. *Middleton*, 1 K. & J. 1173; 2 K. & J. 194; 1 Jur. (N.S.) 1133. And see *S. C.*, 8 De G. M. & G. 192; 25 L. J. Ch. 513; 2 Jur. (N.S.) 528; 4 W. R. 439.

A testator devised land to A., spinster, for life, and after her decease to her children equally in fee; and in case there should not be any child of A., or if any, and all such children should die under twenty-one, and without leaving issue, then he devised the land to the heirs and assigns of A.:—Held, that this was a limitation of an estate for life, with a contingent remainder in fee. *Ib.*

Devise of leaseholds to testator's daughter for life, remainder to her two sons for life; and, in case she should not have a son or sons to attain the age of twenty-one, or such sons dying without leaving issue, then to her daughters, their executors, administrators, and assigns, and if such daughters should die without issue, remainders over; all the residue of the testator's estate to the daughter:—Held, that the testator's daughter took an estate for life in the leaseholds, with remainder to her two sons for life, with ultimate remainder on certain contingencies to herself. *Bradshaw* v. *Skilbeck*, 2 Bing. (N.C.) 182; 2 Scott, 294—H. L. (E.)

A devise of real estate to the use of A. for life, with remainder to the use of all and every the child or children of A. who shall attain the age of twenty-one years, and for want of such issue, over, creates a tenancy for life in A., with a contingent remainder in fee to such of the children of A. as shall attain twenty-one; and on the death of A., leaving infant children, but having had no child who had then attained twenty-one, the interest of the children of A. was divested, and the limitations over were defeated. *Festing* v. *Allen*, 5 Hare, 573. And see 12 M. & W. 279; 13 L. J., Ex. 74.

A testatrix devised to T. for life, and at his death, to his second son on his attaining twenty-one, but in default of there being a second son of T., to the second son of C. on attaining twenty-one. After her death T. had sons, the second of whom, G., died before he attained twenty-one years. T. died intestate:—Held, that G. did not take in fee with an executory devise over, but took a contingent remainder, and that the contingency of G.'s attaining twenty-one years not having happened at the death of T., the limitation over failed, and the heir-at-law was entitled. Confirming *Festing* v. *Allen*, supra, and *Doe* d. *Rew* v. *Lucraft* (8 Bing. 386; 1 M. & Sc. 573; 1 L. J., C. P. 109). *Alexander* v. *Alexander*, 16 C. B. 59; 24 L. J., C. P. 150.

Where leaseholds are bequeathed "to such persons as shall be entitled to the real estate," the gift will be contingent or vested, according as the devise of the real estate is so; but it will not necessarily fail because the devise of the real estate, creating a contingent remainder, fails from a rule of law not applying to personal estate. The income of leaseholds during the minority of a person entitled contingently on his attaining twenty-one, falls into the residue. The income of residuary personalty, in such case, is accumulated for the benefit of the legatee. A devise of freeholds in remainder to all and every the children "who shall attain twenty-one" in fee, with a gift over, "if there shall be no such child," creates a contingent remainder. *Festing* v. *Allen* (12 M. & W. 279) followed; and *Browne* v. *Browne* (3 Sm. & G. 568) not followed. *Holmes* v. *Prescott*, 3 N. R. 559; 33 L. J., Ch. 264; 10 Jur. (N.S.) 507; 12 W. R. 636.

—— **Contingent Remainder to Heir-at-Law.**]—Real property was conveyed to A., B., and C. and their heirs, as to one third to the use of B. and C. as A. should by deed appoint, and, subject thereto, to the use of A. for life without impeachment of waste, and after intervening life estates given to B. and C. as tenants in common, and the survivor, to such uses as A. should by will appoint, and, subject thereto, "to the use of such person or persons as at the decease of A. shall be his heir or heirs-at-law, and of the heirs and assigns of such person or persons":—Held, that (subject to the powers of appointment) A. took a life estate only, with a contingent remainder in fee to the person or persons who might be his heir at his death. *Evans* v. *Evans*, 61 L. J., Ch. 456; [1892] 2 Ch. 173; 67 L. T. 152; 40 W. R. 465—C. A.

—— **Legal Estate in Mortgagees — Remainders preserved.**]—A testator devised a freehold estate to the use of his son for life, and after his decease to the use of the children of his son who should attain twenty-one or die under that age leaving issue, and the heirs and assigns of such children, in equal shares. The testator had mortgaged part of the devised estate, and at his death the legal estate was outstanding in the mortgagees. The testator's son died leaving four infant children:—Held, that as to the mortgaged portion of the estate the contingent remainders were preserved from failure by the legal estate outstanding in the mortgagees, but as to the remaining unmortgaged portion, the remainder failed on the death of the testator's son. *Festing* v. *Allen* (12 M. & W. 279) commented on. *Astley* v. *Micklethwait*, 49 L. J., Ch. 672; 15 Ch. D. 59; 43 L. T. 58; 28 W. R. 811.

—— **Equitable Estate — Attaining Twenty-five—Name and Arms Clause—Possession.**]—A testator devised and bequeathed real and personal estate to trustees upon trust to pay the

income to his wife during her life, and after her decease, if H. was then living, to retain the rents of the realty to their own use during his life, and to pay him the income of the personalty during his life, and after his death upon trust to convey and transfer the real and personal estate to such son of M. as should first attain the age of twenty-five years, upon condition that such son of M. as should become entitled to any property under the will should, within two years after he should so become entitled, take the name and arms of the testator. At the testator's decease M. was living, and had no son who had attained twenty-five, but his eldest son attained that age during the lives of the widow and H. This son died in the lifetime of H. without having taken the name and arms of the testator:—Held, by Malins, V.-C., that although the limitation of the personal estate to the first son of M. who should attain the age of twenty-five was void for remoteness, the direction to convey the real estate to him gave him a contingent remainder which was not void for remoteness, although his estate was only equitable, the doctrine of contingent remainders being applicable to equitable as well as to legal estates; that he was not bound to take the name and arms of the testator until his estate came into possession, and that the real estate devolved upon his heir. But held, on appeal, that the limitation to such son of M. as should first attain the age of twenty-five years could not, as in *Riley* v. *Garnett* (3 De G. & Sm. 629), be treated as intended to give an immediately vested interest liable to be divested on death under twenty-five, but was a limitation contingent on the son's attaining the age of twenty-five years. *Abbiss* v. *Burney*, *Finch*, *In re*, 50 L. J., Ch. 348; 17 Ch. D. 211; 44 L. T. 267; 29 W. R. 449—C. A.

Held, also, that when the legal estate in fee is vested in trustees under the instrument which creates the beneficial limitations, the feudal rule by which a contingent remainder fails if it does not vest before the determination of the particular estate does not apply, and that the limitation to such son of M. as should attain twenty-five years, assuming it to have been an equitable remainder, would still have been void for remoteness. *Ib.*

Held, also, that the direction to the trustees to convey on the death of H. did not create a contingent equitable remainder, but was an executory devise. *Ib.*

—— **Failure for Want of Particular Estate.**]—Testator, by a will dated in 1832, gave and devised all his freehold estates to the use of his daughters (five), whom he named, equally, as tenants in common for their several and respective lives, with remainder to trustees to preserve during the lives of the daughters "respectively," and from and after the decease of either of his said daughters, as to the one-fifth part or share of the daughter so dying, to the use of all and every the children of such daughter, born or to be born, who being a son or sons had attained or should attain twenty-one, or, being a daughter or daughters, should attain that age or be married, in equal shares, and to their several heirs and assigns for ever; but if there should be no such child, who being a son should attain the said age, or being a daughter should attain that age or be married as aforesaid, then to the use of the others of his said four daughters for their respective lives, with remainder as to each share to such daughter's child or children. After making certain specific and pecuniary bequests, the testator, as to "all the rest, residue, and remainder" of his "estate and effects," gave and bequeathed the same to the same trustees, "their heirs," executors, administrators, and assigns, upon trust to lay out and invest the same or the produce thereof, as therein mentioned, as they should think fit, and hold his said residuary estate upon the same trusts as were thereinbefore declared with respect to his real estate, or as near thereto as the rules of law and equity would permit. The testator died in 1834. One of the daughters, who married in 1835, died in 1851, leaving an only child, a son, W., who did not attain twenty-one until 1860. In a suit of *Holmes* v. *Prescott* (ante, col. 1562) upon the same will, it had been incidentally decided that the limitation of each daughter's share in the freehold estates to her child and children being contingent, the remainder to W. failed for want of a particular estate to support it:—Held, that the limitation over of the same share, if there should be no such child, being also a contingent remainder, also failed, and that the reversion in such share, after the death of the daughter, passed under the residuary clause in the same will, and did not descend to the heir. *Perceval* v. *Perceval*, L. R. 9 Eq. 386.

A testator devised all his freehold mills, and houses, and mines, going gear, engines, &c., to his sons S. and J. for life equally, and after the decease of each of his sons, upon trust in favour of such one or more of their children as they should by deed or will appoint, and so far as no such appointment should extend, to the use of all and every the children of his sons, sons at twenty-one, daughters at twenty-one or marriage, equally, and their, his, or her heirs, executors, administrators, or assigns; and if there should be no child of such of his sons as should die leaving his brother surviving, upon the trusts declared of the original shares; and if no child, the whole to the survivor of his sons absolutely. Then followed a hotchpot clause. S. died leaving children, infants, and J. survived him, and was a bachelor:—Held, that the gift to the grandchildren was a contingent remainder and failed, there being no particular estate to support it. *Rhodes* v. *Whitehead*, 2 Dr. & Sm. 532; 12 L. T. 601; 13 W. R. 100.

Estate of Trustees—Legal or Equitable—Provision for Maintenance.]—A testator devised lands to trustees, their heirs and assigns, to the use of A. for life, with remainder to the use of such child or children of A. as should attain twenty-one, as tenants in common in fee, with remainders over; and empowered the trustees to apply the income to which any infant devisee should be presumptively entitled towards his maintenance or for his benefit during his minority. A. died leaving four children, three adult and one an infant:—Held, that the contingent remainder of the infant child of A. was equitable, and did not fail by reason of the death of A. before the remainder vested. *Berry* v. *Berry*, 47 L. J., Ch. 182; 7 Ch. D. 657; 38 L. T. 474; 26 W. R. 327.

—— **Direction to Pay Debts.**]—A testator, by his will made in 1838, directed his debts to be paid; and he devised specific real estate to four persons (whom he afterwards named as his executors), their heirs and assigns, upon trust

and for the intents and purposes thereinafter mentioned, viz., upon trust during the minority of his daughter D., to receive the rents and apply the same for her benefit till she should attain twenty-one, and, on her attaining twenty-one, to pay to or permit and suffer her to receive the rents during her life for her separate use, without power of anticipation. And, from and after her death, upon trust for, and the testator thereby gave and devised the property to the issue, children or child, of the daughter who should live to attain twenty-one, in equal shares, if more than one, and to their respective heirs and assigns, with remainders over. And, after making other specific devises and bequests, the testator devised and bequeathed the residue of his estate and effects (subject to and charged with the payment of his debts) to one of his trustees absolutely for his own use and benefit. The daughter D. survived the testator, and she afterwards married and had three children, but she died before any of them had attained twenty-one:—Held, that, by reason of the direction that the testator's debts should be paid, the trustees took the whole legal estate in fee simple in the specifically devised estate, and consequently that the contingent remainder to the children of the daughter had not failed by reason of the determination of her life estate before the happening of the contingency. *Festing* v. *Allen* (12 M. & W. 279) distinguished. *Creaton* v. *Creaton* (3 Sm. & G. 386; 26 L. J., Ch. 266; 2 Jur. (N.S.) 1223; 5 W. R. 123) followed. *Marshall* v. *Gingell*, 51 L. J., Ch. 818; 21 Ch. D. 790; 47 L. T. 859; 31 W. R. 63. And see *Brooke*, *In re*, *Brooke* v. *Brooke*, 63 L. J., Ch. 159; [1894] 1 Ch. 43; 8 R. 24; 70 L. T. 71; 42 W. R. 186.

Legal Estate Outstanding — Acquisition of Legal Estate.]—Testator, before the Contingent Remainders Act, 1877, devised freeholds, the legal estate being in mortgagees, to J. for life, with remainder to the children of J. attaining twenty-one, and gave his residuary real and personal estate to J. Testator died in 1878. In 1887 the mortgage was paid off, and the legal estate conveyed to J. on the uses of the will. J. died in 1888, leaving three infant sons:—Held, that the acquisition by J. of the legal estate being after the Contingent Remainders Act, had not destroyed the equitable contingent remainder created by the will:—Held, also, that the rents during the suspense of the vesting of the remainders went to J.'s estate under the residuary devise as real estate. *Freme, In re, Freme* v. *Logan*, 60 L. J., Ch. 562; [1891] 3 Ch. 167; 65 L. T. 183; 39 W. R. 696

Accumulation of Rents and Profits until Period of Vesting.]—A testator, by his will dated in 1851, after making divers specific devises and bequests, and giving a life interest to his wife in his residuary real estate, devised such residuary real estate, after the death of his wife, to his trustees in trust for his grandson during his life, and from and after his decease in trust for "all and every his child and children who shall attain the age or respective ages of twenty-one years, and his, her, or their heirs and assigns for ever"; but in case there should be no child of his grandson who should attain the age of twenty-one years, then, as to the same residuary real estate, upon trusts over as in the will mentioned. The will contained a gift of the residuary personal estate, but it was distinct from the above devise, and upon different trusts from those declared concerning the real estate, although some of the trusts were the same. The will also contained powers for the trustees to grant leases, and apply the rents and profits of the real estate in making repairs. The testator died in 1853, and his widow died in 1866. The grandson died in October, 1867, leaving an only child, who was born on the 11th February, 1864. The question arose whether the accumulated rents accruing between the date of the death of the testator's grandson and the time when the grandson's only child attained the age of twenty-one years, were undisposed of by the will, or passed to such child:—Held, that the gift to the grandson's child was a contingent remainder, and not a vested remainder, and subject to being divested. *Williams, In re, Spencer* v. *Brighouse*, 54 L. T. 831.

Held, also, that the accumulated rents belonged to the testator's heir-at-law. *Ib.*

Held, further, that the doctrine of attraction as established by *Genery* v. *Fitzgerald* (Jacob, 468), and *Dumble, In re, Williams* v. *Murrell* (52 L. J., Ch. 631; 23 Ch. D. 360; 48 L. T. 661; 31 W. R. 605), did not apply. *Ib.*

—— **Maintenance — Intermediate Income — Conveyancing Act, 1881, s. 43.**]—A testator specifically devised scheduled property "whether real or personal" to trustees, upon trust for his daughter for life, and after her decease for her children—sons at twenty-one, daughters at that age or marriage; he then devised and bequeathed his residuary real and personal estate, after deducting the scheduled property, to his said trustees to be held by them, as to a moiety thereof, upon the trusts thereinbefore declared of and concerning the specifically devised freeholds. The scheduled property, in fact, comprised freeholds only. The daughter died, leaving two infant children:—Held, that the rule in *Genery* v. *Fitzgerald* (Jacob, 468) applied under the special terms of this will both to the scheduled and residuary gifts, and that the infants were contingently entitled, on attaining twenty-one, or marriage, to the income, since their mother's death, of the specifically devised freeholds, and of one moiety of the residuary estate; and, consequently, that s. 43 of the Conveyancing and Law of Property Act, 1881, applied, and that the trustees had power to resort to the intermediate income for maintenance. *Burton's Will, In re, Banks* v. *Heaven*, 61 L. J., Ch. 702; [1892] 2 Ch. 38; 67 L. T. 221.

Vested or Contingent Estate or Interest—"From and after" the Death of the Tenant for Life.]—A testator gave all his real and the residue of his personal estate to a trustee (as to a specified leasehold house), upon trust to permit his daughter, Elizabeth Jobson, to receive the rents thereof for her life, and "from and after her decease the same premises shall be in trust for all the children of the said Elizabeth Jobson, in equal shares as tenants in common, on their respectively attaining the age of twenty-one years." The will contained no direction as to the application of the rents of the leasehold house after the death of Elizabeth Jobson, and during the minority of her children:—Held, that, notwithstanding the words "from and after," the interest of the children in the leasehold house was contingent on their attaining twenty-one. *Jobson, In re, Jobson* v. *Richardson*, 59 L. J., Ch. 245; 44 Ch. D. 154; 62 L. T. 148.

Joint Life Estates—Contingent Remainder in Fee to Survivor.]—A testator, the owner of real estate in fee, by his will dated in 1840, devised his freehold estate to his wife for her life, to his brother for life, and then to seven children of his brother by name "as joint tenants and not as tenants in common, and to the survivor or longest liver of them, his or her heirs and assigns":—Held, that the devise to the seven children was a devise of joint life estates, with a contingent remainder over in fee to the survivor. *Quarm v. Quarm*, 61 L. J., Q. B. 154; [1892] 1 Q. B. 184; 66 L. T. 418; 40 W. R. 302.

Interests arising under Deeds.]—If the time at which a remainder in a deed is to vest is not ascertained by the limitation itself, it vests immediately in consequence of the legal presumption in favour of vesting estates; but that presumption may be rebutted or controlled by intention collected from the recital of any other part of the deed. *Cholmondeley (Marquis)* v. *Clinton*, 2 J. & W. 1, 81; 2 Mer. 173; 16 R. R. 167; 22 R. R. 84. Affirmed, 4 Bligh, 1; 22 R. R. 83—H. L. (E.)

A., in a conveyance to uses, reciting that he was desirous that certain estates derived from his mother's family should remain in the family and blood of S. R., his maternal grandfather, in consideration of his natural love and affection to his relations, the heirs of S. R., and to the intent that the said estates might continue in the family and blood of his late mother, on the side of her father, settles them to the use of himself for life, remainder to the heirs of his body; for default for such issue as he should appoint, and for default of appointment to the use of the right heirs of S. R., with a power of revocation and new appointment. The ultimate remainder is contingent, and will vest in the person who happens to be the right heir of S. R., at the expiration of the estates previously limited. *Ib.*

Feme covenants to stand seised to the use of herself in tail, remainder to such uses as she, by writing under her hand, should appoint, for want of such appointment, to the use of the plaintiff, her kinsman, in fee. Whether this remainder to such uses as she should appoint is not a void remainder, being on a covenant to stand seised. *Warwick* v. *Gerrard*, 2 Vern. 7.

b. Trustees to Preserve Contingent Remainders.

Estate of Trustees—In General.]—A. devised real estate to the use of trustees and their heirs in trust for B. for life; remainder to his first and other sons in tail; remainder to the future sons of C., successively for life; remainder over. B. died without issue in the testator's lifetime; the contingent limitations were taken as executory devises, because no child was then born to C.; afterwards a child was born to C., and died; and a subsequent remainderman claimed the estate, upon a supposition that all the preceding intermediate limitations which could not vest at the death of such child were destroyed, as it had been decreed that, upon the vesting of the executory devise in that child, the subsequent limitations became contingent remainders upon that executory devise; but it was held, that the inheritance in the trustees was sufficient to support the intermediate contingent remainders till they should come in esse, although no particular estate to support, &c., was inserted, and that the estate should not vest in possession whilst any of the preceding limitations might come in esse. *Hopkins* v. *Hopkins*, 1 Atk. 580; 1 Ves. sen. 268; Cas. t. Talb. 44. And see *Habergham* v. *Vincent*, 4 Bro. C. C. 390, where Lord Loughborough has stated this case from a corrected copy. See also *Bamfield* v. *Popham* (1 P. Wms. 56; 1 Ves. sen. 26), where Lord Trevor said it had been resolved that a cestui que trust for life could not destroy the contingent remainders to his first and other sons.

The legal estate in trustees will support contingent remainders of a trust declared by a will, where no conveyance is directed. *S. C.*, 1 Atk. 594.

Though contingent remainders by law must vest during, or at the instant the particular estate determines, yet it does not hold in the case of trusts. The ground the law goes upon is, that a freehold cannot be in abeyance, because there must be a tenant of the freehold to perform services, and answer all writs concerning the realty; but this objection is obviated in the case of an equitable estate, because the trustee is the tenant of the freehold to perform services, &c. Where there are ever so many contingent limitations of a trust, it is sufficient to bring the trustees before the court, together with him in whom the first remainder of the inheritance is vested. *Ib.*, 589, 590.

The resulting trust of a freehold, to support contingent remainders of a trust, may connect with the limitation in tail, though not created together with it. *Ib.*, 595.

In a limitation to support contingent remainders, it is not material to restrain it to the life of the tenant for life, provided it be restrained to the life of a person in being. *Ib.*, 596.

Semble, that a limitation to trustees to preserve contingent remainders, not confined to the lifetime of a tenant for life, will not be cut down to that life if there are contingent remainders which may require protection during a longer period. *Rochfort* or *Rochford* v. *Fitzmaurice*, 2 Dr. & War. 1; 1 Con. & L. 158; 4 Ir. Eq. R. 375.

—— **Devise to Wife for Life—Daughters for Life—Children of Daughters on Decease of respective Mothers.**]—A testator devised an estate to his wife for life, and upon the determination of that estate by forfeiture or otherwise to a trustee to preserve contingent remainders, nevertheless upon trust for his wife for life, and after her death he gave, devised, and bequeathed the rents to his two daughters in equal parts for life; and in case of the death of either without leaving issue, then to the survivor; but if either daughter should leave issue, such issue to be entitled to the mother's share; and on the death of both daughters he devised one moiety to the issue of each daughter or the whole to the issue of one if the other should die without issue:—Held, that the legal estate was in the trustee until the death of both daughters. *Saunders* v. *Eppe*, 3 L. T. 291; 9 W. R. 69.

Devise to trustees and their heirs to preserve contingent remainders:—Held, to pass an estate during the life of the tenant for life only, and not in fee. *Haddelsey* v. *Adams*, 22 Beav. 266; 25 L. J., Ch. 826; 2 Jur. (N.S.) 724.

Devise to trustees and their heirs, in trust for A. and his wife for their lives, and after the death of the survivor to the testator's four granddaughters, as tenants in common during their respective lives, with benefit of survivorship, remainder to the trustees "and their heirs,"

upon trust to preserve contingent remainders, remainder to the issue male of the four granddaughters successively, remainder to the testator in fee :—Held, that the granddaughters took for life as tenants in common, with survivorship to the survivors and survivor of them ; and that after the death of the last survivor their issue took several inheritances in tail. *Ib.*

Held, also, that the limitation to trustees and their heirs to support contingent remainders was not in fee, so as to make the subsequent remainders equitable, and prevent the coalescing of the remainder to the issue with the life estate to the parent, and therefore that the four granddaughters took estates tail. *Ib.*

—— **Shifting Clause—Persons Next Entitled in Remainder.**]—T. was the daughter and heiress-at-law of L., and tenant for life in possession of the K. estates under his will. Subject to such life estate, and to limitations which had ceased, the estates stood limited as follows : To E. for life, with remainder to trustees to preserve contingent remainders ; with remainder to the second and younger sons of E. in tail ; with remainder to M. for life ; with remainders over. The will contained a proviso to the effect, that if E. became entitled to the T. estates, the limitation of the K. estates in his favour should cease, determine, and be absolutely void, as if he were dead, and the K. estates should go over to the person next entitled in remainder under the will. In 1857 E. became entitled to the T. estates, having at that time one son only. T., the tenant for life, died in 1858, leaving M. her residuary devisee and legatee. In 1859 E. had a second son born :—Held, that the trustees to preserve contingent remainders were "the persons next entitled in remainder" ; but that M. was entitled to the rents of the K. estates from the death of T. to the birth of E.'s second son, and that such second son was entitled to them from that period. *Turton* v. *Lambarde, Lambarde* v. *Turton*, 1 De G. F. & J. 195 ; 29 L. J., Ch. 361 ; 6 Jur. (N.S.) 233 ; 2 L. T. 38 ; 8 W. R. 355.

—— **Estate in Fee Simple in Trustees.**]—A testator devised all his manors, &c., "to my son for his natural life, and at his decease" to trustees, "their heirs and assigns, in trust to preserve"—(this devise in trust was repeated whenever necessary)—"for the son or sons, daughter or daughters, the males taking first of my said son till they attain the age of twenty-one years, or the days of their marriage, and no farther ; the elder son to inherit before the younger, but the daughters to take equally and in common as joint heiresses." He empowered his son to give "any part or even the whole of these estates" to any or either of his sons, but not to his daughters, "as my said son may, from their conduct to him, their father, think deserving of preference." But if the eldest grandson should turn out ill, the testator left him an annuity of 200*l.* chargeable on his landed property, "and to the eldest son of such undeserving grandson I leave and bequeath my landed property, estates," &c. "I will, therefore, that the before-mentioned estates should in such instance descend to my son's grandson, but still subject to any entail of the same which my son may make." If the son died without issue, the trustees were to preserve the estates for the testator's four daughters during their lives, free from the control, &c., "the estates being equally divided between them or their heirs ;" and he gave the "estates and property to them through the said trustees," &c., whom he empowered to raise 10,000*l.* for the daughters, chargeable on all his estate :—Held, that the son took only an estate for life ; that the trustees took an estate in fee in remainder expectant on the determination of the life estate of the son, and that on the son's death without issue the estates went over to the daughters as tenants in common in tail. No gift in the will was void for uncertainty or remoteness. *Watkins* v. *Frederick*, 11 H. L. Cas. 358. And see *Marshall* v. *Gingell*, supra, col. 1565.

—— **Settlement.**] — Under a settlement and recovery, lands were limited to the use of A. for life, and after his decease to the use of B. and his heirs, during the life of A., to support contingent remainders ; remainder to the use of C. for life ; remainder to the same B. and his heirs, during the life of C., to support contingent remainders ; remainder to the first and other sons of C. in tail male remainder ; to the use of D. for life, and if she should marry, and her husband should survive her, to her husband for his life, and after the determination of those estates, to the said B. and his heirs (without saying, during the life of D.), to support and preserve contingent remainders ; remainder to the first and other sons of D. in tail male ; remainder to the use of E. for her life, and if she should marry, and her husband should survive her, to her husband for his life, and after the determination of those estates, to the said B. and his heirs (without saying, during the life of E.), to support contingent remainders ; remainder to the first and other sons of E. in tail male :—Held, that under the limitations to B. and his heirs, after the limitations of estates for life to D. and E., the trustee took the fee, and that E. took only an equitable estate. *Colmore* v. *Tindall*, 2 Y. & J. 605 ; 31 R. R. 637.

It is not a sufficient ground for restraining an estate limited in a deed to a trustee and his heirs, to an estate for life, that the estate given to the trustee seems to be larger than was essential to its purpose, or that the limitation has been unnecessarily repeated. *Ib.*

—— **Estate pur autre Vie in Trustees—Term to Raise Portions.**]—Lands were limited to W. B. for life, remainder to trustees and their heirs to preserve, &c., remainder to R. for life, with remainder to the same trustees for 500 years to raise portions :—Held, regard being had to the intention apparent on the face of the whole deed, that, although the estate was limited to the trustees and their heirs, yet they only took an estate pur autre vie so as to give effect to the 500 years' term. *Beaumont* v. *Salisbury* (*Marquis*), 19 Beav. 198 ; 3 Eq. R. 369 ; 24 L. J., Ch. 94 ; 1 Jur. (N.S.), 458.

A remainder in fee by settlement to trustees, limited to the life of the tenant for life, though not so expressed : the object of the trust terminating with that life ; and a remainder following to the same trustees, upon the death of the tenant for life, for a term of years. A subsequent remainder, therefore, to the heirs of the body of the tenant for life, held a legal estate ; uniting with the legal estate for life ; and vesting an estate tail, according to the rule in *Shelley's Case* ; not an equitable estate, capable of taking effect only as a contingent remainder. *Curtis* v. *Price*, 12 Ves. 89 ; 8 R. R. 303.

Under a voluntary settlement lands were limited unto J. and N. and their heirs, to the use of such persons as J. L. and A. should jointly appoint; and in default of appointment to the use of J. L. for life, and after his death to the use of A. for life, remainder to the use of J. and N. and their heirs, to support contingent remainders, and from and after the death of the survivor of J. L. and A. to the use of W. L. during the term of one hundred years for certain purposes, and subject thereto to the use of T. L., son of J. L., for life, remainder to the use of J. and N. and their heirs, to support contingent remainders; and after the death of T. L. to the use of his first and other sons in tail male, with remainders over:—Held that under the limitation to J. and N. and their heirs they took the legal fee, and that this estate could not be cut down to an estate pur autre vie. *Lewis* v. *Rees*, 3 K. & J. 132; 26 L. J., Ch. 101; 3 Jur. (N.S.) 12; 5 W. R. 96.

Held, also, that a settlement and a recovery suffered by T. L. in consideration of his marriage and after he came into possession as tenant for life were ineffectual to bar the limitations under the previous voluntary settlement. *Ib.*

Devise—Succession of Legal Limitations in Strict Settlement.]—Where a will creates a succession of legal limitations of real estate in strict settlement, the court will not hold the legal estate to be in the trustees merely to prevent a contingent remainder from failing for want of an estate of freehold to support it. *Cunliffe* v. *Brancker*, 46 L. J., Ch. 128; 3 Ch. D. 393; 35 L. T. 578—C. A.

A testator devised real estate to two trustees, their heirs and assigns, to the uses and upon the trusts thereinafter declared, that is to say, to the use of the trustees, their executors, administrators, and assigns for the term of 120 years after his decease, if his niece should so long live, and subject thereto to the use of the niece's husband for life, with remainder to the use of the trustees and their heirs during the husband's life, upon trust to preserve contingent remainders, with remainder to the use of all the children of his niece who should be living at the decease of the survivor of her husband and herself, and the issue of such of them as should be then dead, and the respective heirs and assigns of such children and issue as tenants in common, with divers remainders over:—Held, that the contingent remainder to the children failed for want of an estate of freehold to support it; for the court could not, in order to preserve the contingent remainder to the children of the niece from destruction, hold that the trustees took a legal estate in fee, the testator having clearly expressed his intention that they should be mere conduit pipes to feed the uses. *Ib.*

See now the Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33).

c. Destruction of Contingent Remainders.

i. *In General.*

Old Law—Legal Conveyance obtained by Fraud.]—If a contingent remainder is destroyed by a legal conveyance, and that conveyance is obtained by fraud, equity will relieve against it. *Englefield* v. *Englefield*, 1 Vern. 443.

How far it shall not be in the power of trustees to destroy contingent remainders. *Mansel* v. *Mansel*, 2 Barnard. K. B. 187.

How far a contingent remainder shall be said to be barred or not. *Hooker* v. *Hooker*, 2 Barnard. K. B. 200.

No Trustees—Release by Tenant for Life of Freeholds, Copyholds, and Leaseholds for Lives.]—Freeholds, copyholds, and leaseholds for lives were devised in 1838 to A. for life, with divers contingent remainders over, with an ultimate remainder to the testator's right heirs. There were no trustees to support the contingent remainders. A., who was the heir-at-law of the testator, executed a release, by which he purported to resettle the estates discharged from the contingent limitations created by the testator:—Held, first, that as to the freeholds, there being no trustees to preserve, the contingent remainders therein were destroyed. *Pickersgill* v. *Grey*, 30 Beav. 352; 31 L. J., Ch. 394; 8 Jur. (N.S.) 632; 5 L. T. 706; 10 W. R. 207.

Held, secondly, that the contingent remainders in the copyholds were not destroyed, as they were supported by the estate of the lord of the manor. *Ib.*

Held, thirdly, that the contingent remainders in the leaseholds for lives were not destroyed, as the possible estate, as special occupant, of the heir or executor of the tenant for life, was not large enough to merge the prior life estate of the tenant for life. *Ib.* And see *Allen* v. *Allen*, 2 Dr. & War. 307, 332.

—— **Recovery.**]—Devise "to testator's son G. for life, and from and after his decease unto all and every the child and children of G., lawfully to be begotten, and their heirs for ever, to hold as tenants in common, and not as joint-tenants; but if my son G. should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue, then I give and devise the same estates unto my son T., my daughter A. S., and my son-in-law W. D., and to their heirs for ever, as tenants in common, and not as joint-tenants." After testator's death, G. suffered a recovery, and died unmarried and without issue:—Held, that in that event the devise over must take effect as a contingent remainder, and was therefore defeated by the destruction of the particular estate by the recovery. *Doe* d. *Herbert* v. *Selby*, 2 B. & C. 926; 4 D. & R. 608; 26 R. R. 585.

By Married Woman.]—See *Banchs* v. *Ollerton*, 10 Ex. 168; 2 C. L. R. 1090; 23 L. J., Ex. 285.

By Fine and Recovery.]—See FINES AND RECOVERIES.

ii. *Liability of Trustees.*

Joining with Tenant for Life.]—Trustees in a will, to support contingent remainders, joining with tenant for life in destroying them, are guilty of a breach of trust, and a purchaser, with notice of the trust, is liable to make good the estate. *Gorges* v. *Pye*, 7 Bro. P. C. 221; Pre. Ch. 308; 1 P. Wms. 128.

If trustees to preserve contingent remainders join in sale to one without notice, the purchaser will be safe; contra, if he have notice. *Willoughby* v. *Willoughby*, Amb. 284.

Trustees for supporting contingent remainders joining to destroy them guilty of a breach of

trust; and no diversity, whether the settlement be voluntary, or for a valuable consideration, or by will only. *Mansell* v. *Mansell*, 2 P. Wms. 678; Cas. t. Talb. 252.

A settlement was made by a third person to the use of the husband for ninety-nine years; remainder to trustees during his life, &c.; remainder to the wife for life; remainder to the first, &c., sons of the marriage; remainder to the heirs of the body of the husband; remainder to the right heirs of the husband: there was no issue of the marriage, and the trustees joined in cutting off remainders, yet the court refused to punish them at the suit of a remote remainderman. *Tipping* v. *Piggot*, Gilb. Ex. Rep. 34.

Waste by Tenant for Life.]—Trustees to preserve, &c., are not to permit the tenant for life or years, by destruction of that estate, to bring forward a remainder to himself or another, for the purpose of cutting timber. *Stansfield* v. *Habergham*, 10 Ves. 278; 7 R. R. 409.

Trustees to preserve, &c., may bring title to stay waste by tenant for life. *Perrot* v. *Perrot*, 3 Atk. 95.

Tenant for Life also a Trustee.]—Where tenant for life under will, with remainder in tail, is also made trustee to preserve remainders over, he is not guilty of breach of trust by joining with remainderman in tail, to destroy remainders over. *Osbrey* v. *Bury*, 1 Ball & B. 58.

Joining in a Recovery to Bar Entail.]—Trustee to preserve contingent remainders, joining in a recovery with the remainderman in tail, having attained twenty-one:—Held, no breach of trust, and no objection to a specific performance. *Biscoe* v. *Perkins*, 1 V. & B. 485; 12 R. R. 279.

Trustees to preserve contingent remainders, joining in a recovery:—Held, with reference to the circumstances and occasion, no breach of trust. *Moody* v. *Walters*, 16 Ves. 283.

Generally, trustees joining to destroy the contingent remainders, before the tenant in tail is of age, is a breach of trust. *Ib.*

If a trustee joins with a cestui que trust in any conveyance to bar the entail, it is no breach of trust, for it is no more than what he may be compelled to do, though the trustee himself might have barred such entail without his joining, and that not only by fine or recovery, but also by feoffment, bargain or sale, devise or surrender (if no custom to the contrary in the latter case). See *Goodrick* v. *Brown*, 1 Ch. Ca. 49; *Washborn* v. *Downs*, 1 Ch. Ca. 213; *Digby (Lord)* v. *Langworth*, 1 Ch. Ca. 68; *North* v. *Champernoon*, 2 Ch. Ca. 64, 78.

iii. *Order on Trustees to Convey.*

Trustees ordered to Join—In Sale.]—Trustees to preserve contingent remainders in a voluntary settlement, decreed to join in a sale for payment of debts. *Basset* v. *Clapham*, 1 P. Wms. 358; 2 Eq. Cas. Abr. 748, pl. 1.

Trustees in a marriage settlement, for preserving contingent remainders (there being no issue), are decreed to join in a sale, the settlement being only of an equity of redemption, and the wife consenting to the sale. *Platt* v. *Sprigg*, 2 Vern, 303.

Whether a trustee for preserving contingent remainders shall be decreed to join in a sale, to pay debts, when there is no probability of issue. *Davies* v. *Weld*, 1 Vern. 181.

The court will not compel trustees to join in a sale which will not only destroy contingent remainders, but all the uses in a marriage settlement; for they are guilty of a breach of trust in joining to destroy contingent remainders, whether the settlement be voluntary, for a valuable consideration, or by will. *Symance* v. *Tattam*, 1 Atk. 614.

—— **In Recovery.**]—Where court has at instance of eldest son ordered trustees to join in destroying contingent remainders, it has sometimes imposed conditions on the son as a provision for a sister. *Frewin* v. *Charleton*, 1 Eq. Cas. Abr. 386.

In a marriage settlement husband made tenant for ninety-nine years, if he so long lived; remainder to trustees during the life of the husband, &c.; remainder to the first, &c., sons by the marriage in tail male; remainder to the first, &c., sons of any other wife; remainder over. A son is born, and of age, the wife dead, and there are no other sons by the second marriage: the trust for preserving contingent remainders descends to an infant; if for the benefit of the family, equity will decree the infant trustee to join in a recovery. *Winnington* v. *Foley*, 1 P. Wms. 536.

On marriage lands are settled to A. for ninety-nine years, if he so long live; remainder to B. and his heirs, during the life of A., to support contingent remainders; remainder to the first, &c., sons of A. A. has two sons, C. and D. A., the father, having mortgaged the premises, he and his son C. covenant to suffer a recovery, and to procure B., the trustee, to join. B., the trustee, by answer, submits to the court; the court will not compel the trustee to join, unless D., the second son of the marriage, will consent. *Townsend* v. *Lawton*, 2 P. Wms. 379; Select Ca. Ch. 71.

The court will not compel a trustee for preserving contingent remainders to join in a recovery, unless to continue the estate, or under very particular circumstances. *Bernard* v. *Large*, 1 Bro. C. C. 534.

A., tenant (of a settled estate) for ninety-nine years, if he should so long live; remainder to trustees to preserve, &c., remainder to his first and other sons; remainder over to A. and B. His sons, being indebted, assigned this settled estate in trust to their creditors, and agreed to suffer a recovery. The creditors filed a bill against A. and B., and against the trustee to preserve, &c.; to compel him to join in the recovery. Per curiam, the court will effectuate the intention of a testator as far as possible, to preserve the limitations he has made, where the uses are executory; and as there is no similar case, in which the court has decreed the trustees to join, it ought not to be done here. Bill dismissed. *Woodhouse* v. *Hoskins*, 3 Atk. 22.

7. Executory Devises.

a. In General.

Nature of Executory Devise.] — Executory devise is in its nature equitable, and becomes legal estate only by application of the statute of uses, which executes every species of interest that a court of equity would before: and that has been extended to cases not in contemplation

of the statute. *Perry* v. *Phelips*, 1 Ves. 255. And see *Glover* v. *Monckton*, 3 Bing. 13; 10 Moore, 453; 3 L. J. (o.s.) C. P. 189; 28 R. R. 559.

Devise of personal estate, and of rents and profits of real, in trust, to accumulate and to be laid out in land to be conveyed with the real to the youngest or only son of the trustee, at twenty-one:—Held, a vested interest by executory devise in an only surviving son, and not to wait till the death of the father, but liable to be divested by birth of another son. The trustee survived his son several years, and received the rents and profits till his death, but never laid them out in land as directed; those accrued after the son made his will:—Held, to be an equitable interest in land, and therefore to pass by it. *Ib.*, 251.

A limitation by way of executory devise, which is not to take effect until after the determination of a life or lives in being, and a term of twenty-one years in gross, and without reference to the infancy of any person, who is to take under such limitation, or of any other person, is a valid limitation. Secus, if to the term in gross of twenty-one years be added the number of months equal to the period of gestation. *Cadell* v. *Palmer*, 1 Cl. & F. 372; 7 Bligh (N.S.) 292; 10 Bing. 140; 3 M. & Sc. 57—H. L. (E.) Affirming *S. C.*, nom. *Bengough* v. *Edridge*, 1 Sim. 173; 5 L. J. (o.s.) Ch. 113.

A devise to A. and B. and their heirs, in default of issue male and female of the testator's own body, is, at the testator's death, a devise in possession, and not an executory devise; the contingency being determined at the instant the will takes place, viz. at the death of the testator without issue. *French* v. *Caddell*, 3 Bro. P. C. 257.

Devise to A. and B. and their heirs, to sell and dispose at their discretion of all the testator's rights in S. belonging to the manor of M., and all his right in M., if an act should pass for enclosing the same within twenty years, to pay the proceeds to the several persons therein mentioned. An enclosure act passed within the twenty years, and various allotments were made in respect of the testator's estates:—Held, that the devise was in the nature of an executory devise to take effect on the passing of the act. And the decree declared the parties claiming under the devise to be entitled to one-fourth part of the moneys produced from the sale of allotments in S., in respect of the testator's messuage and lands in S., and to the whole of the moneys produced by the sale of the allotments in respect of the lands in M. *Gardner* v. *Lyddon*, 3 Y. & J. 389.

A. devises his freehold, copyhold, and leasehold, and all his real and personal estate not before devised to three trustees, their heirs, &c., in trust to pay his son B. an annuity; and if he should have any child or children, the residue of the rents, during B.'s life, for the education and benefit of such child or children; and after B.'s decease, a moiety of the trust estate to such child or children as he shall leave, their heirs, &c., the other moiety to the child and children of his grandson C., and every other child and children of his daughter S., their heirs, &c. And if B. die without issue, the first moiety to C., and other child and children of S., and their heirs, &c.; and directs an annual payment to such wife as B. shall marry. The testator died; B. married, and had issue a son and daughter, and died; afterwards C. married, and had issue a daughter, and died: the limitation to the daughter of C. is well supported by the estate in the trustees; or, if not, is good as an executory devise; and the profits, &c., shall go to the children of B. *Chapman* v. *Blissett*, Cas. t. Talb. 145.

Gift to testator's brother, without any restriction as to his children, to whom he shall leave, before or after his death, such part of the testator's inheritance as their conduct may deserve; but if at the death of his brother there should be no children, then to A.; this is an executory devise, which, if it took place, would defeat the interest of the children of the brother. *Lieutand* v. *Agassiz*, 2 Bro. C. C. 615.

It is a certain rule of law, that if such a construction can be put upon a limitation as that it may take effect by way of remainder, it shall never take place as a springing use, or executory devise. *Carwardine* v. *Carwardine*, 1 Eden, 28.

No case of a springing use ever introduced in the middle of a limitation, but it always comes in afterwards, and determines the first gift in fee; and whenever it happens to arise, it displaces the first gift, and changes the uses in favour of other persons. *Ib.*, 44.

Conditional Limitation taking Place as an Executory Devise.]—W. H., by will, gave 100*l.* to his daughter Frances, 450*l.* between two other daughters, and then devises his land in trust for a term of ninety-nine years, with a power to raise a less term upon trust, that if his wife should within four years pay off the 550*l.*, then the lands to go to her for life, and after her death to W. H., his son, and his heirs, male and female, and for want of such issue, to him and his heirs for ever. This is a conditional limitation in the wife, taking place as an executory devise, and the freehold descended to the son as heir-at-law to the testator, till the four years elapsed, or his wife had performed the condition, as a part of the inheritance undisposed of, and by this devise the son had a good estate tail in the inheritance, expectant on the determination of the term of ninety-nine years. *Hayward* v. *Stillingfleet*, 1 Atk. 422.

Alteration of Devolution of Estate at Moment of Devolution Over—Condition Repugnant to Prior Gift.]—A father devised houses to his four sons, share and share alike, with a proviso against division or alienation without their respective consent, and in case of no such distribution being made certain executory gifts over were made:—Held, that the executory devise was void. *Shaw* v. *Ford*, 47 L. J., Ch. 531; 7 Ch. D. 669; 37 L. T. 749; 26 W. R. 235.

An executory devise, which would defeat or abridge an estate in fee, and alter the course of devolution, and can only take effect at the moment of devolution, is void. *Ib.*

An executory devise, which would defeat an estate, and would take effect on the exercise of a right incident to that estate, is void. *Ib.*

—— **After a Fee Simple.**]—T. devised all his real and personal estate to his wife for life; remainder to his son and his heirs for ever; and if he should die without any heir, then to plaintiff. A., by will, devised the whole to plaintiff, but he neither levied a fine nor suffered a recovery. This is a fee mounted upon a fee, and a void devise both at law and equity. *Tilbury* v. *Barbut*, 3 Atk. 617.

—— **Estate Pur Autre Vie.**]—A., having an estate for three lives, settles it to the use of himself in tail, remainder to B.: the remainder is void, or if good, it might be barred by deed, surrender, or other conveyance. *Baker* v. *Bayley*, 2 Vern. 225.

—— **Power of Tenant for Life to Defeat Executory Devise.**]—Leaseholds for lives were devised to A. and his heirs, and in case A. died without issue, to B.:—Held, in analogy to a fee simple, that A. could not by dealing with the property defeat the executory interest of B. *Barber's Settled Estates, In re*, 50 L. J., Ch. 769; 18 Ch. D. 624; 45 L. T. 433; 29 W. R. 909.

Contingent Remainder or Executory Devise—Gift to Children Living at Death of Tenant for Life as before or after His Death Attain Twenty-one.]—Devise to a son for life, and from and after his decease to the use of such child or children of the son living at his decease, "as either before or after the death" of the son should attain twenty-one:—Held, an executory devise, and that the gift did not fail by reason of the son's children being infants at his decease. *Lechmere and Lloyd, In re* (18 Ch. D. 524; 45 L. T. 551) followed. *Brackenbury* v. *Gibbons* (2 Ch. D. 417; 45 L. T. 551) not followed. *Dean* v. *Dean*, 60 L. J., Ch. 553; [1891] 3 Ch. 150; 65 L. T. 65; 39 W. R. 568.

—— **Gift to Children Living at Death of Tenant for Life or thereafter to be Born.**]—Testator gave an estate to his wife Elizabeth and her assigns for life, and after her decease unto all and every the lawful children of his son William living at the time of the decease of his wife Elizabeth or thereafter to be born, in equal shares as tenants in common:—Held, that this was an executory devise, and the children born after the death of the tenant for life were entitled to share equally with those born before her death. *Brackenbury* v. *Gibbons*, supra, and *Lechmere and Lloyd, In re*, supra, observed upon. *Miles* v. *Jarvis*, 52 L. J., Ch. 796; 24 Ch. D. 633; 49 L. T. 162.

—— **Equitable Remainder—Attaining Twenty-five—Name and Arms.**]—A testator devised and bequeathed real and personal estate to trustees upon trust to pay the income to his wife during her life, and after her decease, if H. was then living, to retain the rents of the realty to their own use during his life, and to pay him the income of the personalty during his life, and after his death upon trust to convey and transfer the real and personal estate to such son of M. as should first attain the age of twenty-five years, upon condition that such son of M. as should become entitled to any property under the will should, within two years after he should so become entitled, take the name and arms of the testator. At the testator's decease M. was living, and had no son who had attained twenty-five, but his eldest son attained that age during the lives of the widow and H. This son died in the lifetime of H. without having taken the name and arms of the testator:—Held, that the direction to the trustees to convey on the death of H. did not create a contingent equitable remainder, but was an executory devise. *Abbiss* v. *Burney*, *Finch, In re*, 50 L. J., Ch. 348; 17 Ch. D. 211; 44 L. T. 267; 29 W. R. 449—C. A.

Limitation Over—Invalidity of One Alternative.]—Though a gift over may, as to one alternative, operate as an executory devise, it will not necessarily do so as to another; and if the second is that which in fact occurs, the gift may be treated as a good contingent remainder. *Doe* d. *Evers* v. *Challis*, 7 H. L. Cas. 531; 29 L. J., Q. B. 121; 5 Jur. (N.S.) 825; 7 W. R. 622.

The invalidity of one alternative will not necessarily defeat the other. *Ib.*

—— **Cesser of Life Interest—Forfeiture.**]—A testator, by will dated in 1870, devised real estate to his son for life, and after his death to the son's children then or thereafter to be born, who should live to attain the age of twenty-one, or, being daughters, marry, in equal shares as tenants in common. He declared that in case his son should attempt to dispose of his life interest, or should become bankrupt, or in case the estate devised to him should be taken in execution by any process in law for the benefit of any creditor, the devise should immediately become absolutely void and cease as if he were dead, and the estate should thenceforth absolutely vest in the person or persons who, under the limitations thereinbefore contained, would be next entitled thereto. The testator died and the son entered into possession. An order was made appointing a receiver of the rents and profits of the son's interest under the will in respect of a debt for which judgment had been signed against him. At that time the son had two children, only one of whom had attained twenty-one, or married; subsequently two other children were born:—Held, that the limitation to the son's children in case of his life interest being taken in execution was an executory limitation and not a contingent remainder, and included all such children, whenever born, who should attain twenty-one, or, being daughters, marry. *Blackman* v. *Fysh*, [1892] 3 Ch. 209; 2 R. 1; 67 L. T. 802—C. A.

—— **Maintenance of Infants.**]—Testator, by will executed before the passing of the Contingent Remainders Act, 1877, devised freehold property to the use of E. for life, and after her death to the use of trustees, their heirs and assigns, during the life of S., upon trust for S., and after her death to the child or children of S., who being sons should attain twenty-one, or being daughters should attain that age or marry. The testator then directed that after the death of the survivor of E. and S., his trustees might, during the minority of any child of S. for the time being presumptively entitled, receive the rents of the premises or the share thereof to which any such minor should be actually or presumptively entitled, and apply the same for his or her maintenance, and directed that the unapplied income should follow the destination of the share from which the same should arise. On the death of the survivor of E. and S., there were five children, three of whom were infants and unmarried:—Held, that the children took the legal estate; but, looking to the maintenance clause, there was a sufficient intention expressed on the whole will that infants should share, and that therefore the gift must be construed as an executory devise and not as a contingent remainder. *Bourne, In re, Rymer* v. *Harpley*, 56 L. J., Ch. 566; 56 L. T. 388; 35 W. R. 359.

Tenant in Fee Simple—Executory Limitation Over.]—A testator devised realty to trustees on

trust to pay the rents and income thereof to his wife for the maintenance, education, and benefit of his infant son until twenty-one, without liability to account for the same, and upon his said son attaining twenty-one, then upon trust for him absolutely; but if he should die under twenty-one without leaving issue, then upon trust for his said wife during life or widowhood, with remainder over:—Held, that the infant son was a tenant in fee simple in possession, with an executory limitation over. *Morgan's Estate, In re*, 53 L. J., Ch. 85; 24 Ch. D. 114; 48 L. T. 964; 31 W. R. 948.

A. devises his real estate to B., his brother, for life, then to trustees to preserve, &c., remainder to first and other sons in tail, with power to make jointure; and if his said brother had no son, or if he had and such son died without issue male, then to C., and his first, &c., sons in like manner, and willed that his plate, jewels, &c., should go to the heirs male of his family successively, as his real estate is settled, as much as they could by law. B. having no son, limitation to C. held good by way of executory devise. *Gower* v. *Grosvenor*, 9 Mod. 249.

A residuary estate was given to three brothers and a nephew, for their lives as tenants in common, and after their decease, then in trust for their heirs and assigns as tenants in common. The will then contained provisions that the shares of any or either of their children, dying under twenty-one without issue, should go to the survivors, and that the share of such child as died under twenty-one, leaving issue, should go to the children of such child; but that in case one child only of the brothers and nephew should attain twenty-one or be married, then in trust for such child, his or her heirs or assigns:—Held, that the brothers and nephew took an absolute vested interest in the residuary estate, with an executory devise over in case of children being born. *Spence* v. *Handford*, 27 L. J., Ch. 767; 4 Jur. (N.S.) 987.

Estates in Fee Simple Cut Down to Estates Tail.]—*See* WILL.

Clear Gifts Not Cut Down by Doubtful Expressions.]—*See* WILL.

b. Failure of Prior Gift. Effect on Executory or Substituted Gift.

Gift of Freehold Property for Hospital—Gift over on Failure of Inhabitants to carry out Scheme.]—Devise of a house to the inhabitants of B. to found a lying-in asylum, the executors to call a meeting of the inhabitants within a mile round to appoint a committee and trustees to carry out the scheme; testator's godson to be one of the said trustees. "But in the event of the said inhabitants not appointing a committee, or not [being] willing to carry out the same scheme," then a devise over to the testator's godson:—Held, upon the principle of *Jones* v. *Westcomb* (Prec. Ch. 316; Gilb. Eq. R. 74; 1 Eq. Cas. Abr. 248, pl. 10) and *Axelyn* v. *Ward* (1 Ves. Sen. 420), that the devise over was valid, notwithstanding that the prior devise failed to take effect by reason of the statute of mortmain, and not in the manner contemplated by the testator. *Hall* v. *Warren*, 9 H. L. Cas. 420; 7 Jur. (N.S.) 1089; 5 L. T. 190; 10 W. R. 66. Affirming 28 L. J., Ch. 70.

And see *Att.-Gen.* v. *Hodgson*, 15 Sim. 146; 15 L. J., Ch. 290; and *Philpott* v. *St. George's Hospital*, 21 Beav. 134; 25 L. J., Ch. 33; 4 W. R. 41. And see *S. C.*, 5 Jur. (N.S.) 1102; 7 W. R. 659.

Gift over—On Death of Child under Twenty-five—Child stillborn.]—Testator gave his estate to trustees, to apply the profits for the use of the child with which his wife was then pregnant, during infancy, and at twenty-five to the child in fee; but in case the child should die before twenty-five, without issue, remainder over; the child was stillborn. Afterwards testator made a codicil affirming his will, and died without issue. Forty-three weeks after his death, his widow was brought to bed of a son; this son cannot take the estate, though found to be legitimate, but it shall go to the devisees over. *Foster* v. *Cook*, 3 Bro. C. C. 347.

—— **After Death of Tenants for Life if Children should die under Twenty-one.**]—Bequest of pecuniary legacy to A. for life, with remainder to B., his wife, for life, remainder to such children of A. as should be living at the death of the survivors of A. and B., to be paid at twenty-one; with survivorship in case of the death of any such children under twenty-one, with a gift over to C. after the death of A. and B. if all such children should die under that age. A. had two children, who both attained twenty-one, but died in his lifetime, leaving issue:—Held, that the gift over to C. took effect. *Wilson* v. *Mount*, 2 Beav. 397; 1 Jur. 262.

—— **On Death within certain Time and no Testamentary Disposition.**]—A testator, by his will, gave his residuary estate upon trust for his wife for life, providing she should survive him twelve months and remain unmarried, and he gave to his wife power to dispose by will of one half of the estate, and gave the other half after her decease to his sister J., or, in case of her predecease, to other persons; and he directed that, in case of his wife dying within twelve months from his own decease, his whole estate should go to his said sister, with a gift over as before in case of her predecease, and he made a similar provision with respect to one half of the estate in the event of his wife omitting to make a will. The testator's wife died in his lifetime, and his sister J. survived him:—Held, that the contingencies against which the testator guarded, and which the court, in construing the will, was bound to regard, were the event of his wife not being alive at the expiration of twelve months from his own decease, and the event of there being no testamentary disposition by her, and that, in the events which had happened, the gift over in favour of the testator's sister took effect. *Davies* v. *Davies*, 47 L. T. 40; 30 W. R. 918.

—— **Upon Failure of Heirs of the Body, or making a Particular Disposition.**]—A testator devised specific shares in an estate to several persons, nominatim, to hold the same as tenants in common, and not as joint tenants; and in the event of any of them dying before having heirs of their body, "or" making a particular disposition of his or her property, then his other share was to go to the survivors:—Held, that the devisees did not take estates tail, but estates in fee; that the gift over could only take effect on

the happening of two events; that the word "or" must be read "and," although in effect it introduced a condition repugnant to the estate previously given, and made the gift over void. *Greated* v. *Greated*, 26 Beav. 621; 28 L. J. Ch. 756; 5 Jur. (N.S.) 454; 7 W. R. 367.

—— **Afterborn Illegitimate Son.**]—So far as limitations of real estate, in a will or settlement, are illegal and void, the estate remains subject to the subsequent limitations, or if not affected by them, it belongs to the settlor or testator, and the insertion of the illegal limitations has no effect on the subsequent limitations in the same settlement; therefore where an estate was limited to A. in fee, but if he die under twenty-one, and without issue, then to an afterborn illegitimate son, in fee; but in case there should be no such, or, being such, he should die under twenty-one, and without issue, then to B. in fee: —Held, that the executory devise to B. is good, and on the death of A., and the happening of the contingency of the death of the afterborn illegitimate child, under twenty-one, and without issue, the estate would vest in B.; but if there should be no such child, or if such child should attain twenty-one, the heir takes the estate as undisposed of. *Lomas* v. *Wright*, 2 Myl. & K. 769; 3 L. J., Ch. 68.

Lapse—Gift over on Death under Twenty-one —Death in Lifetime of Testator.]—Devise to A. and her heirs, but, if she dies under twenty-one and unmarried, to B. and her heirs. A. dies in the life of the testator under twenty-one and without issue, but having been married: the heir is entitled. *Williams* v. *Chitty*, 3 Ves. 546; 3 R. R. 71.

First a devise to A. at twenty-one, and if she die under twenty-one to her children, or if she die under twenty-one and no children then over. A. survived twenty-one and had children, and then died in the lifetime of the testatrix; decided at law, that A.'s children could not take, the above being a condition precedent, contrary to the opinion of Lord Thurlow, Ch. *Doe* v. *Brabant*, 3 Bro. C. C. 393; 4 Term Rep. 706. And see *Calthorpe* v. *Gough*, 3 Bro. C. C. 395, n.; 4 Term Rep. 707, n.

A testatrix devised real estate to her trustee and his heirs, in trust out of the rents to maintain her son William until he attained twenty-one, "and when and so soon as" he should attain twenty-one, she devised it to him in fee. But in case he should die before attaining twenty-one, to his children, if any, or if none, then to the defendant. The son did attain twenty-one, and died without issue in the lifetime of the testatrix. There being no heir or next-of-kin of the testatrix:—Held, that the trustee was entitled to hold the real estate beneficially. *Cox* v. *Parker*, 22 Beav. 168; 25 L. J., Ch. 873; 2 Jur. (N.S.) 842; 4 W. R. 453.

—— **Devise over if Devisee should not Give a Release in a Certain Time.**] — Devise on condition that the land should go over to another if devisee did not give a release in three months after testator's death; devisee dying in the testator's lifetime, the devisee over shall take instead of heir-at-law; this being a conditional limitation, and not a strict condition. *Avelyn* v. *Ward*, 1 Ves. sen. 420.

—— **Death of Child Without Issue over Twenty-one in Testator's Lifetime.**]—A testator, by his will, which recited and was intended to carry into effect articles made on the marriage of his daughter, devised real property to trustees to the use of the husband for life, or until bankruptcy or insolvency, and after bankruptcy or insolvency to the use of trustees during the joint lives of husband and wife to pay the rents and profits to the wife for her separate use, with remainder to the wife for life, with remainder to trustees to preserve contingent remainders, with remainder, subject to a power of appointment, to the children of the marriage in fee as tenants in common, with benefit of survivorship, and if only one child, then to that one; and in case every child born or to be born should die under the age of twenty-one, and without leaving lawful issue born or to be born in due time afterwards, then to the use of the heirs and assigns of the wife as if she had continued sole and unmarried. There was one child living at the date of the will. All the children died without issue in the lifetime of the testator, one having attained the age of twenty-one years. The husband became insolvent, and afterwards joined with the wife in a conveyance to such uses as she should by deed or will appoint. She appointed by will to S.:—Held, that a child having attained the age of twenty-one years, the ultimate limitation never took effect, that the case was one of lapse, and that the heir-at-law was therefore entitled to the property. *Tarbuck* v. *Tarbuck* (4 L. J., Ch. 129) approved. *Brookman* v. *Smith*, 41 L. J., Ex. 114; L. R. 7 Ex. 271; 26 L. T. 974; 20 W. R. 906—Ex. Ch.

See also ante, 2—4, and post, C. 7, a.

And see CONDITION.

c. Failure of Executory Gift Over. Effect on Prior Gift.

Life Interest to A.—Gift Over on Marriage and no Children—Death in Lifetime of A.]—A testator gave real and personal estate to his daughter A., and to two other persons, upon trust, to permit A. to receive the rents and interest for life, for her separate use, and after her decease, in trust to convey to her heirs, executors, &c.; but, in case A. should marry and have no children, then the property to belong to D.; or in case of his decease before A., then to his children:—Held, that A. took an absolute equitable estate, with an executory gift over, to D. and his children; and D. having died in the lifetime of A., leaving no children:—Held, that A. was absolutely entitled to the property. *Jackson* v. *Noble*, 2 Keen, 590; 7 L. J., Ch. 133; 2 Jur. 251.

Death under Twenty-one Without Issue — Charitable Gift Over Void.]—A testator devised lands in fee, but declared that if the devisee A. died under twenty-one, and without issue, then the lands should go to a charity. The gift to the charity being void:—Held, on the authority of *Doe* v. *Eyre* (5 C. B. 746), that the gift to A. was divested by the charitable gift over, although that gift was for all other purposes void. *Robinson* v. *Wood*, 27 L. J., Ch. 726; 4 Jur. (N.S.) 625; 6 W. R. 728.

A testator devised his real estates to trustees, their heirs and assigns, upon trust, to apply the rents for the maintenance of his daughter till twenty-one, and then to convey the estates to

his daughter, her heirs and assigns; and in case his daughter should die under twenty-one, then upon trust for the absolute use and benefit of such issue as tenants in common, but if she should die under twenty-one without issue, then upon trust to sell the property and pay the proceeds to a charity. The daughter died under twenty-one without issue, and the gift over being void under the statute of mortmain:—Held, that the original devise to the testator's daughter, assuming that she took an absolute estate in fee simple, was divested by the subsequent gift over, although that gift had failed, and that the trustees of the will became entitled to the estate. *Ib.*

Forfeiture on Alienation — Acceleration of Subsequent Interests.]—Specified freeholds and leaseholds were given by will to trustees upon trust to permit the rents to be received by H. for life, and after his death to convey to his children on their attaining twenty-one, with a proviso that if H. charged or incumbered the property, the gift to him should be absolutely forfeited, and that in such case the gift in favour of his children should at once take effect, and be acted upon by the trustees as thereinbefore directed. H., by a memorandum in writing, in 1869, charged his life estate in favour of W. W. shortly afterwards, on hearing of the clause of forfeiture, and before he had taken any benefit under the charge, repudiated the security, and obtained another security from H. In 1874 the trustee of the will, by leave of the court in an administration suit, filed a bill against persons who were in possession of the property under a title derived from a lessee of H., to make them account for the rents. H. had no children:—Held, that the memorandum of charge produced a forfeiture of the life interest of H., although W. had never claimed any benefit thereunder, and had afterwards disclaimed it, and although H. had no children, so that there were no persons to take under the gift over. *Hurst* v. *Hurst*, 51 L. J., Ch. 729; 21 Ch. D. 278; 46 L. T. 899; 31 W. R. 327—C. A.

Gift to a Class — Substitution.] — A testator directed his trustees, after the death of the longest liver of his son, his daughter, and any widow whom the son might leave, to sell his real estate and to stand possessed of the proceeds and of the rents and profits until sale, upon trust to pay and apply them "unto and equally amongst all and every the child and children of my son W. and daughter M. share and share alike, and the lawful issue of such of them as may be then dead leaving issue, such issue to be entitled to no more than their parent or respective parents would have been if living." He directed that if his daughter's son then living should die without leaving issue, or, leaving issue, all of them should die under age and unmarried, the trustees should pay the share which would have been payable to him under the above trusts to the children of J.; and that if the testator's son died without leaving issue, or all of them died under age and unmarried, the trustees should pay the share which would have been payable to them under the trusts aforesaid, to the children of J. and M. The heir-at-law claimed the corpus as undisposed of, on the ground that the disposition of the proceeds of sale was void for remoteness as being a gift to a class not ascertainable till at or after the death of the son's widow, who might be a person unborn at the testator's death:—Held, that the gift was not a gift to such children of the son and daughter as should be living at the period of distribution and the issue of such of them as should be then dead, but a gift to all the children of the son and daughter, with a gift over by way of substitution of the shares of such of them as might die before the period of distribution leaving issue—that when the gift over of any share was void for remoteness the original gift remained unaffected—and that the heir-at-law had no title. *Goodier, In re, Goodier* v. *Johnson*, 51 L. J., Ch. 369; 18 Ch. D. 441; 45 L. T. 515; 30 W. R. 449—C. A.

See also, ante, 4, and post, C. 7, b.

Construction of Gift over in Particular Events.] —*See* WILL.

8. SHIFTING CLAUSES.

a. Construction and Operation.

In General.]—See *Micklethwait* v. *Micklethwait*, 29 L. J., C. P. 75; 5 Jur. (N.S.) 437; 7 W. R. 451—Ex. Ch. Affirming 4 C. B. (N.S.) 790; 28 L. J., C. P. 121; 5 Jur. (N.S.) 41; 7 W. R. 117.

Shifting clauses, which take away an estate from the owner, are construed strictly. *Wilmesley* v. *Gerard*, 29 Beav. 321; 30 L. J., Ch. 435; 7 Jur. (N.S.) 1041.

A testator devised an estate to his eldest nephew and his issue, subject to a shifting clause, requiring them, under pain of forfeiture, in case they should also become seised, "under any now existing or future will or settlement or other assurance (except actual purchase for money)," to a Lincolnshire estate, to convey it to the younger nephews and their issue male. At the date of the will, and at his death, the eldest nephew was seised in fee of the Lincolnshire estate, which had descended to him as heir of his father:—Held, first, that he was not bound by the shifting clause; but the nephew having, after the testator's death, by deed conveyed the estate to the uses to which it should be conveyed as a compliance with the will. Held, secondly, after his decease, that the deed was as operative as if he had been compellable, under pain of forfeiture, to execute it. *Ib.*

Devise of an estate (Cansfield) to nephews and their first and other sons, in succession, and afterwards to nieces, with a shifting clause requiring any nephew, seised of the Cansfield estate, becoming also seised of the Lincolnshire estate, to settle the latter on the next in age of the nephews and his heirs male, "under the like limitations and restrictions" as were contained in the will as to the Cansfield estates:—Held, that the nieces were not objects of the shifting clause. *Ib.*

Possession of Family Estate.]—Proviso in a will that, in case the devisee should come into possession of the family estate, the trustees should stand seised of the devised estate to the use of the next person in remainder, valid; and the oldest son of the tenant in possession is the next person in remainder. *Nicolls* v. *Sheffield*, 2 Bro. C. C. 245.

Proviso that if any of the tenants for life, in a devise and executory trust to convey in strict settlement, shall become possessed of the

family estate, the devise or limitation directed shall thereupon cease and become void and not take effect; and the person next in remainder, under the said limitations or directions, thereupon become entitled to the possession. The first tenant in tail is entitled under the proviso, notwithstanding the descent of the other estate upon his father for life. *Stanley* v. *Stanley*, 16 Ves. 491. And see *Lambarde* v. *Peach*, post, col. 1593.

—— **Become Entitled—Recovery.**]—A testator, devised his Maytham Hall estate to trustees, upon trust for P. M. for life, and after his decease for his first son for life; and after his decease for the first son of such first son in tail male; and in default of such issue, in trust for all and every other the son and sons of P. M., severally and successively, for the like interests and limitations; and in default of issue of the body of P. M., or in case of his not leaving any at his decease, upon trust for T. M. for life, and after his decease for his eldest son T. G. M., for life, and after his decease for his first son in tail male; and in default of issue of the body of T. G. M., upon trust for all and every other the son and sons of T. M., for the like estates and interests. Proviso, that if P. M. or T. M., their or either of their issue, should become entitled to the Jodrell estates, then the devised estates should go to the next person entitled under the testator's will, as if the person succeeding to the Jodrell estates were dead. T. M. died in the lifetime of the testator. P. M. entered into possession of the devised estates and suffered a recovery to the use of himself in fee. T. G. M. succeeded to the Jodrell estates as tenant in tail in possession, and suffered a recovery to the use of himself in fee. Afterwards P. M. died without having had a son, having disposed of the Maytham Hall estate by will. Upon bill by the eldest son of T. G. M., claiming the Maytham Hall estate: Held, inter alia, that the recovery suffered by T. G. M., of the Jodrell estates, to the use of himself in fee, did not prevent the shifting clause as to the Maytham Hall estate taking effect; and that, consequently, the latter estate passed over to his son, the plaintiff. *Monypenny* v. *Deering*, 2 De G. M. & G. 145; 22 L. J., Ch. 313; 17 Jur. 467.

—— **"Come into Actual Possession."**]—W. G., by his will dated in 1775, devised his estates to his nephew for life, with remainders to his first and other sons in tail male. T. G., the nephew's eldest son, after his father's death, suffered a recovery, and limited the estates to himself for life; remainder, subject to a term for securing a jointure, and raising portions for his younger children, to his first and other sons in tail male. S. F., by his will dated in 1804, devised his estates to trustees, in trust for the second and subsequently born sons of T. G. in tail male: provided that if the lands devised by W. G. to T. G. in tail male, should descend to or devolve upon any son of T. G., or any heir male of such son, and the person on whom those lands should descend or devolve, should, under the trusts of his, S. F.'s will, be tenant in tail male of his estates, so as to be then actually in the possession or receipt of the rents and profits thereof; then his estates should be in trust for the person who would be entitled to his estates under his will, if the person on whom W. G.'s estates had so descended or devolved were dead without issue. T. G. had three sons: the eldest died in his lifetime; then T. G. died:—Held, that as W. G.'s estates came to T. G.'s second son incumbered with the term, S. F.'s estates did not go over under the shifting clause. *Fazakerly* v. *Ford*, 4 Sim. 390. *S. C.* at law, 1 A. & E. 897; 1 N. & M. 1; 2 L. J., Q. B. 111.

—— **Recovery.**—The testator bequeathed his residuary estate upon trust for his son for life, and after his decease for the children of his said son; and he directed, that, in case his said son should at any time thereafter come into the actual possession of an estate entailed upon him (the testator) and his issue by his late uncle, R. D. of B., then and in such case the provision which he had thereinbefore made for his said son, and all and every the trusts thereof, should cease, determine, and be void, and the trustees should thenceforth stand possessed of the said trust moneys for the benefit of his other children, exclusive of his said son. R. D. of B., the late uncle of the testator, had settled three estates to uses, which included, after several estates for life and in tail, a limitation in remainder to his nephew (the testator) for his life, with remainder to trustees upon trust to preserve contingent remainders, with remainder to the first and other son and sons of the body of his said nephew severally and successively in tail male, with divers remainders over. Before the date of the will, a tenant in tail, who had the then first expectant estate tail, joined with the first tenant for life in a recovery, whereby such tenant in tail had acquired the fee as to one of the three estates; but whether that fact was known to the testator, did not appear. After the death of the testator the same tenant in tail came into possession of the property, and suffered recoveries, whereby the entail as to the two remaining estates was barred; and he then devised the three estates to the son of the testator in fee, subject to certain charges, under which devise the said son afterwards entered into possession of the same three estates:—Held, that the possession thus acquired was not an actual possession of the estate entailed upon the testator and his issue within the meaning of the will. *Taylor* v. *Harewood (Earl)*, 3 Hare, 372; 13 L. J., Ch. 345; 8 Jur. 419.

—— **Recovery and Mortgage.**]—By indenture of settlement, two estates, A. and B., were limited to the father for life, and subject thereto the estate A. was limited to the first and other sons in tail male, and the estate B. was limited to the second and other sons in like manner; and it was provided that if the second son should become an eldest son and as such should become entitled to the actual possession or to the receipt of the rents and profits of the estate A., the limitations of the estate B. should cease and determine as if such second son were dead without issue. The second son, by the death of his elder brother, became the eldest son, and joined his father in suffering a recovery of the estate A., the uses of which were declared to the joint appointment of the father and son, and subject thereto to the old uses: in exercise of this power, the father and son by a mortgage in fee of the estate A. raised a sum of money which was paid to the father and son:—Held, that on the death of the father, the estate B. shifted from the second son under the terms of the proviso con-

tained in the settlement. Held, also, that the recovery suffered by the father and son did not by itself prevent the operation of the proviso, and that the mortgage had not that effect, but that, notwithstanding both the recovery and the mortgage, the second son came on the death of his father into possession of the estate A. within the meaning of the terms of the settlement. Held, also, that the party entitled to the estate A. might previously to the happening of the event mentioned in the proviso have so exercised his rights over the estate as to have prevented it from ever coming into the possession of the second son within the meaning of the terms of the settlement. *Harrison* v. *Round*, 2 De G. M. & G. 190; 22 L. J., Ch. 322; 17 Jur. 563; 1 W. R. 26.

The decisions in the cases of *Fazakerley* v. *Ford*, supra, and *Taylor* v. *Harewood* (*Earl*) supra, approved of. *Ib.*

During the life of the father, a portion of the estate A. was sold, and the proceeds applied to the purchase of the land tax of both estates:—Held, that on the estate B. shifting under the provisions of the settlement, the second son had no claim against that estate for the amount expended in the purchase of the land tax of that estate. *Ib.*

When an estate is once fairly taken out of the settlement containing a shifting clause, the shifting clause is at an end, and it matters not whether the estate comes back or not. *Ib.*

—— **Dead without Issue.**]—A testator, who was at the date of his will entitled in remainder, upon an event which afterwards happened, to the G. estates as tenant for life, with remainder to his first and other sons in tail male, remainder to his brother for life, remainder to that brother's first and other sons in tail male, remainder to the testator's first and other daughters in tail male, with remainders over, devised the C. estates, of which the testator was seised in fee, to his eldest son for life, with remainder to his first and other sons in tail male; with similar limitations in favour of the testator's second and third sons, and their issue male; remainder to the testator's unborn sons successively in tail male; remainder to the first and other sons of the testator's eldest son in tail general; with similar limitations in favour of the first and other sons of the second and third sons of the testator; remainder to the first and other daughters of the testator's first, second, and other sons successively in tail male; with remainder to the first and other daughters of the testator's first, second, and third sons successively in tail general; with remainder to the unborn sons of the testator in tail general; with remainder to the testator's eldest daughter for life; with remainders over. The testator then provided, by a shifting clause, that the C. estates should not be held by any one of his sons or daughters, or his, her, or their issue, after such son or daughter, or such his, her, or their issue, should come into possession of the G. estates; but as often as the G. estates should "come to the possession of any of his said sons or daughters, or any of their issue, that then the person next in remainder, according to the limitations" of his will, "after the person or persons who should so come into the possession" of the G. estates, "should be entitled and come into possession" of the C. estates, "in such manner as if the person or persons so becoming possessed" of the estates "had died, or was then dead, without issue":—Held, that the word "issue" must be limited to such issue as might take or inherit under the limitations of the G. estates; and that the effect of the shifting clause was merely to accelerate the next remainder, leaving the remainders over unaffected; and, consequently, that the respondent, though in possession of the G. estates, was not precluded from taking the C. estates. *Jellicoe* v. *Gardiner*, 11 H. L. Cas. 323; 5 N. R. 465; 34 L. J., C. P. 282; 11 Jur. (N.S.) 249; 13 L. T. 127; 13 W. R. 528.

Certain hereditaments were settled to the use of the settlor in tail; remainder to J. L. for life; remainders to the eldest son of J. L. in tail male; remainders to the younger sons of J. L. in tail male; remainder to L. C. for life; remainders over; subject to a proviso, "that in case the said J. L., or any issue male of his body, should become entitled to the possession of the family estates of L., then and in every such case the uses declared of the said hereditaments to or for the benefit of him or them, who should so become entitled to the possession of the family estates of J. L.; and to and for the benefit of the issue male of such person or persons so becoming entitled, should cease, determine, and be absolutely null and void; and then and in every such case, all and singular the said hereditaments and premises should immediately thereupon, from time to time, divest out of the person or persons so becoming entitled, and should go over in such and the same manner, to all intents and purposes, as if such person or persons so becoming entitled were actually dead without issue male." J. L. became possessed of the family estates of L., in the lifetime of the settlor, who afterwards died without issue. At the time of his death, there were living J. L., his eldest son J. H. L. (who afterwards became possessed of the family estate), his second son H. L., and L. C. The court had little doubt about the matter, but sent a case to the court of exchequer, by whom it was held, that L. C. took an estate for life; and it was so decreed. *Morrice* v. *Langham*, 11 Sim. 260; 10 L. J., Ch. 38; 6 Jur. 334. And see *S. C.* at law, 8 M. & W. 196; 10 L. J., Ex. 289. See also *S. C.*, nom. *Sandford* v. *Morrice*, 11 Cl. & F. 667.

—— **Re-settlement—Continuation of Title.**]—A testator settled estates in P. upon T. C. and his issue male, and provided that if T. C. or his issue male should become entitled in possession to the estates settled on the marriage of C. in the county of S., the trust in favour of T. C. and his issue male should cease for the benefit of those next in remainder. C. became under his marriage settlement tenant for life of the S. estates, with remainder to his first and other sons in tail male. After the death of the testator he joined with his eldest son in destroying the entail, and thereupon some portions of the S. estates were sold, and certain charges were imposed upon the residue, which was re-settled. Under the re-settlement, T. C. became substantially entitled to the residue of the S. estates:—Held, first, that the shifting clause must be construed to operate only in the event of T. C. becoming entitled under the marriage settlement of C. *Meyrick* v. *Mathias*, 43 L. J., Ch. 521; L. R. 9 Ch. 237; 30 L. T. 77; 22 W. R. 341—C. A.

Held, secondly, that in any event the shifting clause could not operate, as the identity of the S. estates had been destroyed in point of quantity and value. *Ib.*

—— **Estate in Fee Simple or Fee Tail—"Default of Such Issue."**]—B., by will, made in 1765, devised his lands to trustees, to the use of his brother C. for life; remainder to the use of his nephew J., the eldest son of C., for life; remainder to the use of the first son of the body of J. lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and for default of such issue, to the use of the second, third, fourth, fifth, sixth, seventh, and all and every other son and sons of the body of J. successively, in tail male; and for default of such issue, corresponding series of limitations to C. and T., the second and third sons of his brother C.; and for default of such issue, to the use of all and every the daughter and daughters of his brother C. lawfully to be begotten, her and their heirs for ever, to take as tenants in common, if more than one, and not as joint tenants; and for default of such issue, corresponding limitations to the daughter or daughters of his nephews J., C., and T.; and for default of such issue, to the use of the testator's sister, in fee: "provided, that if at any time thereafter all or any of the daughters of his brother C. or his nephews should enter into religion, and become professed nuns, thereupon the uses before limited to such daughters as should so enter into religion should cease and determine, and that the person next in reversion to take, according to the afore-mentioned limitation, should enter into and enjoy the lands, as if the persons so entering into religion had been then dead without issue":—Held, that by the shifting clause the testator declared that the previous successive estates to the daughters were to be remainders in tail. *Biddulph* v. *Lees*, 28 L. J., Q. B. 211; 5 Jur. (N.S.) 818; 7 W. R. 309—Ex. Ch.

A testator provided that in case R., or any son of his body, should succeed to a certain family estate, the trusts declared by his will of his estates at S. and H., for the benefit of R., and such son so succeeding, should cease, and the estates should be in trust for the person and persons next entitled to the same. R. became tenant for life, and his son tenant in tail in remainder, of the family estate, and of the estates at S. and H.:—Held, that the father alone had succeeded, and that, by the effect of the shifting clause, the estate of W., the son, was accelerated, and he was entitled to S. and H., as tenant in tail in possession. *Bagot* v. *Legge*, 4 N. R. 492; 34 L. J., Ch. 156; 10 Jur. (N.S.) 994; 10 L. T. 898; 12 W. R. 1097.

—— **Stock—Gift over if Legatee should become Entitled to Property of Larger Amount—Settlement on Marriage of Legatee made Prior to Will.**]—C., by will, in 1841, bequeathed all his stock in the 3*l.* per cent. consols to trustees in trust to pay the dividends of one-eighth part to every one of his eight nephews and nieces named in his will, for life, and upon other trusts after the death of every one of these eight persons. The dispositions made to females, and for female children, were for their separate benefits; and he declared, that if and when any of such nephews and nieces should be in the receipt of or entitled to a permanent income of 1,000*l.* per annum or upwards, then the interest under his will of such nephew or niece should cease, and the share of such stock he or she would otherwise be entitled to should be held upon other trusts. To prevent any dispute as to any of his nephews or nieces being in the receipt of or becoming entitled to such permanent income of 1,000*l.* per annum, the decision of the trustees of his will was to be final and conclusive, and the nephews and nieces were not to impeach such decision; and he directed that the interest of which any person claiming under his will might be deprived by any such decision should not be revived by any future diminution of their income. C. died in 1846. In 1856, Mrs. L. (one of the eight persons named in the will) became entitled to a share of personal estate, amounting to 51,000*l.* and upwards; but on her marriage with L., in 1827, they covenanted that all the real and personal estate and property which the wife might become interested in or entitled to, by descent, bequest, or in any other manner, in her own right, during the coverture, should be assigned to trustees in trust for the husband and his assigns for his life, with remainder for the wife and her assigns for her life, with remainder for the benefit of their children. The question raised was, whether Mrs. L. had become possessed of or entitled to such a permanent income of 1,000*l.* a year as was within the meaning of the provision in the will:—Held, that she had not incurred any forfeiture of her interest under the will, but was entitled to the receipt of the income of one-eighth of the accruing share out of the testator's estate. *Curzon* v. *Curzon*, 1 Giff. 248; 5 Jur. (N.S.) 907.

Scotch Settlement—Shifting Clause in Unrecorded Entail.]—A shifting clause binds the heir, though the entail be not recorded, and it binds his creditors if they have notice of it. Such notice will be sufficient if the shifting clause is set out in the record of seisins. *Fleeming* v. *Howden*, L. R. 1 H. L. (Sc.) 372.

An heir of entail in possession in such a case will be deemed a trustee for those entitled under the shifting clause; more especially where the clause requires the heir in possession instantly to denude, and he fails to do so. *Ib.*

Shifting Clause Divisible.]—A testator directed two estates to be purchased (A and B). The estate A was to be settled on the sons of his daughter (except Lord K. the eldest), and their issue, and in default on K. for life, with remainder to his first and other sons in tail, with remainder to his issue in tail general, with remainders over to daughters of the daughter. Estate B was to be settled on Lord K. for life, with remainder to his first and other sons in tail, and afterwards to the same uses as the estate A. There was a shifting clause determining the estate of Lord K. and his first and other sons in estate B, in case he or his issue male became entitled to estate A. K. having become entitled to estate A:—Held, that his first life estate alone in estate B had ceased, but that his second life estate therein, expectant on the failure of younger sons of the daughter, was still subsisting. *Kenlis* (*Lord*) v. *Bective* (*Earl*), 34 Beav. 587.

—— **Gift of Leaseholds upon Trusts to Correspond with Uses of Freeholds.**]—A testator devised his freehold estates in Worcestershire to his third son and his issue male, with remainder to his fourth son and his issue male, in strict settlement; and he devised his freehold estates in Cardiganshire to his fourth son and his issue male, with remainder to his fifth son and his issue

male, in strict settlement. By a shifting clause it was provided that if his fourth son, or any issue male of his fourth son, should become actually entitled to the possession of his Worcestershire estates, and if his fifth son or any of his issue male should then be living, the limitations of his Cardiganshire estates in favour of his fourth son, or his issue male, should absolutely cease. He bequeathed his leasehold estates in Cardiganshire to trustees upon such trusts as, regard being had to the difference in the tenure of the premises respectively, would best or most nearly correspond with the uses declared of the Cardiganshire freeholds. The third son died a bachelor in the lifetime of the fourth son, who thereupon entered into possession of the Worcestershire estates:—Held, that the shifting clause was divisible, and in the events which happened was not bad for remoteness. *Miles* v. *Harford*, 12 Ch. D. 691; 41 L. T. 378.

Name Clause — Condition Subsequent.] — A testator, by codicil, after appointing two persons trustees, as also their heirs and assigns, to his will and codicil, desired that his sister A. should do what she pleased with his remaining property after payment of certain legacies, excepting a tenement at W. and stock, of which she should only receive the interest and rent during her life, and afterwards to his sister's eldest son, on his taking the name of M.; but should he refuse to take the name of M., or his sister depart this life without a son, then the tenement at W. and the stock should go to P. on his taking the name of M., and so on to his heirs, each taking the name of M., none of them being allowed to touch the principal; and no one should after his sister A. inherit the said property or enjoy the interest who did not take or possess the name of M.:—Held, that the trustees took an estate in fee by virtue of their appointment, and that A. was entitled to an estate for life in the tenement and stock, with a remainder in fee in the tenement, and an absolute interest in the stock, to the first-born of A. vested on his birth and baptism by the name of M. *Bennett* v. *Bennett*, 2 Dr. & Sm. 266; 34 L. J., Ch. 34; 10 Jur. (N.S.) 1170; 11 L. T. 362; 13 W. R. 66.

Succession to Title—"Possession or Receipt of Rents and Profits."]—The canon of construction laid down in *Doe* d. *Hearle* v. *Hicks* (8 Bing. 475), and *Langdale* v. *Briggs* (8 De G. M. & G. 391), that an estate clearly given cannot be divested except by words as clear and unequivocal as those which created it, approved and applied. A testatrix by her will directed that certain hereditaments thereby devised should go over in case the person for the time being "entitled to the possession or to the receipt of the rents and profits" of the said hereditaments should succeed to a certain title. A management clause provided that while and so often as the person who (but for the provision) would have been "entitled to the possession, receipt, or enjoyment of the rents, issues, and profits" of the hereditaments, should be an infant, the trustees should enter and hold "the possession or receipts of the rents, issues, and profits" thereof, and manage the same. The trustees had a power of leasing during the minority of any person who if of full age would have been "entitled at law or in equity to the possession or to the receipt of the rents and profits" of the hereditaments:—Held, on the construction of the whole will (several other parts of which also contained the words "possession or receipt of rents and profits," or similar words), that the shifting clause did not apply to the case of a tenant in tail in possession who while an infant succeeded to the title. *Leslie* v. *Rothes* (*Earl*), 63 L. J., Ch. 617; [1894] 2 Ch. 499; 7 R. 600; 71 L. T. 134—C. A.

—— Shifting Clause in Patent conferring a Title.]—By letters patent the barony of Buckhurst was conferred on Elizabeth for life, with successive remainders to her second and other sons and the heirs male of their respective bodies. The patent contained a proviso that if her second son or any other person taking under the letters patent should succeed to the earldom of Dorset, "the succession to" the dignity of Buckhurst should "devolve upon" the son of Elizabeth or the heir who should be next entitled to succeed to the barony, if the person so succeeding to the earldom was dead without issue male. Lands having been devised by a testatrix to trustees and their heirs, upon trust "to convey, settle, and assure" the same "in a course of entail to correspond as nearly as may be with the limitations of" the barony of Buckhurst, "and the provisoes affecting the same contained in the letters patent—" a settlement was executed in which was inserted a clause providing that, if the second son of Elizabeth (who had then by her death become Baron Buckhurst) or any other person taking under the limitations therein contained should succeed to the earldom, the "succession to" the lands thereby settled should "devolve upon" the son of Elizabeth or the heir who would be next entitled to succeed to the barony, if the person so succeeding to the earldom was dead without issue male. The second son of Elizabeth afterwards succeeded to the earldom. He had issue male:—Held, that upon the second son succeeding to the earldom, the third son became entitled in possession to the settled estates. *Cope* v. *De la Warr* (*Earl*), 42 L. J., Ch. 870; L. R. 8 Ch. 982; 29 L. T. 565; 22 W. R. 8.

The House of Lords after Elizabeth's death declared (*Sackville West* v. *Holmesdale* (*Viscount*), 39 L. J., Ch. 505; L. R. 4 H. L. 543) that the estates ought to be limited in strict settlement, to the second son for life, with remainder to his first and other sons in tail male, with remainder to the third and other younger sons of Elizabeth and the heirs male of their bodies respectively and successively in tail male, and that the settlement should contain a shifting clause similar to that in the letters patent:—Held, that clauses postponing the vesting of portions until the death of the person creating them, and providing for the cesser of jointures and portions charged on the estates upon the person charging them succeeding to the earldom of D., ought not to be inserted in the settlement. *Holmesdale* (*Viscount*) v. *Sackville West*, 40 L. J., Ch. 795; L. R. 12 Eq. 280.

And see CONDITION—YOUNGER CHILDREN.

b. Right to Intermediate Income.

Direction to Resettle other Estates—Exclusion of Heir-at-law.]—A testator devised real estate to trustees, to convey and settle the same to the use of A. for life; remainder to the use of the children of A. in strict settlement; remain-

der to the use of B. for life, with remainders over. The testator directed that the settlement should contain a name and arms clause; and in case of refusal, the estate of the person refusing was to cease, and was to go over to the person next entitled in remainder under the limitations, as if the person so refusing, being tenant for life, were dead, or tenant in tail were dead without issue, but without prejudice nevertheless to prior contingent estates. The settlement was also to contain a shifting clause, directing, in the events which happened, namely, that if A. should succeed to certain other estates, he should re-settle them; and in default, that the settled estates should go to such uses, as if the limitations in A.'s favour had not been inserted. A. had no children, and made default in re-settling the other estate:—Held, that the trust was executory; that the whole will was inconsistent with the intention of the testator to die intestate as to any portion of his estate; and that B. was entitled to receive the rents for his life, or until A. should have issue, to the exclusion of the heir-at-law. *D'Eyncourt* v. *Gregory*, 34 Beav. 36; 3 N. R. 628; 10 Jur. (N.S.) 484; 10 L. T. 317; 12 W. R. 679.

"Next Entitled in Remainder."]—T. was the daughter and heiress-at-law of L., and tenant for life in possession of the K. estates under his will. Subject to such life estate, and to limitations which had ceased, the estates stood limited as follows:—To E. for life, with remainder to trustees to preserve contingent remainders; with remainder to the second and younger sons of E. in tail; with remainder to M. for life; with remainders over. The will contained a proviso to the effect that if E. became entitled to the T. estates, the limitation of the K. estates in his favour should cease, determine, and be absolutely void, as if he were dead, and the K. estates should go over to the person next entitled in remainder under the will. In 1857, E. became entitled to the T. estates, having at that time one son only. T., the tenant for life, died in 1858, leaving M. her residuary devisee and legatee. In 1859, E. had a second son born:—Held, that the trustees to preserve contingent remainders were the "persons next entitled in remainder"; but that M. was entitled to the rents of the K. estates from the death of T. to the birth of E.'s second son, and that such second son was entitled to them from that period. *Turton* v. *Lambarde*, 1 De G. F. & J. 495; 29 L. J., Ch. 361; 6 Jur. (N.S.) 233; 2 L. T. 38; 8 W. R. 355.

—— **Rents and Profits Undisposed of.**]—A testator devised the K. estates to T. for life, with remainder over (which remainders failed), with remainder to E. H. T. for life, with remainder to trustees to preserve; with remainder to the second and younger sons of E. H. T. in tail; with remainder to M. T. L. for life, with remainders over; with a shifting clause, as to the K. estates, in case any tenant for life or in tail thereof should become seised of the T. estates. E. H. T. was the eldest son of T., and became seised of the T. estates on the death of his father. E. H. T. had only one son;—Held, nevertheless, that the shifting clause took effect; that the K. estates vested in trustees to preserve; and that during E. H. T.'s life, until he had a second son, the rents and profits were undisposed of. *Lambarde* v. *Peach*, 4 Drew, 553; 28 L. J., Ch. 569; 5 Jur. (N.S.) 480; 7 W. R. 338. And see *Stanley* v. *Stanley*, supra, col. 1584; *Nicolls* v. *Sheffield*, supra, col. 1584.

9. Assignment of Interests.

Possibility.]—It is now well known that a possibility may be both assigned and released. *Jewson* v. *Moulson*, 2 Atk. 417. But see *Thomas* v. *Freeman*, 2 Vern. 563.

Possibility assignable in equity for valuable consideration: and love and affection to a child is a consideration in the second degree, and operates by way of agreement, and will be made good, like the case of defective execution of a power, or devise of copyhold without surrender. *Wright* v. *Wright*, 1 Ves. Sen. 411.

A. granted an annuity to B., and covenanted to charge it upon all such property as, in the event of C. dying before him, he might become possessed of at C.'s death, either by will or otherwise. A. afterwards became bankrupt, and obtained his certificate; and then C. died, having bequeathed an annuity in trust for A.:—Held, that B. was entitled to a decree specifically charging his annuity upon the annuity bequeathed in trust for A. *Lyde* v. *Mynn*, 1 Myl. & K. 683; Coop. t. Brough. 123. Affirming 4 Sim. 505.

An agreement, of which the subject is an expectancy contingent upon the will of a living person, is not illegal, but will be enforced in equity. *Ib.*

Possibility of a Term.]—A possibility of a term is assignable in equity for a good consideration. *Theobalds* v. *Duffey*, 9 Mod. 102.

A remainder of a term is an assignable interest; as if J. G., being possessed of a term of 2,000 years, devised the estate to his wife for fifty, if she should so long live, and after her decease, to his son for fifty years, if, &c., and after her decease, to his two grandchildren for the remainder of the term. One of the grandchildren assigns his interest in the life of the father or grandmother. Per curiam. This is an assignable interest, and a moiety passed by the assignment so decreed. *Kingslader* v. *Courtney*, 2 Freem. 238. Semble, *S. C.*, *Kimpland* v. *Courtney*, Id. 250.

If a father devise lands to trustees and their heirs till his son attain twenty-five years, a mortgage thereof by the son when twenty-one is void. *Spencer* v. *Chase*, 9 Mod. 30.

Expectancy of an heir either presumptive or apparent, not an interest or possibility capable of being made the subject of contract. *Carleton* v. *Leighton*, 3 Mer. 667.

Devise of use of personal to A. for life, and afterwards to B., though B. dies first, transmissible. *Exel* v. *Wallace*, 2 Ves. 119. Affirmed *Id.* 318.

Person out of Possession.]—The contract for the present demise, by a person out of possession, not enforced in equity. *Bayly* v. *Tyrrell*, 2 Ball & B. 358; 12 R. R. 99.

A person out of possession cannot convey anything to a stranger; he can only give a release to one in possession. *Underwood* v. *Courtown (Lord)*, 2 Sch. & Lef. 65.

Equitable Interest under Contract of Purchase.]—An equitable interest under a contract of purchase may be the subject of sale; the subcontract converts the original vendee into a trustee of his equitable interest for his vendee.

who acquires the same rights which he had to the benefits to be derived under the primary contract. Such sub-contracts are not within the doctrine of champerty and maintenance. *Wood* v. *Griffith*, 1 Swanst. 56; 18 R. R. 18.

Reversion.]—Although it is a rule of law that a reversion will pass by general words, unless a different intention is distinctly shown in other parts of the instrument, yet such an intention may be gathered by implication from the form of the deed. *Mullineux* v. *Ellison*, 8 L. T. 226.

Contingent Remainder.]—Quære, whether a transfer by deed of a contingent remainder, before the passing of the 7 & 8 Vict. c. 76 (which made contingent remainders assignable at law), would not, though made without valuable consideration, be held good in equity, as an equitable assignment. *Crofts* v. *Middleton*, 8 De G. M. & G. 192; 25 L. J., Ch. 513; 2 Jur. (N.S.) 528. Reversing 2 Kay & J. 194; 4 W. R. 439.

Assuming that between the passing of the Fines and Recoveries Act, 3 & 4 Will. 4, c. 76, and of the 7 & 8 Vict. c. 76, a man or feme sole could not by any means effectually dispose at law of a contingent remainder in fee by act inter vivos, except by estoppel by means of a false recital, still, upon the true construction of the former act, a married woman could convey such an estate by deed acknowledged. *Ib.*

Supposing such a deed could not operate so as to pass the legal estate, still, if made for a valuable consideration, it would be good to confer an equitable title by way of contract; for the fines and recoveries act gives a married woman power, with the concurrence of her husband, to contract by acknowledged deed, so as to bind her real estate, though not herself personally. *Ib.*

The court will not enforce a deed, although made for valuable consideration, purporting to convey a contingent interest in land which could not be conveyed at law. *Ib.*

Observations on fraud consisting of suppression, and on positive misrepresentation. *Ib.*

Contingent Interest in Residue.]—A testatrix gave the interest of the residue to her brother during his life, and after his death she gave the residue to her executors in trust for four persons by name, and the survivors and survivor of them, to be paid to them respectively when they should attain twenty-one, with interest in the meantime; of those four persons two died during the life of the brother:—Held, that they did not take vested interests in any part of the residue, but that the whole of it belonged to the two survivors. During the lifetime of the testatrix's brother, one of the two survivors assigned all other the estate and effects, of or to which she was then possessed or entitled, to trustees upon trust for her creditors; this assignment did not pass her contingent interest in the testatrix's residuary estate. *Pope* v. *Whitcomb*, 3 Russ. 124; 6 L. J. (O.S.) Ch. 53; 27 R. R. 32.

Assignment of Future Chattels—Possession.]—H. sold to T. all the machinery on T.'s mill and premises. The deed, registered as a bill of sale, after reciting the purchase, witnessed that T. assigned to a trustee all the machinery specified, in a schedule on trust, if T. paid to H. 5,000*l.* on demand for T. absolutely; but, in default of such payment, then to sell and apply the proceeds. The deed also provided that all the machinery which, during the continuance of the security should be fixed or placed on the mill and premises, in addition to or substitution for the present machinery, should be subject to the same trusts. T. remained in possession, working the mill, and from time to time sold part of the machinery, and purchased new, of which he gave notice to H. Afterwards H. demanded payment of the 5,000*l.* which was not paid. An execution creditor of T. issued a fi. fa., and the sheriff seized the added or substituted machinery:—Held, that the added and substituted machinery became, as soon as it was put in the mill, subject to the deed; and H. was equitable owner, and had priority over the execution creditor, without the formality of taking actual possession. *Holroyd* v. *Marshall*, 10 H. L. Cas. 191; 33 L. J., Ch. 193; 9 Jur. (N.S.) 213; 7 L. T. 172; 11 W. R. 171.

At law non-existing property to be acquired at a future time is not assignable; in equity it is so. *Ib.*

At law, although a power is given in a deed of assignment, to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity, the moment the property comes into existence, the agreement operates upon it. *Ib.*

When Devisable.]—*See* WILL.

Equitable Assignments.]—*See* ASSIGNMENT.

In Case of Heirs Expectant and Reversioners.]—*See* FRAUD.

See also VENDOR AND PURCHASER.

C. VESTING OF LEGACIES PAYABLE OUT OF PERSONAL ESTATE.

1. *In General.*
   - *a.* General Principles, 1597.
   - *b.* Legacy on an Uncertain Event, or an Indefinite Time, 1598.
   - *c.* Gift with Direction to Pay at a Fixed Time, 1601.
   - *d.* Gift at a Future Time, without Direction as to Payment, 1606.
   - *e.* No Gift but in the Direction to Pay and Divide.
     - i. In General, 1607.
     - ii. Where Gift preceded by a Life Interest, 1610.
   - *f.* Effect of a Gift Over on Vesting, 1619.
   - *g.* Gift to a Class on attaining a Certain Age, 1623.
   - *h.* Gift to Children Surviving their Parents, 1627.
   - *i.* Gift to Persons "then Living," 1629.
2. *Effect of Gift of Interim Income.*
   - *a.* Gift of Interest, 1636.
   - *b.* Mixed Gift of Interest and Principal, 1637.
   - *c.* Immediate Severance of Principal, 1639.
   - *d.* Gift of Income followed by Gift of Principal, 1642.
   - *e.* Income Expressly Given for Maintenance, 1645.
   - *f.* Fixed Sum Given for Maintenance, 1652.
   - *g.* Part of Income Given for Maintenance, 1653.

h. Power or Discretion to Apply Whole or Part of Income for Maintenance, 1654.
i. Power to Make Advances, 1658.
3. *Words of Contingency whether Extending to a Series of Limitations*, 1660.
4. *Interests Limited in Clear Terms of Contingency*, 1662.
5. *Divesting of Vested Interests*, 1664.
6. *Cross Executory Limitations in Personal Estate*, 1670.
7. *Executory Bequests.*
a. Failure of Prior Gift. Effect on Executory or Substituted Gift, 1674.
b. Failure of Gift over. Effect on Prior Gift, 1678.
8. *Remainders and Gifts over of Personal Property.*
a. Gift of Chattels by Way of Remainder, 1680.
b. Chattels Quæ Usu Consumuntur, 1680.
c. Interests given to Persons in Succession, 1682.

1. IN GENERAL.

a. General Principles.

General Rule.]—The courts lean towards vesting, and seek to find the earliest date at which persons interested take a vested interest. Where property is once vested under a will, it must not be divested except upon strong grounds. *Wood, In re, Moore* v. *Bailey*, 43 L. T. 730; 29 W. R. 171.

Where there is a doubt the court inclines to the construction that a gift by will vests on the testator's death. *King* v. *Isaacson*, 2 Sm. & G. 371; 22 L. J., Ch. 455; 17 Jur. 434; 1 W. R. 209.

A residue to be divided by executors, at an indefinite time, vests at the death of the testator unless an intention is manifest to the contrary upon the face of the instrument. *Stapleton* v. *Palmer*, 4 Bro. C. C. 490.

Distinction between Vested and Contingent Legacies.]—The distinction between vested and contingent legacies is, that a vested legacy, immediately on the death of a testator, attaches as a debt upon his real or personal estate, whereas a contingent legacy does not attach upon either till the contingency happens. In the first case, the legacy is debitum in præsenti solvendum in futuro, but where the legacy is merely contingent, non constat whether under the will the fund will ever be charged with it. *Keily* v. *Monck*, 3 Ridgw. P. C. 255.

A bequest of 100*l.* to the testator's daughter, and in case she should die under twenty-one, to her mother. The mother married and died, and afterwards the daughter died under twenty-one: —Held, that the 100*l.* should go to the personal representative of the mother. *Jones* v. *Aiken*, Wall. Lyn. 328.

Direction postponing Payment.]—The rule, taken from the ecclesiastical court, that a direction postponing the payment of a legacy does not prevent the vesting, prevails in courts of equity as to personal legacies: unless a contrary intention can be inferred; as, where the time of payment forms part of the description of the person to take. The vesting of a residuary bequest is especially favoured, to prevent an intestacy; and a direction, that the interest should accumulate and be paid with the capital, after a deduction for maintenance and preferment, is not sufficient to prevent it. As to real estate the contrary rule prevails, but subject to exceptions. *Bolger* v. *Mackell*, 5 Ves. 509.

Provision for Survivorship among Legatees.]—The vesting of a legacy is not prevented by a provision for survivorship among the legatees in case of the death of any under the age of twenty-one. *Deane* v. *Test*, 9 Ves. 146; 1 Smith, 112.

Legacy payable on some Event.]—A legacy payable as soon as legal proceedings connected with the fund out of which it is to be paid should be terminated, is neither a reversionary interest nor a contingent legacy. *Luff* v. *Lord*, 34 Beav. 220; 10 Jur. (N.S.) 1248; 11 L. T. 656. Affirmed, 11 Jur. (N.S.) 50; 11 L. T. 695.

A legacy, not as an independent bequest, with a time for payment, or distribution, appointed afterwards, but the time annexed to the substance of the bequest: the interests do not vest before that period. *Sansbury* v. *Read*, 12 Ves. 75.

The intention of a testator that his gift should not vest in the legatee until it should be actually remitted to him, will prevail when clearly expressed, provided the remittance be not delayed by negligence or inevitable accident. *Law* v. *Thompson*, 4 Russ. 92; 6 L. J. (O.S.) Ch. 56; 28 R. R. 17.

—— **Contingent Clause added.**]—When a certain time is appointed for the payment of a legacy, and afterwards a contingent clause is added, touching the same legacy, all the words of the will must stand together, which can never be, unless the contingency happen within the period of time appointed for the payment of the legacy. *Colhoun* v. *Thompson*, Beat. 248; 2 Moll. 281.

Vested Legacy directed to Accumulate.]—When a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge. *Saunders* v. *Vautier*, 4 Beav. 115. Affirmed, Cr. & Ph. 240; 10 L. J., Ch. 354.

Executors' Year.] — The year allowed to executors and administrators is only for convenience, and does not prevent vesting. *Garthshore* v. *Chalie*, 10 Ves. 13; 7 R. R. 311.

Contingent Legacy—Security by Person entitled to Fund until Contingency happens.]—Where a legacy is given upon a contingency, and a suit is instituted for the administration of the testator's estate, the court does not direct a sum of stock, belonging to the estate, to be appropriated to pay the legacy when the contingency happens; but directs the whole residue to be paid over to the residuary legatee on his giving security to pay the legacy when due. *Webber* v. *Webber*, 1 Sim. & S. 311; 1 L. J., (O.S.) Ch. 219; 24 R. R. 180.

b. Legacy on an Uncertain Event, or at an Indefinite Time.

Marriage.]—Testator gave legacies to his daughters, to be paid on marriage, with interest from his death, until same should be paid; he

directed that if any of the daughters married a man who did not settle on her a jointure of a certain amount, the interest only of the legacy should be paid to the husband during his life; and at his death, if the wife survived him, he directed the principal to be paid to her, and if she died in his lifetime, leaving children, the principal to be paid to them; but if she left no children, the principal to be paid to his son and to his surviving daughters equally; the shares of the latter to be paid at the same time, and subject to the same restrictions, as their original shares. The residue of his estate, "after payment of his legacies," he he gave to his said son. Two of the daughters died unmarried:—Held, that the legacies to the daughters were vested and transmissible to their personal representatives. *Vize* v. *Stoney*, 1 Dr. & War. 837; 4 Ir. Eq. R. 64.

Residuary bequest to trustees upon trust to pay the dividends, &c., equally between the testator's two great-nieces until their respective marriages, and from and immediately after their respective marriages to assign and transfer their respective moieties or shares thereof unto them respectively:—Held, a vested interest before marriage; being taken out of the general rule from the civil law, that dies incertus in testamento conditionem facit. One of the legatees being dead without having been married, the court directed one moiety to be paid to her executors; but would not permit the other moiety to be paid, but directed the interest and dividends of that moiety to be paid to the other legatee, with liberty to apply in case of her marriage or her death before marriage. *Booth* v. *Booth*, 4 Ves. 399; 4 R. R. 235.

Where the whole property is devised with a particular interest given out of it, it operates by way of exception out of the above absolute property. *Id.*

—— **Accumulation — Tenant for Life.**]—A testatrix gave specific legacies absolutely to her sister, and directed her executors to pay out of her general estate to her said sister's two daughters, A. and B., 5,000*l* each upon their marriage, with all the accumulations of interest thereon from the time of her death. She gave the income of the residue to H., at whose death the whole was to be equally divided between the grandchildren of the father of the testatrix. The testatrix died in 1825. Twenty-one years from the decease of the testatrix expired in 1846. In 1849 A. died. The tenant for life of the residue died in 1838. On a bill by the grandchildren against the executors and representative of A. and H., and against B., for a declaration by the court of the rights under the will:—Held, that the legacies to A. and B. were contingent, and that the representative of H. was entitled to the income of A.'s legacy till the death of H., but that the capital and subsequent accumulations fell into the residue. *Morgan* v. *Morgan*, 4 De G. & Sm. 164; 20 L. J., Ch. 109, 441; 15 Jur. 319.

Marriage with Consent.]—P. devises to J. 200*l*., provided she marries with the consent of her father and mother, or the survivor of them. J., before marriage, and during the lives of her father and mother, brings her bill against the executor to have this legacy paid, the father and mother by their answers consenting. Marriage is here a condition precedent; plaintiff, therefore, too early, and bill dismissed. *Garbut* v. *Hilton*, 1 Atk. 381; 1 Ves. sen. 5; 9 Mod. 210.

Although no time is specified for payment of a legacy given as a portion, subject to a contingency, provision to go over if legatee die before twenty-one, raises a necessary implication, that it is payable at twenty-one. Legacies to A. and B., and "in case the said A. and B., or either of them, shall become entitled to the said lands (real estate settled in remainder, on the event of C. dying without issue), my intention is, that she or they so becoming entitled shall not have, possess, or enjoy any part of my property; but in case A. and B. shall not become entitled to the settled estate, I leave each of them 300*l*.," with other provisions in the event of dying before twenty-one or marriage with consent, that the legacies should go over. A. having attained twenty-one and married with consent:—Held, that her legacy became absolutely vested not liable to be divested, notwithstanding the devolution of the settled estate by the subsequent happening of the event. *Colhoun* v. *Thompson*, 2 Moll. 281; 2 Beat. 248.

W. bequeathed one-third of his real and personal estate in trust for his son and daughter, to be divided between them in equal proportions as tenants in common, and not as joint tenants; the share of the son to be vested in him at twenty-four, and the share of the daughter to be vested in her on her marriage, with the consent of her guardians. But in case his son should die under twenty-four, and without leaving issue, or his daughter should die without having been married with such such consent, he declared that the share of him or her so dying should go to the survivor, and be vested in him or her at the same age as his or her original share. The son attained twenty-four, and the daughter twenty-one, and was unmarried:—Held, that the daughter took a vested interest on her attaining twenty-one. *West* v. *West*, 4 Giff. 198; 1 N. R. 258; 32 L. J., Ch. 240; 9 Jur. (N.S.) 400; 7 L. T. 779.

A testator bequeathed to his daughter E. 200*l*., to be paid her at the time of her marriage, or within three months after, provided she marry with the approbation of his two sons. E. died after twenty-one, but unmarried:—Held, that her representative was not entitled to the legacy. *Atkins* v. *Hiccocks*, 1 Atk. 500.

In all cases, where the condition of marrying is annexed, marriage is necessary to vest the legacy. *Ib.*

Legacy to be paid on marriage with consent, and given over in case of death before twenty-five or such marriage with consent:—Held, that the legacy was only intended to go over in the event of death before twenty-five and such marriage with consent. *Malcolm* v. *O'Callaghan*, Coop. t. Brough. 73; 2 Madd. 349.

E., being on bad terms with his eldest son, bequeaths him a trifling annuity, and bequeaths to M., the daughter of his said son, "if unmarried, and if she does not marry without the consent of the trustees, the sum of 400*l*., one moiety to be paid her upon her marriage, with such consent, the other moiety in one year after; but if said M. was then married, or should marry without consent, said sum to sink into his personal fortune." M., being unmarried, is not entitled immediately either to principal or interest. *Ellis* v. *Ellis*, 1 Sch. & Lef. 1.

Marriage or Taking the Veil.]—A mother bequeathed to each of her four daughters 500*l*.,

to be paid by her son to each of them upon the day of her marriage, or on the day of her taking the veil as a professed nun; and directed that her daughters should reside with her son so long as they should agree to do so, and that, during such residence with him, he should provide them with maintenance and clothing; and should any separation take place between her son and any of his sisters, each such sister so disagreeing should be paid by him 25*l.* a-year until she became entitled to be paid the principal sum of 500*l.*, to be paid quarterly and in advance:—Held, that the legacies did not vest until marriage or taking the veil. *Corr* v. *Corr*, 7 Ir. Eq. R. 397.

Legacy to a Person if Living.]—Legacy to A., if he be living, and in case of his death before the decease of B., to C., is contingent, viz. if A. survives B. *Hodges* v. *Peacock*, 3 Ves. 735.

Legacy in trust to pay out of the interest 60*l.* a year to the testator's wife for life, and the remaining interest during her life to R., Duke of M., and in case of his death to his eldest or only son; and for want of issue male to his eldest or only daughter; for want of such issue female to sink into the residue; and after the death of his wife, the testator gave the principal to the said duke, if then living; but if then dead, to his eldest or only issue male then living; and for want of such issue male, to his eldest or only daughter, for want of such issue female, to sink into the residue. R., Duke of M., died, leaving two sons and a daughter: both the sons died: the eldest left a son, Duke of M., who filed the bill. The plaintiff is entitled to the surplus interest, but the principal is contingent till the death of the testator's widow. *Manchester* (*Duke*) v. *Bonham*, 3 Ves. 61.

c. Gift with Direction to Pay at a Fixed Time.

In General.]—Legacy to be paid at at a particular time is debitum in præsenti solvendum in futuro and vested. *Crickett* v. *Dolby*, 3 Ves. 13.

Legacy payable at twenty-one; before which time the legatee dies: a person claiming by limitation over takes immediately: but the administrator of the infant must wait till the time at which the legacy is payable, unless the whole interest is given. *Id.* 15.

Vesting of legacies, where, by the bequest thereof, they were given to be paid on a day certain "and in case any of the legatees should die before that day, that their legacies should be given to whomsoever of his or her children to whom he or she should bequeath it." *Tolner* v. *Marriott*, 9 L. J. (o.s.) Ch. 14.

Legacy to be paid at a future day is vested, but not where the sum is not certain. *Maddison* v. *Andrew*, 1 Ves. sen. 59.

Distinction between a legacy, given at a future time, and a legacy, given, to be paid at a future time: the latter vested; the payment only postponed: the time being annexed, not to the legacy, but to the payment only. *Hixon* v. *Oliver*, 13 Ves. 113; 9 R. R. 148.

Legacy of 1,000*l.* which devisor had on mortgage on college lease to be paid when devisee came of age:—Held, that it was vested. *Chambers* v. *Jeoffery*, 2 Eq. Cas. Abr. 541.

Bequest of 400*l.* to R., to be paid in a year, and of a further sum of 100*l.* at the death of his mother; the latter held also a vested legacy. *Jackson* v. *Jackson*, 1 Ves. Sen. 217.

Legacy when apprenticeship is served:—Held, on construction of will to be only directory as to time of taking, and not a condition. *Sidney* v. *Vaughan*, 2 Bro. P. C. 254. And see *Humberstone* v. *Stanton*, 1 V. & B. 385; 12 R. R. 243.

F. by will gave to R. legacy of 1,000*l.* to be put out at interest till twenty-one, and in case of death before, then to go to M., his daughter; but if R. lived to attain twenty-one then 500*l.*, part of 1,000*l.*, to go to M., and be paid her when R. should arrive at that age. M. died before that time:—Held, that M. took a vested interest. *Wingfield* v. *Newton*, 9 Mod. 428.

A portion given to one, payable at a certain age, and if he dies, to another, without mentioning any age; if the first dies before the time of payment it vests in the second immediately. *Boycot* v. *Cotton*, 1 Atk. 555.

Where there was first a distinct gift of a legacy, and then a direction that it should be paid within six months, and a general declaration that all legacies should be vested only when payable, and the legatee died within six months:—Held, that the legacy had vested. *Lucas* v. *Carline*, 2 Beav. 367.

P. gives by will "to his three daughters 500*l.* each, to be paid them severally within five years after his decease, if then alive, or any issue of their several bodies, to be paid by son, the residuary devisee, the interest from his death at 4 per cent. for so many of the five years as the son should keep it in his hands; but if there should be no issue living of any of the daughters at the end of five years, then annuity for life of 20*l.* each, and the several sums of 500*l.* to be paid to them so dying without issue, should be equally divided between the survivors and their issue." One of the daughters dies within five years, leaving issue: having previously assigned her interest, the assignee held entitled to the 500*l.* *Oseland* v. *Oseland*, 3 Anst. 628.

If legacy be given to B. payable at two years after death of testator, B. takes a vested interest, though he dies before that time. *Sheldon* v. *Sheldon*, 9 Mod. 211.

A legacy to daughters equally to be divided between them, when they arrive at twenty-four years of age, is vested immediately, and only the time of payment postponed. *May* v. *Wood*, 3 Bro. C. C. 471.

Legacy in trust for testator's mother and sister for life, and after the death of the survivor, for all and every the child and children of his sister living at her death, share and share alike, each receiving his or her share of the principal at twenty-one; and if but one child should be so surviving, in trust to pay the whole to such surviving child at twenty-one: the payment only is postponed, not the vesting. *Wadley* v. *North*, 3 Ves. 364; 4 R. R. 16. S. P., *Chaffers* v. *Abell*, 3 Jur. 578; *Anon.*, 2 Vern. 199; 2 Vent. 344.

Where there is a gift to trustees within three months after the testator's decease, in case any child or children of his son should be then living, to invest a sum of money, in trust for such children, equally, who should attain twenty-one, the dividends to be payable to and become vested in the meantime, with absolute discretion in the trustees as to maintenance, it is not a condition precedent; the limitation is not too remote, and there must be an investment and accumulation for the benefit of the children of the son, the

dividends going with the capital. *Edmunds* v. *Waugh*, 4 Drew. 275 ; 6 W. R. 589.

Legacy to be paid "when or if" Legatee attained Twenty-one.]—A legacy to be paid to the legatee "when or if" he attained twenty-one :—Held, to be vested at the death of the testator, and not to be contingent upon the legatee attaining twenty-one. *Lister* v. *Bradley*, 1 Hare, 10 ; 11 L. J., Ch. 49 ; 5 Jur. 1034.

Residuary bequest to James, John, David, and Frances, equally, to be paid, assigned, &c., at their respective ages of twenty-one ; and if Frances should marry, the executors should settle at least one-third of her income on her for life, with remainder to her children. Frances attained twenty-one unmarried :—Held, that she took a vested interest in the whole share absolutely at twenty-one, she not having married before that time. *Lumsden* v. *Shaw*, 1 L. J., Ch. 115.

"Pay and Divide"—"As and When"—Maintenance.]—A bequest to pay and divide among children "as and when" they shall attain twenty-one, is not to be treated as equivalent to a gift to such of the children as shall attain twenty-one. There is a tendency in the decisions to construe such a gift as vested. A gift "to pay and divide among children as and when they should attain twenty-one," with a maintenance clause during the minority :—Held, to be vested. *Pearman* v. *Pearman*, 33 Beav. 394.

Gift to Children after a Life Interest.]—Under a pecuniary bequest in trust for a niece for life, with remainder in trust for all her children, equally, the shares of sons to be paid at twenty-one, and of daughters at twenty-one or marriage, with executory trusts over in case any of the children should die before they should become entitled, without lawful issue :—Held, that the children were entitled to the income of their shares before attaining twenty-one. *Williams* v. *Clark*, 4 De G. & Sm. 472.

Absolute Gift — Condition Subsequent — Repugnancy.]—A testator gave all his property real and personal to trustees for division among his children, their shares to be paid when they respectively attained twenty-eight. The will further contained a clause cutting down the children's share to 1,000*l.* each, in the case of sons, and to 500*l.*, in the case of daughters, if any of them should embrace a religious life :—Held (following *Saunders* v. *Vautier*, Cr. & Ph. 240), that there was an absolute gift to the children vesting on the testator's death, and the provision as to payment at twenty-eight was nugatory ; and that the clause as to embracing a religious life was a condition repugnant to the former gift, and must be disregarded. *Thompson, In re, Griffith* v. *Thompson*, 44 W. R. 582.

—— **Maintenance.**]—The testator devised his real and personal estate to trustees to convert and invest, and pay the income to his daughter for life, and after her decease to divide the fund among "all her children then living," provided all such children may then have attained twenty-one ; if not, he directed the fund to be placed out at interest, and the interest, &c., to be applied for the maintenance and bringing up of all such children, until the youngest should attain twenty-one, when the fund was to be divided amongst such children as should be then living and the issue of such of them as should be dead, the issue to take their parents' share :—Held, that a child who survived the mother and attained twenty-one, but died before the youngest attained twenty-one, took an absolute vested interest. *Brocklebank* v. *Johnson*, 20 Beav. 205 ; 24 L. J., Ch. 505 ; 1 Jur. (N.S.) 318 ; 3 W. R. 341,

A testator appoints a fund, after the death of his wife, to his son, to be paid to him at her decease, if he shall then have attained twenty-one ; and in case his son dies under twenty-one, and after the wife, he gives the fund to his brother ; and in case the wife should outlive both the son and the brother, he gives it to the brother's daughters then living. The son attained twenty-one, and died in the lifetime of the wife, who survived both the son and the brother ; there were daughters of the brother then living :—Held, that the representatives of the son, and not the daughters of the brother, are entitled to the fund. *Clutterbuck* v. *Edwards*, 2 Russ. & M. 577.

Upon a special case as to the construction of a will, legacies thereby bequeathed were held to be vested in the legatees, as the words of the bequest, importing a contingency, referred only to the time of payment of the legacies ; and as the legatees were entitled to maintenance out of the legacies, they were directed to be invested, and the interest applied accordingly. *Moore* v. *Moore*, 5 L. T. 198 ; 9 W. R. 916.

A testator having grandchildren, procured their father to give up his profession and reside near him, and supported them. By will he left them 5,000*l.* each, to be invested and set apart, and payable as they attained twenty-five, with a proviso that if they intermarried with particular families their legacies should be void ; and if they did not do so before actual payment, they should covenant by deed to refund if they did so. The estate was deficient, and the father was unable to maintain the legatees without borrowing money and selling his own property. On a petition by one of the legatees for past maintenance :—Held, that the testator put himself in loco parentis ; that the legacies were vested subject to be divested (the condition being subsequent), and the father entitled to past maintenance to the extent of money borrowed and due, and property sold for the special purpose. *Parsons* v. *Peters*, 13 W. R. 214.

Contingency — Death Unmarried and without Issue.]—A testator gives all his property to trustees in trust to sell, and out of the proceeds to pay legacies, and as to the residue directs that they shall divide the income equally between his two daughters, until one should marry ; and then upon trust to pay the interest of 3,000*l.* to such as should first marry for her separate use, without power of anticipation, with a gift over to the husband and children, and a like gift to the other daughter's husband and children. There was then a proviso that if either daughter should die in the lifetime fo the other unmarried and without issue, the interest of an additional sum of 2,000*l.* should be paid to the survivor for life, and, subject to the sums aforesaid, in trust to pay 500*l.* to J., and 500*l.* to E. J. and E. both died in the lifetime of the two daughters, one of whom then also died unmarried, leaving all her property to her sister, who was still unmarried also. On the question what interest the surviving daughter took, and whether the legacies of 500*l.* and 500*l.* to J. and

E. were vested or contingent:—Held, that the surviving daughter took one moiety of the residue only, and that the legacies were vested legacies. *Hill* v. *Hill*, 8 W. R. 536.

—— **Death before Tenant for Life.**]—A testator devised his real and personal estate in trust for his wife for life, and after her decease, he devised a real estate to his brother for life, with remainder to his children. He proceeded thus: "And as the residue of my estate and effects not hereinbefore disposed of, or which may remain after satisfying the trusts of this my will, I give the same to my brother (if then living), his heirs, &c. But in case my brother shall then be dead, then in such case I give the residue of my estate and effects to his children." The brother died in the lifetime of the widow:—Held, that the residue vested in him at the testator's death. *Birds* v. *Askey*, 24 Beav. 615.

—— **Survivorship.**]—A testator bequeathed a legacy of 300*l.* to A. to be paid to him, his executors, &c., within twelve months after the death of B., "in case B. shall happen to survive my wife":—Held, that the latter words were to be construed with reference only to the time of payment, and that they did not make void the legacy, B. having died in the lifetime of the testator's wife. *Massey* v. *Hudson*, 2 Mer. 130; 16 R. R. 158.

Condition Precedent—Attainment of Twenty-five.]—Testator bequeathed his residuary estate to trustees, in trust to pay the income of one-third part to his daughter Sarah, for life, and upon her death, to stand possessed of that third in trust for her child or children, and to be transferred to them on their attaining twenty-five; but in case his daughter should have but one child her surviving, then the whole of the one-third part to go to such only child, on his attaining twenty-five, and be transmissible to his executors, and in case his daughter should leave no child her surviving, or in case she should leave a child who should not attain twenty-five, then over:—Held, that the children were not intended to take vested interests until they attained twenty-five, and that, therefore, the bequest to them was void for remoteness. *Judd* v. *Judd*, 3 Sim. 525; 8 L. J. (O.S.) Ch. 119; 30 R. R. 203. And see *S. C.*, nom. *Hunter* v. *Judd*, 4 Sim. 455, on a further hearing and new bill filed.

—— **Attainment of Twenty-one.**]—A testator bequeathed his residuary estate to trustees, upon trust to assign the same to and amongst all such children of M. as should be living at his decease; to be equally divided among them, if more than one, when they should attain the age of twenty-one, and if there should be but one child who should attain that age, then the whole to such one:—Held, that the attainment of the age of twenty-one was a condition precedent, and that no child who did not attain that age could take. *Merry* v. *Merry*, 17 W. R. 985.

Words of Division preceding Words of Gift.]—A testator, by his will, directed the investment of 2,000*l.*, and the payment of the interest to his daughter for life, and from and after her death declared that the trustees should hold the fund upon trust, to pay the same, or assign the securities whereon the same might be then placed or invested, unto, between and amongst all and every the child and children of his said daughter, as and when they should severally attain the respective age of twenty-one years, in equal shares and proportions, share and share alike, "to whom I give and bequeath the same accordingly":—Held, that these words contained a direct gift, independently of the direction to pay, the words "to whom" referring to all and every the child and children of the testator's daughter; and consequently that a child of the testator's daughter, dying under twenty-one, took a vested interest in the legacy. *Bartholomew's Trust, In re*, 1 Mac. & G. 354; 1 Hall & Tw. 565; 19 L. J., Ch. 237; 14 Jur. 181. Affirming 16 Sim. 585.

d. Gift at a Future Time Without Direction as to Payment.

In General.]—Distinction between a legacy given at a future time, and a legacy, given, to be paid at a future time: the latter vested; and payment only postponed: the time being annexed, not to the legacy, but to the payment only. *Hixon* v. *Oliver*, 13 Ves. 113; 9 R. R. 148.

Devise and bequest until a certain period from the nature of the purpose and circumstances not transmissible to representatives. *Davies, Ex parte*, 6 Ves. 147a.

Vesting of a legacy postponed to the time of payment, and a limitation over in nature of a cross remainder, implied from the general intention, reversing a decree that it vested at twenty-one. *Mackell* v. *Winter*, 3 Ves. 536. *See* 5 R. R. 32, n.

The word "when" in a will, alone and unqualified, is conditional, but it may be controlled by expressions, &c. *Hanson* v. *Graham*, 6 Ves. 239; 5 R. R. 277.

Where a time is annexed to legacy, and not to the payment, and legatee dies before that time, it is lapsed. *Smell* v. *Dee*, 2 Salk. 415.

Legacy at Twenty-one.]—The distinction between a legacy given at twenty-one and payable at twenty-one is a positive rule of the ecclesiastical court, adopted as to personal legacies, but not as to real estate; and not approved, or to be extended. *Mackell* v. *Winter*, supra.

Where a legacy is given generally at twenty-one or marriage, the vesting and time of payment are the same. *Heath* v. *Perry*, 3 Atk. 102.

Legacy to A. at twenty-one, and if he die before twenty-one to B. B. dies, then A. dies before twenty-one; the administrator of B. takes. *Anon.*, 2 Vent. 347.

A testator gave the dividends on stock to H. for her life, and after her decease the principal to her children on their attaining twenty-one. H. had one child, who died before attaining twenty-one:—Held, that the child did not take a vested interest in the principal. *Wrangham's Trust, In re*, 1 Dr. & Sm. 358; 30 L. J., Ch. 258; 7 Jur. (N.S.) 15; 3 L. T. 722; 9 W. R. 156.

A testatrix gave the rents of certain leaseholds to J. R. and C. R. She then gave to T. J. R. 100*l.* bank stock when he attained twenty-one, but in case of his death to J. R. On the question what was the period of division:—Held, that the contingency was T. J. R.'s dying under twenty-one. *Bignall* or *Bignell* v. *Rose*, 24 L. J., Ch. 27; 3 W. R. 77.

Marriage with Consent.]—Devise of 1,500*l.* to a granddaughter to be at her own disposal, if she married with consent of her father and mother or trustees, and not otherwise. She dies

at thirteen, intestate and unmarried: it is not vested nor transmissible. *Elton* v. *Elton*, 1 Ves. Sen. 4; 3 Atk. 504.

Accumulation of Rents — Legacies Given at Successive Periods.]—Testator directed the rents of his estates to be accumulated for five years: "at the end of which time I leave as follows: to H. G. 200*l.*; and to W. B., W. C., E. M., or as many as are living, 100*l.* each: and to M. N., S. H., S. S., or as many as are then living, 50*l.* each: and the same sum to be given at the expiration of ten years from the time of my death, and ditto at the end of fifteen and twenty years from my death." Two of the legatees died between the end of the tenth and fifteenth years after the testator's death, having received the payments which became due to them at the end of the fifth and tenth years:—Held, that the rights of the legatees named in the will, to receive the payments, were contingent on their surviving the times of payment, and, consequently, that the executors of the then deceased legatees could not claim any payment at the end of the fifteenth year. *Bruce* v. *Charlton*, 13 Sim. 65; 6 Jur. 594. Affirmed, 13 L. J., Ch. 97.

Real and personal estate given to trustees, upon trust to pay the income to the testator's wife for her life, and within or at the expiration of ten years from the death of the survivor of himself and his wife, to sell and convert the same into money, and out of the income to pay annuities to several persons and classes of persons for the said term of ten years, with pecuniary legacies to the same persons and classes, and also to other persons, at the expiration of that time, and annuities to other persons for the lives of the annuitants, and specific legacies to others. The residue was then given to all and every the several legatees before named (with exceptions) ratably and in proportion to the amount of their respective legacies. The wife survived the testator:—Held, that "the legatees before named" should be construed to be the legatees taking benefits out of the fund which fell in at the wife's death, and the "legacies" such legacies as remained to be satisfied at the expiration of the ten years; that annuitants for life, not having other legacies, were legatees of shares in the residue; that the specific legatees, including one taking a bequest of a watch, chain, and seals, were entitled to share in the residue according to the value of their respective legacies; that annuitants, who survived the testator and died before the expiration of the ten years, when their pecuniary legacies were payable, took vested interests in such annuities and legacies; that a class described as "the children" of B., but not otherwise named, came within the description of "legatees before named"; that the widow of the testator did not take under the residuary gift; that the annuities which ceased at the expiration of the ten years were not legacies in respect of which the annuitants took any share in the residue. *Bromley* v. *Wright*, 7 Hare, 334.

e. No Gift but in the Direction to Pay and Divide.

i. *In General.*

On attaining Twenty-one.]—There is no absolute rule that in a case where there is no bequest distinct from the direction to pay, the vesting is postponed till the time of payment, but the construction will depend upon the nature of the event or contingency upon which the payment is to be made, as importing or not importing a condition. Accordingly, where a residue of real and personal estate was given to trustees to sell, get in, and divide among the testator's children, so soon as the youngest should attain twenty-one, and in case of the death of any leaving lawful issue, such issue to take the parent's share: it was held that the share of one of the children who attained twenty-one, and then died without issue before the youngest had attained that age, was vested and passed to his representatives. *Leeming* v. *Sherratt*, 2 Hare, 14; 11 L. J., Ch. 423; 6 Jur. 663.

Semble, no child, who did not attain twenty-one, was intended to take any interest in the residue. *Ib.*

Testator bequeathed to his wife the use of his furniture, &c., which he desired might be distributed amongst his children when the youngest attained twenty-one, at her and his executors' discretion; such part to be reserved for her use as might be deemed reasonable, and at her death to be distributed as above directed:—Held, that those children who died before the youngest attained the age of twenty-one did not take vested interests. *Ford* v. *Rawlins*, 1 Sim. & S. 328; 1 L. J. (o.s.) Ch. 170; 24 R. R. 188.

Testator devised his real estate to trustees, with power to "let," until all his nephews and nieces should attain twenty-one. And after his youngest nephew or niece should be of age, then he directed his estates to be sold, and the produce to go among all his nephews and nieces, except two by name. He charged his rents with an annuity to A., and with payment of bond debts, but did not otherwise dispose of them:—Held, that the interests of the nephews and nieces vested in all who attained twenty-one, whether dying before or surviving the period directed for sale. *Parker* v. *Sowerby*, 1 Drew. 488; 1 Eq. R. 217; 22 L. J., Ch. 942; 17 Jur. 752; 1 W. R. 404.

Direction to pay at Twenty-one or Marriage.]—On the particular wording of a will the court thought it doubtful whether personal estate did not vest immediately in a legatee, though the gift was only in the direction to pay at twenty-one or marriage, and there was no disposition of the income during minority. *Lang* v. *Pugh*, 1 Y. & C. C. C. 718; 6 Jur. 939.

Bequest to trustees, in trust to pay, assign, and transfer, "unto and between the children of A., when and as they should respectively attain twenty-one, or be married with the lawful consent of parents or guardians," with maintenance in the meantime. A child died under twenty-one, having married without consent:—Held, that her representative took no share in the property. *Gardiner* v. *Slater*, 25 Beav. 509.

Testatrix gave a share of residue upon trust for her son for life, and after his death "upon trust to transfer and pay the capital of the said trust funds unto and amongst the child, if only one, or both or all the children, if more than one, of" her said son in manner hereinafter mentioned. Then followed a direction making the gift to the son void if he aliened or encumbered it, and giving over the dividends to the parties entitled in remainder; then followed another direction of some length, and then a declaration that the shares should be payable at

twenty-one or marriage :—Held, the context of the will not repelling, but rather supporting, that construction, that this was not a substantive gift, with a simple direction to pay, but one general direction to pay at twenty-one or marriage, and the interests of the son's children were not vested. *Shum* v. *Hobbs*, 3 Drew. 93 ; 24 L. J., Ch. 377 ; 3 W. R. 221.

Bequest of leaseholds, upon trust to assign unto all the children of A. B. on their respectively attaining twenty-one, and if one child, to assign to such child (omitting on attaining twenty-one). An only child, who died an infant, was held to take a vested interest. *Walker* v. *Mower*, 16 Beav. 365.

On attaining Twenty-five.] — Testator gave certain real and personal property upon trust to pay, apply and transfer the same unto and amongst all and every the brothers and sisters of R., share and share alike, upon his, her, or their attaining twenty-five if a brother or brothers, and if a sister or sisters, at such age or marriage with consent; and the trustees were authorised to apply the rents, profits, and interest, or so much as they should think fit, for their maintenance in the meantime : — Held, that the gift was only to include children who should attain twenty-five. *Leake* v. *Robinson*, 2 Mer. 363 ; 16 R. R. 168.

A testator, after devising and bequeathing all his real and personal estates to trustees, on trust from time to time to receive the rents and profits, and therewith to pay various legacies and annuities, directed that they should invest the surplus rents and profits at interest, and suffer the same to accumulate ; and he declared that they should stand seised of his said trust estate and the accumulations, upon trust that, when and as soon as any son of either of his nephews A. and B. should have attained the age of twenty-five years, a valuation of his said trust estate should be made, and that the same should then be divided into as many equal lots as there should be sons of his said nephews then living, and thenceforth separate accounts should be kept of the respective portions ; and that each of his said nephews' sons, when and as they should respectively arrive at the age of twenty-five years, should choose one of such portions as the share to be allotted to him and his children ; and that thenceforth the said portion or share should be held by trustees, upon trust for the person so selecting the same for his life, and after his decease upon trust as to one equal moiety for his eldest son and his heirs, executors, &c. ; and as to the other moiety for the rest of his children and their heirs, executors, &c., in equal proportions, and if but one child both moieties for such child absolutely ; but if any or either of his said nephews' sons should die under their respective ages of twenty-five years, or having attained that age should afterwards die without leaving issue, the share or shares intended for the person or persons so dying should go to the others and other of the said nephews' sons ; and if all but one should die without leaving issue, the trustees should stand seised and possessed of the whole trust estate, in trust for such one surviving nephew's son for his life, and for his children and child as aforesaid ; but if all the testator's said nephews' sons should depart this life without leaving issue, then upon trust for such person as should at that time be the testator's heir. At the time of the testator's death A. and B. had several sons living, and B. had another son born afterwards :—Held, upon the construction of the will, that the trusts for accumulation and division of the property comprised all the sons of the nephews who should be living when the first of them should attain twenty-five ; and as the son who should first attain that age might not be born until after the testator's death, the gifts were too remote, and therefore void ; and the testator's real estates upon his death became vested in his heir. *Boughton* v. *Boughton*, 1 H. L. Cas. 406. Affirming with a variation 1 Coll. 26 ; 8 Jur. 329.

Direction that Property should "Devolve."] —A testator directed his property to be settled upon his daughter H., in such manner that, in case of her death, it should devolve upon her children, if she had any, and, if she should not have any, then that she should bequeath it to any person she might think fit : the word "devolve" imports transmission to children living at the death of the mother, and, upon the death of the mother, her husband, as representative of a deceased child, took no interest under the will. *Parr* v. *Parr*, 1 Myl. & K. 647 ; 2 L. J., Ch. 167.

ii. *Where Gift Preceded by a Life Interest.*

Gift not Vested.]—When the only gift to a class consisted of a direction to divide and pay, upon the death of the tenant for life :—Held, upon the context, that those only took who survived such tenant for life. *Beck* v. *Burn*, 7 Beav. 492 ; 13 L. J., Ch. 319 ; 8 Jur. 348.

Where the testator made no direct gift to a class of children, but after the death of his wife, the tenant for life, directed his executors to sell and "divide and equally pay" the produce amongst the class of children, and the issue of such children as should die in the lifetime of the wife :—Held, to apply only to such children as were living at the time of the distribution, and that the class to take consisted of such children or issue as were living at the death of the wife, and the issue of any who died in her lifetime leaving issue living at her death. *Ib.*

—— **Attaining Twenty-one.**] — Bequest in trust for A. for life, and after his death in trust to transfer the whole to A.'s children on the day of their attaining twenty-one, in such shares as A. should by deed or will appoint, and in default of appointment in the manner therein mentioned ;—Held, that the time of payment was annexed to the gift, and that A. could not, by the exercise of his power, accelerate the vesting. *Murray* v. *Tancred*, 10 Sim. 465.

Where there is a gift to A. for life, and after her death the money to be equally divided amongst her children as they attain twenty-one, the gift over to the children is contingent. *Allan* v. *Kelly*, 7 W. R. 139.

Testator bequeathed to his daughter Eliza 2,000*l.* for life, the principal to be equally divided amongst her children, should they have attained twenty-one : and, to the two children of his late daughter Jemima 1,000*l.* each, to be paid on their attaining twenty-one :—Held, that the legacies to the children were contingent on their attaining twenty-one, and that they were not entitled to interest in the meantime. *Young* v. *Macintosh*, 13 Sim. 445 ; 7 Jur. 383.

—— **Twenty-one or Marriage.**] — Testator bequeathed his residuary estate to trustees in

trust to pay the interest to his niece for life, and directed that, after her death, the trustees should pay, apply, transfer and dispose of the residue amongst her children, equally to be divided between them, share and share alike, to be paid to sons at twenty-one, and to daughters at that age or on their marriage: and he empowered the trustees after his niece's decease or in her lifetime with her consent, to raise, pay, and apply, for the preferment and advancement of any of her children, all or any part of their presumptive portions under the trusts aforesaid:—Held, that there was no gift to the children except in the direction to pay to them, and, therefore, their portions did not vest in them until such of them as were sons, attained twenty-one, and such of them as were daughters, either attained that age or married. *Chevaux* v. *Aislabie*, 13 Sim. 71.

L. gave 4,000*l.* bank stock to trustees, in trust, to pay the dividends to his daughter E. for life; and after her death he directed the principal to be divided equally between her children at their ages of twenty-one or marriage; but if they should die before, then to his son L.; the daughter had two children who both attained twenty-one, but one of them died in her lifetime:—Held, that this legacy did not vest absolutely in the children of E. on their attaining twenty-one, but only in such of them as should be living at the time of her death. *Randall* v. *Metcalfe*, 3 Bro. P. C. 318.

A testator bequeaths certain capital sums to trustees, upon trust to pay the interest to W. B. for his life, and after his decease, upon trust to pay, transfer, and assign the capital sums, and all arrears of interest, to the children, if more than one, of the body of the said W. B., lawfully to be begotten, share and share alike; and in case of only one child, to pay, transfer, and assign the same to such one child, the share and shares of such of the said children, if more than one, as shall be a son or sons, at his and their age, or respective ages of twenty-one years; and to such of them as shall be a daughter or daughters, at her or their age, or respective ages, of twenty-one years, or day or respective days of marriage, which shall first happen next after the decease of the said W. B.:—Held, that the children of W. B. did not take vested interests till the time when they were entitled respectively to payment arrived. *Bentinck* v. *Portland*, 4 L. J. (o.s.), Ch. 13; 27 R. R. 251.

—— **Annuity for Son.**]—Devise to testator's wife for life, and from and after her decease, to trustee on trust to sell, and, among other bequests to lay out 500*l.* in annuity for life of a son;—Held, a vested interest in son, if surviving the testator. *Bayley* v. *Bishop*, 9 Ves. 6; 7 R. R. 132.

Gift Void for Remoteness.]—A testatrix appointed a trust fund to two trustees, in trust to pay the dividends to A. for life, and after his decease she gave the dividends to two others, B. and C., for life; and after the decease of the survivor, she gave, bequeathed, willed, and directed the principal to be divided into two parts, and one of them to be "transferred or paid" to the children of those two persons respectively at the age of twenty-five years;—Held, that the gift to the children was void for remoteness. *Chance* v. *Chance*, 16 Beav. 572.

Legacy Vested—In General.]—Devise of personal estate to wife for life, several legacies after her death, residue at her decease to be divided between A., B., C., and D.; B. and C. die in life of wife:—Held, to take vested interests. *Corbett* v. *Palmer*, 2 Eq. Cas. Abr. 548.

Testator directed his executors to purchase out of his residuary estate a certain sum of stock, etc., to pay the dividends to his wife for her life, and after her death to divide the capital between such of his three daughters as should be then living. Provided that if any one of them should be then dead, or should afterwards die before her share should become payable or divisible, leaving a child or children, that share should go to such child or children. The testator's wife died in his lifetime; one of the daughters died three months after the testator:—Held, nevertheless, that she had a vested interest in one of the shares. *Collins* v. *Macpherson*, 2 Sim. 87; 29 R. R. 65.

Residue of testator's estate directed to be invested in Government securities, and the interest paid to his wife; and after her death to be sold, and the money thereby arising to be divided amongst his daughters and grandchildren:—Held, that the share of a daughter dying in the lifetime of the wife was vested. *Hatch* v. *Mills*, 1 Eden, 342.

Bequest of all testator's estate to A., to pay the income to testator's mother for life, and after her decease, I then give to A., etc., the residue to B. with power to dispose of it by will; the legacy to A. vested immediately, and was transmissible. *Benyon* v. *Maddison*, 2 Bro. C. C. 75.

Devise of the residue of personal estate to the wife for life, if she die without issue living at her death, to testator's two brothers, or if one of them shall be dead, to the survivor. They both died in the life of the wife. The legacy was vested in both as joint tenants, and therefore goes to the representative of the survivor. *Barnes* v. *Allen*, 1 Bro. C. C. 181.

Legacy on death of tenant for life does not lapse by death of legatee before that period. *Goodwin* v. *Munday*, Dick. 551.

Testator gave a copyhold estate to trustees for his wife, until the leases to which it was subject expired, and directed that then it should be sold, and the proceeds invested for the benefit of his children; but if his wife should die before the leases expired, that it should be immediately sold, and the proceeds disposed of as before. The wife survived the children, but died before the leases expired. The surviving trustee, who claimed the estate for his own benefit, was decreed to surrender it to the administrator of the children, but without prejudice to the rights of the customary heirs of either the testator or the children, if any such heirs were in existence. *Burton* v. *Hodsoll*, 2 Sim. 24.

Testator gave the use of 800*l.* to his wife for life, and, after her decease, made a disposition of parts of the principal; he then gave several other devises, and afterwards to J. 100*l.*; J. died, leaving a widow:—Held, that his legacy was vested and transmissible. *Monkhouse* v. *Holme*, 1 Bro. C. C. 298.

Devise of real and personal estate to trustees, to pay, etc., to testator's wife for life, then to pay a legacy to his daughter; this is a vested legacy in the daughter, and transmissible. *Molesworth* v. *Molesworth*, 4 Bro. C. C. 408.

Testator "desires" J. "to leave" D. 500*l.* at her death, out of money bequeathed her;—Held, to amount to a legacy from the original testator, and not to lapse by D.'s death in J.'s

lifetime, he having survived the testator. *Medlicott* v. *Bowes*, 1 Ves. sen. 207.

Legacy at the decease of a person entitled to the fund out of which it is given, vested immediately, and payment only postponed. *Blamire* v. *Geldart*, 16 Ves. 314.

Legacy to A. for life, and to her children at her decease, vested in all the children as they come in esse; but upon the circumstances of this case it vested in those living at the death of the mother only. *Spencer* v. *Bullock*, 2 Ves. sen. 687.

—— **Capital to be Divided.**]—Trust to pay the dividends of stock to the testatrix's niece for life, and after her death to divide the capital among the brothers and sisters of the testatrix; and in like manner to the survivor or survivors of them; the shares of those who died in the life of the niece passed to their representatives. *Ib.* And see *Chaffers* v. *Abell*, 3 Jur. 578.

Testator gave annuities to three of his relations, and directed that, if the annuities were paid by the interest of money in the stocks, at the death of the different parties, the principal should be divided between the children of the deceased. One of the annuitants had five children living at the testator's death; but only one of them survived the annuitant:—Held, that the capital of the stock which had been provided to answer the annuity, did not vest in the surviving child, on the annuitant's death; but vested, on the testator's death, in all the children then living, as tenants in common. *Watson* v. *Watson*, 11 Sim. 73.

Testatrix, by her will, gave to each of her four nieces (naming them) a legacy of 50*l.*, and, after bequeathing other legacies, gave the residue of her property to her three sisters, and, after their deaths, to be divided between her nieces abovementioned:—Held, that the nieces of the testatrix took a vested interest in the residue immediately upon her death, and that one-fourth of such residue belonged to the husband and personal representative of one of the four nieces, who, after surviving the testatrix, had died in the lifetime of the tenant for life. *Cochrane* v. *Wiltshire*, 16 L. J., Ch. 366; 11 Jur. 426.

Testator directed the dividends of his residue to be paid to his three children, A., B., and C., in certain shares, and that, after the decease of any one or two of them until the decease of the survivor, the shares of the deceased parents should go to their respective children; and that, after the decease of his surviving child, the capital of the residue should be divided amongst the children of his said children, per capita. A. died first, B. next, and C. last. Both A. and C. left children, some or whom were living at C.'s death. B. had children, but they all died in her lifetime:—Held, nevertheless, that they took vested transmissible interests in the dividends of B.'s share of the residue, which accrued between B.'s and C.'s deaths. *Homer* or *Horner* v. *Gould*, 1 Sim. (N.S.) 541; 20 L. J., Ch. 657; 15 Jur. 457.

Bequest of residue to A. for life, and after her decease, a gift of 3,000*l.* each to B. and C. (granddaughters), for their absolute use; and if either of them should be dead at the decease of A., her 3,000*l.* was to go to the granddaughter who should then be living; but in case such granddaughter should have left children, they were to take her legacy. B. died first, leaving children; C. then died without issue, leaving A. surviving. On the death of A.:—Held, that C.'s legacy was vested and passed to her representatives, *Bright's Trusts, In re*, 21 Beav. 67; 3 W. R, 544.

C., in 1854, after directing that the whole of his estate should be converted, and the interest paid to his wife for life, directed that 1,500*l.* should be set apart, and the interest paid to his daughter A. for life, and that after her death the capital should be divided amongst her children; and in case she should have no child or children, then he directed that the same should be applied for the benefit of his son M. and his children in like manner. The testator then directed that a like sum should be set apart for the benefit of M. for life, and that the capital should after his death be divided amongst his children; and in case he should have no child, the same was to be applied for the benefit of A. and her children in the same manner as the bequest to her was then limited; and in case both M. and A. died without leaving issue surviving, he desired that 1,500*l.* should be divided amongst his next of kin, and the other amongst his wife's next of kin. A. married B., by whom she had one child only, who died an infant in her lifetime. A. died, leaving her husband and her brother M. surviving:—Held, that the child of A. took a vested interest in the 1,500*l.*, and that B. was entitled to it as her legal personal representative. *Whyte* v. *Collins*, 6 Jur. (N.S.) 1281; 3 L. T. 263.

A testator bequeathed to R. S. 1,000*l.*, to be placed out on real security, and the interest to be paid to her during her life; and he directed that at her death the principal should be called in and distributed equally among her children, and that if any children were living, from son or daughter being dead, such child or children should take the share their parent would have been entitled to if living:—Held, that the representatives of such children of R. S. as survived the testator and died without issue in the lifetime of R. S., were entitled to shares. *Strother* v. *Dutton*, 1 De G. & J. 675.

—— **Death or Marriage of Tenant for Life.**]—Residuary gift upon trust for the testator's wife for life, if she should so long continue his widow; and from and after her death or marriage, upon trust to pay and divide the whole thereof equally amongst all and every the testator's nephews and nieces, share and share alike, within six months after they should become entitled thereto;—Held, that the residuary share of one who died in the lifetime of the widow passed to his representatives. *Packham* v. *Gregory*, 4 Hare, 396; 14 L. J., Ch. 191; 9 Jur. 175.

A testator gave the interest of money in the funds to his wife during her life, after which his daughter Maria, if unmarried, was to receive the same until her death or marriage, when the principal was to be divided between his eight sons and daughters, including his daughter Maria, or amongst such of them as should be living at the death of Maria. The testator also gave the children power to take possession of their respective shares, upon giving security for the payment of interest to the widow for her life. Maria married during the testator's life, and died after the widow. One son, Charles, died after the testator, but before the widow:—Held, that the representatives of Charles were entitled to one-eighth part of the property. *Baynes* v. *Prevost*, 13 L. J., Ch. 377.

—— **"Pay and Transfer."**]—A bequest of residue to trustees on the trusts after-mentioned,

followed, first, by a trust to provide for annuities, then by a trust to pay interest to the legatees for life, and then a trust to "pay and transfer" the capital to the children of the tenants for life, gives those children an interest which vests immediately on the testator's death. *Salmon* v. *Green*, 11 Beav. 453 ; 18 L. J., Ch. 166 ; 13 Jur. 272, 617.

The use of such words as "pay and transfer" as the only words of gift in a deferred bequest, does not make such bequest contingent ; the true criterion is, what was the reason for the postponement. If it was the position of the fund, as in a gift to one for life, and after his death to others, the bequest in remainder vests at once ; but if it was the position of the legatee, as where the gift is by a direction to pay the fund to the legatee when he shall attain twenty-one, it is contingent. *Bennett's Trust, In re*, 3 K. & J. 286.

A bequest of personalty to trustees upon trust to pay the interest thereof to the testator's daughters A. and B. for their lives and the life of the survivor, and upon the decease of the survivor to pay and transfer the capital equally among all the testator's children, and the issue, if any, of A. and B., and of any other deceased child, in such manner that such issue might be entitled to such share or shares as his or their deceased parent or parents respectively, if living (A. and B. excepted), would have been entitled to. A. and B. died without leaving issue :—Held, first, that the bequest in remainder vested at the testator's death. *Ib.*

Held, secondly, that the whole fund belonged to the testator's children other than A. and B., and to the children living at the death of such as had died leaving children. *Ib.*

Held, thirdly, that the shares of such as had died without leaving children belonged to their representatives. *Ib.*

—— **"Convey, Transfer and Assure."**]—Bequest of 2,000*l.* in trust for A.'s life, and from and after her decease "to convey, transfer, and assure" it unto all and every the child and children of A. :—Held, that A.'s children took vested interests at their births. *M'Lachlan* v. *Taitt*, 28 Beav. 407. Affirmed on another point, 2 De G. F. & J., 449 ; 30 L. J., Ch. 276 ; 6 Jur. (N.S.) 1269 ; 3 L. T. 492 ; 9 W. R. 152.

Bequest of residue of personal estate, after a life interest, to the use of all and every the children of testator's daughter, equally to be transferred, delivered, and paid to them severally, when by law able to receive and give discharges :—Held, to be vested in each child on coming into being ; and transmissible, though subject to be varied by the birth of others. *Ewel* v. *Wallace*, 2 Ves. sen. 118. Affirmed, *Id.* 318.

—— **Pay and Divide.**]—A testator, by his will, gave real property to trustees, upon certain trusts during the lives of his two sons W. and T. and the life of the survivor, and from and after the decease of the survivor upon trust to sell and "to pay and divide the money arising thereupon unto and amongst all and every the child and children of W. and T., and the issue of such of them as should be then dead, share and share alike, such issue taking only the part or share of his, her, or their deceased parent" ;—Held, that two children of W. and T., who were living at the testator's death, but died without issue before the period of distribution, had vested shares in the proceeds of sale, which passed to their representatives. *Wood, In re, Moore* v. *Bailey*, 43 L. T. 730 ; 29 W. R. 171.

Bequest in trust for testator's niece for life, with remainder in trust to pay and divide "unto and amongst the children of my said niece in equal shares and proportions" :—Held, that all the children who survived the testator took vested interests in the fund. *Wilson's Trusts, In re*, 14 Jur. 263.

—— **Attainment of Twenty-one.**] — Where there is a gift of dividends, to one for life, and after his death the whole principal to be paid and divided between and among his children, in equal shares, on their respectively attaining the age of twenty-one years, those only who attain twenty-one take. *Fitzwilliams* v. *Long*, 6 W. R. 819.

Trust by will, subject to an interest for life, to pay and transfer to the testator's nephew and nieces, equally at twenty-one ; with survivorship in case any should die before his or their shares should become payable ; and a limitation over in case all should die, &c. Vested interest at the age of twenty-one, before the death of the tenant for life. *Hallifax* v. *Wilson*, 16 Ves. 171 ; 10 R. R. 146.

A testator after directing payment of his debts, etc., gave specific legacies and an annuity to his wife, during the time she should remain his widow, and charged the same on his real and personal estate. He then made specific devises, and gave the residue of his property to his trustees to sell, and pay, and divide the proceeds among his children ; as to the specified devises bringing those into hotch-pot, subject to the annuity to his wife, share and share alike, provided that none of the children should enter into the possession or enjoyment of his property until his wife died or married again, or his youngest son attained twenty-one. The testator had ten children ; four died infants in his lifetime, and one died after the youngest attained twenty-one :—Held, that the shares were vested of all that attained twenty-one, and were payable after providing for the annuity, the income from that time, and the capital when the youngest attained twenty-one. *Fawthorpe* v. *Craven*, 3 W. R. 275.

Bequest of a sum of stock to be divided, after the death of an annuitant, between all the children of A. B. as they should attain his or her age of twenty-one years :—Held, that the fund was to go to such of the children of A. B. as were living, when the first attained twenty-one, and who had attained, or who should attain, twenty-one. *Locke* v. *Lamb*, L. R. 4 Eq. 372 ; 16 L. T. 616 ; 15 W. R. 1016.

A., by his will, gave personal estate to trustees, on trust for B. for life, and after her death to pay and divide the fund unto and equally between and among all and every the child and children of B., on his or her attaining twenty-one, and he declared that his mind and will was, that if any or either of his grandchildren should die during the life of B., leaving issue them surviving, then that such issue should be entitled to his, her, or their respective deceased parents' share :—Held, that all the children of B. took vested interests, whether they attained twenty-one or not. *Allen, In re*, 10 L. T. 812.

A testator directed the trustees of his will, upon the decease of A., to whom he had given a life estate, to convey, pay, assign, transfer, and make over the residue of his realty and personalty unto and amongst all and every the child and children of A. as and when they should

severally and respectively attain their several and respective age and ages of twenty-one years, to and for their own absolute use and benefit, as tenants in common; if but one child, to such only child, his or her heirs, executors, administrators, or assigns, according to the nature and quality of such estates, and to whom he gave the same accordingly:—Held, that the children of A. on their respective births took an interest vested and not contingent. *King* v. *Isaacson*, 2 Sm. & G. 371; 22 L. J., Ch. 455; 17 Jur. 434; 1 W. R. 209.

Where there is a doubt the court inclines to the construction that a gift by will vests on the testator's death. *Ib.*

S. L. directed that a moiety of the residue of his property should be divided between J. H. and four others in equal shares; but as to the share of J. H., he desired that the same should be retained in the hands of his executors, upon trust to invest the same, and to pay the proceeds to J. H. for life; and from and after his decease, to pay, assign, and transfer the said moneys, or the stocks, etc., upon which the same should be invested, unto all the children of J. H. equally between them, part and share alike, at their respective ages of twenty-one years; and if there should be but one such child, then wholly to such one child at his or her age of twenty-one; and in case any one or more of the children should die under twenty-one leaving lawful issue, then such issue should be entitled to the share or shares to which his, her, or their father or mother would have been entitled:—Held, that the shares of the children of J. H. were vested on their attaining twenty-one, and not contingent on the event of their surviving their father. *Marshall* v. *Bentley*, 1 Jur. (N.S.) 786; 3 W. R. 566.

Testator gave all his real and personal estate, after payments of debts and legacies, to his wife for life, and directed that, at the end of twelve months after her death, 1,000*l.* should be laid out in trust for his daughter for life, and, after her decease to divide the capital amongst her children, when they should attain twenty-one. One of the children attained twenty-one and died in the lifetime of testator's widow:—Held, that his representatives were entitled to a share of the 1,000*l.* *Cousins* v. *Schroder*, 4 Sim. 23.

A testator bequeathed the residue of his personal estate to trustees, upon trust to pay three annuities; and after the death of the survivor of the three annuitants, upon trust, for the children of his two brothers and sister as tenants in common at twenty-one; but, if any of them died under twenty-one, the shares of them so dying were to go to the survivors;—Held, that one of the children having attained twenty-one, and having died in the lifetime of the annuitants, his personal representatives were entitled to his share. *Morgan* v. *Williams*, 14 L. J., Ch. 449.

Testatrix bequeathed a sum of stock to trustees, upon trust to pay the dividends thereof to her granddaughter for life, and after her decease in trust to assign, transfer, and dispose of the capital unto and among the children of her said granddaughter, share and share alike, at their ages of twenty-one, or sooner if the trustees should think proper; and in case the said granddaughter should die without leaving any child or children, or, leaving such, all of them should die before they or any of them should become entitled to the trust moneys, then in trust to assign and transfer the capital to A. The will contained no clause of survivorship among the children:—Held, that the children dying in the lifetime of the granddaughter, but having attained twenty-one, took vested interests in equal shares, *Mair* v. *Quilter*, 2 Y. & C. C. C. 465.

—— **Proof of Legitimacy.**]—A testator bequeathed 10,000*l.* to his brother, to be paid in twenty equal half-yearly payments, but in case his brother should die before all the payments became due, then the remainder should be placed out at interest, to be paid to the children of his brother till they attained twenty-one, and then the principal to be divided amongst them. The brother died after three payments had been made, leaving five children, one of whom was supposed to be dead, not having been heard of for thirty years. Four of the children received their shares, and filed a bill praying that the remaining share might be divided amongst them. There was no evidence of the brother's marriage:—Held, that there was sufficient evidence of the legitimacy of the children, and that each was entitled, upon attaining twenty-one, to a share in the residue, but inquiries were directed as to the death of the child who had not been heard of. *Gaches* v. *Warner*, 16 L. J., Ch. 281.

—— **Benefit of Survivorship—Trust for Maintenance.**]—A. gave his residue to his wife for her life, to be expended by her in and about the maintenance of herself and her children: and after her decease unto and amongst his children, to be paid to them as they should severally attain the age of twenty-one years, with benefit of survivorship;—Held, that each child, on attaining twenty-one, took a vested interest, but that his presumptive share would not be paid to him with the consent of the mother, as there was a trust for maintenance of the others. Part, however, was paid out, the rest being reserved as security for payment of the life income. *Berry* v. *Bryant*, 2 Dr. & Sm. 1; 31 L. J., Ch. 327; 8 Jur. (N. S.) 69; 5 L. T. 818; 10 W. R. 242.

—— **Attaining Twenty-five.**]—The testator gave the residue of his property to his widow during her life, and at her demise to the eldest surviving son of A., upon his attaining twenty-five (the trustees being directed to apply the interest to his use till he attained that age), or failing such male issue, to the daughters of A. living at the demise of the last of such male issue; the only son of A. died under twenty-five in the lifetime of the widow, leaving two daughters of A. him surviving:—Held, that if there had been any son of A. living at the death of the widow, he would have taken a vested interest in the residue, though he had not then attained the age of twenty-five. *Murray* v. *Addenbrooke*, 4 Russ. 407; 8 L. J. (o.s.) Ch. 79; 28 R. R. 144.

A testator declared that the bequest to one daughter C. should be enjoyed by her for life, and then be put in trust for the benefit of the children she might leave, and to be divided at twenty-five. And he "in like manner" directed the bequest of his second daughter M. should be paid to her for life, and after her death "may be continued in trust and may be divided equally between her children after they have attained the age of twenty-five":—Held, that the bequest to the children of M. was not too remote, and that they took vested interests at their birth. *Saumarez* v. *Saumarez*, 31 Beav. 432.

f. Effect of a Gift Over on Vesting.

Conditional Gift Over—Death before Twenty-one.]—A testator gave legacies of 50*l.* each to six grandchildren, when the youngest grandchild should come of age, payable from the produce of a real estate, then to be sold; and if either of those children should not live to come of age, nor have an heir born in wedlock, he directed the 50*l.* to be equally divided among the surviving children. E. M., one of the six grandchildren, married during her minority, but afterwards attained twenty-one, and before the youngest grandchild attained that age, she died, leaving a child:—Held, that her legacy of 50*l.* was a vested interest, and belonged to her personal representatives. *Murkin* v. *Philipson*, 3 Myl. & K. 257; 3 L. J., Ch. 143.

Legacy to the children of A., to be equally divided amongst them and if either of them die before twenty-one their share to go to the survivors: a vested interest in the children living at the testator's death, subject to be devested in the event pointed out: after-born children therefore excluded. *Davidson* v. *Dallas*, 14 Ves. 576: 9 R. R. 350.

Testator bequeathed 5,000*l.* to A. if he attained twenty-one, but if he should not attain that age, or died without leaving issue male, then over:—Held, that the 5,000*l.* vested, absolutely, in A., on his attaining twenty-one. *Mytton* v. *Boodle*, 6 Sim. 457.

The rule that the court leans to a construction that gives a portion to each child that lives to require it applies to wills as well as settlements. *Knowles, In re, Nottage* v. *Buxton*, 51 L. J., Ch. 851; 21 Ch. D. 806; 47 L. T. 161; 31 W. R. 182.

A testatrix, after giving a life interest in real estate to her three daughters, directed the share of each daughter to be applied in the maintenance of the children of such daughter who survived her until they attained twenty-one, then the share to be theirs. In case of the death of all the children of a daughter under twenty-one, the testatrix gave the share to the other daughters:—Held, that a child of a daughter, who attained twenty-one and died in his mother's lifetime, took a vested interest. *Ib.*

A stock legacy, and a share of residuary personalty expectant on the death of a tenant for life, bequeathed to a minor, payable at twenty-one, with a limitation over in the event of his death under twenty-one:—Held, to be interests which, prior to the 4th of July 1870, were forfeitable to the crown on the conviction of the minor for felony. *Bateman's Trust, In re*, 42 L. J., Ch. 553; L. R. 15 Eq. 355; 28 L. T. 395; 21 W. R. 435.

—— Death without Leaving Issue.]—Testatrix bequeathed 3,000*l.* to trustees upon trust to pay the interest to B. for life and after the decease of B. the testatrix willed that the said 3,000*l.* should be equally divided among such of her children as should be living at the time of her death, as they respectively attained the age of twenty-one; but her will was that if B. should die without leaving issue, then the 3,000*l.* should be paid to C.:—Held, that the children of B. took vested interests in the 3,000*l.* at her death, and, consequently, that the share of one who died after B. under the age of twenty-one devolved to her father as administrator. *Bree* v. *Perfect*, 1 Coll. C. C. 128; 8 Jur. 282. S. P. *Ingram* v. *Suckling*, 7 W. R. 386.

A testator bequeathed money in trust for A. for life, and after her death for the children of A., when and as they should attain the age of twenty-one years; but if A. should die without lawful issue, then over:—Held, that the gift to the children was contingent upon their attaining the age of twenty-one years. *Kidman* v. *Kidman*, 40 L. J., Ch. 359.

A testator gave his property to his daughter for life, and then to her children, who being sons should attain twenty-one, or being daughters attain that age or marry. "And in case my said daughter shall happen to die without leaving any child or children her surviving, or leaving such they shall all die without having obtained a vested interest in the said trust-moneys, and without leaving any issue them, him or her surviving," then over to two cousins. The daughter had children, some of whom attained twenty-one, but all died in her lifetime:—Held, that the gift over took effect, its terms being unambiguous and the event to which it referred having happened. *Hamlet, In re, Stephen* v. *Cunningham*, 58 L. J., Ch. 242; 39 Ch. D. 426; 59 L. T. 745; 37 W. R. 245—C. A.

A. gave to his daughter the interest and dividends of all moneys which should be standing in his name in the three per cent. reduced annuities, for her separate use; and after her decease, the principal of the stock to the child or children of his daughter in equal portions, on their attaining twenty-one. In case of the daughter's decease before her husband, the interest of the stock to be enjoyed by him during his life; but should the daughter die without having any issue, then, after the decease of the husband, the principal to revert to the testator's eldest son absolutely. The testator's daughter died before the testator, leaving one daughter, who, after the death of the husband, died under age and without issue:—Held, that the gift to the children of the testator's daughter was contingent, and upon the death of the only daughter under twenty-one the testator's son became entitled to the stock. *Wrangham's Trusts, In re*, 1 Dr. & Sm. 358; 30 L. J., Ch. 258; 7 Jur. (N.S.) 15; 3 L. T. 722; 9 W. R. 156.

Where a testator directed the annual interest of his residue to be divided into as many shares as there were living children of T. and L., share and share alike, as they should come of age; and in case anyone should die without children, his share to devolve on survivors successively, till the whole interest came into the hands of the grandchildren and great-grandchildren of T. and L.:—Held, that the children of T. living at his death were entitled to the income only, but that there was a gift by implication to these children absolutely, with a gift over of the share of any grandchild who had died without having had issue; not absolutely, but according to the gift of the original share. *Wetherell* v. *Wetherell*, 4 Giff. 51; 32 L. J., Ch. 476; 9 Jur. (N.S.) 368; 8 L. T. 39; 11 W. R. 274.

—— Death of all Children before Tenant for Life.]—Gift of residue on trust to pay the dividends to the testatrix's son for life (except what was required for education of her son's children); and should her son die before all or any of his children should attain twenty-one, she wished each child to receive their share on attaining twenty-one; but, should all his children die before himself, at his death then over:—Held, that a child who died an infant

in the lifetime of the son had not acquired a transmissible interest. *Chadwick* v. *Greenall*, 3 Giff. 221 ; 7 Jur. (N.S.) 959 ; 5 L. T. 232.

—— **Death under Twenty-one or before Tenant for Life.**]—A testator gave a sum of money in trust for E. for life, and after her death for R., should he survive E. Should he not survive E. nor attain twenty-one, then over. R. attained twenty-one, but did not survive E. :—Held, that the gift vested absolutely in R. on his attaining twenty-one, subject to the life interest of E. *Thomson's Trusts, In re*, L. R. 11 Eq. 146 : 25 L. T. 693 ; 19 W. R. 196. S. P. *Maitland* v. *Chalie*, 6 Madd. 243.

A testator bequeathed his residuary personal estate to trustees, upon trust for his daughter A. for life, and after death of A. the said trust money and income in trust for all and every the children of A., share and share alike, to the son or sons when they should have attained the age of twenty-one, and for the daughter or daughters at that age or marriage ; with a gift over, if A. should die without having a child or, having any, such children should die, being sons, before twenty-one, and daughters before twenty-one or marriage. A. died, leaving an only child B., who died under twenty-one :—Held, that the trust property vested in B., so that the income between the death of A. and the death of B. belonged to B.'s estate. *Ridgway* v. *Ridgway*, 4 De G. & Sm. 271 ; 20 L. J., Ch. 256 ; 15 Jur. 960.

—— **Under Twenty-one without Issue.**] — Testator gives his personal estate to trustees upon trust to pay the interest to his daughter E. S. for her life, and, after her decease, to pay and divide the principal among the children of his said daughter, and the issue of a deceased child, as she should appoint, and in default of appointment to go to and be equally divided among them ; and if but one, then to such only child ; the portions of sons to be paid at their respective ages of twenty-one, and of daughters at their respective ages of twenty-one or marriage. If no issue, or all die before their respective portions become payable, then over. The shares are so given as to vest immediately in the children of E. S., though liable to be devested by all dying under twenty-one, without issue. The share of a child so dying was therefore held to pass to its representative. *Shey* v. *Barnes*, 3 Mer. 335 ; 17 R. R. 91.

A devise over upon a contingency does not of itself prevent the shares from vesting in the meantime, provided the words of bequest be in other respects sufficient to pass a present interest, although such a devise over of the entirety may be called in aid of other circumstances to show that no present interest was intended to pass. *Id.* 340.

—— **Before Twenty-one or Day of Marriage.**] – Under a devise of the entire residue real and personal to A., B., and C. (children of the testator) "And all their younger children, their heirs, executors, &c., for ever : A., B., and C. to receive the yearly interest, for their respective lives, of such parts thereof as were intended for their respective younger children. And in case of the death of A., B., and C., the share of any of them so dying, to go to his or her younger children : And in case of the death of A., B., and C., or any of them, without leaving younger children, the share of such child so dying to go to the survivors, and their younger children," with powers of appointment amongst their respective younger children. "And in case of the death of any of the younger grandchildren before twenty-one, or days of marriage, the shares of such to go to the brethren of the child so dying." At the time of the will, and of the testator's death, A. had one younger child ; B. several ; C. none : each had several since. On bill by after-born grandchildren :—Held, that a younger grandchild, dying in the lifetime of its parent under twenty-one, and unmarried, had not a vested interest in its share, transmissible to its representatives. *Crone* v. *Odell*, 1 Ball & B. 449. Affirmed, 3 Dow, 61 ; 1 Bligh (N.S.) 594 ; 15 R. R. 20—H. L. (Ir.)

—— **Under Twenty-three without Issue.**]—A testator bequeathed personal property to his trustees and executors, upon trust to pay the dividends to his daughter during her life, to her separate use, and after her decease to pay the principal unto all and every her children, who should live to attain twenty-three years of age, share and share alike, with benefit of survivorship in case any of them died under that age ; with limitations over in case there should be no child or children, or being such, all of them should die under twenty-three years without lawful issue. The daughter had a child who died under age in the daughter's lifetime. The bequests to the children, and the subsequent limitations, were too remote. *Bull* v. *Pritchard*, 1 Russ. 213 ; 7 L. J. (O.S.) Ch. 41 ; 25 R. R. 27.

—— **Under Twenty-four without Leaving Issue.**]—A bequest to trustees of the testator's residuary estate, with a direction to apply so much of the interest, dividends, and profits as may be necessary for the maintenance and education of the children of the testator's daughter until they should respectively attain the age of twenty-four, and then to divide the principal equally between them, with a gift over in case any of them should die under twenty-four without leaving any issue, is not void as too remote, but gives a present vested interest with an executory bequest over in case of death under twenty-four without leaving issue. *Bland* v. *Williams*, 3 Myl. & K. 411 ; 3 L. J., Ch. 218.

—— **Under Twenty-five.**] — A gift of personalty to trustees for A. for life, and after his death in trust for the children of A. "as they severally attained twenty-five years," the income to be applied during their respective minorities by their guardian for their maintenance, &c., with a gift over in case no child of A. should live to attain twenty-five :—Held, to be vested, and not too remote. *Davies* v. *Fisher*, 5 Beav. 201 ; 11 L. J., Ch. 338 ; 6 Jur. 248.

A testator bequeaths the residue of his property to his nephews and nieces on their respectively attaining twenty-five, with a direction that his trustees shall, in the meantime, apply the profits to their maintenance ; but in case of the death of any of them unmarried and without issue, he gives the shares of those so dying unto the survivors equally, to be paid at the same time with their original shares ; first a nephew and then a niece die, under twenty-five, unmarried and without issue : the whole residue is divisible among the survivors who attain the specified age, and the niece does not, upon the death of the nephew, acquire, under the clause of survivorship, a vested interest in her proportional part of his

share. *Barker* v. *Lea*, Turn. & R. 413; 24 R. R. 85.

g. Gift to a Class on Attaining a Certain Age.

When all the Children attain Twenty-one.]—A devise of land to trustees in fee, upon trust to pay the rents to the testator's daughter for life, and after her death to apply them in the maintenance of all and every her child and children during their minority, and when and as soon as all such children, if more than one, should have attained twenty-one, upon trust to sell, and pay the proceeds of such sale to and amongst all and every such child or children, share and share alike, if more than one, and if but one, then the whole to such only child:—Held, that one of several children who survived the testator, having died under twenty-one, took no share. *Lloyd* v. *Lloyd*, 3 K. & J. 20.

A testatrix bequeathed her residuary estate upon trust for her sister for life, and after the sister's death to pay, divide, and apply the trust fund in manner following: that is to say, one-tenth to or for the use of R. H., and another one-tenth to or for the use of C. R., for their respective lives; and in case either of them should die in the lifetime of the tenant for life, or afterwards, leaving lawful issue, then the testatrix directed that the part of him or her so dying leaving lawful issue should go to and be equally divided among his or her children, as they should attain twenty-one:—Held, that a child of C. R., who survived the tenant for life and attained twenty-one, but died in the lifetime of C. R., took a vested interest. *Boulton* v. *Beard*, 3 De G. M. & G. 608. And see *Bree* v. *Perfect*, 1 Coll. C. C. 128; 8 Jur. 282.

Attaining a Greater Age than Twenty-one.]—In considering the validity of limitations, the state of the family at the death of the testator (and not at the date of his will) is to be regarded; and, therefore, if a gift be to such of the children of a particular parent as shall attain a greater age than twenty-one years, and the parent die in the lifetime of the testator, and the class be ascertained at the testator's death, the gift is valid. A limitation to the unborn children of the testator's children for their lives was not void for remoteness only, because it was a gift to persons who might be unborn at the death of the testator. *Williams* v. *Teale*, 6 Hare, 239.

Gift of residue of real and personal estate to A. for life, and after her decease, in trust for all her sons and daughters who should attain twenty-two equally, with a power to apply the "annual income or fund" for their maintenance or "benefit" during their "minority";—Held, void for remoteness. *Thomas* v. *Wilberforce*, 31 Beav. 299.

A testator bequeathed personal property to his trustees and executors upon trust, to pay dividends to his daughter during her life, to her separate use, and after her decease to pay the principal unto all and every her children who should live to attain twenty-three years of age, share and share alike, with benefit of survivorship in case any of them died under that age, with limitations over, in case there should be no such child or children, or, being such, all of them should die under twenty-three years without lawful issue. The daughter had a child who died under age, in the daughter's lifetime. The bequests to the children, and the subsequent limitations, were too remote. *Bull* v. *Pritchard*, 1 Russ. 213; 7 L. J. (O.S.) Ch. 41; 25 R. R. 27.

Gift to trustees for E. W. for life, and after his decease to assign, &c., to all his children who should be living at his decease, and who should be or live to attain twenty-five, and to apply the income in the meantime for their maintenance. E. W. died in 1837, leaving eleven children; the testator died in 1845. Four only of the children of E. W. survived; the youngest attained twenty-five in 1848;—Held (following *Williams* v. *Teale*, supra), that the gift was not void for remoteness. *Southern* v. *Wollaston*, 16 Beav. 276; 22 L. J., Ch. 664; 1 W. R. 86.

A gift of residuary estate in trust for such child or children of A., as being a son or sons should live to attain the age of twenty-five years, or being a daughter or daughters should live to attain that age or marry, equally to be divided between them, if more than one; but if but one, then the whole to that one, their, his or her heirs, executors, administrators, or assigns, according to the nature and quality thereof, provided that if any of them should die under such age or time as aforesaid leaving issue him or her surviving, such issue should take the same share as his, her, or their parents, attaining such age as aforesaid would have done; with provision for applying the income of the share of every such child, or his or her issue, or a sufficient part thereof, in their maintenance and education, and for an application of a reasonable part of the expectant share of any such child or their issue, to his, her, or their advancement, notwithstanding their minority:—Held, to be void for remoteness. *Boreham* v. *Bignall*, 8 Hare, 131; 19 L. J., Ch. 461; 14 Jur. 265. And see *Bull* v. *Pritchard*, supra.

When Youngest attains Twenty-one.]—A testator bequeathed 3,000*l.* to trustees, upon trust to apply the income thereof towards the maintenance of S. S. and C. S. during their minority; and when and so soon as the youngest of his said two children should have been born twenty-one years, then he directed the principal to be divided equally between them, if they should both be living; but if either of them should then be dead, the moiety of such deceased child was to be divided equally between the children of M. B. C. S. died an infant. S. S. attained twenty-one, but died before the period when, if living, C. S. would have been born twenty-one years:—Held, that they took vested interests in the legacies, to be paid to them when they respectively attained twenty-one, but liable to be divested in case of their death before the period of payment; and consequently that the legal personal representative of S. S. was entitled to one moiety of the fund. *Smith's Will, In re*, 20 Beav. 197; 24 L. J., Ch. 466; 1 Jur. (N.S.) 220; 3 W. R. 277. And see *Smith* v. *Jackson*, 1 L. J. (O.S.) Ch. 231, and *Beckton* v. *Barton*, 5 Jur. (N.S.) 349.

Testator bequeathed to his wife the use of his furniture, &c., which he desired to be distributed among his children when the youngest attained twenty-one, at her or his executors' discretion; such part to be reserved for her use as might be thought reasonable, and at her death to be distributed as above:—Held, that those children who died before the youngest attained twenty-one did not take vested interests. *Ford* v. *Rawlins*, 1 Sim. & S. 328; 1 L. J. (O.S.) Ch. 170; 24 R. R. 188. And see *Hunter's Trusts, In re*, L. R. 1 Eq. 295

A testator gave all his real and personal estate to trustees, upon trust to convert and pay the income thereof to his daughter for life; and after her decease to divide the capital equally among all her children then living, provided the youngest should have attained twenty-one; but if he should not then have attained that age, then upon trust to apply the income towards the maintenance and education of all such children until the majority of such youngest child, and when that event should happen, the capital to be divided among all the children then living, and the issue of such of them as should be dead, the issue to take their parent's share. One of her children survived his mother and attained twenty-one, but died without issue before the majority of the youngest:—Held, that he took an absolute vested interest upon his attaining twenty-one, payment to be deferred until the youngest should have attained that age. *Brocklebank* v. *Johnson*, 20 Beav. 206; 24 L. J., Ch. 505; 1 Jur. (N.S.) 318; 3 W. R. 341.

Testator directed the proceeds of his estate to be invested and accumulated till the youngest child of his brother should attain twenty-one, and then to be in trust for all the children who should then be living, or their issue. All the children except the second in age died without issue before the youngest if living would have attained twenty-one:—Held, that the second, who had attained twenty-one, was entitled to the fund in possession upon the death of the last of the other survivors who died under twenty-one. *Evans* v. *Pilkington*, 10 Sim. 412.

—— **Trust for Sale and Division.**]—A. devised real estate to trustees, to apply the rents and profits for the maintenance of his children till the youngest should have attained twenty-one, and then to sell the real estate, and divide the proceeds "among my children in the following shares and proportions; that is to say," two-fifths to his eldest son, one-fifth part to each of his other children, naming them:—Held, that the children took vested interests upon his death, and that the share of a daughter dying before twenty-one passed to her representatives. *Cooper* v. *Cooper*, 29 Beav. 299; 7 Jur. (N.S.) 178; 3 L. T. 800; 9 W. R. 354. And see *Lyman's Trust, In re*, 2 L. T. 662.

A devise of real estate to trustees to pay the rents and profits to C. for her life during widowhood; and after her decease or second marriage, "to pay the rents and profits to all and every the child and children of his late sister until the youngest of them should have attained twenty-one; and when and so soon as the youngest should have attained twenty-one, then on trust to sell the real estate, and to divide the moneys equally between and among the said children, share and share alike":—Held, that all the children were tenants in common until the youngest attained twenty-one. *Grove's Trust, In re*, 3 Giff. 575; 9 Jur. (N.S.) 38; 6 L. T. 376.

Held, also, that the share of each child of T. in both funds became vested at the death of the testator, whether such child lived to attain twenty-one or not. *Ib.*

Devise to trustees in fee, upon trust to demise until the testator's youngest child attained twenty-one, and during the minority of such youngest child, to pay the rents to the testator's wife, for the maintenance of herself and children, and when and so soon as the youngest surviving child should attain twenty-one, to sell and divide the produce "between and amongst the testator's wife and all his children who should be then living in equal shares." And in case of the death of any child before the estates became saleable, his children were to take his share. The children all died under twenty-one without issue:—Held, that the wife was entitled to the whole estate. *Castle* v. *Eate*, 7 Beav. 296; 8 Jur. 280.

When Youngest Attains Twenty-five.]—Devise in trust for A. for life, and, after her decease, to apply the rents for the benefit of her children, until the youngest attained twenty-five; and, as soon as the youngest should have attained twenty-five, to sell and "pay and divide" the produce equally "among such of the children of A. as should be then living, and issue of such, if any, of her children as might be then dead," such issue to take their parents' share only:—Held, that the gift of the income was valid, but that the gift of the corpus was void for remoteness. *Read* v. *Gooding*, 21 Beav. 478. Affirmed, 4 De G. M. & G. 510.

A positive direction that the shares of all the testator's children should vest at twenty-five and not before, was followed by a declaration that the funds "shall not become divisible, although vested, until the youngest of my children shall have attained the age of twenty-one years":—Held, that the youngest child's share vested at twenty-five and not at twenty-one. *Parker, In re, Parker* v. *Storer*, 26 W. R. 349.

When Youngest Attains Thirty.]—A testator devised Blackacre to trustees, out of the rents and profits to pay an annuity to J. and A. his wife jointly, and a similar annuity to the survivor, and upon trust to accumulate the residue for the benefit of the children of J., and divide the same among such children when the youngest attained thirty; and if any such children should die under thirty leaving issue, such issue was to take their parents' share:—Held that all the children who survived J. took vested interests. *Knox* v. *Wells*, 2 H. & M. 674.

There is no absolute rule that in a case where there is no bequest distinct from the direction to pay the vesting is postponed till the time of payment, but the construction will depend upon the nature of the event or contingency upon which the payment is to be made, as importing or not importing a condition. Accordingly, where a residue of real and personal estate was given to trustees to sell, get in, and divide among the testator's children, so soon as the youngest should attain twenty-one, and in case of the death of any leaving lawful issue, such issue to take the parent's share: it was held that the share of one of the children who attained twenty-one, and then died without issue before the youngest had attained that age, was vested and passed to his representatives. *Leeming* v. *Sherratt*, 2 Hare, 14; 11 L. J. Ch. 423; 6 Jur. 683.

Semble, no child, who did not attain twenty-one, was intended to take any interest in the residue. *Ib.*

Testator devised his real estate to trustees, with power to "let," until all his nephews and nieces should attain twenty-one. And after his youngest nephew or niece should be of age, then he directed his estates to be sold, and the produce to go among all his nephews and nieces, except two by name. He charged his rents

with an annuity to A., and with payment of bond debts, but did not otherwise dispose of them :—Held, that the interests of the nephews and nieces vested in all who attained twenty-one, whether dying before or surviving the period directed for sale. *Parker* v. *Sowerby*, 1 Drew. 488 ; 1 Eq. R. 217 ; 22 L. J., Ch. 942 ; 17 Jur. 752 ; 1 W. R. 404.

h. Gift to Children Surviving their Parents.

Contingent on Surviving Parent—Person in loco parentis.]—Legacies of 1,000*l.* each to the three children then living of A., the testator's daughter, with a proviso for the payment of the interest for their maintenance during minority, and a bequest of 2,000*l.* to trustees, upon trust for A., for her life ; and from and after her decease, for all and every her children living at her decease, equally to be divided, with a proviso that, if any one or more of the children of A. should die under twenty-one, without leaving issue, the original and accrued legacies and shares bequeathed to the child or children so dying should go to the others and other of the said children, equally ; and a declaration that, if all the children of A. should die under twenty-one, and without leaving issue, the legacies of 1,000*l.* a piece should not be raiseable ; but from and after the decease of the last surviving child, the said legacies—and from and after the decease of her daughter the 2,000*l.*—should sink into the residue :—Held, that the rights of the children of A. in the legacy of 2,000*l.* were contingent upon their surviving their mother. *Farrer* v. *Barker*, 9 Hare, 737.

Some of the reasons which have influenced the court in decisions in favour of vesting legacies in children, have no application in the case of grandchildren, where there is nothing to show that the testator had placed himself in loco parentis. *Ib.*

Cases in favour of vesting carried to their full extent. *Id.* 744.

Bequest upon trust for all and every the daughters and daughter of A. living at the time of his death who should attain twenty-one or marry, in equal shares :—Held, that during A.'s life the interests of the daughters were contingent. *Atcherley* v. *Du Moulin*, 2 K. & J. 186.

A testator bequeathed specific articles between his two sons equally ; then he gave certain freeholds to his two sons and their heirs, as joint tenants ; then he gave all his real, leasehold, and other estates and effects, upon trust, that his wife should receive an annuity while unmarried, and his sons to receive the rents and profits while between twenty-one and twenty-five, and afterwards for them as tenants in common ; then he gave the residue upon trust for such of his sons as should be living at the decease or second marriage of his wife, as tenants in common ; but if either died under twenty-one without issue, his share to go to the survivor ; then he gave his partnership property in trade in trust till his sons should attain twenty-one, and afterwards for their individual benefit. One son attained twenty-one, but died in his mother's lifetime, without issue :—Held, that the son so dying took no vested interest in the residue, although the testator may have used a different mode of disposition in all the previous and the subsequent gifts. The partnership property in trade was vested at twenty-one. *Woodhouse* v. *Woodhouse*, 5 Jur. 404.

Legacy to Anne, the wife of Peter, for life, remainder to Peter, the husband, for his life, and, after the death of the husband and wife, upon trust to pay the interest for the maintenance of such children of Anne as should be living at her death, until they should respectively attain twenty-one, and when and as they should severally and respectively attain their said ages of twenty-one years, upon trust to pay and transfer the legacy equally unto and amongst all the children of Anne, when and as they should severally and respectively attain their said ages of twenty-one years ; and if any of the said children should die under twenty-one, then unto such as should attain that age, share and share alike ; and, in case all and every of the said children should die under age, then to pay the legacy to the testator's next-of-kin. The children of Anne, who attained twenty-one years of age, acquired vested interests in the legacy, notwithstanding such children died in the lifetime of Anne, the tenant for life. *Bradley* v. *Barlow*, 5 Hare, 589.

Bequest of 2,000*l.* in trust, to pay one-half of the interest to Nathaniel for life, and the other to Thomas for life, and afterwards to their wives for life ; and in case, at the death of Nathaniel and wife, there should be issue of Nathaniel, to transfer a moiety to the children at twenty-one ; and in case there should be no such issue, or they should die under twenty-one, then over. "And so, in like manner, upon the decease of Thomas and wife, the other half to be transferred to his lawful issue ;" and in case of no such issue, or they shall all depart this life before they shall attain twenty-one, then over :—Held, that a child of Thomas who attained twenty-one, but died in the life of her mother, took no interest. *Wilson* v. *Mount*, 19 Beav. 292 ; 2 W. R. 448.

In construing a will equally with a settlement made by a person in loco parentis, the court leans to the presumption that the intention is to vest the portions in the children when they most require it, whether they survive the tenant for life or not ; and where there is any reasonable ground for supposing such an intention, the benefit of any doubt is to be given in favour of the vesting. *Jackson* v. *Dover*, 2 H. & M. 209 ; 4 N. R. 136 ; 10 Jur. (N.S.) 631 ; 10 L. T. 489 ; 12 W. R. 855.

Gift of residue upon trust for testatrix's daughter A. for life, then upon trust to pay to all the children of A. living at her decease equally, at twenty-one or marriage, unless such day of payment should happen in the lifetime of A., and then the payment to be postponed till the death of A., but to be a vested interest in each of the children at twenty-one or marriage :—Held, that a son who attained twenty-one, and died in A.'s lifetime, was entitled to share. *Ib.*

The rule that the court leans to a construction that gives a portion to each child that lives to require it applies to wills as well as settlements. *Jackson* v. *Dover*, supra, followed. *Knowles, In re. Nottage* v. *Buxton*, 51 L. J., Ch. 851 ; 21 Ch. D. 806 ; 47 L. T. 161 ; 31 W. R. 182.

—— Share not to be transferred until after Parent's Death.]—A testator gave his residuary personalty to a niece for life, and directed his trustees after her decease to pay and divide it unto and amongst all and every the children of his niece who should be living at the time of her decease, if more than one, equally ; and

if only one, then wholly to such only child, "the same to be a vested interest in him or them respectively on their respectively attaining the age of twenty-one, but not to be transferred until after the decease of my niece," with maintenance clauses:—Held, that the representatives of children of the niece who attained twenty-one, but died in her lifetime, took no share, for that the words "but not to be transferred until after the decease of my niece" were not contradictory of the previous expression confining the class to children who survived the niece, and being in any view of the case surplusage, could not be held to modify the definition of the class, *Williams* v. *Haythorne*, L. R. 6 Ch. 782.

Semble, that the representatives of children surviving the niece and dying under twenty-one, would have taken. *Ib.*

A testator gave the interest arising from a sum of stock to V. D., which interest he was to enjoy along with his wife, M. D., during their respective lives, but in the event of either dying and the survivor marrying again, then the capital to be divided, share and share alike, between their children; an arrangement ultimately to take place at the death of their parents, should neither marry again. The testator then directed that the money should not be removed from the English funds during the lifetime of V. D. and M. D., nor until the period arrived "for its distribution (after their death) among their children surviving, share and share alike": —Held, that the interests of the children were not contingent on their surviving their parents, the concluding words not being sufficient to render the previously vested gift contingent. *Duke, In re, Hannah* v. *Duke*, 16 Ch. D. 112; 29 W. R. 341—C. A. And see *Taylor* v. *Graham*, 3 App. Cas. 1287—H. L. (Sc.); and *Carlton* v. *Thompson*, L. R. 1 H. L. (Sc.) 241.

i. Gift to Persons "then Living."

Vesting of Interests—Death of Tenant for Life.]—The clear expression of a bequest after the death of the tenant for life, to the children then living:—Held, not to be controlled by other general expressions in the will, so as to vest any interest in one dying before the tenant for life. *La Roche* v. *Davies*, 3 Y. & C. 612. n.; 1 Jur. 574. And see *Hunter, Ex parte*, 3 Y. & C. 614.

The words "then living," though in one clause of a will they referred to the general period of distribution, were in a subsequent clause of the same held to refer to the immediate antecedent, viz., the death of a tenant for life. *Heasman* v. *Pearse*, 41 L. J., Ch. 705; L. R. 7 Ch. 275, 660; 26 L. T. 299; 20 W. R. 271.

Bequest to A for life, and after her decease to become the property of B., "or in case of her decease, to be equally divided between her children living." B. died in the testator's lifetime, and her only child survived her, but died in the life of A.:—Held, that the word "living" referred to the antecedent, viz., the death of B., and that such only child took a vested interest, and that her legal personal representatives were entitled to the legacy. *Hodgson* v. *Smithson*, 21 Beav. 354. Affirmed 26 L. J., Ch. 110; 2 Jur. (N.S.) 1199; 5 W. R. 3.

Devise to A for life, and after her decease to B. and her children, or such of them as shall be then living; the children take vested interests, and if any die in the lifetime of A., the whole goes to the survivors. *Dansen* v. *Hawes*, Amb. 276.

Testator gave 1,000*l.* to M. and the issue of her body, and in default of such issue he gave the said 1,000*l.* to be equally divided between the daughters then living of J. and E. his wife. This devise takes in daughters of J. and E. born after the testator's death, and therefore the limitation is too remote. *Jee* v. *Audley*, 1 Cox, 324; 1 R. R. 46.

A testator bequeathed 1,000*l.* to G. for life with remainder to her issue, and in default of issue to O. absolutely. But if O. should die before the death of G., then he gave the sum to such of her children as should be "then living":—Held, that "then living" meant living at the death of O. *Drew* v. *Drew*, 22 W. R. 314.

Bequest to H. S. for life, and after her decease to the testator's four brothers and sister, "or such of them as should be then living," equally. And in case any of them should be then dead, then he bequeathed the deceased child's share to the children, "to be paid at the time before mentioned." The brothers and sister all died in the lifetime of H. S., one (A. B.) having had no children:—Held, that the representatives of A. B. were entitled to his share, and that all the children took, whether living at the death of H. S. or not. *Masters* v. *Scales*, 13 Beav. 60.

—— **Marriage of Widow.**]—A testator having three children gave his property to his wife, so long as she lived unmarried, and if she married, and her children resided with her, an allowance was to be made to her, and "after her decease the testator bequeathed his property equally between his children then living;" he directed his farm to be allotted as part of his son Thomas's share, and "he wished whoever might enjoy his farm, if unfortunately his children should fail of heirs," should take his name; and he directed his daughter's share to be secured for her separate use. The son died in the lifetime of the mother: —Held, that he took no interest in the property. *Tawney* v. *Ward*, 1 Beav. 563; 8 L. J., Ch. 319.

"And when my youngest child for the time being shall have attained the age of twenty-one years, then upon trust to pay, assign, and transfer the said residue of my personal estate unto all my children who shall be then living, and the issue of such of them as shall be then dead leaving issue," &c.:—Held, from a former part of the will, to mean, in the event of the testator's widow having married again, or having died before the youngest child attained twenty-one. And that the youngest child, having attained twenty-one, and having died before the widow married again, did not take a vested interest, but her children took as tenants in common. *Ruffell* v. *Norman*, 8 Jur. 819.

The testator devised and bequeathed his real and personal estate (subject to certain trusts for the benefit of his wife) to his son absolutely; but if his son should die under twenty-one without issue, the testator gave the same to his wife during her widowhood, with remainder (subject to certain legacies) as she should by will appoint; and in default of appointment, or in case she should marry again after the testator's decease, he directed, that, from and after the second marriage or decease of his wife, which should first happen, a moiety of the trust estate, or so much thereof as the appointment should not extend to, should be held in trust for all and every the daughter and daughters who should be then

living of his sister, Mary Miles, and the issue then living of such of them as should be then dead, equally amongst them per stirpes. The testator's son died under twenty-one, without issue, in the testator's lifetime; and the testator's wife also died in his lifetime:—Held, that the time of the testator's death was the period at which the persons entitled to take under the said residuary bequest were to be ascertained; that, notwithstanding a daughter of Mary Miles was dead at the date of the will, the children of such daughter, having survived the testator, were entitled, per stirpes, to a share of the said moiety of the residuary estate; that the children of a daughter of Mary Miles—such daughter being living at the death of the testator's wife, but having died in the lifetime of the testator—were also entitled per stirpes to an equal share of the said moiety of such residuary estate; and that the share of the child of a daughter would not lapse by the death of such child in the lifetime of the testator, but the entire share of the class would be divisible amongst the children belonging to such class who survived the testator. *Gaskell* v. *Holmes*, 3 Hare, 438; 8 Jur. 396.

—— **Attaining Twenty-one.**]—S. gives 20*l.* long annuities for the maintenance of H. H. until twenty-one, and then for her separate use for life; and then to her children, for their maintenance until twenty-one, and then to be assigned and transferred to them; but if she should die without lawful issue, or, leaving such, they should die under twenty-one, then for the maintenance of R. H. and E. H. until twenty-one equally; and then to assign and transfer the same equally to them, if both living; but if either should be then dead, the whole to the survivor. H. H. survived R. H. and E. H., who both attained twenty-one; and upon the question whether the representatives of the survivor or the residuary legatee was entitled:—Held, that the word "then" had reference to the death of H. H. without issue; and that the residuary legatee, and not the representatives of R. H. and E. H. was entitled. *Widdicombe* v. *Miller* or *Muller*, 1 Drew. 443; 22 L. J., Ch. 614; 1 W. R. 223.

Testator bequeathed the residue of his real and personal estate, upon trust for his daughter, absolutely, upon her attaining twenty-one; provided that, in case his said daughter's decease should happen before the said age of twenty-one, and his, the testator's, wife should then be living, then in further trust to pay her the whole interest of the residue of his estate and effects; and on her decease, his said daughter being dead before the age of twenty-one, he devised to his wife the house in S. Street, her heirs and assigns for ever; then in further trust to pay the produce of his residuary estate unto and amongst his nephews and nieces, the children of his sister Ann, and such of them as should be then living. The daughter died without issue in the lifetime of the wife. The sister had five children living at the death of the daughter, and one only, Isaac, living at the death of the wife:—Held, that Isaac was entitled to the whole residue. *Hetherington* v. *Oakman*, 2 Y. & C. C. C. 299; 7 Jur. 570. And see *Coulthurst* v. *Carter*, 15 Beav. 421; 21 L. J., Ch. 555; 16 Jur. 532.

Testator bequeathed the dividends of 10,000*l.* stock to his wife for her life, and after her decease he gave and bequeathed the principal unto and amongst A., B., C., and D., and all and every the child and children of N., that might be living at the decease of his said wife, to be transferred and paid to them respectively on their attaining the age of twenty-one years, with benefit of survivorship in case any of them should die under that age. N. never had any other children than those named in the will. They all attained twenty-one, and died in the lifetime of the widow:—Held, that they took vested interests in the 10,000*l.* stock. *Roberts* v. *Burder*, 2 Coll. C. C. 130.

Legacy to the testator's wife of the dividends of stock for her life, which he directed should be continued in the same stock, and then to be shared equally, share and share alike, to his children that should be then living; he also gave to his wife a leasehold house (of which fifty years were unexpired) for her life, and then to be let during the time of the lease to come, and the neat produce thereof to be equally placed in the stocks for the benefit of his children that should be then living equally; and as to the residue of his estate whatsoever and wheresoever the product he gave, &c., the same to be collected yearly to his wife and children equally, share and share alike, that were then living. In other dispositions the words "then" and "then living" were used with reference to some period expressed, viz., the age of twenty-one, or the death of the person to take for life. The stock and house vested, at the wife's death, in those children, who survived her; the residue vested, at the testator's death, in his wife and all the children equally. *Reeves* v. *Brymer*, 4 Ves. 692.

—— **Death of Tenant for Life and Youngest Child attaining Twenty-one.**]—A. devised an estate to his sons Phineas and John equally, during the life of Phineas, and until his youngest child attained twenty-one, and on the death of Phineas, and on the youngest child attaining twenty-one, to sell it and pay one half of the money to John and his heirs, and the other half among the then living children of Phineas. But in case of John's death without lawful issue before the division takes place, then I give his half share to and amongst my then living grandchildren, share and share alike. John died in 1827, Phineas died in 1858:—Held, that the grandchildren were to be ascertained at the death of Phineas, and that the representatives of a grandchild who died in 1856 took no share. *Gill* v. *Barrett*, 29 Beav. 372.

Where the effect of postponing the vesting of the shares of children to the period of division would be to leave the family of a child dying before that period without provision, the court leans strongly in favour of early vesting; but where a testator provides for all his issue living at the period of division, his words will not be strained in order to make the shares vest at an earlier period. *Deighton's Settled Estates, In re*, 45 L. J., Ch. 825; 2 Ch. D. 783; 34 L. T. 81—C. A.

A testator directed his trustees to pay the income of his real and residuary personal estate to his wife for life, and on her death to apply the income to the maintenance of his children then living and the issue of his children then deceased (such issue taking the share which their parents would have taken if living) until his youngest surviving child attained twenty-one, and when such child attained twenty-one, to sell the real estate and hold the proceeds and the personal estate in trust for his children then living and the issue then living of his child or

children dying before that period. The youngest child attained twenty-one twelve years before the widow's death:—Held, that the class was not to be ascertained before the death of the widow, and that the legal personal representatives of a child who had died without issue in her lifetime took nothing. *Ib.*

—— **Death of Annuitants.**]—A testatrix gave all her personal estate to a trustee, upon trust to pay two annuities, and directed that the sum of 800*l.* should be raised and invested, and that the same should be held upon trust to pay thereout the two annuities; and she directed her trustees to sell the remainder of her personal estate, and the moneys arising therefrom, and the residue of her estate, except the 800*l.*, after paying certain legacies, to pay, distribute, and divide equally unto and amongst A., B., C. and D., or such of them as should be living at her decease; and in case D. should not be living at her death, her share of and in her said personal estate and the residue of her property should go amongst D.'s children; and after the decease of the two annuitants, the testatrix directed her trustee to pay and distribute the said sum of 800*l.*, and all and singular the rest, residue, and remainder of her said personal estate, unto and amongst A., B., C. and D., or unto or amongst such of them as should be then living; and in case D. should not be then living, the testatrix directed that her share of and in the said residue should go amongst D.'s children. At the death of the surviving annuitant, A., B., C. and D. were dead, but D. had left two children, who claimed the whole of the testatrix's property:—Held, that they were entitled to the 800*l.*, but that the residue did not go exclusively to them. *Hammatt* v. *Ledsam*, 9 Jur. 173.

—— **Life Interest to Husband after Death of Wife.**]—A testator bequeathed a sum of stock to trustees, in trust for the separate use of his sister for life, and after her death for her husband for life, and from and immediately after his decease for the children of his said sister, who should be then living, in equal shares. The husband died in the lifetime of the wife:—Held, that all the children of the testator's sister, who were living at the death of the husband, were entitled to a distributive share of the trust fund; and one of those children having afterwards died in the lifetime of the mother, the representatives of the child so dying were held entitled to her share. *Archer* v *Jegon*, 8 Sim. 446; C. P. Cooper, 173; 6 L. J., Ch. 340; 1 Jur. 792.

A testator directed his executors to invest a sum of money, and to pay the interest to his daughter for life, and after her death to her husband if he should survive her, during his life, or until he should become bankrupt or insolvent, and after his death or becoming bankrupt or insolvent, to lay out such interest in the maintenance or education of any child or children of the marriage who should be "then living" until such child or children should attain twenty-five; and on his, her, or their attaining that age, then to pay the principal to such children, if more than one, in equal shares. The husband died in the wife's lifetime, leaving two children, who had since died under twenty-one:—Held, that the children took vested interests, and that their mother, as their representative, was entitled to the fund. *Powis* v. *Matthews*, 11 W. R. 662.

Limitation over after a life interest to husband for life, or until bankruptcy, remainder to the wife for life, remainder in case of the wife dying in the husband's lifetime, then after the husband's death, or sooner in case of his becoming bankrupt, to the children "then living":—Held, these words referred to the period of the wife's death, and not of the bankruptcy. *Edington's Settlement, In re*, 3 Drew. 202.

A fund was bequeathed upon trust for a daughter of the testator for life, and after her death for her husband for life, and after the death of the survivor, for the daughter's children who should be living at her decease equally, and the children of such children as should be dead, such children to have their parent's shares only; and if there should be no such child or grandchild, in trust to transfer the fund to all the testator's children who should be then living equally, and the children of such of them as should be dead, such children to have their parent's share only:—Held, that under the last-mentioned clause only such grandchildren of the testator took as survived the tenant for life. *Kirkman's Trusts, In re*, 3 De G. & J. 558.

A fund was settled on trust for the wife for life, and in case she should have any issue living at her death, for the husband for life, and after his decease upon trust to divide it amongst the children of the marriage "that should be then living on their attaining twenty-one years." And in case there should be no child, or of their all dying in the wife's life, to pay the fund to such person as the wife should by will appoint, and in default to the executors or administrators of the husband and wife or the survivor of them. And in case the wife should survive her husband without leaving issue then living, to pay the fund to the wife. The wife died leaving children who had attained twenty-one, and the husband was still living:—Held, that the limitation to the children remained contingent until the death of their father. *Wollaston's Settlement, In re*, 27 Beav. 642.

—— **Gift to a Class.**]—A testator gave a life interest in his residue to three of his children equally, and after the decease of his three children respectively, he gave one-third part of the residue unto such of their children as should be then living:—Held, that on the decease of each, the gift over as to the third part operated in favour of all the children of the three who were actually living at the time. *Brown* v. *Thompson*, 11 Jur. (N.S.) 922; 13 L. T. 395; 14 W. R. 76.

Residuary bequest in trust for A. for life, and after her decease to be distributed "between the testator's brothers and sisters, and such of their children as should be then living, the parents and children to be classed together, and to share in equal proportions":—Held, that those brothers and sisters and children only who survived A. were entitled, and that they took per capita. *Turner* v. *Hudson*, 10 Beav. 222; 16 L. J., Ch. 180.

Bequest of personal estate to A. for life, remainder to the children of A. equally, and in default of issue of A., upon trust to sell and divide equally amongst B. and C. and all their children "then" living, share and share alike;—Held, that the gift was not too remote, and that B. and C. and their children living at the death of A. alone took the personal estate as tenants in common absolutely. *Cormack* v. *Capous*, 17 Beav. 397.

B. died before A., but, nevertheless, she was held to take a share. *Ib.*

A testator gave a legacy of 200*l.* to each of his twelve first cousins (naming them); and then, noticing that one was dead, he gave the legacy intended for him to his children. He gave his wife a life interest in his residuary real and personal estate, to be enjoyed in specie; and, from and immediately after his wife's decease, he gave his executors full power to collect all his property together, and sell the houses and other estates, and to convert into money all his funded property, and then to pay first certain legacies, and then the whole of the remainder of his property was to be divided, share and share alike, among his aforesaid twelve first cousins and their children. By a codicil, he took away the legacy given by his will to his cousin, Mrs. B., but expressed his intention not to exclude her children from the benefit she might thereafter possess in the final division of his property after his wife's decease:—Held, that the cousins who survived the testator took vested interests absolutely, subject, as to those who died leaving issue, to be divested for the benefit of their children, by way of substitution. *Burrell* v. *Baskerfield*, 11 Beav. 525; 18 L. J., Ch. 422; 13 Jur. 311.

Held, also, that the children of the cousin alluded to by the testator as already dead were entitled to a twelfth share of the residuary estate, as representing such deceased cousin.

A devise and bequest to trustees to pay the income of real and personal estate to A. for life, and after her death to sell, and to pay the residue unto the testator's nephews and nieces (nine in number) then living. One of the persons named died before tenant for life:—Held, that the residue became distributable in eight shares. *Ireland* v. *Trembath*, 11 Jur. (N.S.) 479; 12 L. T. 630.

—— **Gift to all Testator's Grandchildren as shall be "then Living."**]—A gift of residue, after conversion, as soon as conveniently might be after the testator's decease and investment, to all and every the grandchild and grandchildren of the testator "who should be then living," means such grandchildren who should be living at a time thereafter mentioned, that is, upon their respectively attaining the age of twenty-one, and lets in all such grandchildren as were living when the first of the class attained his majority. *Hilliard* v. *Fulford*, 42 L. J., Ch. 624; 28 L. T. 892.

The residue of a testator's real and personal estate was given to trustees upon trust to convert and get in as soon as conveniently might be after his death, and to invest the proceeds and assign the same unto all and every the grandchild or grandchildren (except T., or such grandchild as should then be in possession of certain real estates before specifically devised) as should "then be living," to be divided between them when and as such grandchild or grandchildren should respectively attain twenty-one:—Held, that the period of ascertaining the legatees was the time when the eldest of the grandchildren, who were to share in the residue, attained twenty-one. *Ib.*

—— **Death of Survivor of Two Persons.**]—A testator who was entitled to a reversion expectant on the deaths of A. and B., without issue living at their death, devised it in trust to sell and divide the produce between his six daughters, or such of them as should be then living, and the children of such of them as should be dead, the children taking their parents' share. But if only one daughter survived A. and B., she was to take the whole, and the heir-at-law was to take if no daughter or child of a daughter should be living at the death of A. and B.:—Held, that the shares of the children of the daughters vested, not at their mother's death, but at the death of the survivor of A. and B. *Lewis* v. *Templer*, 33 Beav. 625; 10 L. T. 638; 12 W. R. 128.

"Living" held to mean "Having Issue Living."]—A testator made a series of specific devises upon trust for each of his children for life, with remainder to the children of such tenant for life as tenants in common in tail, with cross remainders between them, and failing such issue of the tenant for life, in trust for the testator's other children equally, and the heirs of their respective bodies, as tenants in common, or if there should be only one of his said children "then living," in trust for that child, and the heirs of his or her body; he afterwards gave a share of his residuary real and personal estate upon such trusts as should correspond with those declared concerning his specifically devised estate, which gift was followed by a provision for the event of any child dying in the testator's lifetime, leaving children:—Held, that the gift over, on failure of the issue of a tenant for life, was in favour of children who, or whose issue, were living at the time when the gift over took effect.—*Cooper* v. *Macdonald*, 42 L. J., Ch. 539; L. R. 16 Eq. 258; 28 L. T. 693.

See also WILL.

2. EFFECT OF GIFT OF INTERIM INCOME.

a. Gift of Interest.

In General.]—Legacy at twenty-one with interest in meantime is a vested legacy. *Harrison* v. *Buckle*, 1 Stra. 238. And see *Fonereau* v. *Fonereau*, 3 Atk. 645; 1 Ves. sen. 118.

Gift of a residue to children not to be claimed till twenty-two, but the interest given in the meantime is vested. *Dodson* v. *Hay*, 3 Bro. C. C. 404.

Direction for interest is evidence of vesting in legatory cases. *Hubert* v. *Parsons*, 2 Ves. Sen. 263.

Trust "to raise" 5,000*l.* portion, "and pay it," to such younger child as the father should appoint; for want of appointment, to the younger children at twenty-one, with interest for their maintenance, &c., in the meantime. &c. The only younger child died at two years old:—Held, not to be vested in him, so as to be claimed by the father as his representative. *Id.* 261.

A legacy devised to S. when of the age of sixteen, and interest in the meantime. S. dies before sixteen. The legacy vested, and shall go to the executor of S. *Stapleton* v. *Cheele*, 2 Vern. 673; Pre. Ch. 318.

Legacy to A. payable at twenty-one or marriage with interest is a vested legacy, and executor having become bankrupt, might have been proved under the commission, his certificate therefore a bar, and the residuary legatee not liable. *Walcott* v. *Hall*, 2 Bro. C. C. 305.

Devise of a portion to a child with interest, but not to be paid to the child till twenty-one; the child dies under twenty-one; the portion shall go to the administrator of the child. *Collins* v. *Metcalfe*, 1 Vern. 462.

Legacy out of personal estate, payable or given at a certain time, and interest in the meantime,

is a vested one: otherwise as to legacies out of real estate, for if legatee dies before the time is come, it sinks into the inheritance. The same construction where a legacy is given out of a mixed fund of real and personal estate at a certain time, or to be paid at a certain time. *Van* v. *Clark*, 1 Atk. 510.

By a will, stock was, after the death of a tenant for life, to be divided and paid amongst the children of such tenant for life; if more than one, equally, on attaining twenty-four; and if but one, the whole to be paid to such one child on attaining twenty-four, and in the meantime the interest and dividends to be applied for the use and benefit of such children or child, as the case might be:—Held, that the gift was not void for remoteness, the children taking vested interests as they came in esse. *Bell* v. *Cade*, 2 J. & H. 122; 31 L. J., Ch. 383; 5 L. T. 523; 10 W. R. 38.

A testator gave his residuary real and personal estate to his daughter for life, and after her death he directed it to be paid to her surviving children as soon as they should arrive or come to the ages of twenty-two respectively, with a direction that the share of the child or children dying under twenty-two should go to the other child or children who should attain twenty-two; and directed that only the interest of the share of the child or children who died under the age of twenty-two should be paid to them respectively:—Held, that the gift was contingent upon the children attaining twenty-two, and therefore void for remoteness. *Bulley's Trust Estate, In re*, 11 Jur. (N.S.) 847; 13 L. T. 264—L.JJ.

A gift to a class or an individual on attaining a given age, which standing alone is contingent, is vested if accompanied by a gift of the whole income for the benefit of the class or individual during the interval. *Holt's Estate, In re, Bolding* v. *Strugnell*, 45 L. J., Ch. 208; 34 L. T. 120; 24 W. R. 339.

A testatrix directed the trustees of her will, after the death of a tenant for life, to transfer a fund to the children of A. in equal shares upon their respectively attaining twenty-one, the interest of the fund to be applied for their maintenance until they should respectively attain that age:—Held, that the gift of the interest created a vested interest in the capital. *Ib.*

Residuary bequest to two granddaughters of testator "in trust, till they come of age or marry, the interest to be received in the meantime, and paid to them; but if one of them should die before marriage or twenty-one, then to survivor and her children; but if both should die, leaving no issue, then I give them power to leave it by will as they should think proper." One legatee married, and the other attained twenty-one;—Held, that both acquired vested interests. *Thacheray* v. *Hampson*, 2 Sim. & S. 214; 3 L. J. (O.S.) Ch. 89; 25 R. R. 186.

b. Mixed Gift of Interest and Principal.

Gift of Interest Contingent — Attaining Twenty-one.]—Legacy to A., as soon as she attains twenty-one, with interest:—Held, to be contingent, and no interest payable till legatee attains twenty-one, and is then to be computed from the end of a year after testator's death. *Knight* v. *Knight*, 2 Sim. & S. 490; 25 R. R. 253.

A bequest, by a testator, of one-third of his personal estate to his daughter, and in case of his decease to have the interest therein, and the principal when she attained the age of twenty-five:—Held, to give a vested interest to the daughter, though she died under that age. *Breedon* v. *Tugman*, 3 Myl. & K. 289; 3 L. J., Ch. 169.

Bequest of the interest of the residue to the widow for the maintenance of the testator's children; and after her decease, the property "to be shared equally amongst all his children, if they should have attained twenty-one, and if any had not attained that age, then that his executors should act as trustees until the eldest attained that age, and then pay him his share, and each one as he or she attained that age." A child who died under twenty-one, in the lifetime of the widow, held not to have a vested interest. *Butcher* v. *Leach*, 5 Beav. 392; 7 Jur. 74.

—— **Direction to Accumulate.**]—Testatrix directed the trustees of a fund (over which she had a power of appointment) and the survivor of them, his executors, administrators, and assigns, to pay, assign, or transfer the same to R. M., in trust for his daughter, to be vested in her on attaining the age of twenty-one, or day of marriage, which should first happen, and the interest and dividends thereof to accumulate for her benefit, and be paid to her with the principal at the time before mentioned. The daughter died under age and unmarried:—Held, that she did not take a vested interest in the fund. *Thruston's Will, In re*, 17 Sim. 21; 18 L. J., Ch. 437.

Bequest of 120*l.* per annum, that is to say, the interest of 4,000*l.* stock, to A., with a direction that the interest, as it becomes due, be added to the principal till twenty-one, except 20*l.* per annum for clothes, gives a vested interest. *Stretch* v. *Watkins*, 1 Madd. 253.

Testator gave his residuary personal estate to J. J., an infant, and directed his executors to place it out at interest to accumulate, and to pay the principal to the infant on his attaining twenty-four, and in the meantime to allow 60*l.* a year for his maintenance: and the testator gave residue over, on the infant's dying under twenty-one. The court held that the residue was actually given to the infant, and that what followed the gift was merely directory as to the management of it; and, on the infant's attaining twenty-one, allowed the residue and accumulations to be transferred to him. *Josselyn* v. *Josselyn*, 9 Sim. 63.

A gift in terms importing a present vested interest with a postponed time of payment, is not made contingent by a direction to accumulate till the time of payment arrives. *Blease* v. *Burgh*, 2 Beav. 221; 9 L. J., Ch. 226.

Bequest of residuary estate, to accumulate in trust for all the children of J. B. (except the eldest A.), to be paid at twenty-three, and in the event of the death of all under that age, then over. J. B. had two children, A. and B., born in the lifetime of the testatrix, of whom B. died an infant, and a third, C., born after her death, who being born before the time of distribution, and having attained twenty-three, became the personal representative of B.:—Held, that the legacies were vested, although the payment was postponed; and that the direction to accumulate did not vary the vesting; C. was therefore in his own right and as the representative of his deceased brother B. entitled to the whole fund. *Ib.*

Bequest of residue to trustees upon trust for testatrix's brother's children and M.'s children, to be equally divided between them; the dividends to be laid out by the trustees as should be most advantageous for them; but no

part of the dividends to go for their board or education, but the same to accumulate for them until they come to the age of twenty-one years. M. was herself one of the children of the testatrix's brother :—Held, that the children born at the death of the testatrix took vested interests :—Held, also, that the testatrix did not mean to include M. as one of the children of his brother. *Bull* v. *Johns*, Tam. 513.

A bequest of residuary estate to be invested in consols, and to be held by the executors in trust for all and every the grandchildren of the testator, to be divided equally amongst them at the expiration of twenty years after his decease : —Held, to confer immediate vested and transmissible interests to the grandchildren living at the death of the testator, subject to be opened and let in grandchildren who might be born before the expiration of the twenty years. *Oppenheim* v. *Henry*, 10 Hare, 441 ; 1 W. R. 126.

—— **Maintenance, Education or Accumulation.**]—A testatrix gave the interest of her residuary estate to her four sisters during their lives, and directed that, on their deaths, the interest of their respective shares should, at the discretion of her executor, be applied to the maintenance and education, or accumulated for the benefit of the children of each of them so dying, until such children should respectively attain the age of twenty-two years, when they were to be entitled to their mother's share of the principal ; with limitations over, in the event of the death of any of them under that age :—Held, that the children of the sisters were not to take a vested interest till they attained twenty-two, and that all the gifts, subsequent to the life estates given to the sisters, were void, as being too remote. *Vawdry* v. *Geddes*, 1 Russ. & M. 203 ; Tam. 361; 8 L. J. (o.s.) Ch. 63.

—— **Trust to Accumulate—Substitution of Issue.**]—Testator gave and devised all the residue of his real and personal estate to trustees, upon trust to pay his wife an annuity during her life or widowhood, and from time to time during the lifetime of his wife, or during the time of twenty-one years after his decease, which should first happen, to invest and accumulate the rest of the annual produce in their names ; and after the decease of his wife, or at the expiration of twenty-one years, whichever should first happen, he directed his trustees to sell his estate and to pay and divide the balance of the moneys arising therefrom, after providing for the annuity, if necessary, amongst all his children in equal shares, "the issue of any deceased child to take his, her, or their deceased parent's share." The testator died in 1877, leaving six children, who all survived him and were now living ; one only of the children had issue :—Held, that the six children took vested and indefeasible interests on the death of the testator. *Bragger, In re, Bragger* v. *Bragger*, 56 L. J., Ch. 490 ; 56 L. T. 521.

c. Immediate Severance of Principal.

Vested Interest at Testator's Death.]—Bequest of a particular stock upon trust to accumulate the dividends until A. attained twenty-five, and then to pay him over the whole :—Held, to give to A. an immediate vested interest, on the ground that the subject of the legacy was severed and set apart, although the trustees were also the executors, and on his attaining twenty-one the stock was ordered to be transferred to him. *Saunders* v. *Vautier*, Cr. & Ph. 240 ; 10 L. J., Ch. 354. Affirming 4 Beav. 115.

Legacies to be paid to the legatees "when or if" they attained the age of twenty-one, but which were to be severed from the estate and set apart in trust for the legatees immediately on the death of the testator, and the legacy of each invested on a separate deed :—Held, to be vested at the death of the testator. *Lister* v. *Bradley*, 1 Hare, 10 ; 11 L. J., Ch. 49 ; 5 Jur. 1034.

A. by will gave all his personal estate to trustees until W. should attain twenty-four, and from thenceforth, in trust for him, his executors, &c. W. lived till twenty-one, but died intestate before twenty-four : - Held, a vested interest in W. at A.'s death, and that the age of twenty-four was only directory as to the time of payment. *Love* v. *L'Estrange*, 5 Bro. P. C. 59.

—— **Interim Income.**] — Where a fund is severed immediately from a testator's death for the benefit of the objects of the gift, the interests are vested and carry the interim income, though the only gift is in a direction to pay at a future time. *Dundas* v. *Wolfe Murray*, 1 H. & M. 425 ; 1 N. R. 429 ; 32 L. J., Ch. 151 ; 11 W. R. 359.

Therefore, where, under a power of appointment over a fund, a testatrix directed the trustees, immediately after her death, to raise 5,000*l*., and to pay the same equally between five nephews and nieces, the shares of sons to be payable on their respectively attaining twenty-one, and of daughters at twenty-one or marriage respectively, with benefit of survivorship, and upon trust to apply the residue for the benefit of certain other persons :—Held, that the interests vested immediately on the death of the testatrix, and that the nephews and nieces were entitled to the interim income arising from their respective shares. *Ib.*

Gift of Interest for Maintenance—Severance from general Personal Estate.]—By a will a testator directed his executors to invest 1,000*l*., and with the interest to pay an annuity of 30*l*. to his wife for life, or until she should marry again, and directed the 1,000*l*. to be distributed, share and share alike, among all his children, to each respectively—if a son on his attaining twenty-four, and if a daughter, upon marriage with consent. The testator directed that a sum of 500*l*. should be invested for the benefit of his younger children in equal shares, to be paid to each, if a son, at the age of twenty-four, and if a daughter, on marriage with consent. The residue of his property, after certain other bequests, he bequeathed, in equal shares, to all his children upon attaining twenty-four respectively, and directed his executors to invest, for the maintenance of his children during their minorities, or if daughters, until their marriage, all the moneys to which they might respectively be entitled under his will :—Held, that the shares of the children in the 1,000*l*., in the 500*l*., and in the residue, vested on the testator's death. *Brennan* v. *Brennan*, [1894] 1 Ir. R. 69.

Where there is one gift of corpus and income as parts of a whole, a gift otherwise contingent will be vested : but where there are separate gifts, one of capital and one of income, not necessarily going together, the gift will not be deemed vested. *Fox* v. *Fox* (L. R. 19 Eq. 286, post, col. 1751) considered. *Ib.*

Direction to Accumulate at Death of Tenant for Life.]—Bequest of a residue to A. (who had no children) for life, and at his death 5,000*l.* to be deposited in the hands of trustees to accumulate for the use of A.'s eldest son, at his attaining the age of thirty years: the rest to be equally shared between him and the other children; the general division to take place as each respectively attained the age of twenty-four years:—Held, not void in any part, as the 5,000*l.* vested at the time of the severance and the shares of the residue must be taken to vest at the same time. *Greet* v. *Greet*, 5 Beav. 123.

Failure of Direction to Accumulate.] — A testator, by his will, made in 1821, bequeathed the residue of his personal estate and effects to trustees, upon trust to accumulate until the principal with the accumulations should amount to 3,000*l.* or thereabouts; and when and so soon as such principal and accumulations should amount to 3,000*l.*, or thereabouts, then he directed them to invest the same, and distribute the interest among certain persons for life; and after the decease of the survivor, to distribute the principal amongst the issue of such persons:—Held, that the gift of the fund was not void for remoteness, as, although the sum named might not be accumulated within the period allowed by law, there would be no suspension of vesting; the residue and accumulations, whatever the amount might be, would vest immediately on the death of the survivor of the tenants for life. *Saunders* v. *Vautier* (Cr. & Ph. 240) distinguished. *Oddie* v. *Brown*, 4 De G. & J. 179; 28 L. J., Ch. 542; 5 Jur. (N.S.) 635; 7 W. R. 472—C. A.

Direction to Invest if Tenant for Life Retired from Business or Married.]—A testator left all his real and personal estate to G., his executor, upon trust to raise out of the personal estate 1,500*l.*, and invest that sum, in the events which happened, for the use of his son, to be paid to him with interest on his attaining twenty-one; and in trust to raise 1,000*l.*, and hand it over to his wife in certain amounts therein specified; and he authorised G. to permit his wife to carry on his business, and to dispose of the profits for the maintenance of herself and his children; but if his wife should be desirous to retire from business, or in the event of her marrying, then upon trust to convert all his property not theretofore disposed of in raising the two sums of 1,500*l.* and 1,000*l.*, and invest the same for the use of his son, to be paid to him on attaining twenty-one; and, in the event of his son's death before twenty-one without leaving issue, to the use of his daughter, with provisions for maintenance; and, in the event of the death of both of his children before they attained twenty-one, to pay the wife 500*l.*, in addition to the sum of 1,000*l.*; and upon further trust, upon such events and contingencies, that G. should retain, to his own use and benefit, all the residue of his real and personal estate; and he bequeathed to his son all the residue of his personal estate for his own sole use and benefit. G. proved the will, and assented to all the bequests; the testator's son and daughter died in 1834, both infants, the son being the survivor, and administration to the son was granted to the plaintiff in 1871: the widow died in 1836, having married a second time, and G. died in 1869:—Held, first, that the testator's son took a vested interest in the 1,500*l.* *O'Reilly* v. *Walsh*, Ir. R. 6 Eq. 555.

Held, secondly, that G., by assenting to the legacy of 1,500*l.*, was an express trustee of it, so as to save the bar of the statute of limitations. *Ib.*

Held, thirdly, that G. was entitled to the residue for his own benefit. *Ib.*

Gift of Income Defeasible followed by Gift of Principal.]—A testatrix gave money, to become due on a policy, to trustees, one of whom she afterwards made her executor, upon trust to invest &c., and so long as her nephew should be solvent to pay him the dividends, until he attained twenty-five, so that his receipts alone might be good discharges, and that he might not deprive himself thereof by anticipation. If he attempted to do so, he was to lose the benefit of the provision, which was to go over to his family, if he had any, if not, to the testatrix's residuary estate. The payment of the dividends was to be half-yearly, and there was to be an apportionment of interest in case of the nephew's death between two days of payment. In case the policy moneys should not be paid immediately after her death, the trustees were to make up the first half-year's income out of her residuary personalty. The principal was to be paid to her nephew at twenty-five. There was a declaration that if the nephew should die under twenty-five, leaving children, the principal and interest should go to such children. There was also a clause for the advancement of the nephew. The nephew died a minor, and without having been married:—Held, that the legacy passed to his personal representative; and immediate payment was ordered, though at the date of the decree the nephew, if alive, would have been between twenty-one and twenty-five. *Pearson* v. *Dolman*, 36 L. J., Ch. 258; L. R. 3 Eq. 315; 15 W. R. 120.

d. Gift of Income followed by Gift of Principal.

In General.]—If the interest and dividends of a legacy are alone the subject of the bequest until a particular time, and the principal is not sooner taken out of the residue, but is directed for the first time to be taken out of it and paid to the legatee at the end of that period, the intermediate gift of the interest or dividends will not vest the capital. *Cromek* v. *Lumb*, 3 Y. & C. 565.

Gift to two executors and the survivor, of 1,000*l.* four per cents. in trust for A. and B., to pay them the dividends thereof from time to time, and from and after the decease of the executors, the 1,000*l.* to A. and B., their executors, &c., equally:—Held, that they took absolute equitable interest in the stock, as tenants in common, during the life of the executors, and that on their deaths they took absolute legal interests as tenants in common. *Gardiner* v. *But*, 3 Madd. 425.

A. gave B., his brother, the interest of 1,500*l.* for life, and the principal, after his decease, among the younger sons and daughters of B.; but if he should leave daughters only, then to be paid to them at twenty-one. B. had two daughters, one of whom married, and died in B.'s lifetime:—Held, that her husband was not entitled to her share as administrator. *Billingsley* v. *Wills*, 3 Atk. 219.

Gift of Income—Ultimate Gift at Twenty-one.]—A testatrix by her will devised and bequeathed all her real and personal estate to a trustee absolutely, upon trust to sell and convert into money, and thereout to pay her funeral and testamentary expenses and debts, and stand

possessed of the residue upon trust to invest and apply the income "arising therefrom for or towards the maintenance and education of her two children" (naming them) "until they shall respectively attain the age of twenty-one years, and then to divide the trust funds equally between them as tenants in common." There were two children only, both illegitimate: one, a son, died a minor and unmarried, and if his share vested it went to the crown. On summons:—Held, that the gifts were separate, and the ultimate gift was contingent, and did not vest, but lapsed on the death of the son under twenty-one. *Morris, In re, Salter* v. *Att.-Gen.*, 52 L. T. 840; 33 W. R. 895.

A testator, who had two sons and one daughter, gave the interest, dividends, and annual proceeds of 3,000*l.* stock, standing in his name, to W., one of his children, for life, and, after his decease, he gave the said principal stock or sum of 3,000*l.* unto all and every the child and children of W., to be equally divided between and amongst them, if more than one, share and share alike; and if but one, the whole to such one, to be paid or transferred to him, her, or them, on his, her, or their attaining twenty-one, and the interest to be in the meantime applied for maintenance and education. He gave similar legacies to each of his other two children and their children; "and upon the death of either of my said sons or daughter without issue, then I direct that the interest, dividends, and produce so as aforesaid given and bequeathed to him, her, or them, so dying, shall be paid and payable to the survivors or survivor of them my said sons and daughter in equal shares and proportions." The testator's son W. survived him, and had one child, who predeceased him:—Held, that the limitation over referred to the death of either of the testator's children without leaving issue living at his death; that the child of W. took a vested interest at his birth, but liable to be divested by the death of W., without leaving issue living at his death; and that the gift over therefore took effect. *Westwood* v. *Southey*, 2 Sim. (N.S.) 192; 21 L. J., Ch. 473; 16 Jur. 400.

A bequest of residuary estate to trustees to apply the interest to the education and maintenance of A. during her minority, and, when she has attained the age of twenty-one years, to the use of A. absolutely, does not give A. any vested interest till her full age is attained; and, if she dies during her minority, the residue goes to the next of kin of the testator. *Russell* v. ——, 1 L. J. (O.S.) Ch. 69.

A testator gave all his real and personal estate to trustees to convert into money, and out of the proceeds of the conversion to pay various legacies and annuities, and he directed his trustees to hold the residue of his personal estate so converted into money, upon trust to pay the income for the benefit of his four natural children, or such of them as might be living at his decease, until they should attain twenty-one, and when they attained that age upon trust to pay or transfer the residue of his personal estate unto the four children in equal shares as tenants in common:—Held, that the shares of the four children did not vest till twenty-one, and that the share of one child who died under twenty-one was undisposed of, and passed as to the realty to the heir-at-law, and as to the personalty to the next of kin of the testator. *Hanson* v. *Graham*, post, col. 1645, distinguished. *Leigh* v. *Leigh* (17 Beav. 605) not followed. *Spencer* v. *Wilson*, 42 L. J., Ch. 754; L. R. 16 Eq. 501; 29 L. T. 19.

—— **Payment of Capital at Twenty-four.**]—A testator gave 5,000*l.* to trustees upon trust to invest, and to apply the income to or for the maintenance of a nephew till he should attain his age of twenty-four, and directed that when he attained that age the principal should be paid to him, and he made a gift over in case of the death of the nephew under that age. The legatee was an infant at the testator's death, and died an infant some years afterwards. The trustees raised the fund, and applied part of the income to his maintenance and education, and at his death they had in their hands an accumulation of income unapplied:—Held, that the legacy was vested at the testator's death, subject to be divested in the event which happened of the death of the legatee under the specified age, and that the whole of the income belonged to him during his life, and that his personal representative was entitled to the accumulations. *Peek's Trusts*, 42 L. J., Ch. 422; L. R. 16 Eq. 221; 21 W. R. 820.

—— **Principal to be Transferred at Thirty-two.**]—Testatrix gave to A. the dividends of 500*l.* stock, till he should attain the age of thirty-two; at which time she directed her executors to transfer the principal to him: the legacy does not vest till the age of thirty-two. *Batsford* v. *Kebbell*, 3 Ves. 363; 4 R. R. 15.

Postponement of Enjoyment of Principal—Interim Gift of Income.]—Property was assigned to trustees in trust for S. for life, and after her death to such of her issue as she should by will appoint. S. by her will appointed two-fifths of the property to two trustees of whom L. was the survivor in trust to pay the income to her son till he should attain the age of forty years, and then in trust for her son, his executors and administrators; provided that in case her son should assign his share in the property, then the appointment for his benefit should be void, and the two-fifths should be held in trust for the other objects of the power. The son died under the age of forty without having assigned his share, leaving a will of which B. was executor. After the death of S., L. and N. were appointed trustees of the original settlement. N. afterwards (with the consent of the son's executor) obtained possession of the son's share. Subsequently N. misappropriated the fund. The persons beneficially interested under the son's will recovered judgment against B. for wilful default in allowing the property to remain in N.'s hands; and B. being dead, his executor brought an action against L. to make him liable for the loss of the fund:—Held, on the construction of the will of S., that the beneficial interest in two-fifths of the property vested absolutely in her son and passed by his will. *Scotney* v. *Lomer*, 55 L. J., Ch. 443; 31 Ch. D. 380; 54 L. T. 194; 34 W. R. 407—C. A.

Income until Marriage—Corpus at Time of Marriage.]—A testatrix by her will, after specific bequests of bonds, gave all the rest of her stocks and shares upon trust to pay the income to G. until his marriage, and at the time of his marriage to hand over the stocks and shares to him:—Held, that G. took a vested interest under the gift, and, being of age, was entitled to have the stocks and shares comprised therein transferred to him,

although he had not married. *Batsford* v. *Kebbell*, supra, distinguished; *Bunn, In re*, post. col. 1652, and *Vize* v. *Stoney* (2 Dr. & Wal. 659; 1 Dr. & War. 337) observed upon. *Wrey, In re, Stuart* v. *Wrey*, 54 L. J., Ch. 1098; 30 Ch. D. 507; 53 L. T. 334.

e. Income Expressly Given for Maintenance.

In General.]—Giving the interest of a legacy to the legatee, or for his maintenance, vests the legacy. *Hoath* v. *Hoath*, 2 Bro. C. C. 3.

A. devises 4,000*l.* to his son, to be paid at the age of twenty-five, and interest in the meantime, and he to have a maintenance thereout; and directs the 4,000*l.* to be raised out of a trust estate; this is a vested legacy. *Cave* v. *Cave*, 2 Vern. 508.

A direction for maintenance has not the same effect in favour of vesting, as giving interest. *Hanson* v. *Graham*, 6 Ves. 249; 5 R. R. 277.

Gift to Children on attaining Twenty-one—Intermediate Income for Maintenance.]—A gift to a class or an individual on attaining a given age, which standing alone is contingent, is vested if accompanied by a gift of the whole income for the benefit of the class or individual during the interval. *Holt's Estate, In re, Bolding* v. *Strugnell*, 45 L. J., Ch. 208; 34 L. T. 120; 24 W. R. 339.

A testatrix directed the trustees of her will, after the death of a tenant for life, to transfer a fund to the children of A., in equal shares, upon their respectively attaining twenty-one, the interest of the fund to be applied for their maintenance until they should respectively attain that age:—Held, that the gift of the interest created a vested interest in the capital. *Ib.*

The testator bequeathed to each of the children of his son R., who should be living at his (the testator's) death, and who should live to attain the age of twenty-one years, the sum of 100*l.*, the interest thereof in the meantime to be paid to their said father in aid of their maintenance and education. One of R.'s children, P., survived the testator, but died under twenty-one:—Held, that P.'s legacy vested, by force of the gift of the intermediate interest, and was payable to his personal representative. *Byrne, In re*, 23 L. R., Ir. 260.

And see *Pearman* v. *Pearman*, 33 Beav. 394.

A gift "to be transferred" to the legatee on his attaining twenty-one, with provisions for maintenance out of the income meanwhile, and a gift over on death under twenty-one, such gift being afterwards referred to by the testator as a contingent gift:—Held, to be vested before twenty-one so as to be forfeitable on conviction for felony. *Bateman's Trusts, In re*, 42 L. J., Ch. 553; L. R. 15 Eq. 355; 28 L. T. 395; 21 W. R. 435.

Gift to one for life, remainder to four persons named, with a proviso that the share of any legatee in remainder, who should die in the lifetime of the tenant for life leaving lawful issue, should be "assigned and transferred to such issue respectively, in equal shares and proportions on their attaining twenty-one; and the dividends and proceeds in the meantime to be applied in or towards their maintenance and education":—Held, that the gift of income, being to an entire class, for maintenance only, was not sufficient to vest the legacy in the issue before twenty-one. *Ashmore's Trusts, In re*, 39 L. J., Ch. 202; L. R. 9 Eq. 99.

A father assigned certain leasehold premises to a trustee, in trust for his son until he should attain the age of twenty-one years, and in the meantime to stand possessed thereof in trust, to collect and receive the rents and profits thereof, as, and when, the same should become payable, and thereupon to pay, apply, and dispose of the same for and towards the maintenance, education, clothing, and support of the said son during his minority; and upon his attaining the age of twenty-one years, upon trust to assign the said premises, together with the lease and the accumulation of rents, unto the said son, his executors, &c., for the remainder of the term:—Held, that the son took a vested interest in the lease, and on his death that it passed to his personal representatives. *Stevens* v. *Frost*, 2 Y. & C. 302; 6 L. J., Ex. Eq. 41.

A testator gave real estate in trust for his daughter E. for life, and on her death to sell and divide the produce among her children, with a direction to pay to the children on their attaining twenty-one, and a gift of the income in the meantime for maintenance; and in case E. should die without leaving any children, he gave the property over. He afterwards gave other real estate to his sons T. and M., and the survivor for life, remainder in trust to sell and divide among their children in the same manner at the same ages, and the interest to be applied in the meantime in a similar manner in every respect, as in the case of the trust for E.'s children:—Held, that children, whether of E., T., or M., took vested interests at birth. *Shrimpton* v. *Shrimpton*, 31 Beav. 425; 11 W. R. 61.

Bequest of 1,000*l.* to A., upon trust to lay the same out in consols and pay the interest and dividends to B. for life; and immediately after her decease, upon trust that the said stock should be transferred to B.'s daughter C., in case she should then have attained the age of twenty-one years, for her absolute use and benefit; but in case the said C. should not have attained the age of twenty-one years at the decease of her said mother, then upon trust to pay and apply the said interest and dividends, as the same should become due and payable, for the maintenance and support of the said C., until she should attain the age of twenty-one years, and upon the attainment thereof, upon trust to transfer the said stock or fund to the said C. for her use and benefit. B. and C. survived the testator. Afterwards C. died in the lifetime of B. without having attained the age of twenty-one years:—Held, that C. took a vested interest in the 1,000*l.* *Hammond* v. *Maule*, 1 Coll. C. C. 281; 13 L. J., Ch. 386; 8 Jur. 568.

Bequest of a sum to trustees to pay the interest to testator's son's wife, for the benefit of herself and husband and children during his son's life, and after his death for the benefit of the wife and children, and at her death to be equally divided among the latter if they should have attained twenty-one, and if not the interest to be applied for their maintenance; and in case of the wife marrying again, the children were to receive their shares at twenty-one:—Held, that their shares did not vest until they attained twenty-one. *Taylor* v. *Bacon*, 8 Sim. 100.

A testator directed that certain funds should be payable to children on their arriving at the age of twenty-one, and that his trustee should in the meantime pay and apply the interest towards the maintenance of such

children until their respective shares should become payable; and that it should be lawful to apply the whole or any part of the principal to which any infant might be entitled under the provisions thereinbefore contained, at any earlier period than the same would become vested or payable by virtue of such provision, for the advancement of such infant:—Held, that the representatives of a child who died under the age of twenty-one were not entitled to the interest accrued during his minority. *Skaife* v. *Stewart*, 10 Jur. 299.

A testator directed that a residuary fund should be held in trust for the children of his two nieces, M. and E., "to be equally divided amongst the children, or the survivors of them, as they attain their majority; and in the meantime," that the interest of such ultimate residue should be "from time to time paid to my two nieces in proportion to the number of the children each may have at the time such interest becomes due and payable, for the use and education of such children":—Held, that the children took vested interests, defeasible in the event of their not attaining full age. *Vining* v. *Wright*, 3 L. T. 287.

—— **Twenty-one or Marriage—Accumulation of Residue.**]—Legacies were given by a testator "to each of my children, who, being sons, shall attain the age of twenty-one years, and being daughters shall attain that age or marry under that age with the consent of her guardian or guardians," of 1,000*l.*, with power to the trustees of the will if any of the sons should not have attained twenty-one, or any of the daughters should not have attained that age or married, to apply the whole or part of the interest and income of the legacies to which any of the children should be entitled in expectancy during the minority of the sons respectively and the minority and discoverture of the daughters respectively, for his or her maintenance or education as they should think fit. The will contained a direction to accumulate the residue of the interest and income by investing the same for the benefit of those who should be entitled to the principal, and a proviso, if any of the sons or daughters should marry any person not a Protestant, revoking the bequests of the children so offending, and giving them over equally amongst all the others of the children, sons at twenty-one and daughters at twenty-one or marriage with such consent. One of the daughters died under twenty-one and unmarried:—Held, that her legacy did not vest. *Wilson* v. *Knox*, 13 L. R. Ir. 349. See *Bevan's Trusts, In re*, 56 L. J., Ch. 652; 34 Ch. D. 716; 56 L. T. 277; 35 W. R. 400.

—— **Gift to Children attaining Twenty-five.**]—Gift to A. for life, and after his death to all his children who should be living at his death, and who should attain the age of twenty-five years; with a direction to apply the whole income in maintenance:—Held, that the gift was not void for remoteness, the tenant for life having died in the lifetime of the testator. *Southern* v. *Wollaston*, 16 Beav. 166; 22 L. J., Ch. 664; 1 W. R. 86.

Gift by will to daughters for life, and afterwards to "pay and divide" amongst their issue (children) then living, at twenty-five, the whole interest being given in the meantime for their maintenance during minority:—Held, that the age of twenty-five referred to the period of distribution and not of vesting. *Tatham* v. *Vernon*, 29 Beav. 604; 7 Jur. (N.S.) 815; 4 L. T. 531; 9 W. R. 822.

A testator gave all his real estate to his mother for life, and after her death to his executors, upon trust to sell, and to stand possessed of the proceeds of such sale upon trust to pay to his natural daughter H. 500*l.* when she should attain twenty-five; and the testator "directed that the legacy should carry interest from the time of his mother's decease, which interest should be paid in and towards the maintenance, education, and support of his natural daughter until she should attain the age of twenty-five." He then gave two other legacies; and, subject as aforesaid, he directed that the trust moneys should be for the benefit of the persons mentioned in his will. He died in 1849, and his mother died in 1850. After the death of his mother the real estate was sold. H. died in 1857, at the age of twenty-three:—Held, that the legacy was vested in H., although she died under twenty-five. *Hart's Trusts, In re*, 3 De G. & J. 195; 28 L. J., Ch. 7; 4 Jur. (N.S.) 1264; 7 W. R. 28.

Bequest to A. for life, with remainder to her children who should attain twenty-five, with a clause for maintenance during minority and for accumulation of surplus income:—Held, that the gift to the children was not void for remoteness. *Bute* (*Marquis*) v. *Harman*, 9 Beav. 320.

The marginal note of this case is incorrect, the bequest having been held void for remoteness. See *Southern* v. *Wollaston*, supra.

A gift of personalty to trustees for A. for life, and after his death in trust for the children of A., "as they severally attained twenty-five years," the income to be applied during their respective minorities by their guardian for their maintenance, &c., with a gift over, in case no child of A. should live to attain twenty-five:—Held, to be vested, and not too remote. *Davies* v. *Fisher*, 5 Beav. 201; 11 L. J., Ch. 338; 6 Jur. 248.

Gift of Income for Maintenance and Education—Direction to Pay at Twenty-one.]—A testatrix, who died in 1867, by her will dated in 1865, devised and bequeathed her real estate and the residue of her personal estate to trustees upon trust for sale and conversion, and after payment of her debts and certain legacies, upon trust to divide the residue of the income of her personal estate and the rents of her real estate until sold, into nine equal shares. The testatrix disposed of one of such shares in the following manner: As to one other equal ninth part or share of such dividends, rents and interest, upon trust to pay or apply the same for and towards the maintenance and education of A., B., and C.; and as and when they should respectively attain the ages of twenty-one years, upon trust to pay them in equal shares one equal ninth part or share of such principal moneys and the dividends and interest which might accrue due thereon. A. died in the lifetime of the testatrix. B. survived the testatrix, but died under twenty-one. C. survived the testatrix and attained twenty-one:—Held, that the gift was contingent and not vested, and that therefore B.'s share lapsed. *Martin, In re, Tuke* v. *Gilbert*, 57 L. T. 471.

The testator directed his personalty to be invested for the sole use and maintenance of his daughter until she arrived at twenty-one; and when she attained twenty-one the remainder to be paid to the daughter. She died under twenty-

one :—Held, a vested interest. *Rose* v. *Sowerby*, Tam. 376.

Bequest to A. for his second daughter, that he shall have born, for her education, till she shall attain the age of twenty-one ; and after she shall attain the age of twenty-one, to her and her heirs for ever, she being christened Z. ; and in default of such issue, over. Another bequest to A. till the said second daughter shall attain twenty-one, and after she shall attain twenty-one, to her and her heirs for ever. Both vested in a second daughter, the third child, christened Z., though she died under twenty-one. *Lane* v. *Goudge*, 9 Ves. 225 ; 7 R. R. 163.

A husband bequeathed the residue of his personalty to trustees in trust to permit his wife to carry on his business until his son should attain twenty-one, the wife maintaining all his children in the interim, and then after a trust to pay her 100*l.*, in trust for the son for his own use and benefit :—Held, that the son's attaining twenty-one was a condition precedent, and that as he died under that age he took no vested interest in the bequest. *Sullivan* v. *Edgell*, 23 W. R. 722.

Testator gave 5,000*l.* to trustees in trust for his daughter E., for life, and after her death, in trust to apply the interest for the maintenance of all her children as should be living at her death, during their minorities, and, on their attaining twenty-one, in trust to transfer the same equally between them. But if E. should die without leaving any such child, or leaving such they should all die under twenty-one, then to transfer the same unto such children of F. as should be living at E.'s death without issue. One of E.'s children attained twenty-one, but died in E.'s lifetime :—Held, that that child did not take a vested interest. *Tucker* v. *Harris*, 5 Sim. 538 ; 2 L. J., Ch. 18.

A testator directed his trustees to pay the interest of 2,500*l.* to his daughter for life for her separate use, and after her death for the maintenance of all her children until they should attain twenty-one, and then the principal to be equally divided amongst her said children ; and if his daughter should die without leaving a child, then that the principal should be divided amongst all his own children then living. The daughter had children, but they all died under twenty-one :—Held, nevertheless, that the legacy vested in them. *Parker* v. *Golding*, 13 Sim. 418.

A testator directed the interest of his residue to be applied to the maintenance and support of his son, and his son's wife and children, and after the death of the survivor of his son and wife, he directed such interest to be applied by his executors, in the support of and bringing up the child and children of his son during their minority or minorities, and as they severally attained twenty-one he gave and bequeathed the share of each to be paid to her or him, and in case only one of such children should live to attain twenty-one, then he gave the whole to such one child absolutely :—Held, that the gift to the children was contingent on their attaining twenty-one. *Tracey* v. *Butcher*, 24 Beav. 438.

—— **Benefit of Survivorship.**]—A testator gave the residue of his real and personal property to trustees to sell and stand possessed of the proceeds upon trust to pay the dividends and interest thereof to his wife for life, to be by her expended in or about the maintenance of herself and the maintenance and education of his children, and after the decease of his wife he gave the principal of the estate unto and amongst all his children equally, and to be paid to them as they should severally attain twenty-one, with benefit of survivorship amongst them. There were seven children ; and two of them upon attaining twenty-one, while four of the others were yet infants, petitioned jointly with the mother that the amount of their shares might be paid to them for their advancement in the world :—Held, that the shares became vested upon the children attaining twenty-one, and though the court would not usually sanction the payment of the shares, where the whole income was not ample for the maintenance of the children, yet such a course might be adopted here upon the undertaking of the two children to secure to the mother the dividends which would have accrued in respect of those sums. *Berry* v. *Bryant*, 2 Dr. & Sm. 1 ; 31 L. J., Ch. 327 ; 8 Jur. (N.S.) 69 ; 5 L. T. 818 ; 10 W. R. 242.

—— **Indefinite Gift of Income.**] — Testator gave to his daughter A. residue of funded property and his leasehold estates for her life, and in case of A.'s decease, he directed his trustees to receive "the dividends, interest, and produce of his said funds, and also the rents and profits of" his leasehold estates, "to pay a sufficient part thereof for and towards the maintenance, education, support, and bringing up" of A's children until they should attain their ages of twenty-one years, and on their severally attaining that age, "to pay, assign, transfer, and convey all the said residue and remainder of the said dividends, interest, and produce of the said funds, and the rents of his said leasehold messuages, as shall not have been applied for and towards the maintenance and education of the said children as aforesaid equally unto and amongst all the children" of his said daughter A. A. died, leaving B., her only child, her surviving. On bill filed by B. against trustees :—Held, that the indefinite gift of income is tantamount to a gift of the corpus. *Fisher* v. *Mair*, 8 W. R. 108.

—— **When Youngest attained Twenty-one.**]—Bequest to executors in trust, to sell, &c., and apply so much of interest, &c., for maintenance, &c., of testator's five children, and the surplus to accumulate to pay each child at twenty-one 2,500*l.*, and if there should be any surplus after such payments, to pay and divide it amongst the five children, or such of them as should be living when the youngest attained twenty-one ; and in case any of them died under twenty-one having issue, his share should go to the children ; with benefit of survivorship amongst the five children, in case of one dying without issue :—Held, that one dying after twenty-one, and before youngest had attained twenty-one (though with issue), took no vested interest in the surplus. *Howes* v. *Herring*, M'Cle. & Y. 295.

A testator bequeathed leaseholds in trust for his wife for life, and, after her decease, to apply the rents for the maintenance and education of all his children living at his decease ; and after all his children should attain twenty-one, upon trust to sell, and pay, and divide amongst all his children ; and if but one, or but one surviving child, the whole to such child :—Held, that all the children who survived the father took vested interests. *Boulton* v. *Pilcher*, 29 Beav. 633 ; 7 Jur. (N.S.) 767 ; 4 L. T. 426 ; 9 W. R. 626.

B. by his will gave to his wife certain property for life or during widowhood, with remainder to trustees upon trust to pay the rents to M. C. for life, and after her death for the maintenance of any children she might have until the youngest attained twenty-one, with remainder upon trust to sell, to distribute, and divide the proceeds among such children equally; and if one, the whole to such one. But in case M. C. should die without issue, or such issue should not attain twenty-one, then the testator gave such property to his son W. B. in fee. Then followed gifts of other property charged in various ways, with a general gift of residuary realty and personalty, upon trust to lay out the same and pay the interest to M. C. for life, her receipt to be a good discharge; and after her decease, for the education of her children until the youngest attained twenty-one, when the moneys should be equally divided among them, and if one, the whole to that one; but in case M. C. should die without issue, or if such issue should not attain twenty-one, the whole to go over to testator's son W. B. absolutely. On the question whether M. C.'s children dying under twenty-one, took:—Held, that they did not. *Davenhill* v. *Davenhill*, 5 W. R. 18.

—— **Twenty-one or Marriage.**]—A father devised his property upon trust for his daughter for life, and after her death upon trust to sell and invest, and to pay the income "during the minorities of her children towards their respective maintenance," and declared that as and when his grandchildren should severally attain twenty-one years, or, if females, marry, his trustees should pay, assign, and transfer unto such grandchild so attaining twenty-one, or marrying, an equal share of the trust funds per stirpes according to the number of grandchildren living at the death of his daughter. She had five children, all of whom survived her, and two of whom died in infancy:— Held, that all her children took absolute vested interests, and that the legal personal representative of the two who died was entitled to their shares. *Perrott* v. *Davies*, 38 L. T. 52.

—— **Children to Receive Principal and Interest at Twenty-two.**]—A testator directed the proceeds of his real estate to be invested in stock upon trust to pay the dividends to his two daughters in equal shares during their natural lives, and "from and after their decease to go to their respective children for their support and maintenance until they shall attain the age of twenty-two years severally, they to receive the principal and interest as they attain such age, in equal shares"; should either die before twenty-two, the shares of either of them so dying before the attainment of such age to be equally divided among the survivors or survivor of them:—Held, that the children took vested interests. The divesting clause was held to be void. *Hobbs* v. *Parsons*, 2 Sm. & G. 212; 2 W. R. 347. But see *Vawdry* v. *Geddes*. 1 Russ. & M. 203; Tam. 361; 8 L. J. (o.s.) Ch. 63, post, col. 1656.

—— **On Children Attaining Twenty-four.**]—A testator gave 3,000*l.* to trustees, upon trust to pay the interest to A. during her life, and, after her decease, to apply the interest to the maintenance of the children she has at the date of the will, and the survivors of them, till they attained twenty-four respectively, and, upon their respectively attaining that age, to transfer their shares to each of them; the share of any one dying to go to the survivors, upon their attaining twenty-four, with a direction, that, if none of the children should be living at A.'s death, or if none of them should attain twenty-four, the 3,000*l.* should go over: of those children only one attained twenty-four, but he died in A.'s lifetime:—Held, that the fund vested in him absolutely. *Langslow* v. *Butts*, 5 L. J. (o.s.) Ch. 166.

—— **Minority till Twenty-five.**]—Testator gave his real and residuary personal estate, in trust to pay an annuity to his nephew, and, subject thereto, in trust for his daughter for life, remainder in trust to pay the income for the maintenance of all and every such child or children as she might leave at her decease during his, her, or their minority; and, when the youngest should have attained twenty-five, to pay, assign, and transfer the income, together with the principal, to the children, the same to be divided equally between them, share and share alike; but if any of them should die leaving a child or children who should attain twenty-one, then to pay and assign the share of such child to such his or their child or children: and the testator then expressed his further will to be that his trustees should, immediately after his nephew's decease, convey, release, and assign all his freehold and leasehold estates unto the heir or heirs who should be legally entitled thereto; and in case his daughter should leave no child or children, or they should die under age and unmarried, then in trust to pay and assign the income together with the whole residue, unto and equally between his next of kin. The daughter left five children living at her death, all of whom attained twenty-five:—Held, that the trust for them was not void for remoteness, but that they took vested interests in the trust property on their mother's death. *Milroy* v. *Milroy*, 14 Sim. 48; 13 L. J., Ch. 266; 8 Jur. 234.

Bequest of residue upon trust to apply such part as the trustees should think fit for maintenance of A. until twenty-one, then to pay her out of income 500*l.* a-year until twenty-five, and then A. for life, and after her death for all her children, until they should respectively attain twenty-five, then for such children so attaining twenty-five, with a gift over. Similar bequests of leaseholds, except that it concluded with an absolute life interest in A.:—Held, that the children of A. took vested interests at birth, and that the gift over was void for remoteness. *Hardcastle* v. *Hardcastle*, 1 H. & M. 405; 1 N. R. 83; 7 L. T. 503.

—— **Direction to Pay at Thirty.**]—A testator bequeathed his residuary personal estate to trustees in trust for conversion and investment, and to pay the income to B. for his maintenance and until he should attain the age of thirty; and upon his attaining that age to pay or transfer the capital to him absolutely. B. survived the testator and died under thirty:—Held, that B. took a vested interest. *Bunn, In re, Isaacson* v. *Webster*, 16 Ch. D. 47; 29 W. R. 348.

f. Fixed Sum Given for Maintenance.

Maintenance till Twenty-one or Marriage—Death before Either Event.]—Direction to executors to apply 25*l.* per annum for the maintenance of testator's natural daughter, till twenty-one or marriage, which should first

happen, when his executors were thereby required to pay to her 500*l.* She died under twenty-one, and unmarried:—Held, that the legacy failed. *Watson* v. *Hayes*, 5 Myl. & Cr. 125; 9 L. J., Ch. 49; 4 Jur. 186. Reversing on this point, 9 Sim. 500. And see *Grimshaw's Trusts, In re*, infra.

Maintenance on Attaining Twenty-one.]—A testator gave his property, after the death of his wife, to trustees, on trust to pay the interest and profits to his two daughters, J. and E., to their separate use, with a direction to pay to and apply for the benefit of A., the son of E., 200*l.* annually, when he attained the age of twenty-one years, and before that period, such part of the 200*l.* bequeathed to him as might be judged proper; he then gave his daughters power to dispose of the principal by will to their children or grandchildren respectively, "except that proportion of principal given to E., and from which the interest is to arise to my grandson, viz. 4,000*l.*, which sum shall be my grandson's property"; and, in case either of the daughters died without issue, he limited her share of the fund over to the other daughter, her children or grandchildren. A. having attained twenty-one, and died in his mother's lifetime:—Held, that the annuities ceased upon his death, but that the 4,000*l.* vested in him. *Livesey* v. *Livesey*, 3 Russ. 542; 7 L. J. (o.s.) Ch. 120—L. C. But see *Bass* v. *Russell*, Tam. 18; 7 L. J. (o.s.) Ch. 177.

Bequest of "120*l.* per annum, (that is to say) the interest of 4,000*l.* of my 3 per cent. consols" to A., and a direction that the interest, as it becomes due, be added to the principal, till A. attains twenty-one, except 20*l.* per annum for clothes, gives a vested interest. *Stretch* v. *Watkins*, 1 Madd. 253.

Legacy payable at twenty-one, with a certain allowance in the meantime. The legatee dies before twenty-one. His administrator not entitled to the legacy till such time as he would have attained twenty-one. *Roden* v. *Smith*, Amb. 588.

See also next Subdivision.

g. Part of Income Given for Maintenance.

Outstanding Charges—Debts.]—Devise, charged with debts to trustees and their heirs; in trust to receive, &c., the rents, &c., and thereout to support and educate the devisor's son, till the age of twenty-one; and then to him:—Held, not a use executed in the son before twenty-one. *Bailey* v. *Ekins*, 7 Ves. 322.

—— **Annuity.**]—A testator bequeathed a fund, which was to be produced by the conversion into money of the residue of his real and personal estate, to trustees, upon trust to pay the interest of one moiety to his daughter, for her separate use during her life; and, after her death, to pay 100*l.* a-year to her husband during his life, and to apply the remainder of the dividends to the maintenance and education of all and every her children, until they attained twenty-one respectively, and when they attained their respective ages of twenty-one, upon trust to pay the principal to them in equal shares: the mother survived the testator, and left two children, who died under twenty-one. The moiety of the residue vested in these children. *Jones* v. *Machilwain*, 1 Russ. 220; 25 R. R. 32.

A testator gave a portion of his personal property to trustees, to invest the same in the securities therein mentioned, and pay out of the proceeds an annuity of 5*l.* to P., and apply the residue of the interest towards the maintenance and education of C. until twenty-one, and on his attaining that age to transfer the principal of the trust moneys charged with the annuity of 5*l.* unto C. absolutely. But if C. should die before twenty-one, and during the life of P., then the trustees were to pay P. for life an annuity of 10*l.* in lieu of the 5*l.*, and to pay the remainder of the interest during the life of P., as well as the principal after her death, to a third person absolutely. P., the annuitant, died before C., but C. died a minor:—Held, that the gift to C. was an absolute vested interest in him, and notwithstanding he died under twenty-one, the estate was not divested, since the precise contingency of C. dying under twenty-one and during the life of P., never happened; that consequently the representatives of C. were entitled to the property. *Potts* v. *Atherton*, 28 L. J., Ch. 486; 7 W. R. 331.

h. Power or Discretion to Apply Whole or Part of Income for Maintenance.

Trust to Assign to Children when they Attain Twenty-one—Maintenance during Minority.]—A testator gave the residue of his property to trustees to assign and transfer the same to and amongst all and every such child or children of M. as should be living at his (testator's) decease, to be equally divided among them if more than one when they should attain the age of twenty-one; and if there should be but one who should attain the age of twenty-one, then the whole to such child absolutely. Power of maintenance during minority was given to the trustees; and during the suspense of absolute vesting the residue of the annual proceeds was to be accumulated for the benefit of the persons who should become entitled to the principal:—Held, that no child of M. who did not attain twenty-one could take a vested interest. *Merry* v. *Hill*, L. R. 8 Eq. 619; 17 W. R. 985.

A testator gave the residue of his property to trustees to pay the income of a moiety to one of his daughters for life, and after her death as to such moiety, and the income thenceforth to become due for the same, upon trust for all her children who should be alive at her death, when and as they should attain twenty-one, in equal shares, with powers of maintenance and advancement:—Held, that the shares vested at the testator's death, and accordingly that the share of a child who was alive at his death, but died under twenty-one, was payable to her representative. *Downe's Trust, In re*, 23 L. T. 588.

A power to the trustees of a will "to apply the whole or such part as they shall think fit of the annual income of the share or presumptive share" of residuary legatees "during minority for or towards their education or maintenance" will not vest legacies or shares of residue that are contingent on the legatees attaining the age of twenty-one years. *Fox* v. *Fox*, infra, criticised and not followed. *Wintle, In re, Tucker* v. *Wintle*, 65 L. J., Ch. 863; [1896] 2 Ch. 711; 75 L. T. 207; 45 W. R. 91.

Gift of Income for Maintenance—Gift to Children at Twenty-one.]—Testator gave to trustees a sum of money upon trust to pay the income unto A. B. and his wife during their joint lives, and to the survivor for life, and after the decease of the survivor to apply the income

thereof, or of so much thereof as they should think proper, in the maintenance, education, and bringing up of their child or children during their minorities, and upon their attainment of the age of twenty-one years to pay and divide the principal sum, with the accumulations thereof, unto and equally amongst such child or children, and in case there should be no child, unto A. B., his executors, &c. Two out of four children, the issue of the marriage, died infants without having been married, and one child attained the age of twenty-one years, and died intestate without having been married :—Held, that the shares of the children did not vest till they attained the age of twenty-one years, and that the surviving child, who attained the age of twenty-one years and married, was entitled to the deceased children's shares. *Watson* v. *Hayes*, supra, followed, and *Fox* v. *Fox* infra, distinguished. *Grimshaw's Trusts, In re*, 48 L. J., Ch. 399 ; 11 Ch. D. 406 ; 27 W. R. 544.

A bequest of a legacy, upon trust to apply so much of the interest as the trustees should think proper in the maintenance of the testator's grandson until twenty-one ; and, upon his attaining that age, to pay the whole of the interest of the legacy to the grandson, for his life : and a direction that, after the decease of the grandson, the trustees were to stand possessed of the legacy and interest, and all accumulations, in trust for the grandson's children, with remainder, in default of such issue, over :—Held, that the provision for the maintenance of the grandson during his minority, out of the interest of the legacy, showed that the interest was intended for him ; that the legacy vested in interest (although not in enjoyment,) before the grandson attained twenty-one ; and that the grandson was therefore entitled to the interest which accrued during his minority, and was not applied in his maintenance ; that the unapplied accumulations accruing during the minority of the grandson did not go with the capital of the legacy, because the disposition of the capital after the grandson attained twenty-one was of the interest and certain specific accumulations, not including the accumulations during the minority. *Rouse's Estate, In re*, 9 Hare, 649.

A testatrix gave her residuary real and personal estate to trustees in trust for sale and conversion and investment of the proceeds, and to hold the investments upon trust to pay the income thereof, "or such part thereof as her said trustees" should "from time to time deem expedient," in or towards the maintenance and education of her children until they should attain their respective ages of twenty-one years ; and from and immediately after their attaining their respective ages of twenty-one years, then upon trust to pay and transfer the capital to her said children in equal shares, and to settle each daughter's "share whether original or accruing" ; and the testatrix empowered her trustees to dispose of any competent part, not exceeding one-half, of "the presumptive share of any of her children," for their advancement in life. The testatrix left three children, of whom two attained twenty-one, and the third died an infant :—Held, that the infant did not take a vested interest in his one-third share of the residuary estate of the testatrix. *Fox* v. *Fox*, infra, distinguished. *Parker, In re, Barker* v. *Barker*, 16 Ch. D. 44. And see *Mervin, In re, Mervin* v. *Crossman*, 60 L. J., Ch. 671 ; [1891] 3 Ch. 197 ; 65 L. T. 186; 39 W. R. 697.

Discretionary Trust for Maintenance till youngest Child attains Twenty-one—Assignable Interest.]—A testator directed his trustees, after the death of his wife, to apply the income of his estate "in and towards the maintenance, education, and advancement of my children in such manner as they shall deem most expedient until the youngest of my said children attains the age of twenty-one years," and on the happening of that event he directed them to divide his estate equally among all his children then living. The testator left four children, two of whom at the death of the widow in 1884 were of age, and the youngest was in his seventh year. After the decease of the widow, the trustees paid each of the adult children one-fourth of the income, and applied the other two-fourths for the benefit of the minors equally till 1886, when J. S. C., the eldest son, made an absolute assignment for value of all his interest under the testator's will to H. The trustees declining to pay one-fourth of the income to H. he took out a summons to have the construction of the will determined :—Held, that no child of the testator was entitled, prior to the attainment of twenty-one by the youngest of the testator's children, to the payment of any part of the income, and that the trustees were entitled to apply the income for the maintenance, education, or advancement of the children, including J. S. C., in their absolute discretion ; that H. was entitled to no interest in the income except such moneys or property, if any, as might be paid or delivered or appropriated for payment or delivery by the trustees to J. S. C. *Coleman, In re, Henry* v. *Strong*, 58 L. J., Ch. 226 ; 39 Ch. D. 443 ; 60 L. T. 127—C. A. But see *Blackmore* v. *Snee*, 1 De G. & J. 455.

Testator directed his trustees and executors to apply the income of his residuary estate for the maintenance, &c., of all his children, and to accumulate the surplus for their benefit, until the youngest should attain twenty-one, and then to divide the capital into as many equal shares as there should be children then living, one to be allotted to each, and to the issue of such as should be then dead, such issue taking their parents' share, the shares of sons to be paid, to them or their issue, on his youngest child attaining twenty-one, and the shares of daughters to remain in the hands of his trustees, upon trust to pay the interest for their lives for their separate use, and on the decease of each daughter or in case any of them should be dead leaving issue when his youngest child should attain twenty-one, then he directed his trustees to pay the share of each such daughter to her issue. One of the daughters who was living when the youngest child attained twenty-one, died a spinster :—Held, that she took an absolute interest in a share of the residue. *Hulme* v. *Hulme*, 9 Sim. 644.

Trust for Children at Twenty-two.]—Gift of residue of real and personal estate to A. for life, and after her decease, in trust for all her sons and daughters who should attain twenty-two equally, with a power to apply the "annual income or fund" for their maintenance or "benefit" during their "minority" :—Held, void for remoteness. *Thomas* v. *Wilberforce*, 31 Beav. 299.

A testatrix gave the interest of her residuary estate to her four sisters during their lives, and directed that, on their deaths, the interest of their respective shares should, at the discretion of her executor, be applied to the maintenance and

education, or accumulated for the benefit of the children of each of them so dying, until such children should respectively attain the age of twenty-two years, when they were to be entitled to their mother's share of the principal; with limitations over, in the event of the death of any of them under that age:—Held, that the children of the sisters were not to take a vested interest till they attained twenty-two, and that all the gifts, subsequent to the life estates given to the sisters, were void, as being too remote. *Vawdry* v. *Geddes*, 1 Russ. & M. 203; Tam. 361; 8 L. J. (o.s.) Ch. 63.

Trust for Children Attaining Twenty-three or Marrying Under.]—A testator gave the residue of his property to A. for life, with remainder to her children as she should appoint, and subject thereto, in trust for all the children of A. who should attain twenty-three or marry under; the will contained provisoes giving a discretionary power to the trustees to apply all or any part of the income of any share for maintenance and education during minority, and directing that the surplus income should be accumulated, such accumulation to be added to the principal of the share whence the same should have arisen, with a further discretionary power to apply the accumulated fund or any part thereof also for maintenance and education:—Held, that the gift to the children of A., in default of appointment, was void for remoteness. *Bowyer* v. *West*, 24 L. T. 414; 19 W. R. 598.

Trust to Transfer to Children at Twenty-five.]—Gift to trustees upon trust to permit A. to take the rents and profits for life, and after his decease in trust for all and every the children or child of A. who should live to attain twenty-five, but not otherwise: with a direction to the trustees to apply the annual income of the trust estates and premises for the use and benefit of the children of A. until they should severally attain the age of twenty-five:—Held, void for remoteness. *Cam* v. *Salmon*, 5 W. R. 31.

Where a testator gave residue to his four children, with a gift over to the survivors or survivor, in the event of any of them dying under twenty-five, and appointed guardians "during their respective minorities," and gave a power to apply accumulations of income of each child's share, "during his minority," in maintenance, &c.:—Held, that the word "minority" was used in its ordinary sense, and that each child was absolutely entitled to the income of his share, between the ages of twenty-one and twenty-five years. *Fraser* v. *Fraser*, 1 N. R. 430; 8 L. T. 20.

A testator directed his trustees to raise 15,000*l.*, and after the determination of certain prior life interests given to T. and his widow to divide and transfer one-fifth of the fund to and amongst the children of T. equally as and when they should respectively attain the age of twenty-five, applying from time to time the income of the presumptive share of each child, or so much as the trustees for the time being might think fit, for his and her maintenance and education until such share should become payable as aforesaid; but if T. should leave no children him surviving, or if he should, and they should all die before attaining the age of twenty-one, then to pay and transfer the said fifth part to the other persons therein referred to:—Held, that the children of T. took vested interests, and consequently that the gift to them was not void for remoteness. *Pulsford* v. *Hunter* (3 Bro. C. C. 416), and *Ashmore's Trusts, In re* (L. R. 9 Eq. 99, ante, col. 1645) dissented from, and not followed. *Fox* v. *Fox*, L. R. 19 Eq. 286; 23 W. R. 314. And see *Brennan* v. *Brennan*, [1894] 1 Ir. R. 69, ante, col. 1640. But see *Wintle, In re*, supra.

A testator directed his trustees to hold a trust fund upon trust for "all his children or any his child who being sons or a son should attain twenty-five, or being daughters or a daughter should attain twenty-one or marry, and if more than one, in equal shares, and to be divided and paid on the youngest of his said children attaining twenty-one"; and he empowered his trustees to apply "the whole or such part as they should think fit of the annual income to which any child should be entitled in expectancy towards the maintenance or education of such child." The testator had only two children, the elder a son, and the younger a daughter. Upon petition by the son, presented after the daughter had attained twenty-one but before he had himself attained twenty-five:—Held, that his interest under the will was not vested, but contingent on his attaining twenty-five. *Fox* v. *Fox*, supra, distinguished. *Dewar* v. *Brooke*, 49 L. J., Ch. 374; 14 Ch. D. 529; 28 W. R. 613.

Bequest to trustees, upon trust to pay to each of the testator's children who should be living at his death, as and when they attained twenty-five, the sum of 3,000*l.* absolutely, with a power for the trustees to apply all or any part of the income of the shares of the children for their maintenance or education till twenty-five:—Held, to give the children vested interests at the testator's death. *Eccles* v. *Birkett*, 4 De G. & Sm. 105; 19 L. J., Ch. 280; 14 Jur. 800.

Maintenance until Twenty-six—Account of Rents between Twenty-one and Twenty-six.]—Testator devised to trustees, in trust for N. and the heirs of his body, and to pay such sums out of rents for maintenance as B. should appoint: by codicil, he directs trustees, during N.'s minority, to pay rents to plaintiff, so much as she pleases for his maintenance, and the residue to her own use: by another codicil, he directs trustees shall not settle the estate on N. and the heirs of his body, till twenty-six, and till then such maintenance as trustees and plaintiff shall think fit:—Held, that rents vested in N. at twenty-one, and the time of receiving only prolonged till twenty-six; and trustees decreed to account for rents, &c., from N.'s age of twenty-one to twenty-six. *Smith* v. *Newport*, 2 Atk. 344.

i. Power to make Advances.

Gift to Children at Twenty-one.]—Held, that a bequest of personal estate, to be equally divided among the children of the testator, as a class, "on their attaining twenty-one," with a power of advancement to them "out of their respective portions," carried an immediate vested interest. *Vivian* v. *Mills*, 1 Beav. 315; 8 L. J., Ch. 239.

Bequest of residuary estate upon trust for testator's wife during her widowhood, and after her decease or second marriage in trust for all and every his child and children who should be living at his decease as tenants in common, to become vested in them respectively after the decease or second marriage of his wife when and as they should severally attain twenty-one, with interest on their respective shares for maintenance and education in the meantime, and with equal benefit of survivorship in case of

the death of any of them under age and without issue; with gift over, in case of the death of any of the testator's children in his lifetime or during the widowhood of his wife, leaving issue who should survive the decease or second marriage of testator's wife, to such issue of their parent's share. And the testator empowered his wife to advance to all or any of his children such sums as she might think advisable for their advancement in life, and to take their promissory note or receipt for the same; and declared that such advances should be received by his children and accounted for to his executors as part of their share of the estate, to which they would be entitled at the decease or second marriage of his wife, such advances not to exceed one-half of what they would at the time of such advances be considered as likely to be entitled to at the death or second marriage of testator's wife:—Held, that having regard to the proviso for advancement, and to the circumstance that any other decision would have resulted in intestacy as to the share in question, that one of five children of the testator who attained twenty-one, and died, leaving issue, which died during the widowhood of the testator's wife, took a vested interest in one-fifth of the estate, which passed on his death to his personal representatives. *Walker* v. *Simpson*, 1 K. & J. 713; 1 Jur. (N.S.) 675.

Gift to Nephew and Nieces at Twenty-one.]—Where a testator directed his trustees to pay all or any part of the residue of the income of his personal estate, so long as his mother should live, as in their discretion, and to the exclusion of any one or more of them, his trustees should think fit and proper, for the maintenance and education, or otherwise for the advancement of "my nephew A. W. and my nieces, the son and daughters of my late sister A.," and after the decease of his mother to pay an annuity, which he had given her, "for the benefit of my nephew and nieces," in the same manner, and for the same purposes as thereinbefore directed, until they should respectively attain twenty-one, and provided that, "in case my said nephew, or any or either of my said nieces," should marry under twenty-one, and die leaving issue, his trustees should make advances out of income for the benefit of such issue "as they may deem expedient or think fit," and directed that, immediately after the decease of his mother, and upon his nephew and nieces respectively attaining twenty-one, his trustees should transfer one equal share of the trust estate to each, and provided that, in the event of his nephew or either of his nieces dying under twenty-one, married and leaving issue, the issue should take their parent's share:—Held, that the gift to the nephew and nieces was made to them nominatim, and not as a class. *Barnshaw's Trusts, In re*, 15 W. R. 378.

Held, that the nephew and nieces who died under twenty-one, did not take vested interests. *Ib.*

Gift to Children at Twenty-five.]—Bequest to A. for life, with remainder to such of his children as should live to attain twenty-five, equally, with an imperative direction, that the interest thereof, while any person presumptively entitled should be under twenty-five, should be applied for his maintenance, and a discretionary power of advancement:—Held, void for remoteness. *Southern* v. *Wollaston*, 16 Beav. 166; 22 L. J., Ch. 664; 1 W. R. 86. But see *Eccles* v. *Birkett*, supra.

Nephews and Nieces "when and as" they attained Twenty-six.]—A testator directed his executors to invest his personal estate, and pay the dividends of one-third part to his daughter for life for the maintenance of herself and what issue she should have; and after her death his executors were to pay, apply, and divide one-third of the principal moneys unto and amongst all and every the children of his said daughter "when and as" they respectively attained the age of twenty-six years, with benefit of survivorship among them; and in case either of such children, at the time of his daughter's decease, should be under twenty-one, then the executors were to invest the principal share of such child, and during minority apply the interest for its maintenance; they were also empowered to apply any part of such child's share for advancement:—Held, that a direction to pay to an indefinite class "when and as" they attained a certain age, did not prevent any from becoming entitled, and that the intention of the testator, to be collected from other parts of the will, was to give the children of his son and daughter immediate vested interests. *Harrison* v. *Grimwood*, 12 Beav. 192; 18 L. J., Ch. 485; 13 Jur. 864.

Postponement of Enjoyment until Thirty.]—A. bequeathed his property to his four children in equal proportions, but the capital not to be divided until all his children should have become settled in life, except so much as should be required for their equipment in life or in professions, or until they severally became thirty years old, when the capital was to be placed at their own disposal respectively:—Held, that the children, on their attaining twenty-one, took vested interests, and were entitled to be paid their respective shares. *Jacob's Trusts, In re*, 7 Jur. (N.S.) 302; 4 L. T. 104; 9 W. R. 474.

3. WORDS OF CONTINGENCY, WHETHER EXTENDING TO A SERIES OF LIMITATIONS.

Death under Twenty-five or Marriage without Consent.]—Construction of gift over in case a daughter should die under twenty-five or marry without consent. Contingency extended to all the trusts of a legacy. *Thompson* v. *Teulon*, 9 Hare (App.) xlix.; 22 L. J., Ch. 243; 1 W. R. 97.

Survivorship.] — Bequest of residue equally between A. and B. (the wife of C.); and if C. survive B. for life, and afterwards to their four children:—Held, that the children took only in the event of C. surviving B. *Cattley* v. *Vincent*, 15 Beav. 198.

Marriage of Daughter and Settlement Made.]—A testator bequeathed to his daughter an annuity of 100*l.*, while she remained single, but on her marriage, and on some adequate provision made, and which he directed to be made by settlement for her for life and to the use of her issue, he bequeathed to and for her use 2,500*l.*, and in default of such issue, he bequeathed that sum for the benefit of his grandchildren who should be then living. The daughter married, but no settlement was made, and the annuity continued to be paid to her. She had an only child, who died in her lifetime under age:—Held, that the gift over did not take effect, and that her personal representative was entitled to the 2,500*l.* *Findon* v. *Findon*, 1 De G. & J. 380; 24 Beav. 83; 26 L. J., Ch. 561; 5 W. R. 485, 791.

Death in Testatrix's Lifetime.]—A testatrix

bequeathed the interest of long annuities to her sisters, and in case of one or both of their deaths before hers, gave "the whole of interest in long annuities" to her brother for life. At his death, half of the interest she gave to a daughter of the brother till she attained twenty-one, and "then to receive half the capital." Likewise the testatrix bequeathed to a son of her brother the other half:—Held, on the construction of the whole will, that the bequests to the niece and nephew were not contingent upon the sisters' deaths in the testatrix's lifetime. *Boosey* v. *Gardener*, 5 De G. M. & G. 122.

Marrying a First Cousin.]—A testator, by will, made in 1832, bequeathed a moiety of the dividends arising from stock standing in his name in the reduced 3*l.* 10*s.* per cents. to his niece, G., for life, and after her death the principal to her children, as she should appoint; and as to the other moiety, he bequeathed the same upon trust to pay the dividends to his niece O. for life, or until she "shall intermarry with any person who shall be her first cousin in kindred. In the event of her marriage with a first cousin, he gave her, in lieu of such bequest," the dividends of a smaller sum of stock, for life; and subject thereto, he gave the principal to G., "subject to the same trusts as are before expressed concerning her own moiety of the reduced 3*l.* 10*s.* per cents." O. never married her cousin, and died without issue:—Held, that the moiety to which O. was entitled for her life fell into, and formed part of, the residue of the testator's estate. *Gray* v. *Golding*, 6 Jur. (N.S.) 474; 8 W. R. 371.

Son Dying or Issue Failing.] — Testator appoints executors in trust to pay the interest of 1,000*l.* to his son for life, then to his son's children, and, if he left none, or they should die unmarried, and under age, bequeaths a moiety of the principal unto G. W. and his wife, or their children, and representatives:—Held, that the estate, which passed on the death of the testator, under the second disposition, was consonant to that limited under the first, not absolute, or vested; but remained in contingency, till the event of the son dying, or his issue failing, &c., determined to whom it belonged; the parents, if then living, being entitled; if not, in the next place, their children; or, finally, their representatives. *Fenoulet* v. *Passavant*, 2 Ken. Ch. 109.

Death or Second Marriage of Widow.]—A testator bequeathed the interest of his property in the funds to his wife for life or widowhood, and the capital at her death in equal shares unto and among the children of his brothers J. and E., and of his late brother S., as should be living at the death or second marriage of his wife. By a codicil, he declared it to be his wish, that H. M. M. (a niece) might have her share equally with his brothers' E. and S.'s children:—Held, that H. M. M. took her share absolutely, and not contingently upon her surviving the tenant for life. *Biggs* v. *Gibbs*, 5 De G. & Sm. 744.

Becoming Entitled to Real Estate.]—J. devised his real estate to his son M., for life, and after his death, if he leaves any issue male, to other persons, and to one of those other persons he gave the legacy of 500*l.* at twenty-one. M. died without issue. The legatee also died:—Held, that the legacy was not contingent on his becoming entitled to the real estate. *Baynes* v. *Bertie*, 5 Bro. P. C. 62.

Estate by Implication at Twenty-one.] — H. gives all his personalty to trustees upon trust as to all the yearly interest arising therefrom to his wife, "for her and my son's support, &c.," until twenty-one, and if he died under twenty-one, then the whole interest in bank stock to his wife for life, and after her death to S. for her separate use. The son died under twenty-one:—Held, that there was an intestacy; that the wife took one-third, the other two-thirds to the son, and that S. took nothing. *Fitz-Henry* v. *Bonner*, 2 Drew. 36; 2 Eq. R. 454; 2 W. R. 30.

And see ante, B. 2.

4. Interests Limited in Clear Terms of Contingency.

Failure of Contingent Legacy.]—A contingent legacy failed, the event which happened not being provided for, and no necessary implication in favour of the legatee. *Parsons* v. *Parsons*, 5 Ves. 579; 5 R. R. 120.

A legacy upon an express contingency which never happened failed, notwithstanding the apparent intention in favour of the legatee. *Holmes* v. *Cradock*, 3 Ves. 317.

A testator gives to his mother an annuity for life, and after her decease to his sister, if she be a widow, but not otherwise, but to revert back to his children after her death. At the death of the testator and of the mother, who survived him, the sister was a married woman:—Held, that the sister, on afterwards becoming a widow, was not entitled to the annuity. *Bartleman* v. *Murchison*, 2 Russ. & M. 136; 9 L. J. (O.S.) Ch. 60.

Limitations Over.]—Legacy in trust to pay the interest to the separate use of A. for life; and, after her decease, as to the capital for her children; if no child, to pay the interest to her husband during his life; and from and after his decease, in case he shall become entitled to such interest, then to pay the principal to other persons. Though the husband, having died during his wife's life, never became entitled to the interest, the limitation over was established; as distinguished from the case of express condition. *Pearsall* v. *Simpson*, 15 Ves. 29; 10 R. R. 1. See *Pyle* v. *Pyle*, 6 Ves. 779.

A testator gave his property, subject to a life estate, to his nephews and nieces, with a gift over in the event of the death of any of them leaving issue before the distribution of his estate. One of the nephews died in the testator's lifetime, leaving issue:—Held, that the gift over took effect. *Taylor* v. *Sparrow*, 12 Jur. (N.S.) 593; 15 L. T. 150; 14 W. R. 881—L.JJ.

Minority.]—A testator directed that when his youngest child attained twenty-one, his property should be divided into three shares, one for his wife, one for his daughter A., and one for his daughter M.; and that if either of the daughters should die before division, and leaving no surviving issue, her share should be given to her surviving sister; but if either of them should die leaving issue, her share should be divided among her surviving children. He directed the income to be applied to the support of his wife, and the support and education of the children "during their minority, or the minorities of either of them," and that each daughter should have 10*l.* pocket money "during the minority, or until division of the property." By a codicil he made a gift over, "should both children die in their minority and leave no issue." One daughter

attained twenty-one, and died unmarried; the other afterwards died a minor, and unmarried:—Held, that the words "in their minority," could not be construed as meaning "before the period of distribution," or "while either of them is a minor," and that the gift over had failed. *Maddison* v. *Chapman*, 3 De G. & J. 536; 28 L. J., Ch. 450; 5 Jur. (N.S.) 277; 7 W. R. 214. Affirming 4 K. & J. 709.

Testatrix bequeathed one moiety of the residue of her personal estate to her daughter H., for her separate use, during the joint lives of her and her husband; and if she survived him to her absolutely; if not, to such of her children living at her decease as should attain twenty-one; with a bequest over, if there were no such children, to another daughter, M., and her children; and she bequeathed the other moiety to M., for her separate use, during the joint lives of her and her husband, and, after her decease, to such of her children living at her decease as should attain twenty-one; and if there were no such children of M., to H. and her children, in like manner as the first moiety; with a proviso, that, if H. died in her husband's lifetime, and should not have a child living at her decease who should attain twenty-one, the second moiety was to go over to H.'s executors and administrators; and that, in like manner, the first mentioned moiety, in the event in which it was limited over, should, if M. had not a child living at her death who should attain twenty-one, go over to M.'s executors and administrators: by a codicil, the testatrix gave 1,500*l.*, if M. died without leaving any child who attained twenty-one, to H. and her children, in the same manner as was in the will directed touching the first-mentioned moiety of the residue; and in case both daughters died without leaving any child living who should attain twenty-one, she bequeathed the 1,500*l.*, together with all the residue of her personal estate, to A.: both the daughters died without issue, but H. survived her husband:—Held, nevertheless, that A. was entitled to the residue. *Hopkins* v. *Towle*, 3 Russ. 304. Affirming 1 Sim. & S. 337; 1 L. J. (O.S.) Ch. 155.

Accumulations.]—A testatrix directed that her trustees should stand possessed of the residue of her estate as to one moiety, and the dividends thereof, to pay the same to her daughter A. for life, and then upon trust as to the said moiety, and the dividends and accumulations thereof, until it should be payable and distributable, to pay the same to the children of A., who should survive her, at twenty-one, with benefit of accruer and survivorship; and she gave the other moiety in similar terms to her daughter B.; and in case, at the decease of either of her said daughters, there should be no children of such daughter who should have lived to attain a vested interest under the trusts of the will, then the moiety of the daughter so dying, and the dividends and accumulations thereof, to be held upon trust for the other daughter for life, and her children afterwards. And if upon the death of the survivor of the two daughters there should be no child or children of either who should have lived to attain a vested interest under the trusts in the two moieties, then the entirety of the said two moieties and the dividends and accumulations thereof to be held in trust for the testatrix's six nephews and nieces on attaining twenty-one. The daughter A. died before the testatrix, and she then made a codicil directing that her moiety should go to B. in the same manner as it would have gone to A. if she had lived; and she gave an annuity for the maintenance of the only daughter of A. until she should attain twenty-one. B. died, leaving six children:—Held, that the interest of the six grandchildren of the testatrix was not vested until they attained twenty-one, and the dividends must be accumulated; and that the nephews and nieces were not entitled under the gifts over, until default in the attainment of twenty-one by the grandchildren. *Bull* v. *Jones*, 31 L. J., Ch. 858; 10 W. R. 820.

And see ante, B. 3.

5. DIVESTING OF VESTED INTERESTS.

Contingency—Survivorship.]—Bequest to A. for life, and after her decease to B. and C., in equal moieties, and in case of the decease of either in the life of A., the whole to the survivor of them living at her decease. B. and C. have vested interests as tenants in common, subject to be divested only upon the contingency expressed. *Harrison* v. *Forman*, 5 Ves. 207; 5 R. R. 28.

A clear vested interest not divested, the express contingency upon which it was to be divested not having happened. *Ib.*

Bequest to A. for life, and afterwards to B.; but if he should be then dead, to C. and D. in equal shares, or the whole to the survivor of them. B. died in the life of the tenant for life, as did also C. and D.:—Held, that gift to C. and D. was a vested interest in them as tenants in common, subject to be divested if one only should survive the tenant for life. *Browne* v. *Kenyon* (*Lord*), 3 Madd. 410; 18 R. R. 261.

Bequest of residue to A. for life, and after the death of A. and B. to G. B. and H. B., to be equally divided between them, share and share alike, or to the survivor or survivors of them. G. B. and H. B. both died in the lifetime of the surviving tenant for life:—Held, that their representatives were respectively entitled to a moiety of the residue on the death of the surviving tenant for life. *Belk* v. *Slack*, 1 Keen, 238.

A bequeathed a legacy upon trust for his widow for life, and after her death for A. and B., in equal shares, "and in case of the death of either of them in the lifetime of my wife, then upon trust to pay the whole of the trust fund unto the survivor of them, A. and B., his executors, administrators, or assigns." A. died in the lifetime of the widow:—Held, that upon his death B. acquired an indefeasible vested interest in the whole fund. *White* v. *Baker*, 2 De G. F. & J. 55; 29 L. J., Ch. 577; 6 Jur. (N.S.) 591; 2 L. T. 583; 8 W. R. 533. And see *Clark's Trusts, In re*, L. R. 9 Eq. 378; 22 L. T. 151; 18 W. R. 446.

Under a direction, that, after the decease of A., a fund "should be transferred to A. B. and C. D., or the survivor or survivors":—Held, that A. B., who survived C. D., but died in A.'s lifetime, was entitled to the whole. *Antrobus* v. *Hodgson*, 16 Sim. 450; 18 L. J., Ch. 93.

Testatrix gave an annuity of 50*l.* to her son-in-law for his life, provided he remained unmarried, but if he should marry the annuity to cease; and, after his death or second marriage, she gave 1,000*l.* to be equally divided between her brother and sisters; and if they should not all be then living, she gave the share of him, her, or them so dying to be equally divided between them her surviving brother and sisters. The testatrix's brother and sisters all died in her son-in-law's lifetime, and he died unmarried:—

Held, that the brother and sisters took a vested interest in the 1,000*l.* as tenants in common. *Peters* v. *Dipple*, 12 Sim. 101.

—— **Event becoming Impossible.**]—When a legacy is given, subject to be defeated by a subsequent event, the legatee has an absolute interest till the event happens; and if the event become impossible, the legacy becomes absolute. *Lowther* v. *Cavendish* (*Lord*), Amb. 358; 3 Bro. P. C. 186.

—— **Event not Strictly Happening.**]—A legacy given absolutely will not be divested if the event on which it is given over does not strictly happen. *Page* v. *May*, 24 Beav. 323; 27 L. J., Ch. 242; 3 Jur. (N.S.) 1047; 5 W. R. 840.

After the cessor of a life estate, "a gift to three persons equally, or in case of the death of each or either of them, to be divided between the survivors or survivor, or their representatives":—Held, on the death of the three before the tenant for life, that their legal personal representatives were entitled to the fund. *Ib.*

Gift of personal property to trustees, to be settled on the marriages of the testator's daughters for their separate use, and on their deaths upon trust for their children, with a limitation over in the event of either of the daughters dying without having been married, or without leaving any children her surviving. The shares of the children of each daughter are vested, subject to be divested by all dying before their mother; and there being one alive at her death, the representatives of two who died before her were held entitled to their shares. *Bromhead* v. *Hunt*, 2 J. & W. 459; 22 R. R. 200. And see *Cross* v. *Cross*, 7 Sim. 201; 4 L. J., Ch. 38.

Testatrix bequeathed the residue of her funded property, in trust for her niece for life, and, after her death, to be equally divided amongst all her children, whether sons or daughters, share and share alike: in case it should happen that there was but one child at the niece's death, then to go to that one only child; and in case of failure of issue, to go as the niece should appoint by her will. The niece had eleven children; three of whom died in her lifetime:—Held, that all the children took vested interests, and, as more than one survived their mother, there was no divesting of interests. *Templeman* v. *Warrington*, 13 Sim. 267.

A testator gave a fund to trustees upon trust to pay the income to A. during his life, and after the decease of A. leaving issue, upon trust to pay, apply, assign, and transfer both principal and interest to and amongst all and every the child and children of A., equally to be divided between them, and if but one, then to such only child, to be paid to them, if sons, at twenty-one, and if daughters at that age or marriage, with benefit of survivorship; and in case there should be no child or children of A. at the time of his death, or if all and every such child or children should die before attaining twenty-one or marriage, then over. A. had eight children, of whom three died infants in their father's lifetime, two attained twenty-one and died in his lifetime, and three attained twenty-one and survived him:—Held, that the two children who attained twenty-one and died in their father's lifetime took vested interests, and that their representatives were entitled to share in the fund along with the children who survived their father. *Corneck* v. *Wadman*, L. R. 7 Eq. 80. And see *Skey* v. *Barnes*, 3 Mer. 335; 17 R. R. 91.

A testator directed that a legacy of 1,500*l.* should be set apart for the benefit of his daughter A. for life, and after her death the principal and capital to go and be divided amongst her children; "and in case she should have no child or children," then the same to go to and for the benefit of his son C. and his children in like manner. He made a similar bequest in favour of his son C., and directed that "in case both his son and daughter should die without leaving any issue him or her surviving," then the 1,500*l.* should go and be divided among his next of kin, and the remaining 1,500*l.* amongst the next of kin of his wife. A. married B., by whom she had one child only, who died in her lifetime. A. died, leaving B. and C. surviving her:—Held, that the child of A. took a vested interest in the legacy of 1,500*l.*, which was not cut down by the subsequent bequest over, and that B. was entitled to the capital as the legal personal representative of his daughter. *Whyte* v. *Collins*, 6 Jur. (N.S.) 1281; 3 L. T. 263.

Testator gave to his son for life, and if his son should die without leaving lawful issue living at his death, then for "all and every his brothers and sisters, and the issue of such as should be then dead, such issue taking only the share their parents would have been entitled to if living":—Held, that a brother surviving the testator, but predeceasing the tenant for life, took a vested interest, and his representatives were entitled. *Etches* v. *Etches*, 3 Drew. 447; 4 W. R. 307.

Held, also, as to a sister who survived the testator, but died before the tenant for life, leaving a child, who also died before the tenant for life, the representatives of that child were entitled. *Ib.*

Bequest to Illegitimate Children of Person Dead at Date of Will.]—A testator bequeathed trust funds and moneys "in trust for all the children, to be equally divided amongst them, their respective executors, administrators, and assigns, of my brother, H. M. W., of my nephew, A. W. D., of my sister, H. C. D., and of my niece, M. B., of Jamaica, and my nephew, G. D. himself (if he shall be then living, but not otherwise, G. D. taking a share with all such children), and the respective shares of such children to be absolutely vested on my decease." H. M. W. was dead at the date of the will. He left three illegitimate children only, who survived the testator. The evidence of the marriage of H. M. W. with the mother of his children, was defective. There was, however, enough in the case to enable the court to presume that the testator was aware of the state of H. M. W.'s family:—Held, following *Herbert's Trusts, In re* (1 J. & H. 121; 29 L. J., Ch. 870), that (assuming the children of H. M. W. to be illegitimate) still they could take under the bequest. *Milne* v. *Wood*, 42 L. J., Ch. 545.

Death before attaining Twenty-one.] — A legacy was given to testator's son A., when he attained twenty-five, with a proviso that should any of the testator's sons or daughters die before attaining twenty-one, "the legacy hereby bequeathed, or share of the residue" of such sons or daughters should go to the survivors:—Held, that the legacy vested in A. at twenty-one. *Gunning's Estate, In re*, 13 L. R. Ir. 203.

Recovery of Person of Unsound Mind and Appointment by Him.]—Bequest of 1,000*l.* in

trust to apply the income for the maintenance of E., a person of unsound mind, for life, and in case E. should recover sanity, in trust as to the principal as E. should by will appoint; and in default of such appointment, then, after the death of E., to pay the principal of the bequest to J. And the testator directed that in case of the death of any of his legatees before the legacy to such legatee should become vested or payable, the legacy which should so lapse by the death of the legatee should go to P. E. survived J., and died without recovering:—Held, that the 1,000*l.* vested in J. as a reversionary legacy, subject to be divested on an appointment by E., in the event of recovery which did not happen; that it was not subject to the gift over by J.'s death in the lifetime of E.; and that the gift over applied only to legacies lapsing by the legatee predeceasing the testator. *Beddy* v. *Courtnay*, 19 L. R. Ir. 245.

Death "Unmarried."]—Gift to A. for life, with remainder in case A. died unmarried (as happened) between B. and C., "or such of them as should be then living," and the lawful children of such of them as should be then dead, "for the share of the father or mother deceased only." B. and C. died in the lifetime of the tenant for life. B. had issue, C. had none:—Held, that C.'s interest was not vested, and that his representatives were not entitled. *Willis* v. *Plaskett*, 4 Beav. 208; 5 Jur. 572.

A husband bequeathed 600*l.* (after the death of his wife) to his two daughters, A. and B., in equal shares; and if either of them should die in the lifetime of his wife, to such of her children as should attain twenty-one; "but if there be one such child" then upon the trusts of the other moiety:—Held, that the gift over was good, though A. died in her mother's lifetime unmarried. *Moore* v. *Beagley*, 33 L. T. 198. And see *Jones* v. *Davies*, 28 W. R. 455.

—— Without Issue.]—Gift of a legacy upon trust for A., a son of the testator, for life, remainder to any wife he might marry, for life, remainder to his children absolutely, with a gift over, "in case he should die unmarried and without issue, to B., C., and D., or such of them as should be living at his decease absolutely." A. died a widower, and without having had any children. B., C., and D. all died in A.'s lifetime:—Held, that the interests of B., C., and D., though depending on a contingency, were transmissible, and that their representatives were entitled to their shares. *Sanders' Trusts, In re*, L. R. 1 Eq. 675; 12 Jur. (N.S.) 351; 14 W. R. 576.

Legacy on condition to be void, in case the legatee should succeed in the event of the death of A., without issue of her body; payment decreed in the life of A., and without security. *Fawkes* v. *Gray*, 18 Ves. 131; 11 R. R. 168.

Bequest of 1,000*l.* to the children of J. W., to be paid to them or the survivors or survivor of them after the decease of the testator's wife (who was to have the interest for her life), share and share alike; and also 1,000*l.* to a trustee after the decease of testator's said wife, in trust to permit R. W. after the decease of testator's said wife, to receive the interest thereof for his life; and if the said R. W. should die, leaving issue, to divide the 1,000*l.* among such issue, &c.; and if the said R. W. should die without such issue, the 1,000*l.* to go to and among the children of the said J. W. in the same manner as the 1,000*l.* so bequeathed to them as aforesaid. R. W. survived testator's widow, and died without issue. Only two of the children of J. W. survived the testator's widow, but all of them died during the lifetime of R. W.:—Held, that the two children of J. W. who survived the testator's widow, took, as to the second legacy, vested interests transmissible to their representatives. *Luby* v. *Hamilton*, 1 Ir. Eq. R. 305.

Bequest to A. for life, and, after his decease, to his eldest son; but in case A. should "die under age without issue," over:—Held, that the word "and" was not to be read "or," and that A.'s son, in his father's lifetime, took a vested interest not subject to be divested. *Malcolm* v. *Malcolm*, 21 Beav. 225.

Children Living at Death of Tenant for Life.]—Bequest to A. for life, and then to be equally divided between her three children, or such as shall be living at her death. Children took vested interests and transmissible to representatives, subject to be divested only in favour of those who should be living at the prescribed period. *Sturgess* v. *Pearson*, 4 Madd. 411; 20 R. R. 316. See 6 Madd. 250.

Marriage over Twenty-one.] — Testator bequeathed a sum of money in terms which by themselves were sufficient to carry the absolute interest to his daughter in the event of her attaining twenty-one, and, in the event of her dying under that age, then over. He then directed that, should his daughter live to marry, her interest in the money was to be enjoyed by her during life, with remainder to her children. She attained twenty-one, and then married:—Held, that she was entitled to the money absolutely, the contingency provided for by the latter clause being a marriage under twenty-one. The statement in a will of the date of a legatee's birth is primâ facie taken to be correct. *Vulliamy* v. *Huskisson*, 3 Y. & C. 80; 2 Jur. 656.

Single Child Surviving Father.]—Under a bequest of the interest of a fund to a person for life, "and after his death to divide the said sum, and any interest that may be due thereon at his death, among all his children equally, and if he leave but one child then to give the whole sum to such one child," the children take a vested interest in their respective shares, as tenants in common, liable to be divested as to children dying in the father's lifetime, in favour of a single child surviving him, should such an event happen. *Kimberly* v. *Tew*, 2 Con. & L. 366; 4 Dr. & War. 139; 5 Ir. Eq. R. 389.

Granddaughters Marrying a Relation of a Certain Person.]—The testatrix directed her residuary estate "to be divided equally" between her two granddaughters on the youngest attaining twenty-one. She added, "if both marry a relation of J. D. everything belonging to me is to be divided between my nephews and nieces." The granddaughters having attained twenty-one and being still unmarried, the court declined deciding the validity of the gift over, but held that they were entitled to payment, subject to any future question. *Hird* v. *Pinckney*, 34 Beav. 273.

Daughter Dying in Lifetime of Husband Leaving Issue.]—Bequest of stock to trustees, to pay the dividends thereof to the testator's daughter M., the wife of G. W., for her separate

use, free from the control of her husband; and after the decease of G. W., in case M. should be then living, and without issue, upon trust to transfer the stock, and the interest unto M., to and for her own use and benefit; and in case M. should die in the lifetime of her husband G. W., leaving a child or children, then upon trust to transfer the stock, and the interest and produce thereof, to all and every such child or children equally, and if but one, then the whole to such one. M. died in the lifetime of G. W., without issue:—Held, that G. W., as personal representative of M., was entitled to the stock, and the dividends thereof. *Whipple* v. *Martyn*, 14 Jur. 361.

Deaths of Tenants for Life in a Certain Order.]—A testator gave life estates in some personal property to his sisters, Mary and Harriet, in succession, and, after their deaths, equally to his two brothers, Robert and John, to do as they pleased with; but in case his sisters, Mary and Harriet, should survive Robert and John, after their deaths, to go to A. and W. Robert died first, Mary second, John third, and Harriet last:—Held, that the contingency had not happened, and that the representatives of the brothers whose interest had not divested, were absolutely entitled. *Terrell* v. *Cooke*, 5 L. J., Ch. 68. And see *Minor's Trust, In re*, 28 Beav. 50.

Death in Life of Tenant for Life Leaving Children.]—Bequest to the testator's wife for life; and after her death to be divided between his brothers and sisters in equal shares: but in case of the death of any in life of the wife the shares of him, &c., so dying to be divided between his, &c., children:—Held, vested, subject to be divested only by death in the life of the widow, leaving children. Therefore the representative of one, who died in her life, never having had a child, entitled. *Smither* v. *Willock*, 9 Ves. 233.

Testator bequeathed 1,500*l.* stock to trustees in trust for his daughter for life, and after her decease for her children, but, if she should have no children, then he directed his executors to stand possessed of the fund in trust to pay or transfer the same equally unto and between his three nephews, A., B., and C., and his niece, and the survivors or survivor of them, share and share alike. The nephews and niece survived the testator and died in the lifetime of the daughter, who died without ever having a child:—Held, that the representatives of the nephews and niece were entitled in equal shares. *Wagstaff* v. *Crosby*, 2 Coll. C. C. 746.

Children Dying during Minority.]—A. devised 600*l.* apiece to his two daughters, and the residue of his personal estate to his son, and, if either of his children died during their minority, the survivors to be heirs to the deceased by equal portions; the son died, and one sister brought a bill against the executors and the other sister, to have her own 600*l.* and one-half of her brother's personal estate, which was decreed, upon her giving security to pay back her own 600*l.* in case she died during her minority. *Pate* v. *Hatton*, 1 Ch. Ca. 199.

Brothers Surviving Sister and her Husband.]—A testator, by his will, directed his daughters' fortunes thereby bequeathed to be settled, to the intent that, should any of them die without issue, then, on the decease of their respective husbands and themselves, their fortunes should revert to their surviving brothers, share and share alike. A daughter died in the lifetime of three brothers, leaving a husband, who survived the three brothers:—Held, that the husband was entitled to his wife's fortune absolutely. *Eaton* v. *Barker*, 2 Coll. C. C. 124; 9 Jur. 822.

And see, ante, B. 4.

6. Cross Executory Limitations in Personal Estate.

Cross Limitations Implied.]—Vesting of a legacy postponed to time of payment, and a limitation over in the nature of a cross remainder implied from the general intention. *Mackell* v. *Winter*, 3 Ves. 236, 536. *See* 5 R. R. 32, n.

—— **Twenty-one or Marriage.**]—One having a wife and three daughters devises 900*l.* to his three daughters equally, payable at their respective ages of twenty-one or marriage, and, if all die before their legacies were payable, then the whole to the mother. If two of the daughters die before their shares become due, the surviving daughter is entitled to the whole. *Scott* v. *Bargeman*, 2 P. Wms. 68; 2 Eq. Cas. Abr. 542, pl. 12.

Bequest to the child or children of the testator's two daughters in terms creating a tenancy in common, viz., equally to be divided, &c., to be paid at twenty-one or marriage of daughters, with survivorship upon the death of any before his or their shares become payable; the accrued share to be equally divided, and to be payable, &c., as the original shares; the issue of any dying in the lifetime of the two daughters to stand in the place of the parent, and a limitation over in case his daughters die without issue, or, having had issue, such issue should die in the lifetime of his daughters. The event of a death of a child above twenty-one not being within the survivorship expressed, his interest vested in his representative, subject to the ultimate contingent limitation. *Bayard* v. *Smith*, 14 Ves. 470.

—— **Surviving Children of Daughters at Twenty-one.**] — Testator gave an annuity, to which he was entitled for the life of E., to his daughter L. for life, and, after her death, to her children; but if she should not have any who should survive E., then to such persons as should then be entitled to the testator's personal estate. He then disposed of all his estate amongst his sons and daughters, giving the shares of his sons to them, absolutely, and the shares of his daughters to trustees for them, for their respective lives, and, after their deaths respectively, to apply the interest of the shares of his daughters respectively, for the maintenance of their respective children until they attained twenty-one, and then to divide the principal amongst such children respectively, as should attain that age. But if all such children of his daughters respectively, or both of them, should die under twenty-one, then upon trust to pay the said trust money to such persons as should then be entitled to his personal estate. A., one of the testator's daughters, died, leaving children who attained twenty-one; then L., the only other daughter, died without issue:—Held, that cross limitations were not to be implied between the children of the daughters, and that the persons who were to take under the gift over were not sufficiently described, and, therefore, that the annuity and L.'s share of the

residue must go as in case of an intestacy. *Turner* v. *Frederick*, 5 Sim. 466; 2 L. J., Ch. 2.

—— **Lapse.**]—Bequest of personal estate, after the death of the tenant for life, in trust to pay equally between A. and B. But if "neither" should be then living, to C. A. died in the lifetime of the testatrix. B. survived the tenant for life, and claimed the whole, either as surviving joint tenant or under a gift to her by implication. The court rejected such claim, and held, that the moiety intended for A. had lapsed, and belonged to the next-of-kin of the testatrix. *Baxter* v. *Losh*, 14 Beav. 612; 21 L. J., Ch. 55. And see *Skey* v. *Barnes*, 3 Mer. 334; 17 R. R. 91.

—— **Gift Over on total Failure of Issue.**]—A testator devised real and personal estate to A. for life, with a direction to the executors, after A.'s death, to divide it amongst all her children and their lawful issue, share and share alike. There was a gift over of the leaseholds to other persons, on a total failure of issue of the children:—Held, that the children took estates tail in the realty, and absolute interests in the personalty; and that cross remainders were not to be implied in regard to the leaseholds. *Beaver* v. *Nowell*, 25 Beav. 551.

A testator gave a moiety of his estate to the children of A., and the other moiety to the children of B. The will contained a single clause of survivorship and accruer applicable to all the children, and not, in terms, distributive, with a gift over if there should be no children of A. and B., "or of either of them," or being such, all such children should die without having attained a vested interest:—Held, that there were no cross remainders between the two classes of children, and that on the death of A. without having been married, the children of B. would not take the first moiety. *Edwards* v. *Tuck*, 23 Beav. 268.

Bequest of 500*l.* to A., and in case of her death, either before or after the testator, to devolve to her child or children, or in the event of their being also dead at her decease to B. There were three children, one of whom only survived:—Held, that he was entitled to the whole fund. *Currie* v. *Gould*, 4 Beav. 117; 10 L. J., Ch. 304.

Devise of copyholds to A. for life, remainder to the eldest or only son of A. and the legal and customary heirs respectively of such eldest or only son for ever; provided that if A. leave no son or issue of a son living or in ventre sa mere at his death, then the testator gave the land to the daughters or only daughter of A., as tenants in common, and their respective legal and customary heirs for ever; provided that if A. having neither son nor daughter nor issue of a son or daughter living or in ventre sa mere at his death, then over. A. had a son and daughters, but left no son or issue of a son living at his death:—Held, that all the daughters, and not those only who were living at A.'s death, took, as tenants in common in fee, so that those who died in A.'s lifetime had descendible contingent interests. *Rider* v. *Wood*, 1 K. & J. 644; 3 Eq. R. 1064; 24 L. J., Ch. 737.

Held, also, that the devise to the daughters was not a gift to a class, to be ascertained at the death of the tenant for life, within the principle of *Currie* v. *Gould*, supra. *Ib.*

Testator directed the dividends of two sums of stock to be equally divided between all his nephews living at his decease, and after the decease of any of them, the capital of his share to be sold and the proceeds to be divided amongst his children; and in default of such issue then to go and be divided amongst the children of A., and in case all A.'s issue should be dead, then to be divided amongst the children of B. A. had four children. Three of them died, and then one of the testator's nephews died without issue:—Held, that the three deceased children, as well as the surviving child of A., took vested and transmissible interests in the deceased nephew's share of the stock. *Cohen* v. *Waley*, 15 Sim. 318; 10 Jur. 767. S. P., *Templeman* v. *Warrington*, 13 Sim. 267. And see *Bromhead* v. *Hunt*, 2 J. & W. 459.

—— **Death without Issue or before Twenty-one.**]—Although the operation of a bequest of a residue by a father to his two children, to be equally divided between them, and if they should die without issue, or before twenty-one, to go over, would be to give vested legacies to be divested only on the deaths of both children under twenty-one, and without issue; and the representative of one of the children dying under twenty-one, and without issue, would be entitled till the happening of that event; yet the intention that the surviving child should take the whole, sufficiently appearing on the will, controls the effect of the bequest to the deceased child, and the survivor held to be entitled to the residue, subject to the event on which the whole was given over. *Beauman* v. *Stock*, 2 Ball & B. 406.

—— **Survivor of Life Tenants in Common.**]—A testator gave a residue upon trust to pay the produce thereof between his grandchildren A. and B., during their respective lives, in equal shares, and after the death of A. and B. to transfer the capital unto and amongst the children of A. and B. in equal shares, and if there should be no children living at their decease then upon trust for his personal representatives. A. died, leaving children, in the lifetime of B.:—Held, that B. was entitled to the whole for life. *Pearce* v. *Edmeades*, 3 Y. & Coll. 246; 8 L. J., Ex. Eq. 61; 3 Jur. 245. And see *Cooper* v. *Macdonald*, 42 L. J., Ch. 539; L. R. 16 Eq. 258.

A father gave his residuary personal estate upon trust to pay the income equally between his three daughters F., E., and C. during their lives; and if all or any of them should die leaving issue, to pay one-third of the principal amongst the issue of each daughter so dying, in equal shares; and if only one such daughter should die leaving issue, then to pay and apply the whole residue equally amongst the issue of such one daughter; but if all the daughters should die without leaving issue, then over. C. died leaving issue, and afterwards F. died without leaving issue:—Held, that cross limitations were to be implied between the daughters and their families, and that the issue of each daughter was, for all purposes, to be ascertained at her own death; and that, therefore, one moiety of F.'s share was payable to the issue of C. living at C.'s death, and the other moiety went by way of accretion to E.'s original share. *Ridge's Trust, In re*, 41 L. J., Ch. 787; L. R. 7 Ch. 665; 27 L. T. 141; 20 W. R. 878.

C. directed that his residuary real and personal estate should be sold and converted, and that his trustees should hold four-sixths of the proceeds for three reputed daughters and a lawful daughter (naming them) of his brother during their lives, and after their

deaths for their children respectively, as they should respectively appoint, and in default of appointment, for the children of the four daughters, in equal shares, with cross executory trusts as between the children of the same parent as regards the shares of male children dying under twenty-one and female children dying under twenty-one and unmarried, with an ulterior trust in case the four daughters should all die without leaving any child or children, or, leaving such, if such children should all happen to die under twenty-one, and without having been married. One of the four legatees died without having been married:—Held, that, as to her share, cross limitations must be implied between the other three legatees and their children, corresponding with the limitations contained in the will of the original shares. *Clark's Trust, In re*, 2 N. R. 386; 32 L. J., Ch. 525; 8 L. T. 571; 11 W. R. 871.

Held, also, that no such cross limitations could be implied as to the share of any daughter after once a child of that daughter had attained a vested interest, even though the daughter might subsequently die without leaving a child, the proper function of the cross limitations being not to divest any estate once vested, but merely to supply the gap left by the testator. *Ib.*

—— **Original and Accruing Shares.**]—A will contained a trust of real and personal property during the lives of five children and the survivor to divide the income into five parts, and pay one-fifth to each, if living, or if dead to their respective children or issue, the latter taking equally between themselves in classes the one-fifth share which the parent, if living, would have taken. And if any one of the five children died without leaving children or issue, or if such issue failed during the period, the share of such children or issue to belong to the others of the testator's children and their issue in the same way as original shares. This clause to apply to accruing as well as original shares, and upon the death of the last surviving child the capital to testator's grandchildren in classes, per stirpes. One child died leaving children. One of the grandchildren died, leaving one child, Lucia, who died unmarried before the time had expired:—Held, upon a special case to determine what became of Lucia's share of income—that she took only a life interest, and that on her death her share went equally among her uncles and aunts and their issue, per stirpes, cross limitations being implied to effect this. *Hudson, In re, Hudson* v. *Hudson*, 51 L. J., Ch. 455; 20 Ch. D. 406; 46 L. T. 93; 30 W. R. 487. And see *Rabbeth* v. *Squire*, 4 De G. & J. 406; 28 L. J. Ch. 565; 7 W. R. 657.

—— **Rules Deducible from Authorities.**]—Rules deducible from the authorities:—1. Cross executory limitations in the case of personal estate, like cross remainders of real estate, are only implied to fill up a hiatus in the limitations which seems from the context to have been unintentional. 2. They cannot be implied—as cross remainders could not—to divest an interest given by the will. 3. The existence of other cross limitations between different persons does not prevent the implication. 4. But where such express cross limitations are in favour of the persons to whom the implied cross remainders would convey the property, that circumstance is of weight in determining the intention. *Ib.*

See also ante, B. 5.

Implication of Gift to Survivors.]—*See* WILL.

7. EXECUTORY BEQUESTS.

a. Failure of Prior Gift. Effect on Executory or Substituted Gift.

General Rule.]—As a general rule, when a bequest is take effect after the failure of a prior gift, the total failure of the latter does not prevent the ulterior gift taking effect. *Tennant* v. *Heathfield*, 21 Beav. 255; 25 L. J., Ch. 197; 2 Jur. (N.S.) 33.

Distinction between a series of limitations all dependent on the same contingency and successive limitations, each intended to take effect upon the failure of all those prior to it. *Ib.*

Gift to A. for life, and after her death to her children, and in case of their death before the vesting of their shares in trust for her next-of-kin; the daughter never had any children:—Held, that her next-of-kin were nevertheless entitled. *Ib.*

Contingency not happening.]—A. devised a term for years to his wife for life, and after her death to the child she was then enceinte with, but, if such child died before twenty-one, then he devised one-third part of the said term to his wife, whom he made executrix. The wife not being enceinte at the time of the devise:—Held, first, that the devise to her was good, though the contingency never happened; secondly, that she should have the undisposed surplus of the personal estate, and not to go in a course of administration. *Jones* v. *Westcomb*, Pre. Ch. 316; 1 Eq. Cas. Abr. 245.

Condition Precedent or Subsequent—Substantial Fulfilment of Condition.]—A testator, after giving a life interest to his wife, bequeathed certain stock to his four sons, A., B., C. and D., provided D. should be of sound mind at the time of the decease of his wife. But in case he should be insane at that period, then he directed that the stock should be divisible between his sons, A., B. and C. D. died insane in the lifetime of the testator's wife:—Held, that D. did not take any vested interest in such stock, and his share was divisible in thirds, and payable to the three other sons. *Chappell's Trust, In re*, 6 L. T. 643; 10 W. R. 573.

Power of appointment in a tenant for life, subject to the condition of her remaining sole and unmarried, which condition was qualified by a proviso that a marriage with the consent of A., B. and C., should not determine that power:—Held, a condition subsequent, and becoming impossible by the death of A., B., C., the marriage of the tenant for life after their death, without their consent, did not determine the power. *Aislabie* v. *Rice*, 3 Madd. 256; 18 R. R. 230.

Limitation over after a limitation, which never took effect, established; not operating as a condition precedent. *Meadows* v. *Parry*, 1 V. & B. 124; 12 R. R. 198.

Wife having absolute power of appointment over 5,000*l.*, appointed it in favour of her daughter, but in a certain event directed it to be divided between her son and her daughter, desiring that her husband should have the free use of the interest of the 5,000*l.* till his death:—

Held, that the husband took a life interest in the 5,000*l.* in any event. *Darby* v. *Darby*, 18 Beav. 412.

Construction of a residuary clause, after a bequest to the testatrix's younger children, "but in case I shall have but one child living at the time of my decease," or all but one die under twenty-one and unmarried, to another family, not a condition. Residuary bequest is therefore established in the event of the testatrix's death, having never had a child. *Murray* v. *Jones*, 2 V. & B. 313; 13 R. R. 104.

Gift in remainder "in case A. B. should die under twenty-one without issue, or leaving issue all of them should die before twenty-one":—Held, not to take effect on A. B. dying unmarried and above twenty-one. *Leonard* v. *Flight*, 4 L. J., Ch. 225.

Failure by Lapse.]—Bequest of a contingent interest in personalty void, where the preceding gift never vested, owing to a lapse. *Miller* v. *Faure*, 1 Ves. sen. 85.

A testator, after bequeathing a sum of long annuities to his wife for life, gave the capital after her death, to A., if he shall be living at her decease; and if not, to A.'s son; A. outlives the wife, but both he and the wife die in the testator's lifetime:—Held, that the legacy to A. lapsed, and that the gift to his son did not take effect. *Williams* v. *Jones*, 1 Russ. 517.

Bequest to a son of the testator on his accomplishing his apprenticeship, with the dividends in the meantime for maintenance; and in case he shall die before he accomplishes his apprenticeship, then, and in such case, to the other children. The legacy lapsed by the death of the legatee, having accomplished his apprenticeship in the testator's life. *Humberstone* v. *Stanton*, 1 V. & B. 385; 12 R. R. 243.

Event not in Terms provided for.]—A legacy was given in trust for P., who was then unmarried, and who never married, for life, for her separate use, without power of anticipation, with remainder to her children; and in case there should be no child who should attain a vested interest, in trust for P. absolutely, "if she should survive her husband, but if she should die in his lifetime" as she should by will appoint, and in default in trust for her next-of-kin, as if she had died intestate and unmarried:—Held, that P. was absolutely entitled to the legacy, although the event of her dying unmarried was not in terms provided for. *Broch* v. *Bradley*, 33 Beav. 670; 4 N. R. 529; 10 Jur. (N.S.) 815; 11 L. T. 16; 12 W. R. 1136.

By a marriage settlement, property belonging to the intended wife was conveyed to trustees, upon trust (after the death of the husband and wife) for the children of the marriage in the usual way. It was declared, that, if all the children should die, the trustees should convey the property to A., B. and C. There never was any issue of the marriage:—Held, that, although the language of the deed only provided for default of issue, the gift over took effect. *Osborn* v. *Bellman*, 2 Giff. 593; 6 Jur. (N.S.) 1325; 3 L. T. 265; 9 W. R. 11

A. made a will by which, under a power of appointment reserved to her in her father's will, she bequeathed her property to her husband; "and in case my husband shall die in my lifetime," to W. The husband made a will in the same terms. The husband and wife were by the same wave swept off the deck of the vessel in a storm at sea, and were drowned. No evidence was given to prove that one survived the other:—Held, that W. could not claim under either will, and that the property went over to those who by the father's will were to take in default of appointment by the daughter. *Wing* v. *Angrave*, 8 H. L. Cas. 183; 30 L. J., Ch. 65. *S. C.*, nom. *Underwood* v. *Wing*, 19 Beav. 459; 4 De G. M. & G. 633; 3 Eq. R. 794; 24 L. J., Ch. 293; 1 Jur. (N.S.) 169; 3 W. R. 228.

The union of the two titles of W. did not affect the case, for he could not succeed in one because he could not succeed under the other, but was bound to establish his claim clearly under one or the other. *Ib.*

Charge contingent on Eldest Son coming into Possession.]—A father, by will, gave to each of his younger sons 1,000*l.*, "which I charge on my estate at A., hereinafter devised to my eldest son, but I direct that the sum shall not be raisable or paid to them respectively until my eldest son shall come into actual possession of the M. estate." The M. estate was settled on F. for life, remainder to the eldest son of the testator for life, remainder to his issue in tail male. The eldest son died before F., and without coming into possession of the M. estate:—Held, that the legacies to younger sons were wholly contingent upon the eldest son becoming owner of the M. estate; and that as that event had not happened they failed and sank into the residue. *Taylor* v. *Lambert*, 45 L. J., Ch. 418; 2 Ch. D. 177; 34 L. T. 567; 24 W. R. 691.

A testator gave one-fifth of the interest of a fund in the following proportions: namely, one-fifth to M., and two-fifths each to C. and J.; if M. should die without issue, which event did happen, her fifth was to go between C. and J. for their lives, if living at M.'s decease, or if only one, to him; if C. should leave issue, they should be entitled to the principal moneys the interest whereof was given to C. for life; but if he should die without issue in the lifetime of J., all benefit of the bequest to C. should go to J.; and if J. should die without having succeeded to, and been in actual possession of, the family estate, for a certain time, leaving issue other than an only son, such issue should be entitled to all the principal moneys the interest whereof J. might be entitled to as aforesaid. Then followed a gift over of all benefit intended for J., in case he should die in the lifetime of C., either without issue, or without issue other than an only son, or having been in possession of the estate for a certain time. If both C. and J. should die without issue, to be entitled as aforesaid to the bequest, the whole property should go as the survivor should think fit. J., having survived M., died in the lifetime of C., leaving a daughter, and without having been in possession of the estate; and then C. died without issue:—Held, that the daughter of J. was entitled to the whole fund. *Newburgh (Earl)* v. *Eyre*, 4 Russ. 454; 6 L. J. (O.S.) Ch. 153.

Wife Surviving her Husband.]—Bequest in trust for the wife and children of H. during his life; and from and after the decease of H., in trust to pay it to his children then living, reserving one-fifth for his wife for her life, which, immediately on her death, was to be divided amongst H.'s children generally:—Held, that the reservation of the one-fifth for the wife and

children was contingent on the wife surviving H., and she having pre-deceased him, that it did not take effect. *Patch* v. *Sparkes*, 30 Beav. 515; 8 Jur. (N.S.) 297; 10 W. R. 239.

Death of Son in Mother's Lifetime, a Bachelor.]—Testator bequeathed a sum of stock to his wife, and after her decease to his three sons, to be equally divided amongst them, if they should be all living at the decease of his wife; but if any or either of them should die in her lifetime, leaving a child or children, such child or children who should be living at the time of the wife's death should be substituted in the place of such of his sons who should so happen to die, and take his, her, or their parent's share. All the sons died in the wife's lifetime, two of them leaving children who survived the wife; the third died a bachelor:—Held, that one-third of the stock fell into the residue. *Hustler* v. *Tillbrook*, 9 Sim. 368.

Daughter Dying Unmarried.] — Testator bequeathed a sum in trust for his daughter (a single woman) for her separate use, independently of any husband she might have, and after her death in trust for her children, and, if no children then if she should survive any husband she might have, for her absolutely, but if her husband should survive her then as she should appoint, and in default of appointment for her next of kin. The daughter died unmarried:—Held, that she only took a life interest, the apparent intention being to give the corpus only in the event of her marrying. *Lenox* v. *Lenox*, 10 Sim. 400; 9 L. J., Ch. 83; 4 Jur. 5.

Bequest of money to trustees on trust to invest in the public funds, and pay the dividends to A. until marriage, and then to transfer the stock to her husband; in case she should die unmarried, then as she should appoint by will, and in default of appointment to her executors and administrators. Semble, she is not entitled to have the fund transferred while unmarried. *Wilson* v. *Mount*, 2 Sim. & S. 493.

Death Unmarried, but having Attained Twenty-four.]—Bequest of a moiety of a residue to A. for life, if she shall attain twenty-four, or marry under twenty-four with consent, remainder to her children. Similar bequest of the other moiety in favour of B. and her children. And in case either of them should die under twenty-four, and without having been married with consent, the survivor attaining twenty-four, or marrying with consent, to take the other's moiety, for life, remainder to her children. But if both A. and B. shall die under twenty-four, and without having been married with consent, and shall die without issue, the whole estate to go to the testator's three sisters. It was held, that in the event that had happened of A. attaining twenty-four, and dying unmarried, there was no disposal by the will of the first moiety. *Losh* v. *Towaley*, Cooper t. Brough. 372.

Dying Without Issue in Mother's Lifetime.]—A testator bequeathed his residue to trustees, in trust for J. F. for life, and, after her death, for her children: but in case J. F. should survive her mother, and die without having had lawful issue, then in trust for the brothers and sisters of J. C. But in case J. F. should die in the lifetime of her mother without lawful issue, then the testator directed the trustees to retain, out of the residue, sufficient to produce 150*l.* a year, and to pay the annual produce to the mother for life; and, after her decease, he gave the principal so to be retained, to the person or persons who would be entitled thereto in case J. F. had survived her mother and died without lawful issue. J. F. died without issue in her mother's lifetime:—Held, that the whole of the residue, except the fund for paying the annuity, was undisposed of. *Clarke* v. *Butler*, 13 Sim. 401.

Death in Lifetime of Mother having Attained Twenty-one.]—Testatrix bequeathed her residue in trust for her daughter Caroline for life, and after her death, for her granddaughter, if she should survive her mother, and attain twenty-one, but in case she should not survive her mother, and attain twenty-one, then in trust for such other child or children of the testatrix's said daughter as should be living at their mother's death, to be paid to them after her death as they attained twenty-one; and if all such other children of the testatrix's said daughter, should die before attaining twenty-one, then in trust for L. M. The granddaughter attained twenty-one, but did not survive her mother. Another child of the testatrix's daughter attained twenty-one, but did not survive his mother; afterwards the daughter died:—Held, that the bequest over to L. M. took effect. *Mackinnon* v. *Sewell*, 5 Sim. 78. *S. C.*, 2 Myl. & K. 202; Cooper t. Brough. 224; 3 L. J., Ch. 161. S. P., *Wilson* v. *Mount*, 2 Beav. 397.

Testator bequeathed a sum of stock to A. and B., for their lives, and on their deaths to their children then living, who should attain twenty-one, with a gift over to the survivor of A. and B., in case the children of either of them should die under twenty-one. A. died, leaving a child who had attained twenty-one. B. afterwards died without having had a child:—Held, that A.'s personal representatives were entitled to B.'s moiety of the stock. *Aiton* v. *Brooks*, 7 Sim. 204.

Bequest of stock in trust for three persons nominatim, in equal shares, to be transferred to them when they shall attain twenty-one. But, if any of them shall depart this life under the age of twenty-one and unmarried, then his share, original and accruing, to go to the survivors. And if all of them shall die under twenty-one and unmarried, then the stock to sink into the residue. One of the three died some months prior to the making of the will:—Held, that the survivors were entitled to the share which the testator intended to bequeath to the deceased. *Sheppard's Trusts, In re*, 1 K. & J. 269.

See also ante, B. 7. b.

b. Failure of Gift over. Effect on Prior Gift.

"Die Unmarried and Without Children."]—A bequest to A., and if she shall die unmarried or without children, to B., is an absolute gift to A., defeasible by an executory gift over in the event of A. dying, at any time unmarried or without children. This construction can only be affected by a context which renders a different meaning necessary. *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388; 31 L. T. 705; 23 W. R. 361.

A gift to X. for life, with remainder to A., and if A. dies unmarried or without children, to B., is an executory gift over, which will defeat the absolute interest of A. in the event of A. dying, at any time, unmarried or without children. *Ib.*

Held, that the husband took a life interest in the 5,000*l.* in any event. *Darby* v. *Darby*, 18 Beav. 412.

Construction of a residuary clause, after a bequest to the testatrix's younger children, "but in case I shall have but one child living at the time of my decease," or all but one die under twenty-one and unmarried, to another family, not a condition. Residuary bequest is therefore established in the event of the testatrix's death, having never had a child. *Murray* v. *Jones*, 2 V. & B. 313; 13 R. R. 104.

Gift in remainder "in case A. B. should die under twenty-one without issue, or leaving issue all of them should die before twenty-one":—Held, not to take effect on A. B. dying unmarried and above twenty-one. *Leonard* v. *Flight*, 4 L. J., Ch. 225.

Failure by Lapse.]—Bequest of a contingent interest in personalty void, where the preceding gift never vested, owing to a lapse. *Miller* v. *Faure*, 1 Ves. sen. 85.

A testator, after bequeathing a sum of long annuities to his wife for life, gave the capital after her death, to A., if he shall be living at her decease; and if not, to A.'s son; A. outlives the wife, but both he and the wife die in the testator's lifetime:—Held, that the legacy to A. lapsed, and that the gift to his son did not take effect. *Williams* v. *Jones*, 1 Russ. 517.

Bequest to a son of the testator on his accomplishing his apprenticeship, with the dividends in the meantime for maintenance; and in case he shall die before he accomplishes his apprenticeship, then, and in such case, to the other children. The legacy lapsed by the death of the legatee, having accomplished his apprenticeship in the testator's life. *Humberstone* v. *Stanton*, 1 V. & B. 385; 12 R. R. 243.

Event not in Terms provided for.]—A legacy was given in trust for P., who was then unmarried, and who never married, for life, for her separate use, without power of anticipation, with remainder to her children; and in case there should be no child who should attain a vested interest, in trust for P. absolutely, "if she should survive her husband, but if she should die in his lifetime," as she should by will appoint, and in default in trust for her next-of-kin, as if she had died intestate and unmarried:—Held, that P. was absolutely entitled to the legacy, although the event of her dying unmarried was not in terms provided for. *Brock* v. *Bradley*, 33 Beav. 670; 4 N. R. 529; 10 Jur. (N.S.) 815; 11 L. T. 16; 12 W. R. 1136.

By a marriage settlement, property belonging to the intended wife was conveyed to trustees, upon trust (after the death of the husband and wife) for the children of the marriage in the usual way. It was declared, that, if all the children should die, the trustees should convey the property to A., B. and C. There never was any issue of the marriage:—Held, that, although the language of the deed only provided for default of issue, the gift over took effect. *Osborn* v. *Bellman*, 2 Giff. 593; 6 Jur. (N.S.) 1325; 3 L. T. 265; 9 W. R. 11

A. made a will by which, under a power of appointment reserved to her in her father's will, she bequeathed her property to her husband; "and in case my husband shall die in my lifetime," to W. The husband made a will in the same terms. The husband and wife were by the same wave swept off the deck of the vessel in a storm at sea, and were drowned. No evidence was given to prove that one survived the other:—Held, that W. could not claim under either will, and that the property went over to those who by the father's will were to take in default of appointment by the daughter. *Wing* v. *Angrave*, 8 H. L. Cas. 183; 30 L. J., Ch. 65. *S. C.*, nom. *Underwood* v. *Wing*, 19 Beav. 459; 4 De G. M. & G. 633; 3 Eq. R. 794; 24 L. J., Ch. 293; 1 Jur. (N.S.) 169; 3 W. R. 228.

The union of the two titles of W. did not affect the case, for he could not succeed in one because he could not succeed under the other, but was bound to establish his claim clearly under one or the other. *Ib.*

Charge contingent on Eldest Son coming into Possession.]—A father, by will, gave to each of his younger sons 1,000*l.*, "which I charge on my estate at A., hereinafter devised to my eldest son, but I direct that the sum shall not be raisable or paid to them respectively until my eldest son shall come into actual possession of the M. estate." The M. estate was settled on F. for life, remainder to the eldest son of the testator for life, remainder to his issue in tail male. The eldest son died before F., and without coming into possession of the M. estate:—Held, that the legacies to younger sons were wholly contingent upon the eldest son becoming owner of the M. estate; and that as that event had not happened they failed and sank into the residue. *Taylor* v. *Lambert*, 45 L. J., Ch. 418; 2 Ch. D. 177; 34 L. T. 567; 24 W. R. 691.

A testator gave one-fifth of the interest of a fund in the following proportions: namely, one-fifth to M., and two-fifths each to C. and J.; if M. should die without issue, which event did happen, her fifth was to go between C. and J. for their lives, if living at M.'s decease, or if only one, to him; if C. should leave issue, they should be entitled to the principal moneys the interest whereof was given to C. for life; but if he should die without issue in the lifetime of J., all benefit of the bequest to C. should go to J.; and if J. should die without having succeeded to, and been in actual possession of, the family estate, for a certain time, leaving issue other than an only son, such issue should be entitled to all the principal moneys the interest whereof J. might be entitled to as aforesaid. Then followed a gift over of all benefit intended for J., in case he should die in the lifetime of C., either without issue, or without issue other than an only son, or having been in possession of the estate for a certain time. If both C. and J. should die without issue, to be entitled as aforesaid to the bequest, the whole property should go as the survivor should think fit. J., having survived M., died in the lifetime of C., leaving a daughter, and without having been in possession of the estate; and then C. died without issue:—Held, that the daughter of J. was entitled to the whole fund. *Newburgh (Earl)* v. *Eyre*, 4 Russ. 454; 6 L. J. (O.S.) Ch. 153.

Wife Surviving her Husband.]—Bequest in trust for the wife and children of H. during his life; and from and after the decease of H., in trust to pay it to his children then living, reserving one-fifth for his wife for her life, which, immediately on her death, was to be divided amongst H.'s children generally:—Held, that the reservation of the one-fifth for the wife and

children was contingent on the wife surviving H., and she having pre-deceased him, that it did not take effect. *Patch* v. *Sparkes*, 30 Beav. 515; 8 Jur. (N.S.) 297; 10 W. R. 239.

Death of Son in Mother's Lifetime, a Bachelor.]—Testator bequeathed a sum of stock to his wife, and after her decease to his three sons, to be equally divided amongst them, if they should be all living at the decease of his wife; but if any or either of them should die in her lifetime, leaving a child or children, such child or children who should be living at the time of the wife's death should be substituted in the place of such of his sons who should so happen to die, and take his, her, or their parent's share. All the sons died in the wife's lifetime, two of them leaving children who survived the wife; the third died a bachelor:—Held, that one-third of the stock fell into the residue. *Hustler* v. *Tillbrook*, 9 Sim. 368.

Daughter Dying Unmarried.] —Testator bequeathed a sum in trust for his daughter (a single woman) for her separate use, independently of any husband she might have, and after her death in trust for her children, and, if no children then if she should survive any husband she might have, for her absolutely, but if her husband should survive her then as she should appoint, and in default of appointment for her next of kin. The daughter died unmarried:—Held, that she only took a life interest, the apparent intention being to give the corpus only in the event of her marrying. *Lenox* v. *Lenox*, 10 Sim. 400; 9 L. J., Ch. 83; 4 Jur. 5.

Bequest of money to trustees on trust to invest in the public funds, and pay the dividends to A. until marriage, and then to transfer the stock to her husband; in case she should die unmarried, then as she should appoint by will, and in default of appointment to her executors and administrators. Semble, she is not entitled to have the fund transferred while unmarried. *Wilson* v. *Mount*, 2 Sim. & S. 493.

Death Unmarried, but having Attained Twenty-four.]—Bequest of a moiety of a residue to A. for life, if she shall attain twenty-four, or marry under twenty-four with consent, remainder to her children. Similar bequest of the other moiety in favour of B. and her children. And in case either of them should die under twenty-four, and without having been married with consent, the survivor attaining twenty-four, or marrying with consent, to take the other's moiety, for life, remainder to her children. But if both A. and B. shall die under twenty-four, and without having been married with consent, and shall die without issue, the whole estate to go to the testator's three sisters. It was held, that in the event that had happened of A. attaining twenty-four, and dying unmarried, there was no disposal by the will of the first moiety. *Losh* v. *Townley*, Cooper t. Brough. 372.

Dying Without Issue in Mother's Lifetime.]—A testator bequeathed his residue to trustees, in trust for J. F. for life, and, after her death, for her children: but in case J. F. should survive her mother, and die without having had lawful issue, then in trust for the brothers and sisters of J. C. But in case J. F. should die in the lifetime of her mother without lawful issue, then the testator directed the trustees to retain, out of the residue, sufficient to produce 150*l.* a year, and to pay the annual produce to the mother for life; and, after her decease, he gave the principal so to be retained, to the person or persons who would be entitled thereto in case J. F. had survived her mother and died without lawful issue. J. F. died without issue in her mother's lifetime:—Held, that the whole of the residue, except the fund for paying the annuity, was undisposed of. *Clarke* v. *Butler*, 13 Sim. 401.

Death in Lifetime of Mother having Attained Twenty-one.]—Testatrix bequeathed her residue in trust for her daughter Caroline for life, and after her death, for her granddaughter, if she should survive her mother, and attain twenty-one, but in case she should not survive her mother, and attain twenty-one, then in trust for such other child or children of the testatrix's said daughter as should be living at their mother's death, to be paid to them after her death as they attained twenty-one; and if all such other children of the testatrix's said daughter, should die before attaining twenty-one, then in trust for L. M. The granddaughter attained twenty-one, but did not survive her mother. Another child of the testatrix's daughter attained twenty-one, but did not survive his mother; afterwards the daughter died:—Held, that the bequest over to L. M. took effect. *Mackinnon* v. *Sewell*, 5 Sim. 78. *S. C.*, 2 Myl. & K. 202; Cooper t. Brough. 224; 3 L. J., Ch. 161. S. P., *Wilson* v. *Mount*, 2 Beav. 397.

Testator bequeathed a sum of stock to A. and B., for their lives, and on their deaths to their children then living, who should attain twenty-one, with a gift over to the survivor of A. and B., in case the children of either of them should die under twenty-one. A. died, leaving a child who had attained twenty-one. B. afterwards died without having had a child:—Held, that A.'s personal representatives were entitled to B.'s moiety of the stock. *Aiton* v. *Brooks*, 7 Sim. 204.

Bequest of stock in trust for three persons nominatim, in equal shares, to be transferred to them when they shall attain twenty-one. But, if any of them shall depart this life under the age of twenty-one and unmarried, then his share, original and accruing, to go to the survivors. And if all of them shall die under twenty-one and unmarried, then the stock to sink into the residue. One of the three died some months prior to the making of the will:—Held, that the survivors were entitled to the share which the testator intended to bequeath to the deceased. *Sheppard's Trusts, In re*, 1 K. & J. 269.

See also ante, B. 7. b.

b. Failure of Gift over. Effect on Prior Gift.

"Die Unmarried and Without Children."]—A bequest to A., and if she shall die unmarried or without children, to B., is an absolute gift to A., defeasible by an executory gift over in the event of A. dying, at any time unmarried or without children. This construction can only be affected by a context which renders a different meaning necessary. *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388; 31 L. T. 705; 23 W. R. 361.

A gift to X. for life, with remainder to A., and if A. dies unmarried or without children, to B., is an executory gift over, which will defeat the absolute interest of A. in the event of A. dying, at any time, unmarried or without children. *Ib.*

There is no rule of construction arising from possible delay in the vesting of a gift, which controls the natural meaning of the terms of the bequest. *Ib.*

Gift of 1,000*l.* consols to A. for her life, after her death to her daughter B., "if B. should die unmarried or without children the consols I here will to revert to C." The will then appointed D. residuary legatee. Both A. and C. died in the lifetime of the testatrix. On her death B. entered into possession, and married, but after some years died without ever having a child:—Held, that on the death of B. without children the gift over to the residuary legatee took effect, and that it was not affected by the death of C. in the lifetime of the testatrix. The gift to C. failed by lapse, and the residuary legatee became entitled to take all that C., if living at the death of the testatrix, could have taken. *Ib.*

The words "I here will to revert to C." indicated a benefit intended for C. by means of an executory limitation over, after enjoyment by a previous taker, and not an alternate gift to take effect, if at all, before the period of enjoyment had commenced. *Ib.*

Absolute Gift or Life Interest.]—When a legacy is given subject to be defeated by a subsequent event, the legatee has an absolute interest till the event happens; and if the event becomes impossible, the legacy becomes absolute. *Lowther* v. *Cavendish* (*Lord*), Amb. 358; 3 Bro. P. C. 186.

Gift by a testator of all the residue of his estate and effects, real and personal, whatsoever and wheresoever, to his wife, and after her death, to be equally divided to the children, should there be any; he also appointed his wife sole executrix. There were no children:—Held, that the wife was absolutely entitled. *Crozier* v. *Crozier*, L. R. 15 Eq. 282; 21 W. R. 398.

A testator gave his whole property to his wife, upon condition that she should pay an annuity of 130*l.* to his mother during her life, and after the death of his wife to be equally divided between those of his children who should survive her, share and share alike. All the testator's children died in the lifetime of his widow, who married again, and died leaving her husband surviving her:—Held, upon her death, that in the events which had happened the testator's property was undisposed of, and that the next of kin, and not the second husband in right of his wife, were entitled to it. *Joslin* v. *Hammond*, 3 Myl. & K. 110; 3 L. J., Ch. 148.

Testator gave the interest and produce of the residue to his two sisters for their lives; and after their decease, the principal to be paid to their children, share and share alike: but whichever died before the other, then the share so paid to her to be paid to her children, in equal proportions: but if she should leave no children, then the interest and produce to be paid to the survivor as aforesaid. One sister died without leaving children; the survivor is entitled to the interest for life; and the principal is vested in all her children. *Taylor* v. *Langford*, 3 Ves. 119.

Bequest of Term of Years.]—Semble the dictum in *Forth* v. *Chapman* (1 P. Wms. 666), and the doctrine in *Doe* v. *Cooke* (7 East, 269), that when there appears to be an intention on the face of a will to give the whole of a term of years away from an executor, a bequest of it, though only for a day, is a gift of the whole term, in case the limitations over are void, cannot be sustained. *Kerr* or *Ker* v. *Dungannon* (*Lord*), 1 Dr. & War. 509; 1 Con. & L. 335; 4 Ir. Eq. R. 343.

See also ante, B. 7. c.

8. Remainders and Gifts Over of Personal Property.

a. Gift of Chattels by way of Remainder.

In General.]—Personals cannot be limited; and bill to have bonds executed tending thereto, according to directions of will, was dismissed. *Williams* v. *Williams*, 1 Eq. Cas. Abr. 307.

Whether a remainder may be limited on a donatio mortis causâ, quære. *Hambrooke* v. *Simmons*, 4 Russ. 25.

Devise of chattels for life, with remainder over, good; but if of small value, and the case requires, it may be otherwise. *Cooper* v. *Williams*, Pre. Ch. 71.

A. devises household goods to his wife for life and afterwards to his son. The court allowed this a good devise over; and to be the same as if the devise had been only of the use of the goods to the wife for life. *Hyde* v. *Parratt*, 1 P. Wms. 1; 2 Vern. 331.

Devise of a personal thing to one for life, remainder to another; the remainder is good; it being the same as if the use of a thing was devised to one for life, the remainder over. *Clarges* v. *Albemarle*, 2 Vern. 245; Nel. Ch. Rep. 174.

A., seised in fee by deed and fine, conveys the lands to the use of trustees for seventy years, if A. so long live, remainder to trustees for 3,000 years, and, after the death of A., then to his son B. Whether the remainder to B. is good, quære. *Penhay* v. *Hurrell*, 2 Vern. 373; 2 Freem. 258.

Gifts Generally—Gift Over of whatever Remained at Death.]—A testator bequeathed all his "estate and effects, goods, chattels, houses, lands, moneys," to his wife, for her sole, separate use and benefit; and further gave, willed, and directed that at her decease "whatever remains of" his estate and effects should go to other parties, who were enumerated and described. The widow only received and spent a small sum of money, and enjoyed the remainder in specie, and died:—Held, that such of the parties enumerated and described as were living at the death of the widow were entitled to the property. *Constable* v. *Bull*, 3 De G. & Sm. 411; 18 L. J., Ch. 302; 13 Jur. 619.

The widow was entitled to an estate for life only in the residuary personal estate of the testator after payment of his debts and funeral and testamentary expenses. *S. C.*, 22 L. J., Ch. 182.

b. Chattels Quæ Usu Consumuntur.

In General.]—A specific bequest, for life, of things quæ ipso usu consumuntur, is a gift of the property; and there can be no limitation over after a life interest in such articles; but if included in a residuary bequest for life, they must be sold, and the interest enjoyed by the tenant for life. *Randall* v. *Russell*, 3 Mer. 194; 17 R. R. 56. And see *Hardman* v. *Johnson*, 3 Mer. 347; 17 R. R. 95; *Bryant* v. *Easterson*, 5 Jur. (N.S.) 166; 7 W. R. 298.

Where the use and the property can have no separate existence, the old rule must prevail, viz. that a gift for life carries the absolute interest. *Ib.*

In this case where the gift was of a leasehold farm, and the stock and crop thereon, an inquiry was directed to ascertain of what the stock consisted. *Ib.*

If a testator bequeaths consumable articles to A. for life, with a limitation over by way of remainder to B.; as the gift to A. is absolute, the limitation to B. cannot take effect, even though A. die in the testator's lifetime. *Andrew* v. *Andrew*, 1 Coll. C. C. 690.

Testator, after devising his real estate to his natural son, T. A., bequeathed as follows: "I give and bequeath unto my sister E., to be paid out of the rents and profits of the aforesaid lands, the sum of 250*l.* per annum, and to live free from rent in the house I now occupy in H., with the land and buildings I now occupy, containing about nine Lancashire acres, with the use of my household furniture, plate, linen, books, wines, spirits, carriages and horses, cows, hay and farming utensils and stock, for her sole use during her natural life, or so long as she shall remain unmarried; in either event, then to go to T. A.; but should she marry, then my will and mind is, that my executors shall pay her 100*l.* per annum for her own use during her natural life, out of the rents and profits of my said estate." The sister married in the testator's lifetime:—Held, that the consumable articles did not go to T. A., but fell into the residue. *Ib.*

Farming Stock and Implements of Husbandry.]—Farming stock and implements of husbandry are not things quæ ipso usu consumuntur, and therefore a gift of them for life does not confer on the legatee for life the absolute interest in them. *Graves* v. *Wright*, 2 K. & J. 347; 2 Jur. (N.S.) 277.

—— **"Not Accountable for Depreciation."**]—A husband gave to his widow his personal estate, including his farming implements and stock, live and dead, for her life, and declared that she should not be liable to account for any diminution or depreciation in the farming implements and stock; and after her decease he gave the residue of his personal estate to his children:—Held, that the widow took an absolute interest in the farming implements and stock. *Breton* v. *Mockett*, 47 L. J., Ch. 754; 9 Ch. D. 95; 26 W. R. 850.

Man's Wearing Apparel.]—Man's wearing apparel given, with other articles, to wife for life, remainder over:—Held, that the wearing apparel did not vest absolutely in her as things quæ ipso usu consumuntur. *Hall's Will, In re*, 1 Jur. (N.S.) 974.

Business and Stock-in-Trade.]—A gift for life of a business and stock-in-trade confers only a life interest in such part of the stock-in-trade as consists of consumable articles. *Cockayne* v. *Harrison*, L. R. 13 Eq. 432; 26 L. T. 385; 20 W. R. 504.

Secus, when the gift is of consumable articles, without any reference to trade or business. *Ib.*

—— **Book Debts or Capital.**]—A. bequeathed his stock-in-trade, &c., to his wife and son to be used by them in his trade and business, which he directed to be carried on by them, in partnership, during the widowhood of his wife; "and for that purpose they were to have the use of the book-debts or capital which he at his death might have employed therein";—Held, that the widow and son were entitled to the book-debts or capital absolutely. *Terry* v. *Terry*, 33 Beav. 232; 9 L. T. 469; 12 W. R. 66.

Wines.]—A wine merchant, possessed of a large stock of wine, by his will gave all his household goods, and everything he died possessed of, to his wife for life; and he bequeathed the whole of his effects that might be remaining after her death to his daughter:—Held, that the wife took absolutely the wine which the testator had for his private use, but a life interest only in the rest. *Phillips* v. *Beal*, 32 Beav. 25.

Devise upon trusts to permit M. to have the use and enjoyment of house and premises free of ground rent, and also all household furniture, carriages, horses, goods, wines, linen, &c., in or about the house for life or widowhood:—Held, that M. was confined to the personal use and enjoyment of the house and furniture and effects, but that he was entitled to the wines and other consumable articles absolutely. *Clive* v. *Clive*, Kay, 600; 2 Eq. R. 913; 23 L. J., Ch. 951.

Limitation of Terms.]—*See* MERGER—SETTLEMENT.

Gift over of Undisposed of Interest.]—*See* WILL.

c. Interests Given to Persons in Succession.

Absolute Interest or Interest for Life.]—A testator left all his personal estate, subject to legacies, and all his houses, gardens, parks, and woods, and all his landed estates, to his wife for her life, and afterwards all his personal and landed estates to his sister for her life, and then to the eldest son G. B., afterwards to G. B.'s second, third, or any later sons he might have by the testator's niece, A., and then to the eldest son and other sons successively of the Earl of B., by the testator's niece C.; but all these to be subject to outpayments and legacies by the will given; and if they and the conditions of his will were not complied with exactly, he left all the advantages of it to the next person in succession, subject to the legacies and so on, unless they were discharged. The testator, by codicils to the will, gave numerous legacies and annuities, upon the non-payment of which he declared repeatedly, and in various forms of expression, that the persons taking his personal estate should be subject to the penalties in the will. G. B. had several sons, all living at the death of the testator:—Held, that the eldest son of G. B. took the personal estate absolutely, subject to the prior life estates and to the legacies and annuities given by the will and codicils. *Hoare* v. *Byng*, 10 Cl. & F. 508; 8 Jur. 563—H. L. (E.) Affirming 5 Beav. 558; 12 L. J., Ch. 169.

Under a gift by A. to his wife of 10,000*l.*, "afterwards to go to the understated residuary legatee E.":—Held, that the legacy of 10,000*l.*, was given to the wife absolutely, but that interest upon such legacy did not begin to run until after one year from the testator's death. *Percy, In re, Percy* v. *Percy*, 24 Ch. D. 616; 49 L. T. 554.

Heirlooms — Contingent future Interest — Tenant in Tail—Personal Estate.]—A testator by his will directed that his books and plate should be considered as heirlooms and should pass with his real estate in the same manner as if they were an estate of inheritance at common law, and should so continue annexed to his said real estate as long as the law would permit, to be inherited by the several persons who should succeed thereto; and he devised and bequeathed all his real and residuary personal estate to trustees upon trust for R. C., for life, and after the decease of R. C. for his first and other sons successively in tail male, and in default of such issue upon trust for Henry C., the eldest son of J. C., for life, and after his decease for his first and other sons successively in tail male, and in default of such issue upon trust for "the next eldest son of the said J. C. who shall survive the said Henry C." for life, and after his decease upon trust for "the first and other sons of the body of the said next eldest son of the said J. C. who shall survive the said Henry C." successively in tail male, and in default of such issue upon trust for his, the testator's, own right heirs. R. C. and Henry C. died without having married. J. C. died in testator's lifetime. George was the next eldest son of J. C., who survived Henry. F. J. C. was the eldest son of George, and the first tenant in tail under the settlement, and he died an infant in the lifetime of R. C. and of Henry C.:—Held, that notwithstanding the death of F. J. C., before it could be known whether his father would survive Henry C., or whether there would be any issue male either of R. C. or Henry C., the heirlooms and residuary personalty vested absolutely in the legal personal representative of F. J. C. *Hogg* v. *Jones* (32 Beav. 45; 1 N. R. 222; 32 L. J., Ch. 361; 9 Jur. (N.S.) 507; 8 L. T. 816) distinguished. *Cresswell, In re, Parkin* v. *Cresswell*, 52 L. J., Ch. 798; 24 Ch. D. 102: 49 L. T. 590.

See also SETTLEMENT.

D. LEGACIES CHARGED ON REAL ESTATE.

1. *In General. Not Vested*, 1683.
2. *Contrary Intention*, 1685.
3. *Legacies Charged on a Mixed Fund*, 1689.

1. IN GENERAL.

General Rule.]—Charge upon land payable at a future day, not vested till the time of payment. *Phipps* v. *Mulgrave (Lord)*, 3 Ves. 614; 2 R. R. 607.

Legacy charged on real estate and payable at a future day sinks as to the real estate by the death of the legatee before the time of payment, and the assets cannot be marshalled. *Pearce* v. *Loman*, 3 Ves. 135.

A legacy payable out of land at a future day, although given with interest in the meantime, shall not be raised if the legatee die before the time of payment. *Gawler* v. *Standerwick*, 2 Cox, 15.

Whether a portion charged on land be given with or without interest, by deed or by will, if the person die before it becomes payable, it shall sink in the estate. *Boycot* v. *Cotton*, 1 Atk. 555.

Testator, being entitled to the reversion of an estate after the death of his wife, devised it to A. in fee on condition that he paid to E. 100*l.* within six months after the reversion came into his possession. E. died before the reversion came into possession:—Held, that her representative was not entitled. *Hall* v. *Terry*, 1 Atk. 502.

Where money is given to be paid out of real estate at a future time, if the person die before the time, it shall sink into the estate; the same as to personal estate, where the time of payment is annexed to the legacy. *Ib.*

Whether a sum of money be given as a portion, or as a legacy, if charged upon land, and the party die before the time, it cannot be raised. *Ib.*

A trust upon land for raising and paying a sum of money, within six years after the testator's death, to his second son, who died within the time, construed to be for maintenance only and not transmissible. *Ib.*

A testator directed a sum of 5,000*l.* to be raised for each of his children, and the rest of his estate to accumulate till 1848, when he directed 3,000*l.* to be raised and paid to each of his children then living, or to their issue if dead, &c. And he declared that if any child should die, &c., before his share became payable, his share should be equally divided among the survivors:—Held, on the construction of the whole will, that no sum of 3,000*l.* was to be raised in respect of the share of a deceased child. *Little* v. *Daniel*, 12 Jur. 167. And see *Remnant* v. *Hood*, infra.

A legacy charged on land to be purchased with the residue of a personal estate will lapse by the death of the legatee before the day of payment, as if charged upon lands actually purchased. *Harrison* v. *Naylor*, 2 Cox, 248; 3 Bro. C. C. 108.

Portion Payable at Twenty-one.]—One devises 100*l.* to his daughter for her portion, charged upon a real estate, and payable at twenty-one. Daughter dies before twenty-one. The portion shall sink in the land; otherwise if no time had been limited for the payment of the portion, for in that case it goes to the executor of the daughter. No difference where the portion is secured by a settlement or a will, if secured out of a real estate, and the party dies before it is payable. In either case it sinks into the lands. *Smith* v. *Smith*, 2 Vern. 92.

—— **Twenty-one or Marriage.**]—A., having entailed his land on his son, subject to a mortgage, by will devises his leasehold and personal estate to pay his debts and legacies, and directs, if his personal estate is applied to pay the mortgage, it should be kept on foot to make good his daughter's portion, and gives her 3,000*l.* to be paid at twenty-one or marriage, if married with consent, if not but 1,000*l.* She died at six years of age; the portion shall not be raised for the benefit of her administrator. *Yates* v. *Phettiplace*, 2 Vern. 416; Pre. Ch. 140.

—— **Marriage and Death under Twenty-one.**]—A. devises lands to B., his son and his heir, and declared that out of the lands he shall pay 200*l.* to his daughter at her age of twenty-one. She marries and dies under age; legacy not vested. *Carter* v. *Bletsoe*, 2 Vern. 617; Pre. Ch. 267; Gilb. Eq. R. 11.

If lands are devised in fee, in trust to raise 300*l.* as a portion to be paid at twenty-one or marriage, and the legatee dies before twenty-one or marriage, it sinks into the real estate. *Langley* v. *Oates*, 2 Eq. Cas. Abr. 541, fol. 7.

Legacy Payable at Twenty-one—Interest till Twenty-one — Charge on Real and Personal Estate.]—A. gave a legacy of 400*l.* charged upon his real and personal estate, to be divided, upon the death of his granddaughter, equally between her children, if more than one, or if but one, then the whole to that child, the same to be paid to such children at the age of twenty-one; and if any child died before attaining twenty-one, then his share to go to the survivors and to the executor or administrator of such as should have lived to attain twenty-one; and the testator declared that the shares of such of the children as, upon the death of his granddaughter, should be under twenty-one, should bear interest at the rate of 5*l.* per cent. per annum from her decease, such interest to be paid towards their maintenance until their respective shares should become payable. No child lived to attain twenty-one, and the personalty was insufficient:—Held, that the legacy could not be raised out of the real estate, which had become freed from the charge. *Parker* v. *Hodgson*, 1 Dr. & Sm. 568; 30 L. J., Ch. 590; 7 Jur. (N.S.) 750; 4 L. T. 762; 9 W. R. 607.

Condition—Eldest Son coming into Possession.]—The testator by will, gave to each of his younger sons 1,000*l.*, "which I charge on my estate at A. hereinafter devised to my eldest son, but I direct that the sum shall not be raisable or paid to them respectively until my eldest son shall come into actual possession of the M. estate." The M. estate was settled on F. for life, remainder to the eldest son of the testator for life, remainder to his issue in tail male. The eldest son died before F., and without coming into possession of the M. estate:—Held, that the legacies to the younger sons were wholly contingent upon the eldest son becoming the owner of the M. estate: and that as that event had not happened they failed and sank into the residue. *Taylor* v. *Lambert*, 45 L. J., Ch. 418; 2 Ch. D. 177; 34 L. T. 567; 24 W. R. 691.

Legacy to Grandchildren Payable Twelve Months after Mother's Death.]—A testator gave his daughter a life annuity of 50*l.*, and from and immediately after her death he bequeathed 1,000*l.* unto her children, share and share alike, payable twelve months after the daughter's death. This was payable exclusively out of the testator's real estate:—Held, that those children alone of the daughter who survived her participated in the 1,000*l.* *Cartledge*, *In re*, 29 Beav. 583.

Legacy Payable Six Months after Death of Annuitant.]—A testator devised real estate to A. in fee, charged with an annuity to B. for life, and directed that after the death of B. the estate should be charged with the payment of 100*l.* apiece to X., Y. and Z., and that the same should be paid to them respectively within six calendar months after the death of B., or such of them as should be then living. X. died in the lifetime of B.:—Held, that the legacy to X. had not vested, and was not payable to his representatives. *Goodwin* v. *Drury*, 21 L. J., Ch. 680.

2. Contrary Intention.

General Rule.]—The rule, that future legacies payable out of real estate do not vest till the time of payment, will be made to give way when an opposite intention can be clearly implied from the will. *Brown* v. *Woolar*, 2 Y. & C. C. C. 134.

Bequest to two daughters of 1,000*l.* each, to be raised and paid to them immediately after decease of testator's wife, out of rents, &c., of his manors, &c., or by sale or mortgage, with interest after the rate of 6 per cent. from the decease of his wife until the sums should be duly paid to his daughters or their respective executors, administrators, or assigns, and in case either of his said daughters died before him, then the survivor, her executors, &c., were to receive all the sums before devised out of his said lands, to be raised in a manner thereinbefore appointed, and the part of the daughter so dying should not cease or sink into the estate for the benefit of his heir, but should remain and be raised for the benefit of his surviving daughter. Both daughters survived the testator, and one of them died before her mother, and the representative, after the mother's death, applied to have her legacy raised:—Held, that it should be raised. *Lowther* v. *Condon*, 2 Atk. 127; Barnard. 327.

Where a legacy upon lands depends on two contingencies, though one of them does not happen, the legacy shall be raised. *Ib.*

Where the postponing the time of payment of a legacy has been owing to the circumstances of the testator's estate, and not to the circumstances of the legatees, that is not so strong a case for a legacy's sinking into the estate, as where the postponing the payment of it has appeared to have arisen from circumstances on the part of the legatee. *Ib.*

An inference may be drawn in the plaintiff's favour from the direction that the legacy shall be paid to the daughters, or their respective executors, administrators, and assigns. *Ib.*

The clause on which Lord Hardwicke principally founded his opinion was, the direction that, if one daughter died before him her part should not sink into the estate. *Ib.*

Legacies or portions charged on real estate, and payable at a future time, do not vest until the time appointed for payment, but, upon the death of the legatee or portioner before that time, lapse or sink into the inheritance. *Remnant* v. *Hood*, 2 De G. F. & J. 396: 30 L. J., Ch. 71; 6 Jur. (N.S.) 1173; 3 L. T. 458.

Payment Postponed for Convenience of Estate.]—But if the payment of the legacy or portion is postponed, not from any consideration personal to the legatee or portioner, but for the convenience of the estate, the legacy or portion will vest, notwithstanding the legatee or portioner dies before the time of payment. *Ib.*

Where, therefore, a devised estate was charged under a settlement with portions for younger children, to be raised and levied within three months after the death of the tenant for life, and to be forthwith paid and payable:—Held, that a younger child of the settlor, who attained twenty-one and died in his lifetime, took a vested interest in her portion. *Ib.*

A legacy was charged on real estate, and payable when the brother and sister of the legatee had attained twenty-one, and the rents of the estate were up to that time given for their maintenance:—Held, that the legacy did not lapse by the death of the legatee before the time of payment, being postponed for the convenience

of the estate only. *Goulburn* v. *Brooks*, 2 Y. & C. 539; 7 L. J., Ex. Eq. 33; 1 Jur. 354.

Death before Time of Payment.]—By a will made in 1857, R., after giving all his lands, stock and cattle to his son M., bequeathed his farm at F. to his (the testator's) daughter G., "and also the sum of 1,000*l.* to be charged on my estate, and to lie out at 4*l.* per cent. for ten years. In the event of her decease, the said sum to go to her children, share and share alike." G. died in 1867, within ten years after R.:—Held, that the legacy of 1,000*l.* was indefeasibly vested in G., the time of payment only being postponed in ease of the estate, and that the words of contingency pointed to her death in the testator's lifetime. *Neary's Estate, In re*, 7 L. R. Ir. 311.

Testator devised real estates to A. for life, remainder to B. in fee. And he gave a legacy to C. to be paid to her by B. within twelve months after A.'s death; and he charged his estate with the legacy, and appointed A. his executrix; C. died in A.'s lifetime:—Held, that the legacy did not lapse. *Pool* v. *Terry*, 4 Sim. 294.

A. devised lands to his son B., but if he should die without issue male of his body then living, or which might be afterwards born, that then his daughter M. should receive at her age of twenty-one, or day of marriage, which should first happen, 3,500*l.* over and above 2,500*l.* before given her, and in case the contingency of his said son's dying without issue male should not happen before his daughter's said age, or day of marriage, that she should receive the said 3,500*l.* whenever such contingency might happen; and the testator charged this legacy or portion on his real estate. M., having attained twenty-one, married, and died in the lifetime of her brother B., who afterwards died without issue male:—Held, that the husband and administrator of M. was entitled to this legacy, for it was vested in her at the time of the marriage, and that it was a subsisting charge on the testator's estate. *Wither* v. *King*, 3 Bro. P. C. 135. Affirmed, nom. *King* v. *Withers*, 4 Bro. P. C. 228; Pre. Ch. 348; Gilb. Eq. R. 26; 3 P. Wms. 414; Cas. t. Talb. 117; 2 Eq. Cas. Abr. 656, pl. 10.

Devise of freehold houses to A. for life, remainder to B., he paying thereout to C. and D., legacies three months after the death of his wife. C. and D. died, living the wife:—Held, raisable for their representatives. *Jeale* v. *Titchener*, Amb. 703; Dick. 444; 1 Bro. C. C. 120, n.

As to administration of interests absolutely vested in a deceased party, see *Hutchins* v. *Foy*, 2 Comyns, 716.

Devise of lands to trustees in fee in trust, within six years after the testator's death, to raise and pay 1,500*l.* to his daughter A. A. dies within the six years; the 1,500*l.* shall go to her administrator, there being no certain time limited when, but only the ultimate time within which, it shall be raised. *Cowper* v. *Scott*, 3 P. Wms. 119.

One having two sons, G. and C., and a daughter, devises several estates to his two sons and their issue, with cross remainders, and declared, that if either of them should die without issue living at his death, so that his estate should come to his brother, the surviving brother should pay 2,000*l.* to his daughter within one year after his brother's death, and charged the estate with it; G. died leaving two sons; afterwards C. died without issue:—Held, that the 2,000*l.* should be raised. *Tollett* v. *Tollett*, Amb. 177.

A. devises a college lease for twenty years to his wife for life, remainder to his son, she paying 10*l.* per annum to his son during her life; the son dies in the lifetime of his mother; the rent continues during the life of the wife, and shall go to the executor of the son, and the wife is compellable to pay her proportion for a renewal of the lease. *Lock* v. *Lock*, 2 Vern. 666.

Devise of estate to second son, J., after the decease or marriage of the wife, charged with 100*l.* to testator's daughter M. M. died, living the wife; but held the legacy vested in M. and transmissible. *Godwin* v. *Munday*, 1 Bro. C. C. 191; Dick. 551.

Devise of lands to wife for life, and after her death to the son, he paying out of such lands 600*l.* to testator's daughters within six months after death of wife, with power of entry in case of nonpayment. The daughters died in the life of testator's wife:—Held, their legacies vested, and on his death to be raised for their representatives. *Manning* v. *Herbert*, Amb. 575.

A legacy out of real estate, to be paid within twelve months after the death of A. The legatee survives A. but one month; it does not lapse, but goes to the representative. *Hodgson* v. *Rawson*, 1 Ves. sen. 44.

Legacy given charged on real estate, to vest immediately on testator's death, but to be paid at twenty-one, vests, though legatee dies before twenty-one. *Watkins* v. *Cheek*, 2 Sim. & S. 199; 25 R. R. 181.

Testator devised land to wife for life, remainder to S., till his grandson attained twenty-three, and when he attained twenty-three, testator devised to him in fee, on condition that he paid H. 60*l.* within two years after he attained twenty-three, and testator gave H. power of entry. H. lived till the grandson attained twenty-three, but died within the two years after he attained that age:—Held, that the 60*l.* should be raised and paid to the representative of H. *Emes* v. *Hancock*, 2 Atk. 507.

R., by will, gave an estate to his wife for life, and if there should be no issue between them, to defendant, charged with two sums to be paid to M. and W. Afterwards M. being dead, by codicil he ordered the legacy to be paid to W., and R. died, living the wife; the charge was vested, and transmissible to his representatives. *Dawson* v. *Killet*, 1 Bro. C. C. 119.

Devise of lands to his sister, paying 100*l.* a year to his wife for life, and several legacies within twelve months after the death of his wife; several of the legatees died in the lifetime of the wife, and held, their representatives were entitled. *Tunstall* v. *Brachen*, Amb. 167; 1 Bro. C. C. 124, n.

A testator gave legacies of 50*l.* each to six grandchildren, when the youngest grandchild should come of age, payable from the produce of a real estate, then to be sold; and if either of those children should not live to come of age, nor have an heir born in wedlock, he directed the 50*l.* to be equally divided among the surviving children. E. M., one of the six grandchildren, married during her minority, but afterwards attained twenty-one, and before the youngest grandchild attained that age she died, leaving a child:—Held, that her legacy of 50*l.* was a vested interest, and belonged to her personal representatives. *Markin* v. *Phillipson*, 3 Myl. & K. 257; 3 L. J., Ch. 148.

Lands devised to be sold for payment of portions; one of the children dies after the por-

tion becomes due, and before the land sold; the administrator is entitled to the moiety. *Bartholomew* v. *Meredith*. 1 Vern. 276.

A testator, by his will, gives 2,000*l*. to a daughter to be secured on land until paid as thereinafter mentioned, and charges certain estates with the payment. In a subsequent passage he directs the daughter to let her legacy remain in the hands of the executors at interest till she should happen to marry, and then, and in such case, the legacy should be paid by certain instalments by the executors, they contributing to the payment equally. He then devises the property charged, subject to the payment of the legacy, to three of his sons, whom he appoints his residuary legatees and executors, they paying his debts, funeral expenses, the legacy above mentioned, and certain annuities:—Held, that the bequest was a vested legacy of 2,000*l*., and not merely a gift of the interest, while the daughter remained single, with a contingent gift of the principal in the event of marriage. *Hudson* v. *Forster*, *Forster*, *In re*, 2 Mont. D. & D. 177; 10 L. J., Ch. 340. Affirming 5 Jur. 176.

Charge for Child of which Wife Enceinte.]—A testator gave an annuity, charged on land, to A. for her life, and directed the annuity, at her decease, "to go to the child of which she was then pregnant if it be alive, to it and its heirs for ever if it attaineth the age of twenty-one, if not, the money to be divided" amongst a class. The child was born alive, and attained the age of twenty-one, but died before A.:—Held, that the annuity vested absolutely in the child at twenty-one. *Baines* v. *Ibbotson*, 15 W. R. 56.

One charges his lands with 6,000*l*. for the child of which his wife was privement enceinte, if it proved a daughter, with a clause of entry for nonpayment. A daughter is born and dies; the 6,000*l*. shall go to her administrator. *Norfolk* v. *Gifford*, 2 Vern. 208.

3. Legacies Charged on a Mixed Fund.

Real and Personal Estate — Death before Day of Payment.]—A. devised all his lands to B. and C., and their heirs, in trust to sell part of his lands, and pay his debts, as far as the produce would go; and as to the rest in trust to receive the rents and make leases for ninety-nine years, determinable on three lives, and therewith to pay his debts and legacies, then to the use of D.'s wife for life, remainder to her issue; and he made the trustees executors; he likewise gave 500*l*. to his nephew E., to be paid at twenty-one or marriage, who died under twenty-one. The lands directed to be sold were insufficient to pay the debts, and testator's personal estate was only 700*l*.:—Held, the nephew's legacy being charged on real as well as personal estate, cannot be raised, as he did not live to attain twenty-one. *Prowse* v. *Abingdon*, 1 Atk. 482.

The resolutions that there is no difference between a charge on the real estate only, and a charge on the real and personal estate too, are so strong that they are not to be shaken. *Id.* 415.

Whether charge on land be created by deed or will, whether given by way of portion for a child, or merely as a legacy by collateral relations or others, if the party die before the day of payment, it cannot be raised. The reason is, that the court of equity governs itself by the rules of the common law, for then if A. covenant to pay money to B. at a future day, and B. die before the day, the money is not due to his representative. *Ib.*

A., by will, devised all her real and personal estate to B., to pay her legacies thereout, and then she gave to C. 2,000*l*., in trust for his daughter D., to be paid within eighteen months after her decease, which he should place out at interest, and pay the same, with the produce thereof, to his daughter, for her own use at eighteen or marriage. C. died in the lifetime of testatrix, and his daughter died six months after. This legacy is a charge on both funds, and as the court always goes as far as possible to hinder the raising of portions out of land for the benefit of representatives, it was decreed that this portion should not be raised, though if D. had survived the eighteen months, her representative would have been entitled, notwithstanding C. was dead. So, if she had died under eighteen or unmarried, provided she outlived the eighteen months. If a legacy is payable or given at a certain time out of a personal estate with interest in the meantime, it is a vested legacy, but if out of a real estate, and the party dies before the time, it sinks into the inheritance; and the construction is the same if charged on a mixed fund, where it is given or payable at a certain time. *Van* v. *Clark*. 1 Atk. 510.

Where testator gave 300*l*. to trustees in trust, to be paid within three years after his decease to W., for her separate use, and after her decease, 200*l*. thereof to her son T., and the other 100*l*. to her son C., and W. and T. die within the three years:—Decreed, that the money should be paid, though charged on both funds. *Id.* 511.

Where residue was directed by testator to be divided among six persons, at the death of his wife, and two died before her:—Held, that the interest of the two was vested and transmissible, and depended not on surviving the wife. *Ib.*

A testator devised lands to A. for life, remainder to his sons successively in tail, remainder to B. for life, remainder to his sons successively in tail, remainder to his testator's nieces, C. and D., and the survivor, for their respective lives as tenants in common; he also bequeathed to D. a sum of 1,000*l*., charged upon his real and personal estate, to be by her distributed among her younger children, in such shares as she should think proper, provided always that if D. should, under the foregoing limitations in the will get into possession of the lands, then the said sum of 1,000*l*. should not be paid unto her for the purpose aforesaid. D. survived the testator, but died, her life estate in the lands never having taken effect in possession:—Held, that she took a vested interest in the legacy of 1,000*l*., at the death of the testatrix, subject to be divested on the happening of the contingency; and, accordingly, that interest was payable upon the legacy from the testator's decease. *Finucane* v. *Studdert*, 1 Ir. Ch. R. 140.

Deficiency to be raised out of Real Estate.]—A testator bequeathed to his four daughters a legacy of 500*l*., to be paid to them respectively on the days of their respective marriages, with the consent of his wife and executors, with power to each of them to dispose thereof by will or deed as they might think proper; such four legacies to be charged on his personal estate, and the deficiency to be raised out of his real estate, which he empowered his trustees to do by demise, sale, or mortgage; and he directed his

executors to pay not less than 30*l.* or more than 40*l.* a year for his daughters' maintenance until their respective marriages, out of his personal estate, and on a deficiency, out of his real estate. By a codicil to his will, he devised four additional legacies of 500*l.*, to be paid to each of them at the time and in the manner in his will mentioned. One of the daughters died unmarried, having bequeathed her legacies to the survivors:—Held, first, that the legacies of the daughter who died could not be raised out of the testator's real estate. *Bolton* v. *Bolton*, 12 Ir. Ch. R. 233.

Held, secondly, that the legacies to the surviving daughters were not raisable out of the real estate, before their marriage with consent. *Ib.*

One by his will devises, that all his debts and legacies shall be paid by his executor out of his personal estate, if that shall be sufficient; but if not, then that his executor, within twelve months after his death, shall sell or mortgage so much of his real estate as shall be sufficient for that purpose, and (inter alia) gives a legacy of 1,000*l.* to S., who dies within a year, and the personal estate is not sufficient; this is a vested legacy, and shall be paid to the executor of the legatee, though charged upon land; for the words "within twelve months" denote the ultimate time; but the executors may pay the legacy sooner. *Wilson* v. *Spencer*, 3 P. Wms. 172; 2 Eq. Cas. Abr. 547, pl. 25.

—— **Personal Estate and Rents of Real Estate.**]—A., by will, gives 500*l.* to his daughter, to be paid by his executors at her age of twenty-one, out of his personal estate, and rents of his real; and if not raised by that time, the executors to stand seised, and take the rents till the 500*l.* was raised, and after payment gives the land to his son; the daughter marries at eighteen, and dies under twenty-one; the husband takes administration:—Decreed, the portion to be raised, and that by a sale, though the land, by reason of the incumbrances, would produce little more than the 500*l.* *Jackson* v. *Farrand*, 2 Vern. 424; Pre. Ch. 109.

Term of Years and Sum of Money.]—A testator, in pursuance of a power, appointed by his will the sum of 5,000*l.* amongst his five daughters, in equal shares; and reciting that he was possessed of certain lands for a term of twenty-one years, with a toties quoties covenant for renewal, bequeathed the same, together with the sum of 1,000*l.*, to trustees, in trust to pay the interest, proceeds, rents, and profits to his wife for life, and from and after her death, or in her lifetime, if she should so direct, to raise by sale, mortgage, or otherwise, such a sum of money as, together with the provision thereby made for them, should make up to each of his five daughters on marriage, if in the lifetime of his wife, with her consent, and if unmarried at the time of her death, then upon their attaining the age of twenty-one, or being married, the sum of 2,000*l.*; and until payment of the additional provision thus made for his daughters, he directed the trustees, on the death of his wife, to pay to each daughter out of the rents of the land and the interest of the 1,000*l.*, so much as, together with the interest of the 1,000*l.*, would produce 120*l.* per annum; and after the death of the wife, and payment of the additional portions, to assign over the residue to his son. The wife did not direct the additional provision to be raised during her life:—Held, that a daughter who attained twenty-one, but died in the lifetime of the wife, did not take a vested interest in the additional provision. *Brabazon, In re*, 13 Ir. Eq. R. 156.

Freehold Estate and Term for Years.]—A testator who was seised of a freehold estate, and was also possessed of a term for years with a toties quoties covenant for renewal, bequeathed to his daughter a legacy of 600*l.*, charged both upon the freehold estate and the term for years, and directed the same to be paid to her on her attaining the age of twenty-one years or day of marriage, whichever should first happen, with interest from the day of his death:—Held, that this legacy, so far as it was charged upon the term for years, was vested, and that, consequently, upon the death of the legatee intestate before she attained the age of twenty-one years, and without having been married, it became divisible in equal shares among her next of kin. *Hudsons, In re*, Dr. 6.

E. PORTIONS AND OTHER INTERESTS CREATED BY DEED.

1. *When Charged on Land*, 1692.
2. *Gifts to Children Contingent on Surviving their Parents.*
   a. In General, 1694.
   b. Effect of Word "Such," 1701.
   c. Contingency Running Through the Whole Class, 1702.
   d. Gift Over, 1704.
3. *Gift of Interest for Maintenance*, 1709.
4. *Other Cases*, 1711.

1. When Charged on Land.

In General.]—Whether portion charged on land be given with or without interest by deed or by will, if the person die before it becomes payable it shall sink into the estate. *Boycot* v. *Cotton*, 1 Atk. 555. S. P., *Lowther* v. *Condon*, 2 Atk. 131; Barnard. 327.

If I secure a portion to a child by deed, payable at twenty-one, out of land, and the child dies before twenty-one, the portion shall sink into the land and not go to the executor. So if I devise a portion to a child out of land, payable at twenty-one, and the child dies before twenty-one, the portion shall sink. Also the portion shall sink as well for the benefit of hæres factus as of the hæres natus. So though the money given to the child be not said to be for a portion, if it appear to be so in fact. If by will the portion be given out of a real and personal estate payable to the child at twenty-one, and the child dies before twenty-one, then so much as will arise out of the personal estate shall go to the executor or administrator, but what would arise out of the land must sink. *Jennings* v. *Looks*, 2 P. Wms. 276. S. P., *Prowse* v. *Abingdon*, 1 Atk. 485; *Harvey* v. *Austin*, 1 Atk. 379; Cas. t. Talb. 212, 217, n.

Legacies or portions charged on real estate, and payable at a future time, do not vest until the time appointed for payment. Upon the death of the legatee or portioner before the time appointed for payment, they lapse or sink into the inheritance. *Remnant* v. *Hood*, 2 De G. F. & J. 396; 30 L. J., Ch. 71; 6 Jur. (N.S.) 1173; 3 L. T. 485. Affirming 27 Beav. 74. S. P., *Phipps* v. *Musgrave (Lord)*, 3 Ves. 614; 2 R. R. 607.

If, however, the payment of the legacy or portion is postponed, not from any consideration personal to the legatee or portioner, but for the

convenience of the estate, the legacy or portion will, notwithstanding, vest in the legatee or portioner before the time of payment. *Ib.* And see *Ruby* v. *Foot*, Beat. 581.

Time Fixed for Payment.]—Term of 1,000 years to secure daughters' portions payable at sixteen; proviso, if no daughter at the time of failure of issue male, the portion to sink. There is a daughter who attains to sixteen, and marries without consent, and no son by the marriage; but the daughter dies in the lifetime of the father and mother, and consequently while there might be a son; the portion sinks. *Gordon* v. *Raynes*, 3 P. Wms. 134.

Portion secured out of land, and the daughter dies before the portion becomes payable; it sinks into the land. So if a legacy be given out of land to J. S., payable at twenty-one, and J. S. dies before twenty-one; the legacy sinks. Secus, in both cases, where the legacy or portion is given out of a personal estate. *Ib.*

Term limited by a settlement to raise portions for younger children, payable at twenty-one or marriage; one of them dies under twenty-one, and unmarried: her portion shall not be raised for the benefit of the administratrix; otherwise, if the portion was to be raised out of a personal estate. *Poulet* v. *Poulet*, 1 Vern. 204. And see *Brathwaite* v. *Brathwaite*, 1 Vern. 334.

Power to father to raise portions for younger children, not exceeding 3,000*l.*; if no appointment, the estate charged with 3,000*l.*, for the sons at twenty-one, for the daughters at twenty-one or marriage. Nothing vested in the father's lifetime, and representative of one who attained twenty-one, and became elder, but died in father's life, not entitled to a share. *Loder* v. *Loder*, 2 Ves. sen. 531.

A term is created by marriage settlement, to raise 3,000*l.* for daughters' portions, within twelve months after death of the survivor of the husband and wife; there being one daughter, the father devises the trust lands to make good his wife's jointure, and to raise 5,000*l.* for his daughter's portion: the daughter shall not have two portions of 3,000*l.*; and she dying at the age of five years, and the portion to be raised out of land, it shall not be raised for her administrator, but the interest or maintenance the child was entitled to shall. *Brewin* v. *Brewin*, Pre. Ch. 195; 2 Vern. 439.

By marriage settlement a term is created for raising 400*l.* a-piece for younger children, to be paid them within a year after the father's death, and with interest from his death; one of the children dies after the father, but within a year after his death, the portion not being raised:—Held, that it should sink in the inheritance, and not be raised for the benefit of its representative. *Tournay* v. *Tournay*, Pre. Ch. 290.

No Time Fixed for Repayment.]—By marriage articles, A. agreed to settle lands to the use (inter alia) of trustees for a term of 500 years, to commence at the death of the settlor, upon trust to raise 6,000*l.* for the younger children of the marriage, to be paid and distributed amongst them in such manner and shares as the father should by deed or will appoint; and in default of appointment, share and share alike. No time was fixed for a payment. There were three daughters; one died in the lifetime of her parents, under age, intestate and unmarried. No appointment having been made:—Held, that no time being fixed for vesting, and the deceased daughter not having occasion for her portion, it sank for the benefit of the estate. *Leslie* v. *Dungannon* (*Lord*), Wall. Lyn. 263.

Portions provided by marriage settlement for younger children, to be paid at such time as the trustees shall think proper. One of the children dying at seventeen, before any appointment, his portion shall sink in the inheritance, but maintenance, and a sum paid in placing him out apprentice, to be allowed out of the trust estate. *Warr* v. *Warr*, Pre. Ch. 213.

Portion not to be Raised during Life of Settlor.]—By a marriage settlement in 1795, the father of the lady conveyed certain lands, of which he was seised in fee, to trustees for ninety-nine years, to raise 1,000*l.*, part of a sum of 4,800*l.* agreed to be secured by him, and pay same to the intended husband for his own use, and to permit him to receive the interest on 1,300*l.*, further part of the 4,800*l.*, for his life; and if the intended wife should survive him, to permit her to receive the interest during her life; and then to pay the 1,300*l.* to the husband, if he should be living, and, if dead, to his executors or administrators. If there should be any child or children of the marriage, the trustees were then directed to raise 2,500*l.*, the residue of 4,800*l.*, and pay same to the children, if more than one, as the husband should appoint; and, in default of appointment, to pay same to them in equal shares, if more than one, and if but one, the whole to such one at twenty-one, or marriage. It was declared, that the husband should receive the interest of the 2,500*l.* during his life, but that neither principal nor interest should be raised during the lifetime of the father; and, that if there should be no issue of the marriage, the 2,500*l.* should not be raised. There was only one child of the marriage, and he died a few days after his birth, in the lifetime of his father:—Held, upon the construction of the settlement, that the child, at the moment of its birth, took a vested interest in the 2,500*l.* on his birth, and that his personal representative was entitled to have it raised out of the estate. *Reilly* v. *Fitzgerald*, Dr. 122; 6 Ir. Eq. R. 335.

Some of the Portions becoming Payable.]—Where, under a settlement, a sum of money is to be raised, out of real estates, for the portions of younger children, and some of the portions have become payable, the court will raise the whole sum at once, although some of the children have not acquired vested interests. *Gillibrand* v. *Goold*, 5 Sim. 149; 3 L. J., Ch. 100.

2. Gifts to Children Contingent on Surviving their Parents.

a. In General.

In General—Death in Lifetime of Parents.]—Construction of an incorrect and ambiguous settlement, as vesting portions at twenty-one, against words importing a condition of surviving the parents: an intention, which, if clearly expressed, must prevail; but is not to be inferred, as not a rational construction of an ambiguous family settlement. *Howgrave* v. *Cartier*, 3 V. & B. 79; G. Cooper, 66; 13 R. R. 142. And see *Jones* v. *Franco*, 1 Russ. & M. 649, and *Theed's Trusts, In re*, 3 K. & J. 375; 26 L. J., Ch. 514.

The rule in *Howgrave* v. *Cartier*, supra, in favour of putting on a settlement or will making a provision for a family such a construction as

will give the children indefeasible interests on their attaining twenty-one, is only a rule of construction to be applied in construing ambiguous words, and not a positive rule which will modify the effect of plain words. *Hamlet, In re, Stephen* v. *Cunningham*, 58 L. J., Ch. 242; 39 Ch. D. 426; 59 L. T. 745; 37 W. R. 245—C. A.

In construing a marriage settlement, it is the duty of the court to give effect to the plain meaning of the words, unless the instrument on the whole affords grounds for leaning in favour of a construction which will include all children. *Jeyes* v. *Savage*, 44 L. J., Ch. 706; L. R. 10 Ch. 555; 33 L. T. 139; 23 W. R. 764.

The rule in *Woodcock* v. *Dorset* (*Duke*), infra, is an artificial rule, and ought not to be extended. It is founded on an implied agreement that the children of a child dying in the lifetime of his parents should be provided for. *Ib.*

When such children were provided for according to the natural meaning of the settlement:—Held, that the rule was not applicable; that the word "leaving" must be construed according to its natural meaning, and that a son who attained twenty-one, and died without issue in the lifetime of his parents, had not acquired a vested interest. *Ib.*

In this case, a portion proceeding from a parent held vested in a deceased child, upon what was collected by the court, as the intention of the parties, against very strong expressions to the contrary. *Woodcock* v. *Dorset* (*Duke*), 3 Bro. C. C. 569; 3 V. & B. 82, n.

The presumption that a pre-nuptial settlement is intended to provide for children of the marriage at the time when they require a provision, is so strong that the court will not, unless absolutely compelled by the language of the instrument, adopt a construction of such a settlement which would exclude from its benefit a child who comes of age but does not survive both parents. *Currie* v. *Larkins*, 4 De G. J. & S. 245; 3 N. R. 621; 10 Jur. (N.S.) 349; 10 L. T. 47; 12 W. R. 515.

Interest in a partnership trade under articles to the widows of the partners for their respective lives, and after the decease of the widows to be equally divided among their respective children:—Held, not vested in children who died in the life of mother; on account of nature of the subject: the primary object being to constitute a partnership, and ascertain the succession; and a provision for the family being only a secondary object through that medium. *Balmain* v. *Shore*, 9 Ves. 500.

One, having a daughter thirty years old, settles his estate on himself and wife for their lives, remainder for 500 years, remainder over, and declares the trust of the term to raise after the death of him and his wife 850*l.* for his daughter, her executors and administrators. The daughter died in the lifetime of her father:—Held, her representatives were entitled. *Smith* v. *Partridge*, Amb. 266.

—— **Children attaining Twenty-one.**]—In determining the rights of children under a marriage settlement, the court, unless prevented by clear and distinct words, will hold that children who attained twenty-one, and died leaving their parents, took vested interests under the settlement. *Bailie* v. *Jackson*, 1 Sm. & G. 175; 1 W. R. 196.

The court will lay hold of minute circumstance in favour of such construction. *Ib.*

Trust, in case husband and wife should, at death of survivor, leave any child, &c., and such child, &c., attain twenty-one, to convey to such child, if but one, and if more than one who shall attain twenty-one to convey to such children who should attain twenty-one, according to appointment of father and mother surviving; in default of appointment, equally at twenty-one, with survivorship; and if both parents die without leaving any child, &c., remainder to the father:—Held, vested in children having attained twenty-one, who died in the life of one parent, with those who survived both. *King* v. *Hake*, 9 Ves. 438; 7 R. R. 266.

—— **Twenty-one or Marriage.**]—A portion was made payable to children at twenty-one, or marriage, whichever should first happen after the death of the parent; but if in his lifetime, then within three calendar months after his death; and it was afterwards provided, that if any child should die before his portion should become payable, his share should go to the surviving children: one child married, and died in the lifetime of the parent:—Held, that her portion did not go over, but belonged to her administrator. *Wakefield* v. *De Burgh*, 4 L. J., Ch. 215.

Portions in a settlement by a term after mother's death for defendants, to grow due and payable at twenty-one or marriage, &c. One daughter having, after twenty-one and marriage, died in life of mother, her portion shall go to her representatives, and not to her sister. *Emperor* v. *Rolfe*, 1 Ves. sen. 208.

Portions at twenty-one or marriage, when C. and his wife should die without issue male:—Held, a condition precedent, and not to be raised till both are dead; though one die, and the other remain tenant in tail after possibility of issue extinct. *Champney* v. *Champney*, 10 Mod. 314.

By a voluntary settlement personal property was assigned to trustees upon trust to pay the interest to T. during his life, and on his decease to pay the principal to his lawful issue, if then of age or married, share and share alike, if more than one, and if only one the whole to be paid to such only child, or in case such child or children should be an infant or infants on the death of the said T., then the principal was to be paid to him, her, or them as aforesaid on their attaining twenty-one if sons, or if daughters on their marriage, respectively. By his will the settlor bequeathed certain other funds to the same trustees upon similar trusts. T. died, leaving an infant daughter his sole surviving child:—Held, that the daughter would become absolutely entitled to the bonds in question, either on her attaining twenty-one or her marriage under that age. *Lang* v. *Pugh*, 1 Y. & C. C. C. 718; 6 Jur. 939.

A fund was assigned by a marriage settlement to trustees upon trust, after the death of A., to transfer it and all the interest, &c., to all and every the child or children of the marriage, or the issue of any such child or children who might happen to be then dead, leaving issue, or to any one or more of them, in such shares, &c., at such ages, &c., as A. by his will should appoint, and, in default of appointment, to pay the fund between them all, to sons at twenty-one, and to daughters at twenty-one or marriage, in case such ages or days should not take place till after the decease of A.; but in case such should happen in his lifetime, then such payment should be

postponed until after his decease. A. by will appointed the fund to the children of the marriage share and share alike, on their attaining twenty-one or marriage with consent, and directed that the interest should be for their support and maintenance, given in trust to his wife until the boys entered professions or attained twenty-one, and the girls attained twenty-one or married with consent:—Held, first, that the portions were, by the settlement, vested in the children before the period of payment; secondly, that the provision in the will as to maintenance was of itself sufficient to vest the portions. The rules as to the vesting of portions and legacies are the same. *Orme, In re*, 1 Ir. Ch. R. 175.

—— **Having Issue Male.**] — Covenant in marriage articles, that in case the father should happen to die, having issue male, and one or more younger son or daughter, to raise portions; if but one then living 1,000*l.*, if two, 1,200*l.*, if three, 1,500*l.*, to be paid at their respective ages of twenty-one or marriage, in such proportions as the survivor of the father and mother should direct, in default of such direction, equally:—Held, that the share of a son who attained twenty-one was vested, though he died in the father's lifetime. *Rooke* v. *Rooke*, 2 Eden, 8.

—— **No Issue Male — Daughters.**] — On a marriage, lands are limited to the husband for life, remainder to the wife for life, remainder to the first and other sons of the marriage in tail male, remainder to S. in fee, provided if there be no issue male of the marriage, and there be one or more daughters living at the husband's death, then the trustees to stand seised, subject to the intent that such daughter or daughters should receive out of the rents 10,000*l.*, and 100*l.* per annum for maintenance, but no time limited for payment of the portion. The husband dies, leaving only one daughter, who lives to seventeen, but by her will disposes of the 10,000*l.*:—Decreed, this is a vested interest in the daughter, and well disposed of by her will. *Rivers* (*Earl*) v. *Derby* (*Earl*), 2 Vern. 72.

On marriage lands are settled on A. for life, remainder to the first, &c., sons of the marriage in tail male, remainder to trustees for 500 years, to raise 5,000*l.* portions for daughters, payable at eighteen or marriage; remainder to A. in fee. After the marriage A. settles other lands, and a term is created for raising the like sum of 5,000*l.* for daughters on failure of issue male, payable at sixteen or marriage. A. dies, leaving a daughter his heir-at-law, who attains eighteen, and dies unmarried. The trust of the term is not merged in the fee, but the portion shall go to the daughter's executors, and is disposable by her will; but there shall be but one 5,000*l.* raised. *Thomas* v. *Kemeys*, 2 Vern. 348; 2 Freem. 207; 1 Eq. Cas. Abr. 269, pl. 10.

On a settlement before marriage, the trust of a term was, that in case the husband should have no issue male, and there should be daughters, to raise, if two daughters, 25,000*l.*, to be paid at twenty-one or marriage, but not to be raised till after the death of their grandfather. The father died, leaving two daughters, and then the grandfather died: the husband of one daughter claimed 12,500*l.*, with interest from the time of the marriage:—Decreed, with interest, as a vested portion in the words of the settlement. But upon portions, or interest of them, to be raised out of reversionary terms, especially upon construction or implication, the court reluctantly interfered. *Lyon* v. *Chandos* (*Duke*), 3 Atk. 416.

Marriage settlement on husband and wife for life, and trust term if no issue male, or if all should die without issue male before twenty-one years, to raise portions for daughters, &c. A son attained twenty-one, but died in his father's lifetime without issue male. The portions not raisable. *Worsley* v. *Granville* (*Earl*), 2 Ves. sen. 331.

A term is limited to raise portions for daughters, if no sons; provided such daughters survive their father. A daughter dies in the life of her father. Her portion shall not be raised. *Hickman* v. *Anderson*, 2 Vern. 654.

Term raised to secure daughters' portions. Trust thereof declared, that if the husband should leave no heir male by the marriage, and should leave a daughter or daughters, then the trustees to raise portions payable to daughters at twenty-one or marriage; proviso, that if the husband should die without leaving a daughter living at his death, then the term to cease. There is no issue male by the marriage; but there is a daughter who attains twenty-one and marries. Mother dies, and daughter dies in the father's lifetime, leaving issue; her husband administers to her: he shall have no portion. *Wingrave* v. *Palgrave*, 1 P. Wms. 401.

On marriage a leasehold estate settled in trust for husband and wife for life: after decease of survivor then trustees to assign it with the rents and profits to the eldest son; for want of such issue of such son, to daughters. It goes to the only daughter at the mother's death, and not to representatives of a son who died without issue, in mother's lifetime. *Exel* v. *Wallace*, 2 Ves. sen. 318.

—— **Death in Lifetime of both Parents.**]— Upon the construction of a settlement it was held, that a daughter who died in the lifetime of both parents was not entitled to any portion, under the trusts of a term created for raising portions, notwithstanding she had previously attained eighteen and married. *Whatford* v. *Moore*, 3 Myl. & C. 270; 6 L. J., Ch. 378.

In a case of doubt, the court leans to that construction which will include a child attaining its age and dying before its parents, as the most convenient and most likely to have been the intention of the parties. *Ib.*

A term limited in remainder after the father's death, in trust for raising portions for daughters at eighteen, or marriage; portions may be raised during life of father. *Corbett* v. *Maydwell*, 2 Vern. 655; 3 Ch. Rep. 190; 1 Salk. 159; 1 Eq. Cas. Abr. 337, pl. 5.

A sum of money settled on marriage to the use of the husband for life, after his death to the wife for life, and if they should both die, leaving children, to such children, vests in all the children of the marriage, and not exclusively in the children surviving both parents, such being the clear intent of the parties, though contrary to the literal expressions in the settlement. *Bradish* v. *Bradish*, 2 Ball & B. 479; 12 R. R. 109.

—— **Surviving Child.**] — In a settlement of personalty, on the marriage of M. and W., it was declared that, "from and after the several deceases of M. and W., and the death of the survivor of them, in case there should be any child or children of M. and W. which should be then living, the trustees should pay the trust

funds unto such child or children, and to be paid to such child or children at his, her, or their respective age or ages of twenty-one years." Personalty was settled in trust "for all and every the child or children of M. which should be living at the time of her decease, and to be paid to them at their respective ages of twenty-one years":—Held, on the construction of each settlement, that the only child who was living at the death of the survivor took the whole. *Jeffery* v. *Jeffery*, 17 Sim. 26; 13 Jur. 482.

Limitation in an article on marriage to A. for life, subject to annuities for the lives of B. and C. and a charge for a jointure for D., if she should survive A., and after the death of said B. and C., A. and D., then to the use of the issue, &c. The limitation to the issue is not to await the deaths of A., B., C. and D., but they are to take upon the death of A., subject to the charges for B., C. and D. *Bushell* v. *Bushell*, 1 Sch. & Lef. 95; 9 R. R. 21.

Gift to Children and Issue.]—By a marriage settlement, trustees were directed to pay the income of certain trust funds to the husband and wife for their lives, and after the death of the survivor to divide such funds between the children and issue of the marriage, to be transferred and paid unto sons at twenty-one, and to daughters at twenty-one or marriage. There were three children of the marriage. One of them attained twenty-one, and died in the lifetime of the tenants for life, leaving children and grandchildren; another attained twenty-one, and died in the lifetime of the tenants for life, without children; and the other attained twenty-one, survived the parents, and had children;—Held, that the trust funds vested in the children of the marriage as they attained twenty-one, and that the surviving child and the representatives of the deceased children were entitled to them. *Gordon* v. *Hope*, 3 De G. & Sm. 351; 18 L. J., Ch. 228; 13 Jur. 382.

Grant of personal estate by a deed to trustees for a niece after the death of the grantor, in whose life niece dies; it goes to representative of niece, not to executor of grantor. *Peck* v. *Parrot*, 1 Ves. sen. 236.

A direction to trustees, to pay a principal sum after the death of a father and mother to their issue equally, to sons at twenty-one and to daughters at twenty-one or marriage, is only a circumstance or qualification of the person receiving, and not intended to accelerate the payment, or vest it in the children; for the direction of the payment is the gift, and will not vest till the time of payment comes. *Seamer* v. *Bingham*, 3 Atk. 57.

Settlement of money on husband and wife, reciting, &c.; and in case the husband shall die, and the wife survive, he having no issue of her body, or such issue shall die in the lifetime of the wife, then the money to be paid and assigned to the wife. There was issue a daughter, who married, attaining twenty-one, and died in the lifetime of the mother, leaving two children, who survived their grandmother:—Held, the daughter acquired a vested interest transmissible to her representatives. *Heurtley* v. *Mason*, Amb. 621.

Election.]—A., by his marriage settlement, covenanted that he would, by his will, or otherwise, settle all the real and personal estates which he should die seised or possessed of, so that the same might be enjoyed by his wife, for life, in case she should survive him; and, after the death of the survivor, by all the children of the marriage, equally: some of the children of the marriage died in the lifetime of A. and his wife:—Held, that under this covenant, all the children became entitled to vested interests on their coming into existence; and that A. (who, as administrator to some of his deceased children, had become entitled to their shares of his personal estate) having, by his will, given both his real and personal estates to the same persons, some of whom exclusively claimed the real estates, under the covenant, a case of election arose. *Naylor* v. *Wetherell*, 4 Sim. 114; 9 L. J. (o.s.) Ch. 125.

By settlement on marriage, reciting an intention to provide for the wife and children, certain tolls were granted for the remainder of the grantor's term, in trust to raise an annuity for the lives of the wife and her mother and the survivor: then reciting that the remainder of the term might expire in the life of the wife or her children, therefore to make a provision for her and her children by her then or any future husband, the trustees should be possessed of the said tolls for the remainder of the term, upon trust to raise, after the deaths of the grantor and the mother of the wife, 100*l.* annually, to be placed out in the purchase of freeholds or leaseholds, for two or three lives, as often as a competent sum should be raised for that purpose; and until convenient purchases should offer, to be invested in government securities upon trust, in case the wife should survive the term, to pay the rents and profits of such estates so to be purchased, or the interest to arise from the money so intended to be placed out, until such purchase should be made, to the wife for life; and after her decease, to apply the same towards the maintenance of such children of her as should be living at her death, till the youngest should be twenty-one, and then to be possessed of such estates or money to the use of such children, in such share and proportions, payable at twenty-one, as the survivor of the husband and wife should by will or deed appoint; in default thereof to the use of all such children, equally to be divided at their respective ages of twenty-one: but if she should die without leaving any children, or all should die under twenty-one, then to the use of the grantor, his heirs, executors, administrators, and assigns; and after paying the annuities, to be possessed of all the surplus money arising from the tolls during the remainder of the term for the use of the grantor, his executors, &c. From the death of the grantor, who survived the wife's mother, the trustees received 100*l.* a year, and laid the same out in stock. The only son attained twenty-one in the life of his mother, and survived her. The court would not invest the fund in land: but held it, with the accumulations, from the death of the grantor, and the future payments, a vested interest in the son at twenty-one, and as personal estate belonging to his administrator. *Swann* v. *Fonnereau*, 3 Ves. 41.

Alienation—Clause of Forfeiture.]—Property was settled upon trust after death of settlor to apply the whole or part of income towards the maintenance and education of the six children of S. B. (by name), and to accumulate the residue of the income until the death of the survivor of O. B. and S. B., or until such time as the youngest of the six children, or the youngest of such of them as should be living, attained

twenty-one; and then if O. B. and S. B. should then have died, or if not, immediately after the death of the survivor, to convey and assign the same to the children, or such of them as should be then living. There was no other gift to the children. The settlement contained a clause, that the share of any of the six children who alienated his share should be forfeited, and go over to the other children:—Held, that none of the children took a vested interest till after the happening of the last of the three events, namely, the attainment of twenty-one by the youngest, and the death of O. B. and S. B., and, therefore, that none of the children who died before the last of such events happened took a vested interest. *Blake* v. *Barnett*, 2 Dr. & Sm. 117; 31 L. J., Ch. 898; 8 Jur. (N.S.) 812; 6 L. T. 886; 10 W. R. 767.

Held, also, that the term "alienated" meant not only an actual alienation, but any act done for the purpose of alienating. *Ib.*

Trust for Children—General Words Restrained by Context.]—A fund was settled upon marriage, in case the husband should die in the lifetime of the wife and there should be issue of the marriage living at the death of the husband, for all and every the child and children of the marriage, and the issue of such child or children in case any of them should happen to be dead, leaving issue, in equal shares; the issue to be entitled only to the shares which their parents would have been entitled to if living:—Held, that, having regard to the context, the words "all and every the child and children" must be restricted to children who survived their father. *Thorne's Trust, In re*, 10 W. R. 338.

Under a trust for A. for life, "and after her death, to be divided equally between her younger children":—Held, first, that the children took vested interests at their births, and secondly, that the character of youngest child was to be determined at the period of vesting, and not that of distribution. *Adams* v. *Roberts*, 25 Beav. 658.

b. Effect of Word "Such."

Such Children.]—A sum was vested in trustees, upon trust declared by deed. The deed recited an intention to make some provision for A. and her children, and declared that the trustees should hold the fund for A. for life, and upon her death, or doing any act to incumber her interest, the trustees were to stand possessed, "if there should be one child of A. then living, the said stock to be an interest vested in such child at twenty-one, and to be paid accordingly, if such age should happen after the death of A., and if not, immediately on her death or making any charge." And if there should be two or more such children, then the stock to be transferred amongst such children, in equal shares, at the age of twenty-one, if A. should be dead; but if not, then immediately after her decease or having made such incumbrance. The deed contained clauses of survivorship in case of any child dying under twenty-one, as to "the share intended to be thereby provided for such child dying," and also clauses for maintenance, advancement, and accruer. There were several children; one attained twenty-one, and died in the life of A.:—Held, that her representatives did not participate in the fund. A petition of appeal from the decision was dismissed with costs by Lord Cottenham on the 8th July, 1848. *Skipper* v. *King*, 12 Beav. 29; 12 Jur. 209. Affirmed 12 Jur. 570.

By a marriage settlement, executed in 1784, certain hereditaments were vested in trustees, in trust for the husband and wife successively, for life; and on the death of the survivor to pay the rents in maintenance of "all and every the child or children until such child or children should attain twenty-one, and when and as such child or children respectively should attain twenty-one," upon trust to convey "unto such child or children" as the parents should appoint; and, in default, "to convey all the same premises unto and amongst such children equally"; and if but one such child, upon trust to convey to such only child, and his or her heirs for ever, with a gift over. By a deed executed in 1835 the surviving parent executed the appointment in favour of some only of the children:—Held, that the word "such" must be taken in the sense of "the said"; and that the power did not warrant an exclusive appointment in favour of some of the children:—Held, also, that the limitation in default of appointment gave a vested estate in fee to each child on his birth. *Strutt* v. *Braithwaite*, 5 De G. & Sm. 369; 21 L. J., Ch. 609; 16 Jur. 882.

In putting a construction on a marriage settlement, the court always endeavours not to make the interest of the children depend on their surviving their parents. *Ib.*

By a settlement personal estate was vested in trustees for the husband and wife successively for their lives, and after the death of the survivor, for the children, their shares to be paid as they should attain twenty-one, or if daughters at that age or marriage, with maintenance in the meantime. It was afterwards declared, that if there should be only one child living at the decease of the survivor of the husband and wife, or if there should be more than one such child, and all but one should die before twenty-one, then the fund should be paid to such only child on attaining such age if a son, or if a daughter at that age or marriage, with maintenance in the meantime; and if there should be no such child then living, upon trust for J. A. There was issue only one daughter of the marriage, and she attained twenty-one:—Held, after the death of her mother, that she took a contingent interest in the settled property during the life of her father. *Lloyd* v. *Cocker*, 19 Beav. 140; 24 L. J., Ch. 84; 1 Jur. (N.S.) 174.

The court would not rectify the settlement, as the trusts were complete. *Ib.*

c. Contingency running through the whole Class.

Child Attaining Twenty-One and Predeceasing Tenant for Life.]—In a marriage settlement, the father of the wife, after making a provision for her during life, covenants, that in case there shall be a child or children of the marriage living at her decease, he will pay 3,000*l.* to such child or children, on their attaining twenty-one, or, if they shall have attained that age in their mother's lifetime, at her death. In the directions that are afterwards given for the distribution of the sums in different events, among the children of the marriage, and their issue, no reference is made to the contingency of their surviving the mother; and though there is an express enumeration of the cases in which the money is not to be payable, the death of a child in the mother's lifetime,

after having attained twenty-one, is not specified as one of those cases:—Held, that the interest, which a child who has attained twenty-one takes in these sums, remains contingent during the life of the mother; there not being enough in the subsequent clauses to control the plain words of the covenant. *Fitzgerald* v. *Field*, 1 Russ. 430; 4 L. J. (o.s.) Ch. 170; 25 R. R. 97.

In the same settlement, the father covenants to pay upon the death of the husband 2,000*l.* to the eldest or only son of the marriage:—Held, that this covenant is controlled by subsequent clauses, so as not to give a vested interest upon the death of the father to an only son who was then under age. *Ib.*

By a settlement before marriage, whereby lands given to trustees for 500 years, in trust, that if the husband and wife should leave one or more daughter or daughters, younger son or sons, that should be living at the time of the decease of the survivor of them, the trustees should raise, &c., 2,000*l.* for the portion or portions of such daughter or daughters, younger son or sons, the same to be paid to such daughter, if but one, and no younger son, at eighteen or marriage; and to such younger son, if but one, and no daughter, at twenty-one, with allowance for maintenance in the meantime, &c.; and if there shall be more than one daughter or younger son, then to be paid to such daughter or daughters at eighteen or marriage; and to such younger son or sons at twenty-one years, &c.:—Held, that the settlement did not vest any interest in children who died before the decease of the surviving parent. *Hotchkin* v. *Humfrey*, 2 Madd. 65; 17 R. R. 188.

A fund was settled on trust for a wife for life; and in case she should leave any issue living at her death, for the husband for life; and after his death, upon trust to divide it amongst the children of the marriage "that should be then living on their respectively attaining twenty-one." And in case there should be no child, or of their all dying in the wife's life, to pay the fund to such person as the wife should by will appoint, and in default to the executors or administrators of the husband and wife, or the survivor of them; and in case the wife should survive her husband without leaving issue then living, to pay the fund to the wife. The wife died leaving children who had attained twenty-one, and the husband was still living:—Held, that the limitations to the children remained contingent until the death of their father. *Woollaston's Settlement, In re*, 27 Beav. 642.

By a settlement trustees were directed to hold trust funds upon trust to pay the income to H. for life, and after her death, "leaving a child or children," to transfer, pay, and make over the fund unto "all and every the child or children of H., and the issue of such of the children as might be then dead" (such issue to take the parent's share), equally between them if more than one, the shares of sons to be transferred and paid at the age of twenty-one, and the shares of daughters at that age or marriage. Five of the children of H. survived her, and attained twenty-one or married, and one son of hers attained twenty-one and died without issue in her lifetime:—Held, that although the trust only took effect in case some one child survived H., the contingency upon which the trust took effect was not to be imported into the constitution of the class who were to take under the trust, and that the son who attained twenty-one and died in the lifetime of the tenant for life without issue took, nevertheless, a vested interest in the fund. *Orlebar's Settlement Trusts, In re*, 44 L. J., Ch. 661; L. R. 20 Eq. 711.

Appointment — Child surviving Father but predeceasing Mother.]—When by a settlement portions are provided for the children of the marriage, not raisable until after the death of both parents, but with a power to the father to appoint among all the children; and the portions have actually become raisable, by reason of some of the children surviving both parents; a child, to whom the father appointed a share, who survives the father, but predeceases the mother, is entitled to the share appointed, unless the settlement, consistently throughout all its clauses, manifests an intention to the contrary. *Goddard, In re*, Ir. R. 5 Eq. 14.

d. Gift Over.

Settlement — Conflicting Clauses.] — When clauses in a settlement are conflicting, the rational presumption is, that a child attaining twenty-one takes a vested interest. *Dixon* v. *Barkshire*, 34 Beav. 531.

In a settlement, the limitation was to the children who should be living at the time of the decease of the father; this was controlled by the gift over:—Held, that a child who died in the life of her father, having attained twenty-one, was entitled to a share. *Ib.*

—— On Death of Children under Twenty-one or Unmarried.]—By a marriage settlement stock was vested in trustees upon trust, to pay the dividends to the husband during coverture, and to the wife during her life, in case she survived him; and from and after her decease, in case there should be any children of the marriage then living, then upon trust for such of the said children as should attain twenty-one or be married, with a direction, in case all or any of such children should then be under twenty-one and unmarried, to apply the dividends for their maintenance; and in case the wife should die without leaving any child or children at the time of her decease, or in case there should be one or more such child or children then living, yet all of them should die under twenty-one and unmarried, upon trust, if the husband should survive the wife and all such children, to pay the dividends to him during his life, and from and after the death of the survivor of the husband and wife, and from and after the death of the said children, in case there should be any, and all of them should die under age and unmarried, in trust for certain other persons. The wife survived the husband, and at her death there was no child of the marriage living; but a son, who died in her lifetime, had attained twenty-one, and married:—Held, that the stock vested in that son absolutely. *Torres* v. *Franco*, 1 Russ. & M. 649.

Money was settled upon trust, after the death of the survivor of the parents, to pay, apply, and dispose of the same unto all the sons and daughters, and the children of such as should be dead leaving issue (the children to take the share of their parents), with a gift over if there should be no child of the marriage, or being such, all sons, should die under twenty-one, and the daughters under twenty-one or marriage:—Held, that the shares vested in the children on their births, and

that the representatives of those who died unmarried in their infancy, and in the life of the parents, took a share. *Minor's Trusts, In re*, 28 Beav. 50.

—— **Voluntary Settlement by Person in Loco parentis.**]—By a voluntary settlement a fund was limited (after certain life estates) "to all the children of G. B. who shall be living at his decease, equally, as tenants in common"; followed by a proviso, that "if more than one child of G. B., and any of them should die under twenty-one, or before marriage," his or her share was to go to the survivors or survivor, or others or other of the children; and at the close there was a limitation over of the corpus to other parties, "in case all the children of the said G. B. shall die, as to sons, without attaining twenty-one, and as to daughters, without attaining twenty-one or marrying." The consideration was stated in the settlement to be the natural love and affection of the settlor towards G. B., who was a son of the settlor:—Held, that the consideration of natural love and affection was not thereby prevented from extending to the children of G. B., who were the settlor's grandchildren. *Swallow* v. *Binns*, 1 K. & J. 417; 1 Jur. (N.S.) 843.

G. B. had six children who all survived the date of the voluntary settlement, and all attained twenty-one. Two died in the lifetime of G. B.:—Held, that they took vested transmissible interests, and that their personal representatives were entitled to their two-sixths of the fund, and not the four surviving children, who claimed under the clause of accruer. *Ib.*

—— **Gift over before Portion Payable.**]—By a marriage settlement a term for years is created to raise 5,000*l.* portion for daughters, payable at their age of twenty-one or marriage; proviso if any of the daughters attain the age of twenty-one or marry in the father's lifetime, then the portion to be paid within a year after the father's death. Also if any of the daughters die before her portion payable or before her age of twenty-one or marriage, her share to go to the survivor. There was issue a son and three daughters, the first of whom married and received her portion; the second attained twenty-one, married and died without issue, and her husband administered; the third daughter survived both her sisters. Resolved, the husband, as administrator of the second daughter, is entitled to her share of the 5,000*l.*, she having lived to twenty-one, so that the right vested in her, and the payment was only suspended till her father's death. *Pitfield's case*, 2 P. Wms. 513.

Portions to be paid or transferred at twenty-one or marriage; if in the life of parents entitled for their life, then such portions were not to be paid, &c., till the decease of such parents, with survivorship in case of death of any, before his, her, or their shares should be payable, &c.:—Held, vested at twenty-one or marriage, in life of parents. *Schenck* v. *Legh*, 9 Ves. 300; 7 R. R. 199.

Portions held vested in the case of parent and child by implication from the whole settlement, against express words; and a clause of survivorship upon the death of a child, before the portion "should become payable," was upon the authorities construed, "before it should be vested." *Hope* v. *Clifden* (*Lord*), 6 Ves. 499; 5 R. R. 364.

Where portions are provided for daughters by a settlement, the father cannot by his will, annex any condition to the payment of them, or devise them over, in case of the death of any of the daughters before their portions become payable. *Aston* v. *Aston*, 2 Vern. 452; 1 Ch. Rep. 164; Pre. Ch. 266.

By a marriage settlement a term was created for raising portions for daughters in case the father should die without issue male, such portions to be paid at twenty-one or marriage; but if the daughters should attain that age or be married in the lifetime of the father, then within six months after his decease. But if all the daughters died before their portions became payable, then the fund was not to be raised. There was issue of the marriage a daughter and only child; she attained twenty-one and married, and afterwards died in her father's lifetime. The father died without issue male:—Held, nevertheless, that the daughter's representatives were entitled to her portion. *Fry* v. *Sherborne* (*Lord*), 3 Sim. 243; 8 L. J. (O.S.), Ch. 25; 30 R. R. 156.

—— **Power of Appointment not Exercised.**]—Term to commence after the father's death, to raise portions for younger children, in such shares and proportions as he should appoint, for want of appointment, equally, to sons at twenty-one, to daughters at twenty-one or marriage, to be paid immediately after the decease of the father; with survivorship in case of the death of a child before its portion should become due and payable. The father died without making any appointment:—Held, the portions vested at twenty-one or marriage during his life. *Cholmondeley* v. *Meyrick*, 1 Eden, 77; cited 3 Bro. C. C. 253 n.

Term in trust, after the decease of father, in case he shall leave a younger child, &c., to raise portions; to be paid according to appointment, and in default, &c., at twenty-one or marriage; with a provision for advancement in the life of the father by his direction, and survivorship upon death of any child, before the portion shall be payable; and, if there shall be no such child, or all die before the portions become payable, not to be raised:—Held, vested in an only younger child; who, having attained twenty-one, died in the life of the father; no appointment having been made. *Powis* v. *Burdett*, 9 Ves. 428; 7 R. R. 259.

A. settles his estate on his sister B. for life, remainder to her second and other sons in tail, &c., and gives her a power, with the consent of C., her husband, and for C. surviving B., to charge it with a sum not exceeding 12,000*l.* for their children; and if they, or the survivor of them, do not appoint the provision, then 2,000*l.* each to be raised for younger sons, and 3,000*l.* each for daughters, at their ages of twenty-one, with interest at 5 per cent. for their maintenance, to commence from the time of the appointment; and if no appointment, then from the death of the survivor of B. and C.; and if any of the younger children die before their shares become payable, the same to go to the survivor. A. dies; C. dies, leaving four younger sons and two daughters, one of which died an infant soon after her father; then B. dies, without making any appointment: the whole 14,000*l.* shall be raised, and carry interest from the death of B. *Rolt* v. *Rolt*, Cas. t. Talb. 189.

—— **Death before Annuities became Transferable.**]—By settlement made previously to the marriage of A. and B., certain exchequer annuities were vested in trustees in trust for the husband for life, then to the wife for life, and after both their deaths for the children of the marriage equally, if more than one, and if but one for such only child, to be assigned over to such child or children respectively at their ages of twenty-one, happening after the death of the survivor of husband and wife; but if either of the children should attain twenty-one during the joint lives of the father and mother, or the life of the survivor, then his or her share was to be paid within three months after the death of such survivor; but if there should be no children of the marriage, or being such, all of them should die before their share should become transferable as aforesaid, then the annuities were to go to the survivor of the husband and wife. There was issue only a son, who attained twenty-one, but died in lifetime of his mother, who survived her husband:—Held, that the annuities became vested in the son on his attaining twenty-one years, and were transmissible by him, notwithstanding he died in his mother's lifetime. *Jeffreys* v. *Reynous*, 6 Bro. P. C. 398. Affirming 2 Eden, 368.

—— **"Payable" meaning "Vested"—Issue.**]—By a marriage settlement, stock was settled, subject to life interests in the husband and wife, in trust for their children in equal shares, to be paid or payable at twenty-one or marriage, the shares of those dying leaving issue before their shares had become payable, to go to their issue, and in case any died without issue before their shares had become payable, then such shares to go to the surviving children of the marriage. Two of the children attained twenty-one, and died in the lifetime of the surviving parent:—Held, that "payable" meant "vested," and that the shares of the two children so dying went to their representatives. *Mocatta* v. *Lindo*, 9 Sim. 56.

In a settlement of trust moneys in trust for certain persons for life, and after the decease of the survivor in trust for their children, being sons at twenty-one and being daughters at twenty-one or marriage, "the issue of any child whose parent should die before his or her share should become payable to be entitled to the share which his or her parent would have been entitled to if living":—Held, that having regard to the fact that daughters' shares vested at their marriage when they could not have any issue, "payable" must refer to the period of distribution, and could not mean "vested." *Day* v. *Radcliffe*, 3 Ch. D. 654; 24 W. R. 961.

—— **"Due and Payable."**]—By a marriage settlement stock was settled upon trust for the husband and wife successively for life, and after the death of the survivor of them on trust to assign the trust fund among their children, and the issue of such of them as should be then dead leaving issue, as the husband and wife should appoint, and in default of appointment amongst the children and the issue of any of them who should be then dead leaving issue (such issue to take only their parents' share), equally to be divided among them, to sons at twenty-one, and daughters at twenty-one or marriage; and until their respective shares should become "payable," on trust to pay the income towards their maintenance; and in case any child should die without issue before his share should become "due and payable," upon trust to pay and divide the share of such child among the survivors or survivor and the issue of any of the children then dead, leaving issue, equally, when and as their original share should become "due and payable"; and if at the death of the surviving tenant for life no such child or issue should be living, or in case any of such children and issue were then living, but all of them should die before their respective shares were "payable," then on trust over for other persons. The settlement also contained a provision enabling the trustees to pay the children's shares to them before the expiration of the respective times thereinbefore limited for the "payment" thereof:—Held, that the words "due and payable" must bear their natural meaning, so that the share of a son who attained twenty-one and died in the life of the surviving tenant for life passed under the accruer clause. *Wilmott's Trusts, In re*, 38 L. J., Ch. 275; L. R. 7 Eq. 532.

—— **Gift over on Death before becoming Entitled.**]—By a marriage settlement a fund was limited in trust after the death of the parents, to transfer, &c., to all the children equally, the shares of minors to be paid, transferred, &c., and assigned at their age of twenty-one years, with maintenance in the meantime; and there was a gift over if there should be no child, or "if they should all happen to die before they became entitled to their respective shares":—Held, that the shares of the children vested at their birth, and that the shares of two of them, who died in their infancy in the lifetime of their parents, passed to their personal representatives. *Jopp* v. *Wood*; *Smith* v. *Jopp*, 2 De G. J. & S. 323; 34 L. J., Ch. 625; 11 Jur. (N.S.) 833; 12 L. T. 689; 13 W. R. 954.

—— **Entitled to and Actually Receive.**]—By a marriage settlement funds were vested in trustees for the husband for life, and after his death for the wife for life, and after the death of the survivor, in case they should leave issue, who being a daughter or daughters should live to be married or attain twenty-one, or being a son or sons should live to attain twenty-one, upon trust to pay the funds equally amongst all such issue as and when they should attain the age of twenty-one or be married, and if there should be but one such child, upon trust to pay the same to such only child, provided that if any such issue should happen to die before he or she should become entitled to and actually receive his or her portion, leaving lawful issue surviving, such issue should be entitled to their parent's share equally:—Held, that the word "leaving" must be construed according to its natural meaning, and that the representatives of a son who attained twenty-one and died without issue in the lifetime of his parents were not entitled to share in the trust fund. *Jeyes* v. *Savage*, 44 L. J., Ch. 706; L. R. 10 Ch. 555; 33 L. T. 139; 23 W. R. 764.

—— **Death before Share to which Person Entitled should have been Transferred.**]—Stock was, by articles of agreement, vested in trustees for several parties, in different portions, for their absolute use and benefit; provided that no payment or transfer should be made to any of them until he or she should have completed his or her

twenty-fifth year, unless he or she should be previously settled in life, with the sanction and approbation of the trustees, or of the major part of them; and in case any of them should marry or act otherwise in opposition to the wishes of the trustees, it should be optional with them to deprive the party so marrying or acting of all benefit or advantage under the articles, and the portion to which such person would be otherwise entitled should go to, and be equally distributed amongst the others; and provided that in case any of them should happen to die before the share to which he or she was entitled under the articles should have been transferred to him or her, the share of the person so dying should be distributed equally amongst the survivors, and that the trustees should apply the dividends of the fund for the maintenance and education of the parties in the several proportions to which they would be respectively entitled to the principal:—Held, that the original portions were vested, though not transferable until the respective parties attained twenty-one. *Bradon* v. *Bradon*, 16 Ir. Ch. R. 415.

Held, also, that shares accrued under the survivorship clause did not go over on the parties entitled to them dying under the age of twenty-five, but belonged to their next-of-kin. *Ib.*

Declaration of Trust—Maintenance during "Joint Lives"—Gift of Principal.]—The trusts of 2,000*l.* were declared to be the interest to be retained by the settlor during his life; and after his decease, to be applied to the maintenance of H. and her daughter. In a subsequent part of the instrument the trusts were, "after my decease I wish the interest of the above sum to be applied to their maintenance during their joint lives; and at the decease of her mother, if the child survives, and lives till she has attained the age of twenty-one years, then the principal sum I bequeath to her; (but in the event of both their deaths before the child shall have attained twenty-one years), then" the principal sum to be paid to the brothers and sisters of the settlor. The daughter lived to attain twenty-one, but died in the lifetime of her mother:—Held, that the mother was entitled to the interest of the 2,000*l.* during her life; and that the daughter, upon attaining twenty-one, acquired an absolute vested interest in the principal. *Moor* v. *Abbott*, 26 L. J., Ch. 787; 3 Jur. (N.S.) 551.

Decisions under Will.]—*See* WILL.

3. GIFT OF INTEREST FOR MAINTENANCE.

Effect on Vesting.]—Trust "to raise" 5,000*l.* portion, "and pay it" to such younger children as the father should appoint; for want of appointment to the younger children at twenty-one with interest for their maintenance, &c., in the meantime, &c., &c. The only younger child died two years old:—Held, not to be vested in him so as to be claimed by the father as his representative. *Hubert* v. *Parsons*, 2 Ves. sen. 261.

By marriage articles, it was agreed that 6,000*l.* should be vested in trustees in trust for all and every the child and children of the marriage (other than the one son for whom a portion of 30,000*l.* was provided), the said 6,000*l.* to be paid to such child or children, in such shares, at such times, and subject to such provisoes for maintenance and education until their shares should become payable, as the intended husband should, by deed or will, appoint; and in default of appointment, to be paid to such child or children, and to be equally divided among them; the shares of the sons to be paid at twenty-one; and of daughters at twenty-one or marriage; and in the meantime, until their portions should become payable, to apply the interest of their shares towards their maintenance and education; and in default of any issue save an only son, in trust for the intended husband, his executors, administrators, and assigns. There was issue of the marriage one son and two daughters, all of whom survived their parents. One of the daughters died under age and unmarried; the other attained her age of twenty-one:—Held, that the daughters took vested interests in the 6,000*l.* on being born; and that the share of the one who died under age vested in her personal representative. *Hynes* v. *Redington*, 1 Jo. & Lat. 589; 7 Ir. Eq. R. 405; Ll. & G. t. Plunk. 33.

There are cases where the court, though it would not raise the portion for a representative of an infant child, has allowed interest or maintenance whilst it lived. *Edgeworth* v. *Edgeworth*, Beat. 337.

—— **Appointment to Infant of Portion, Payable with Interest from Death of Appointor.**]—In a power to appoint to children, the word "reasonable" is applicable not only to the amount of the portion, but also to the time and occasion on which the child would want it. Therefore, an appointment of a portion to an infant, payable with interest from the death of the appointor, does not so vest the portion as to make it, on the death of the infant, transmissible to her representative; the appointment being under the implied condition that the child should attain that age at which the portion would be required for advancement in life. But the infant being entitled to a reasonable maintenance while it lived, her administrator decreed, under the head of general relief, entitled to a reasonable allowance for maintenance, though not specifically prayed by the bill. *Ib.* 328.

If such a construction can be given to an appointment as will secure the real object, the court will not disappoint provisions for children because the parent has in part misconceived his power. On instruments providing portions, the court has assumed a latitude of exposition which it does not on other instruments. *Id.* 334.

—— **Assignment of Leaseholds on Trust to Apply Rents during Minority for Maintenance.**]—A father assigned certain leasehold premises to a trustee, in trust for his son until he should attain the age of twenty-one years, and in the meantime to stand possessed thereof in trust, to collect and receive the rents and profits thereof, as and when the same should become payable, and thereupon to pay, apply, and dispose of the same for and towards the maintenance, education, clothing, and support of the said son during his minority; and, upon his attaining the age of twenty-one years, upon trust to assign the said premises, together with the lease and the accumulations of rents, unto the said son, his executors, &c., for the remainder of the term:—Held, that the son took a vested interest in the lease, and that, upon his death under twenty-one, it passed to his personal representative. *Stephens* or *Stevens* v. *Frost*, 2 Y. & C. C. C. 302; 6 L. J., Ex. Eq. 41

—— **Gifts in Favour of Sons — Daughters Included.**]—By a post-nuptial settlement reciting an intention to make further provision for the children of the marriage, certain sums of stock were vested in trustees in trust for the wife for life, and after her decease upon trust for all and every the child and children of the marriage who being a son or sons should attain the age of twenty-one years, equally to be divided between or among them and their respective executors and administrators; and if there should be but one such child, the whole to be in trust for such one or only child, his or her executors and administrators. There followed a clause directing that the trustees should, during the minority of each of the said children, pay to the father, to be by him applied or not as he should think fit, and after his decease should apply, the income of the presumptive share of every such child for or towards his or her maintenance and education until his or her share should become vested, or he or she should previously die:—Held, that daughters who attained twenty-one were entitled to share in the fund. *Daniel's Settlement, In re*, 45 L. J., Ch. 105; 1 Ch. D. 375; 34 L. T. 308; 24 W. R. 227.

Semble, daughters would not acquire a vested interest till they attained twenty-one. *Ib.*

And see ante, C. 2.

4. OTHER CASES.

Child Dying before he wanted Portion.]—Portions not to be raised for representative of child dying before he wanted it. *Teynham (Lord)* v. *Webb*, 2 Ves. sen. 209.

A power in a settlement to raise a portion for a younger child, at such time as the parent should direct; he directs it to be raised when she is fourteen, and she dying, files his bill for it as her administrator. The portion shall not be raised for the father. *Hinchinbroke* v. *Seymour*, 1 Bro. C. C. 395.

Payment Postponed.] — Under marriage articles, 2,000*l.*, part of 3,000*l.* vested in trustees, was to be paid to such son as should attain the age of twenty-one, when and at such time as he should have attained the age of twenty-three. The eldest son attained twenty-one, but died before twenty-three:—Held, that he became absolutely entitled to the money, and the time of payment only was postponed to the age of twenty-three. *Combe* v. *Combe*, 2 Atk. 185.

No Interest Vesting until Payment.]—Construction of a trust, by deed, of money to accumulate, until the grantor's grandchildren, then living, or to be born, respectively attain twenty-one; and on attaining, &c., to pay to each, as they should respectively attain such age, their respective shares; to be ascertained by the number in being as they respectively attain twenty-one without regard to such as might afterwards be born. No interest vested until payment; the measure of distribution is the number existing at each period: those, who had received, have no further claim upon the fund, increased by shares falling in; therefore, one dying under twenty-one, after all the others had either received their shares or died under twenty-one, that share is undisposed of by the deed; and passed by a bequest of "all effects whatsoever," following specific descriptions of property. *Campbell* v *Prescott*, 15 Ves. 500.

Younger Children — Appointment excluding One Child.]—By marriage settlement 1,500*l.* was provided for younger children, in such shares as the parents should appoint, in default of appointment to all the children after the death of the wife. The parents afterwards made an appointment, excluding one child; this deed vests the portions in the children born or to be born, except the one excluded. *Mayhew* v. *Middleditch*, 1 Bro. C. C. 162.

—— **Satisfaction—Portion not Raisable.**]—By a marriage settlement the real estate of the husband was limited to him for life, and at his death to trustees for a term of years, and subject thereto to the first and other sons of the marriage in tail male, remainder to the husband in fee. The trusts of the term were declared to be for raising portions for younger children of the marriage, "in case there should be one or more child or children of the marriage, besides an eldest or only son." There were two daughters only, and no son, issue of the marriage, and on the marriage of one of the daughters the father settled upon her and her husband, and her children, an annuity of greater value than her share of the portions under his own marriage settlement, and charged that annuity upon the estate which had been subject to that settlement. Upon the marriage of the second daughter he made a pecuniary provision for her, which was declared to be in satisfaction of her portion under the settlement; and by his will he devised the estate which had been settled to his two daughters, in the same manner as it would have come to them if he had died intestate:—Held, upon the construction of the settlement, that the portions were not raisable in the events that had happened, there being no son of the marriage. *Walcott* v. *Bloomfield*, 2 Con. & L. 577; 4 Dr. & War. 211; 6 Ir. Eq. R. 227. *And see* 2 Con. & L. 587, n; 4 Dr. & War. 225, n.

—— **Divesting Clause.**]—By a marriage settlement stock was settled, subject to the husband's and wife's life interests therein, upon trusts for the children and issue of the marriage (except an eldest son entitled to certain settled estates), as the husband and wife, or the survivor of them, should appoint, and in default of appointment, for the children (except as aforesaid) in equal shares, the shares of sons to be vested at twenty-one, of daughters at twenty-one or marriage; and it was provided that if the husband should die in his wife's lifetime, leaving an only child a son, such son should be entitled to the whole trust fund; but if the wife should survive the husband, and there should be only two children or only one child (except as aforesaid) who should attain twenty-one or marry, such two only children or one only child (except as aforesaid) should not be entitled to any part of the trust fund, but it should go to the husband absolutely as in that event such two children or one child (except as aforesaid) were otherwise provided for by a deed of even date creating a charge upon the settled real estates. There were two children of the marriage, a son who died an infant, and a daughter who married, and became, on her brother's death, entitled to the settled estates. The wife survived the husband. The deed, purporting to create a charge upon the settled estates, turned out to be invalid:—Held, upon the construction of the settlement, and without

resting the decision upon the invalidity of the charge, that the daughter took an absolutely vested interest in the trust fund, and that it did not go to the husband's representative. *Carter* v. *Ducie* (*Earl*), 41 L. J., Ch. 153 ; 25 L. T. 656 ; 20 W. R. 228.

Semble, that if it had been otherwise, the invalidity of the charge would have been sufficient to displace the claim of the husband's representative. *Ib.*

See also POWERS.

As to Portions Generally.]—*See* PORTION.

As to Fluctuations between Eldest and Younger Children.]—*See* YOUNGER CHILDREN.

W. A. G. W.

VESTING ORDERS.

See TRUST.

VESTRY.

See ECCLESIASTICAL LAW—LOCAL GOVERNMENT—PARISH—POOR LAW.

VETERINARY SURGEON.

See MEDICINE.

VICAR AND VICARAGE.

See ECCLESIASTICAL LAW.

VICE-ADMIRALTY COURTS.

See SHIPPING.

VICTORIA.

See COLONY.

VIEWS.

In Civil Actions.]—*See* PRACTICE (JURY).

In Criminal Matters.]—*See* CRIMINAL LAW.

VISITOR AND VISITATION.

See ECCLESIASTICAL LAW—CHARITY.

VOLUNTARY CONVEYANCE.

See BANKRUPTCY—FRAUD—SETTLEMENT—TRUST.

VOLUNTEER.

Military.]—*See* ARMY AND NAVY.

Under Settlements.]—*See* FRAUD—SETTLEMENT—TRUST.

VOTE.

At Parliamentary and Municipal Elections.]—*See* ELECTION LAW.

In Vestries.]—*See* ECCLESIASTICAL LAW.

At Meetings of Companies.]—*See* COMPANY.

At School Board Elections.]—*See* SCHOOL AND SCHOOL BOARD.

Under Public Health Act.]—*See* LOCAL GOVERNMENT.

WAGER.

See GAMING.

WAGES.

Of Servants.]—*See* MASTER AND SERVANT.

Of Seamen.]—*See* SHIPPING.

Proof in Bankruptcy and on Winding-up.—*See* BANKRUPTCY—COMPANY.

WAIVER AND ACQUIESCENCE.

And see LIMITATIONS, STATUTES OF.

1. *General Principles. Knowledge of Rights.*
   a. Laches, 1715.
   b. Lapse of time, 1717.
   c. Waiver, 1729.
   d. Confirmation, 1733. *And see* infra, 4 c.
2. *By what Persons.*
   a. Infant, 1735.
   b. Married Woman, 1736.
   c. Company, 1737.
3. *Notice and Duty to Enquire*, 1737.
4. *What Acts Amount to.*
   a. Laches or Delay, 1739.
   b. Acquiescence.
      i. Permitting Expenditure, 1741.
      ii. Permitting the Settlement or Disposition of Property, 1746.
   c. Confirmation, 1749. *And see* supra, 1 d.
5. *Particular Cases.*
   a. Objections to Jurisdiction, 1751.
   b. Delay in Prosecuting Suit, 1752.
   c. Proceedings before Arbitrators, 1753.
   d. Matters of Contract and Agreement, 1756.
   e. Breaches of Covenant, 1760.
   f. Debtor and Creditor, 1763.
   g. Testamentary Provisions, 1767.
   h. Tortious Acts, 1770.
   i. Voidable Deeds, 1772.
   j. Accounts, 1775.
6. *In Bankruptcy Proceedings. See* BANKRUPTCY.
7. *Breaches of Trusts. See* TRUST AND TRUSTEE.
8. *Objections to Title. See* VENDOR AND PURCHASER.
9. *Forfeiture. See* LANDLORD AND TENANT—VENDOR AND PURCHASER.
10. *Ratification of Fraudulent Transactions. See* FRAUD.
11. *In Mode of Keeping Accounts. See* BANKER—ACCOUNTS AND INQUIRIES.
12. *Waiver of Time—When Essence of Contract. See* VENDOR AND PURCHASER.
13. *Right to Injunction—When Barred. See* INJUNCTION.
14. *Waiver or Discharge of Lien. See* LIEN—SOLICITOR—VENDOR AND PURCHASER.

1. GENERAL PRINCIPLES. KNOWLEDGE OF RIGHTS.

a. Laches.

General Rule.]—Principle of equity, that the demand of relief should be prompt. *Colchester Corporation* v. *Lawten*, 1 V. & B. 246; 12 R. R. 216

Principles on which the court acts in refusing applications, either original or by way of appeal, on the ground of laches. Effect of objection in excluding laches. *G. W. Ry.* v. *Oxford, Worcester, & Wolverhampton Ry.*, 3 De G. M. & G. 341; 5 De G. & Sm. 437; 16 Jur. 443.

Mere laches in asserting a right to an interest executed are not sufficient to disentitle a party to relief in equity, but he may by standing by waive his right. *Clarke* v. *Hart*, 6 H. L. Cas. 633; 27 L. J., Ch. 615; 5 Jur. (N.S.) 447. And see *Rule* v. *Jewel*, infra, col. 1759.

Remedy at Law.]—Equity will not assist a plaintiff who has disabled himself by laches from proceeding, if his remedy had been at law. *Congrieve* v. *Power*, 1 Moll. 121.

Equity will not interfere in favour of a party who omits to avail himself of his legal remedy, in due time. *Drewry* v. *Barnes*, 3 Russ. 94; 5 L. J. (O.S.) Ch. 47; 27 R. R. 20.

Legal or Equitable Right.]—Where a plaintiff comes to the court to enforce a legal right, his delay in taking proceedings is no defence, if it has not continued long enough to bar his legal right. The case is different where the plaintiff endeavours to enforce an equitable right. *Maddever, In re, Three Towns Banking Co.* v. *Maddever*, 53 L. J., Ch. 998; 27 Ch. D. 523.

Ignorance of Rights.]—A delay of thirteen years, during which the plaintiff did not object to the dealings with the assets, she not being apprised of her rights:—Held, not to bar the plaintiff's right to relief. *O'Neill* v. *Hamill*, Beat. 618.

A son remained in ignorance of his right to legitim for nearly three years after his father's death, and all parties acted as if legitim was not due:—Held, the son's claim to legitim was not barred by acquiescence. *Kintore (Countess)* v. *Kintore (Earl)*, 11 App. Cas. 294—H. L. (Sc.)

—— **Voluntary Promise.**]—When a wrongful act has been completed without the knowledge of the party injured, his right of action is not barred by mere submission to the injury, or even by a voluntary promise not to seek redress; some conduct amounting to release or accord and satisfaction must be shown; although, on account of laches, relief may be refused under special circumstances. *De Bussche* v. *Alt*, 47 L. J., Ch. 381; 8 Ch. D. 286; 38 L. T. 370.

Trustees.]—Trustees charged with loss occasioned by their mere laches; costs follow of course. *Caffrey* v. *Darby*, 6 Ves. 488.

The doctrine that where there is an express trust lapse of time is not material:—Held, not to apply where there had been gross laches on the part of the cestui que trust. *Bright* v. *Legerton*, 2 De G. F. & J. 606; 30 L. J., Ch. 338; 7 Jur. (N.S.) 559; 3 L. T. 713; 9 W. R. 239.

Creditor and Debtor.]—Where creditor takes from debtor an assignment of debt due from third person as security for his own, and by his wilful default the debt becomes irrecoverable, he must bear the loss. *Williams* v. *Price*, 1 Sim. & S. 581; 2 L. J. (O.S.) Ch. 105; 24 R. R. 238. And see *Jones* v. *Thomas*, infra, col. 1731.

Laches not to be imputed to creditors, under a devise for debts, as to an individual devisee, to limit the account of rents and profits; even against an infant heir. *Kidney* v. *Coussmaker*, 12 Ves. 136; 2 R. R. 118.

Agreement when first Impeached.]—Where a party rests satisfied with an agreement, and for some time treats it as fair, it is material to ascertain the time he first impeaches it. *Morony* v. *O'Dea*, 1 Ball & B. 118.

Fraud when a Defence.]—Lapse of time is a bar to all proceedings in equity for the purpose of undoing any transaction which is not tainted by fraud; meaning thereby an act involving grave moral guilt. *Agriculturalists' Cattle Insurance*

Co., In re, Smallcombe's case, L. R. 3 Eq. 769; 15 W. R. 501.

Fraud being established against a party it is for him, if he allege laches, to show when the other acquired knowledge, and prove that he knowingly forbore to assert his right. *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221; 22 W. R. 492.

Members of Family.]—Delay in instituting proceedings, where the parties are members of the same family, not so strictly regarded as where they are strangers. *Laver* v. *Fielder*, 9 Jur. (N.S.) 190; 7 L. T. 602; 11 W. R 245.

Practice—Bill.]—Laches in filing bill cannot be taken advantage of on arguing demurrer. It should be pleaded. *Ros* v. *Willoughby*, 10 Price, 2.

—— **Injunction.**]—Laches may be a defence to an application for an injunction. *Att.-Gen.* v. *Sheffield Gas Consumers' Co.*, 3 De G. M. & G. 304; 22 L. J., Ch. 811; 17 Jur. 677; 1 W. R. 185.

—— **Costs.**]—When considerable delay has occurred in the prosecution of suit costs are not given though decree is reversed. *Colclough* v. *Sterum*, 3 Bligh, 181; 22 R. R. 1.

Notice to Treat.]—Notices by railway companies to take land cannot be treated higher than contracts; and after great delay, they will be considered as abandoned. *Hedges* v. *Metropolitan Ry.*, 28 Beav. 109; 6 Jur. (N.S.) 1275; 3 L. T. 643.

Personal Representative.]—No rule is better settled than that a personal representative is bound by the laches or neglect which affects the person through whom he claims. *Hodgshon* v. *Bibby*, 8 L. T. 266; 11 W. R. 529.

Delay in claiming payment of a trust fund, for 28 years held fatal. *Ib.*

Interest.]—Interest refused upon a stale demand. *Merry* v. *Ryes*, 1 Eden, 1.

Waste.]—In cases of waste, it is the business of the reversioners to apply to the court promptly. *Barry* v. *Barry*, 1 J. & W. 653.

Ship—Injunction.]—Injunction to restrain the sailing of a ship upon the application of a part owner, refused, where the ship was to sail next day, and it did not appear, by the affidavit that there were any circumstances to account for the plaintiff's delay. *Christie* v. *Craig*, 2 Mer. 137.

Effect of, where Party not Prejudiced.]—Directors of a company made payments of dividends that had not been earned from 1869 to 1878. In 1886 the company was wound up. In 1890 the liquidator brought an action against the representatives of some of the directors to recover the amounts improperly paid:—Held, that the claim must succeed, as there was nothing to show that the defence was prejudiced by the delay, and the creditors ought not to lose their rights on account of the liquidator's delay, since the defendants had not been prejudiced by it. *Masonic Life Assurance Co.* v. *Sharpe*, 61 L. J., Ch. 193; [1892] 1 Ch. 154; 65 L. T. 806; 40 W. R. 241—C. A.

b. Lapse of Time.

General Principles.]—Time is a bar in equity to stale demands, independently of the statute *Harcourt* v. *White*, 28 Beav. 303; 30 L. J., Ch. 681.

Length of time, where it does not operate as a statutory or a positive bar, operates simply as evidence of assent or of acquiescence. *Life Association of Scotland* v. *Siddall*, 7 Jur. (N.S.) 785; 4 L. T. 311—H. L.

Transactions of many years' standing not set aside, unless on a case well proved. *Evans* v. *Brown*, Wightw. 102.

Equity will not give relief after great length of time. A conveyance by a party out of possession shall not affect the rights of third persons, though it may operate as a contract to bind the party. *Underwood* v. *Courtown* (*Lord*), 2 Sch. & Lef. 41.

Length of time, or long acquiescence in a transaction may be a bar to relief in cases where the transaction, if impeached within a reasonable time would be set aside. *Hickes* v. *Cooke*, 4 Dow, 16.

Length of time a bar to an equitable title. *Burke* v. *Crosbie*, 1 Ball & B. 503.

Lapse of time, imputed as laches, may be excused by the obscurity of the transaction, whereby the plaintiff was disabled from obtaining full information of his rights. *Murray* v. *Palmer*, 2 Sch. & Lef. 487.

The court cannot attend to circumstances of distress or embarrassment as an excuse for laches, whereby the demand has become barred by length of time. *Hovenden* v. *Annesley* (*Lord*), 2 Sch. & Lef. 639.

When parties have acquiesced for a long period, such as twenty-three years, under an agreement, they will not be permitted to impeach it on grounds of alleged illegality. *Westby* v. *Westby*, 1 Con. & L. 537; 2 Dr. & War. 502; 4 Ir. Eq. R. 585.

A suit to set aside a transaction entered into openly twenty years previously, cannot be sustained. *Barwell* v. *Barwell*, 34 Beav. 371.

Effect of length of time elapsing between the transactions complained of and the institution of a suit for relief against them, where the fiduciary character on which the title to relief is founded has de facto ceased for a long period, evidence has been lost, and it has become impossible to restore the defendant to the same position as he would or might have been in if the suit had been promptly brought. *Beaden* v. *King*, 9 Hare, 532.

Bill for an account of the produce of captures by privateers dismissed on the ground of laches, the original bill having been filed in 1749: but the length of time cannot be pleaded in bar. *Pearson* v. *Belcher*, 4 Ves. 627.

A large demand established after a lapse of more than twenty years, against the estate of an accounting party, though no evidence could be given as to the particulars of the demand. *Purrier* v. *Ranken*, 7 L. J. (O.S.) Ch. 141.

Long Possession.]—Presumption from length of time in favour of long possession of whatever is necessary to constitute a right. *Chalmer* v. *Bradley*, 1 J. & W. 63.

Suit dismissed after 100 years' possession. *Kinston* v. *Pigot*, Cary, 110.

Where party had been in possession fifty years, and that possession was proved just in equity, other party was prohibited, by injunction, from disputing his title in court of law. *Tomley* v. *Clench*, Cary, 23.

An estate subject to a mortgage in fee being in settlement, with an ultimate limitation to the right heirs of S., A., on expiration of the previous estate, enters, claiming to be entitled under that limitation; he and (after his death) his son continue in quiet possession, paying interest on mortgage for twenty years. The devisee of the person really entitled under the limitation is barred by length of time. *Cholmondeley* v. *Clinton*, 2 J. & W. 2, 192. Affirmed, 4 Bligh, 1.

——Of no Effect during Investigation of Title.]—Lapse of time shall not prejudice a person who has title, while seeking a discovery of that title from persons who have possessed themselves of the evidences of it. *Bond* v. *Hopkins*, 1 Sch. & Lef. 413.

Parties obtaining wrongful possession, and setting up a false title (under colour of instruments finally condemned), during the investigation of which they are protected in their possession by the court, shall not avail themselves of any length of possession pending the investigation, as a bar to the person who ultimately proves to have the right. *Ib.*

In Actions for Redemption of Mortgages.]—Length of time can only be a bar to bill to redeem mortgage where parties entitled to equity of redemption have been tenants in fee simple. *Cowne* v. *Douglas*, M'Cle. & Y. 321.

Decree of foreclosure was opened after sixteen years on account of equity of redemption being worth much more than was due on mortgage, and distress on part of mortgagor. *Burgh* v. *Langton*, 5 Bro. P. C. 213.

The rule established in equity as to the redemption of mortgages (by way of analogy to the statute of limitations), that after twenty years' possession a mortgage shall not be disturbed, is a very right and proper one, but after a possession of fifteen years only, length of time is no bar, and a redemption will be decreed. *Anon.*, 3 Atk. 313.

Though there is no time limited for redemption of mortgages, yet where a man comes in as an old hand, it has been sometimes decreed that the possessor should account no further than for the profits made in his own time, to discourage the stirring of dormant titles; but the common doctrine in equity is, that mortgagees are not within the statute of limitations; yet that statute is sometimes mentioned as a proper direction to go by, for the court is tender of settling any set time, because a man can never be injured if he receives principal, interest and costs; but the owner of the land is injured if he parts with the possession under the full value; yet sometimes the court has allowed length of time to be pleaded in bar, where the mortgaged estate descended as a fee, without entry or claim from the mortgagor, and where the possessor would be entangled in a long account. *Porter* v. *Emery*, 1 Ch. Rep. 97. And see *Saunders* v. *Hord*, *id.* 184, in which case the statute of limitations was actually pleaded, and held good. See also *Clapham* v. *Bowyer*, 1 Ch. Rep. 206.

Where the estate had descended on the heir, who had sold it; and twenty years had elapsed from the time of the forfeiture: plea of these facts allowed. *Pearson* v. *Pulley*, 1 Ch. Ca. 102.

A. and B., his wife, by deed and fine, mortgaged her estate to C.; they then sold their equity of redemption to D. for 10*l.* and covenanted that the fine should be for strengthening the latter deed. D. entered and made many improvements; twenty-three years afterwards A. died, and nine years afterwards his wife, B. died. Then E. her heir, sold all his interest to F. for 81*l.*, who brought his bill to redeem, ten years after the death of B.; but the court would not allow it, more especially as the payment of the purchase-money by F. to E. was not clearly proved. *Fleetwood* v. *Templeman*, Barnard, 187.

After a possession of a mortgagee for twenty-five years, redemption decreed on defendant's submitting by answer to be redeemed. *Proctor* v. *Oates*, 2 Atk. 140.

If a mortgagee admits himself to have no other title, it shall bind him, and the court will let in the mortgagor to redeem, after twenty years: not so if by his answer he claims by a better title. *Perry* v. *Marston*, 2 Bro. C. C. 397.

On a bill to redeem mortgage fifty-five years after date, forty-seven years after mortgagee had got into possession, after five ejectments brought to defeat his estate by a title paramount, and after refusing, by four different answers, come to an account on foot of mortgage and redeem the lands, a redemption was decreed, and an account of rents, etc., directed. *Palmer* v. *Jackson*, 5 Bro. P. C. 281.

Plaintiff's grandfather, in 1689, mortgaged an estate to W., who mortgaged it to C. and his heirs for 200*l.* C., to secure the interest, leased the estate to plaintiff's father and his assigns for 5,000 years, at 12*l.* per annum for three years, and 10*l.* per annum for the remainder of the term; and if, at the end of three years the 200*l.* and interest was paid, then the premises to be reconveyed. Receipts were given sometimes for interest, and sometimes for a rent-charge, the last in 1730. The 200*l.* lent was charity money directed to be laid out in lands in fee, and the rents to be applied in clothing twenty-four needy housekeepers. In 1738 plaintiff gave notice to pay off the mortgage, but defendant insisted on an absolute purchase; and it was so decreed in favour of defendant; for where a mortgagee has been in perception of the rents and profits for a considerable time, equity will not decree a redemption, for that would be making him a bailiff to the mortgagor. *Mellor* v. *Lees*, 2 Atk. 494.

Semble, no lapse of time will bar the right to redeem where relief is sought against the improper and oppressive exercise of a power of sale by the mortgagee. *Robertson* v. *Norris*, 1 Giff. 421.

Where a mortgagee under an improper exercise of a power of sale contained in his deed himself became the purchaser of the mortgaged property, on a bill filed fifteen years afterwards, the court decreed redemption, and ordered the costs of the suit to the hearing to be paid by the mortgagee. *Ib.*

An equitable mortgagee, who has bought in the legal estate, is fifteen years in undisturbed possession of the rents and profits:—Held, that the lapse of time and presumed acquiescence are immaterial as against an insolvent, and that he has a right to redeem. *Hayward* v. *Kersey*, 14 L. T. 879; 14 W. R. 999.

After a decree of foreclosure against the mortgagor and some creditors, whose debts were

charged on the estate, one of the creditors pays off the mortgage, and agrees with the rest that they should redeem it at a future day, otherwise he should hold the lands absolutely. This gives the other creditors a new redemption, and, accordingly, a redemption decreed, though after twenty years' possession, and great improvements made. *Eaton* v. *Greaves*, 1 Vern. 138.

A mortgaged estate getting into different hands redemption was refused as to part from length of time, and opened as to the other parts, accounts having been kept, and there being a devise of it as a mortgage. *Lake* v. *Thomas*, 3 Ves. 17.

I. S., in 1679, mortgaged his lands to A. for a small sum by an absolute conveyance, with a separate defeasance, that I. S. should redeem in his lifetime, and with his own money. I. S. was soon after forced abroad, where he died about twenty-seven years ago, and his heir knew nothing of the mortgage. In 1702 A. devised, that if the mortgage should be redeemed, the money should go so and so. Sixteen years after A.'s will, a bill was brought to redeem, to which length of time was objected. Per cur., the defeasance was a fraud in its creation, and no length of time will bar a fraud; but considering the case distinct from the fraud, the declaration in A.'s will is sufficient to let in a redemption. Redemption decreed. *Ord* v. *Smith*, Sel. Ca. Ch. 9.

If a mortgagor agrees that mortgagee shall enter and hold till he is satisfied, length of time is no objection to a redemption. *Orde* v. *Heming*, 1 Vern. 418.

A. and B. being seised in fee, in right of their wives, of two undivided fourth parts of an estate, subject to a mortgage term, joined, in 1784, with the owners of the other moiety, in conveying the estate, by lease and release, but without a fine, to a purchaser in fee, and the mortgage was paid off, and the term assigned to attend. The purchaser, and those claiming under him, had been in possession from the date of the conveyance. A.'s wife survived him, and died in 1825, leaving one of the plaintiffs her heir. B.'s wife died in 1818, leaving the other plaintiff her heir. B. died in 1826. In 1830 the plaintiffs brought an enjectment, but were non-suited by the defendants' setting up the term. In 1831 they filed a bill to redeem, which was dismissed, on account of the length of possession by the defendants and those under whom they claimed. *Ashton* v. *Milne*, 6 Sim. 369; 3 L. J., Ch. 52.

The heir of mortgagor files a bill to redeem an old mortgage made by demise for 999 years, under a rent at 20*s.* and redeemable at any time on paying 1,200*l.* at one entire payment. The defendant pleads his title as a purchaser for a valuable consideration under a marriage settlement, without notice of mortgage. The settlement was made by the original mortgagee, and there was quiet possession of seventy years; the plea was allowed. *Dunsany* v. *Shaw*, 5 Bro. P. C. 262.

Where mortgage-money is stipulated to be paid in one entire sum, the mortgagee, and those claiming under him, continued in possession for near 100 years, without foreclosing. A bill brought to redeem shall be dismissed with costs. *Hartpole* v. *Walsh*, 5 Bro. P. C. 267.

One, for 800*l.* consideration, grants a rent-charge of 48*l.* a-year in fee, upon condition that if the grantor during his life shall give notice and pay in the 800*l.* by instalments, viz. 100*l.* at the end of every six months, and shall do this during his own lifetime, the grant to be void; the mortgage was made about sixty years since, when the legal interest of money was eight per cent. Decreed, not redeemable. *Floyer* v. *Lavington*, 1 P. Wms. 268.

A. mortgages in 1639, and, in 1663, his heir brings a bill to redeem; he dying, the suit is revived by his co-heirs, who obtain a decree in 1672, but do not prosecute it, and B., having purchased the equity of redemption of them, he now brings a bill to have the benefit of the former decrees; bill dismissed by reason of the difficulty of the account and length of time. *St. John* v. *Turner*, 2 Vern. 418.

Through infancy may be an answer to the objection of the time in not coming to redeem a mortgage, yet where the time begins upon the ancestor, it shall run on against his infant heir, as in the case of a fine at common law. *Ib.*

Mortgagor admitted to redeem a mortgage made in 1642, after three descents on the defendant's part, and four on the plaintiff's part. Length of time answered by infancy and coverture, and an account made up by the mortgagee in 1686. *Proctor* v. *Cowper*, 2 Vern. 377; Pre. Ch. 116. And see *Blewitt* v. *Thomas*, 2 Ves. J. 669.

Demurrer, on the ground of length of time, to bill for a redemption of mortgage, is good. *Hardy* v. *Reeves*, 4 Ves. 479.

When less than Twenty Years cannot be Raised by Demurrer.] — The plaintiff was entitled under her father's will and an appointment by her mother, who was his executrix, and being in embarrassed cirumstances, and without professional advice, and ignorant of the amount of her claims, G., her solicitor, induced her in 1833 to convey to him all her rights, which he represented to be only one half that they amounted to, for a rent-charge on the lands so conveyed to him, the payment to be personally secured by him. The deed was drawn by G., and contained no clause of re-entry or covenant by him to pay, but a non-alienation clause was fraudulently, as alleged, inserted. G. ceased to pay in 1836, and the bill was filed in 1845 to set aside the deed and carry the trusts of the will into execution, and for an account of the testator's property, so far as to ascertain the plaintiff's rights, and, if necessary, of the personal estate of her mother. B., the executor of the mother, and the administrator de bonis non of the father, was made a party, but the trustee of the father's will was not:—Held, on a demurrer filed by G., that the length of time since the execution of the deed falling short of twenty years could not be set up by him on demurrer. *O'Kelly* v. *Glenny*, 9 Ir. Eq. R. 25.

Claims by Creditors against Executors and Administrators.]—Where a party has lain by a great length of time, and suffered estate to be distributed, he shall not have an account. *Hercy* v. *Dinwoody*, 4 Bro. C. C. 257. And see 2 Ves. J. 87.

Stated accounts by men of full age, after a great length of time, not to be set aside against an executor. *Western* v. *Cartwright*, Sel. Ca. Ch. 34.

In a creditor's suit, a claim was carried in before the master in respect of transactions which

occurred as far back as the year 1793. The principal witness in support of the claim was sixty-three years of age, and the circumstances to which he deposed had taken place when he was between thirteen and sixteen years old; and, upon minute investigation of his evidence, it appeared to contain some variances and inconsistencies which were not explained:—Held, that considering the circumstances and the age of the witness, and the length of time since the event happened, the claim ought to be disallowed. *Strother* v. *Dutton*, 17 L. J., Ch. 87.

Claim by Mortgagee against Mortgagor's Residuary Legatees.]—In 1843 G. mortgaged to solicitors a freehold farm, furniture and stock, the mortgagor being permitted to use the furniture and stock, but not to sell without consent of the mortgagees. In 1859 G. died, having by his will bequeathed the furniture to his unmarried daughters, and devised the farm to A., B. and C. upon trust to allow his unmarried daughters to occupy it, they keeping down the mortgage interest, and having bequeathed his residuary personal estate to A., B. and C., whom he appointed executors upon trust for sale and division among his children. By a codicil the testator directed that his unmarried daughters should pay a rent of 600*l.* for the farm, and on their giving it up it should be let. With the knowledge of the mortgagees, two of the testator's daughters continued to carry on the farm as tenants to the trustees of the will, and for that purpose used the furniture, and took part of the farming stock at a valuation as against their shares of residue. In 1861 the executors, with the knowledge of the mortgagees, sold the remainder of the testator's residuary personal estate, consisting almost entirely of farming stock, and distributed the proceeds among the residuary legatees pursuant to the trust of the will, the two daughters who were tenants of the farm applying their shares in carrying it on. In 1863 one of these two daughters married, whereupon her husband took a lease from the trustees, and bought out the interest of the unmarried daughter in the stock and furniture. The interest on the mortgage was, by the direction of the trustees, paid to the mortgagees by the tenants of the farm out of the rent, the mortgagees giving receipts to the tenants only. In 1882, the interest having been unpaid from August, 1880, and the security being worthless, the legal personal representative of the surviving mortgagee sued G.'s executors for an alleged devastavit in having distributed G.'s residuary personal estate without providing for the mortgage debt (*Blake* v. *Gale* (22 Ch. D. 820)), when it was declared that the executors were not liable for a devastavit, but judgment was pronounced for a sale, and for administration of G.'s estate. Under that judgment the chief clerk certified that the security was unsalable, and allowed the payments by the executors to the residuary legatees, but the order on further consideration was made without prejudice to any proceedings the plaintiff might take against any other persons than the executors. Thereupon, in 1885, the plaintiff brought an action against the residuary legatees for payment of the mortgage debt out of G.'s assets received by them:—Held, that although the legal debt under the mortgage was still subsisting, and was in no way barred by statute, yet that the plaintiff's claim against the residuary legatees, being in the nature of an equitable demand, was barred by lapse of time and acquiescence. *Blake* v. *Gale*, 55 L. J., Ch. 559; 32 Ch. D. 571; 55 L. T. 234; 34 W. R. 555—C. A.

Legacies.]—Legacy presumed to be paid after a great length of time. *Fotherby* v. *Hartridge*, 2 Vern. 21.

Payment of a legacy presumed after about forty years without demand. *Jones* v. *Turberville*, 2 Ves. J. 11; 4 Bro. C. C. 115.

Thirty-nine years, under certain circumstances:—Held, to be insufficient to justify presumption of payment of legacies. *Shields* v. *Rice*, 3 Jur. 950.

Every fair presumption shall be made against a stale demand; and where at bar the title can be only made good by record, or by a patent which cannot be found, such instruments shall be presumed to have been lost. *Pickering* v. *Stamford* (*Lord*), 2 Ves. J. 581.

After thirty-five years a legacy would be barred on presumption of satisfaction. *Id.* 280.

Bill by next of kin for personal estate, secured by mortgage, given to a charity. The will was dated in 1754. No bill was filed till 1792, and the court then ordered a reference to enquire into circumstances. *S. C.*, 4 Bro. C. C. 214.

A testator bequeathed to his widow a pecuniary legacy and a life annuity. She survived him twenty-eight years, and after her death her executrix filed a bill for their recovery. No explanation was given of the circumstances, and no proof of any intermediate payment. The bill was dismissed on the ground of great laches. *Pattison* v. *Hawkesworth*, 10 Beav. 375.

—— **Where Charged on Land.**]—Power to lend legacy on personal security to those taking real and personal estates upon which it was charged: no presumption that it was thus lent so as to exonerate the real estates, although more than thirty years had elapsed. *Horner* v. *Sayner*, C. P. Cooper, 168.

Legatees, whose legacies were charged on real estates, subject to prior charges, not affected by lapse of time so long as any of the prior charges subsisted. *Faulkner* v. *Daniel*, 3 Hare, 212.

Rent-Charge.]—No limitation, before 3 & 4 Will. 4, c. 27, to a rent-charge at law or equity. But demand might be excluded by presumption from length of time and acquiescence. *Stackhouse* v. *Barnston*, 10 Ves. 467.

In the Case of Trusts.]—If there be no doubt of the origin and existence of a trust, this court will not allow lapse of time to enable those who are mere trustees to appropriate to themselves that which is the property of others; but, in questions of doubt whether any trust exists, and whether those in possession are not entitled to the property for their own benefit, the court will pay the utmost regard to the length of time during which there has been enjoyment inconsistent with the existence of the supposed trust. *Att.-Gen.* v. *Fishmongers' Co.* (*Preston's Will*), 5 Myl. & Cr. 16; 5 Jur. 693. Affirming 2 Beav. 588.

Between cestui que trust and trustee no lapse of time will preclude an account from the commencement of the trust; in a case in which the relation of trustee and cestui que trust continues, the transactions between them are not closed, and the delay of the claim is attributable to the

trustee not having given to his cestui que trust that information to which he was entitled, and accounted with him in such manner as he ought. *Wedderburn* v. *Wedderburn*, 2 Keen, 722. Affirmed, 4 Myl. & Cr. 41; 8 L. J., Ch. 177; 3 Jur. 596.

Time is no bar in cases of direct trust; it may be otherwise if there has been a direct and independent dealing between the trustees and cestuis que trust after the relation has terminated. *S. C.*, 2 Keen, 749.

Where a trust has been created by the acts of the parties themselves, time is no bar to a suit relating to any transaction that has taken place in connection with the trust property. *Clanricarde* (*Marquis*) v. *Henning*, 30 Beav. 175; 30 L. J., Ch. 865; 7 Jur. (N.S.) 1113; 5 L. T. 168; 9 W. R. 912.

A trustee and cestui que trust have no privilege against lapse of time, if the party from whom they claimed acquiesced, and omitted in his lifetime, for several years, to take any steps to set aside the sale of an estate, which was purchased from him by his solicitor. *Ib.*

G., being trustee of moneys for S. and his children, died in 1838, having devised his copyhold and freehold estates to trustees upon trust to sell and pay the proceeds of sale to his executors in aid of his personal estate, and after the payment of his debts he gave the residue of his personal estate, including such proceeds of sale, to his wife absolutely. The trustees allowed the widow to enter into possession of the copyholds, but sold the freeholds and applied the proceeds as directed by the will. In 1853 S. and two of his children filed a bill on behalf of themselves and all other creditors of G., for administration of his estate. They then learned that the widow was in possession of the copyholds, but they took no step to obtain possession of the rents, or to obtain a receiver. The estate being insufficient for the payment of his debts, three of the children of S. (who had died in the meantime) instituted a suit in 1866, to claim the rents received by the widow since the death of her husband, and praying for a declaration that the trustee of G.'s will was guilty of a breach of trust in allowing her to receive the rents:—Held, that the plaintiffs were barred from recovering by their own laches. *Gwynne* v. *Gell*, 20 L. T. 508.

A bill by a cestui que trust against the representatives of his trustees for an account of rents and profits arising from cottage property, after the lapse of upwards of twenty years from the sale of such property, was dismissed, with costs, on the ground of laches and acquiescence. *Bright* v. *Legerton*, 2 De G. F. & J. 606: 30 L. J., Ch. 338; 7 Jur. (N.S.) 559; 3 L. T. 713; 9 W. R. 239. Affirming 29 Beav. 60.

A court of equity will not allow a dormant claim to be set up when the means of resisting it, if unfounded, have perished, much less cast upon a defendant the burthen of proving such an affirmative as that forty years ago cottage rents were properly collected, when the witnesses who might have proved the fact are all dead. *Ib.*

A. died in 1822, having devised certain pieces of land, houses, and cottages, to trustees to apply the rents in payment of an annuity until a child of one of his (the testator's) two brothers reached twenty-one, then to be sold and invested for payment of the annuity and for the benefit of the children of his two brothers, such children being entitled to the surplus of the rents and profits. One brother died without issue, the other left two children, of whom A. was one. He attained twenty-one in January, 1839. The trustees sold the estates in July, 1839, and invested the proceeds in the funds. The trustees had all since died, the survivor having died in 1851. A. filed a bill in August, 1859, against the representatives of the deceased trustees, for an account of the rents and profits omitted to be received by the trustees from the death of the testator until the estates were sold:—Held, that the claim was barred. *Ib.*

Although the trust was an express trust in its creation, it was not a continuing trust so as to prevent lapse of time being a bar. *Ib.*

The court will not establish a trust in favour of a plaintiff where his own evidence in support of it is uncorroborated, or where a considerable length of time has elapsed between the creation of the trust and the assertion of the claim to establish it. *Poole* v. *Foxwell*, 11 L. T. 441.

A testator died in 1809; his grand-daughter came of age in 1829; she then executed a release and married in 1836; her father died in 1850, and in 1852 she instituted a suit to make his estate liable for the profits made by him (he not being a trustee) by the employment of part of the trust moneys made:—Held, under circumstances, that assuming her right, there was nothing to justify the delay in instituting the suit. *Parker* v. *Bloxam*, 20 Beav. 295.

The wrongful receipt and conversion of trust property place the receiver in the same situation as the trustee from whom he received it, and he is subject to the same liabilities as the trustee himself. In such a case relief is given on the ground of fraud, and not of constructive trust; lapse of time, therefore, is no bar to the suit. *Rolfe* v. *Gregory*, 34 L. J., Ch. 274; 11 Jur. (N.S.) 98; 12 L. T. 162; 13 W. R. 355.

A sum of 600*l.*, secured by a promissory note, was specifically bequeathed for the benefit of R., a married woman, for her life, with remainder for her children. The executor of the will, R.'s husband, delivered up the note to G., the debtor (who had full knowledge of the trust), in discharge of a private debt. Twenty years afterwards R. and her children instituted a suit against G. for the recovery of the money:—Held, that the right of R. to a life interest in the money was not barred by lapse of time. *Ib.*

A bill alleged a breach of trust by a deceased tenant for life under a settlement, in the application to the liquidation of a charge on the settled estates of the proceeds of part of such settled estates, while there was in his hands, as personal representative of the settlor, personal estate of such settlor primarily applicable to the liquidation of the charge:—Held, the alleged breach of trust having taken place at least thirty years back, that the plaintiff was not entitled to an account of the settlor's personal estate. *Morris* v. *Morris*, 28 L. J., Ch. 329; 5 Jur. (N.S.) 229; 7 W. R. 249—L.JJ.

Where a trustee admits that the trust-money has not been paid, but that it has remained for a length of time in his hands, quære, whether any length of time will operate as a bar to the lawful claimant in a court of equity. *Cator* v. *Croydon Canal Co.*, 4 Y. & C. 405. Affirmed, 13 L. J., Ch. 89; 8 Jur. 277.

B., a trustee of a will, who was also tenant

for life of the residue, omitted to invest it. Upon his death, in 1834, H., a widow, became absolutely entitled to the fund. H. resided with and was maintained by her son, who was B.'s executor, and she took no steps to obtain payment of the fund during her lifetime. She died in 1858. A bill, filed in 1863 by the representatives of H. against the representatives of the representative of B. to recover the fund, was dismissed with costs, on the ground of the lapse of time. *Hodgson* v. *Bibby*, 32 Beav. 221; 11 W. R. 559.

Trustee sells the lands to one who had no notice of the trust, and, after a fine and five years' non-claim, re-purchases the land. Decreed he should stand seised in trust, as before the sale. *Bovey* v. *Smith*, 1 Vern. 60; 2 Ch. Ca. 124.

Under a trust-deed dated in 1806, the trustee after the performance of certain trusts was to pay the surplus rents to the owner during his life. The owner died in 1816; the trustee died in 1818; and in 1828 a bill for an account was filed, by the representatives of the former, against the representatives of the latter. The answer was filed in the following year, but no further proceedings were taken until 1839, when the cause was set down:—Held, that no such laches existed as to bar the account, held also, that as regarded the lapse of time, the case was to be looked at in the same light now as at the filing of the bill. *Dickenson* v. *Holland* (*Lord*), 2 Beav. 310.

—— **Charitable.**]—Bequest to the corporation of R. on trust for the benefit of the poor of the town of R., with a proviso that, if the corporation of R. should, for one whole year, neglect to observe the directions of the will, the gift should be utterly void, and the property be transferred to the corporation of L. in trust for a hospital in the town of L. After the corporation of R. had acted in disregard of the directions of the will, with the knowledge of the corporation of L. and the hospital, for more than twenty years, a suit was instituted on behalf of the hospital, claiming the property under the proviso:—Held, that the delay of the plaintiffs in making their claim, furnished no ground of defence against it, either to the corporation of R. or to the attorney-general, as representing the general interests of the charity in that town. *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460; 1 Hall & Tw. 533; 19 L. J., Ch. 33; 14 Jur. 339. Affirming 6 Sim. 83.

Where the attorney-general sues in the court of chancery for the vindication of an endowed public charity, neither acquiescence nor lapse of time will be any bar to the proceeding. *Cairncross* v. *Lorimer*, 3 Macq. H. L. 827.

But there is no such principle or rule where the suit is instituted by private individuals in a matter affecting solely their own interests. On the contrary, in such a case acquiescence and lapse of time will be a bar. *Ib.*

—— **Reconveyance of Legal Estate Presumed.**]—Reconveyance of the legal estate presumed under obscure circumstances after a great lapse of time, though the possession originally not adverse, but under a trust; upon that presumption a specific performance decreed against a purchaser. *Hillary* v. *Waller*, 12 Ves. 239.

Application to set aside Sales or Leases.]—Application to impeach a sale to a trustee must be made within a reasonable time. *Chalmer* v. *Bradley*, 1 J. & W. 59.

A bill was filed in 1859 by legatees under a will against the representatives of a devisee in trust, impeaching a sale made by him in 1816 as being at an undervalue, and in reality a sale to the trustee himself. The court made a decree in the favour of the legatees:—Held, that though the claim of the legatees was not barred by lapse of time or acquiescence, yet as the evidence showed that the sale was made bonâ fide, and not at an undervalue, the bill must be dismissed. *Baker* v. *Peck*, 4 L. T. 3; 9 W. R. 472.

The tenant for life of an estate, who was also devisee in trust in remainder for the children of the testator, with a power of appointment by will amongst them, purchased and obtained from the objects of the power a release of their reversion at an undervalue, and devised the estate to her son in fee, charged with debts and legacies. The son took possession of the estate, and paid off the legacies and charges fourteen years and a half after the death of the tenant for life, and seventeen years after the purchase of the reversion. The assignee of one of the vendors, an object of the power, who had become insolvent, filed his bill to set aside the sale:—Held, that the lapse of time was a bar to the relief, and that the mere circumstance of the poverty of the cestui que trust was not sufficient to excuse the delay. *Roberts* v. *Tunstall*, 4 Hare, 257; 14 L. J., Ch. 184; 9 Jur. 292.

A testator gave to his daughter all his estates for her life, with remainders over, with power to grant mining leases for twenty-one years. In 1840 the daughter granted a lease for twenty-one years and died the same year. In 1846 the next tenant in tail attained twenty-one, and executed a disentailing deed. He then gave notice to the lessees to give up the lease, alleging that it was invalid, but took no further proceedings, and in 1852 he sold the estate to the plaintiff, who was his agent. In 1860 the plaintiff filed a bill against the lessees to have the lease declared void, on the ground of there being no power under the will, and that it was obtained by fraud:—Held, that he was disentitled to relief, on the ground of laches alone, no proceedings having been taken until fifteen years after the tenant in tail attained twenty-one. *Ernest* v. *Vivian*, 9 L. T. 785; 12 W. R. 295.

In Claims for Specific Performance.]—Bill for a specific performance of a covenant whereby the plaintiff was solely to have a pit in the defendant's ground for digging black stone; proved that the defendant had for above sixty years been in quiet possession of this pit for digging black stones. Bill dismissed. *Scolefield* v. *Whitehead*, 2 Vern. 127.

Where a tenant for life, with remainder to his issue as tenants in common in fee, conveyed the lands as if he had the fee therein, to a purchaser in 1794, and died in 1820, and the children filed a bill in 1837 against the purchaser, claiming under the articles, and praying a specific execution of them: Held, that there was not such acquiescence upon their parts as enabled the court, exercising its discretion under 3 and 4 Will. 4, c. 27, s. 27, to refuse them relief. *Thompson* v. *Simpson*, 1 Dr. & War. 459.

Whatever effect time might have in precluding relief against a bargain of a remote period,

it affords no ground for a court of equity to enforce it, if shown to have been originally illegal. *Molony* v. *L'Estrange*, Beat. 414.

Tenant for Life in Receipt of Income.]—Where a tenant for life under a will has been in the receipt of the income of a fund for thirty-five years, the court will allow her to continue in such receipt, without directing a reference to inquire as to the existence of debts due from the testator's estate. *Nounday* v. *Balls*, 6 Jur. 550.

Action for Waste against prior Tenant for Life.]—An expectant tenant for life in remainder, who sees a tenant for life in possession, improperly cut timber, and takes no step to prevent it during his life, cannot, in a suit instituted nearly twenty years after the death of such prior tenant for life, charge his estate with the burden of making good the value of the timber so improperly cut by him; and upon the principle of preventing the assertion of stale demands, the lapse of time alone will form a bar, in equity, to such a suit, although the statute of limitations has no application. *Harcourt* v. *White*, 28 Beav. 303; 30 L. J., Ch. 681; 6 Jur. (N.S.), 1087; 8 W. R. 715.

A devise contained in the will of the prior tenant for life of his estates for the payment of debts, held not to prevent the lapse of time from operating as a bar, because, at his death, the amount due in respect of the timber improperly cut had not been ascertained, and therefore there was no debt in existence upon which the trust for payment of debts could operate. *Ib.*

In Claims for Dignities.]—Length of time is no bar to a claim to a dignity, though if a series of persons entitled to it do not assert their right, that may raise a presumption against the right, if not accounted for. *Hastings Peerage*, 8 Cl. & F. 144; West, 621. And see *Kintore* (*Countess*) v. *Kintore* (*Earl*), supra, col. 1716.

c. Waiver.

General Principles.]—Delay is not waiver, inaction is not waiver, though it may be evidence of waiver. Waiver is consent to dispense with the notice—Per Bowen, L.J. *Selwyn* v. *Garfit*, 57 L. J., Ch. 609; 38 Ch. D. 284; 59 L. T. 283; 36 W. R. 513.

What amounts to in general. See judgment of Fry, L.J., citing *Willmott* v. *Barber* (infra, col. 1731), in *Russell* v. *Watts*, 25 Ch. D. 559; 50 L. T. 673; 32 W. R. 626—C. A.

In order to constitute acquiescence, or a waiver, it must be shown that the party said or did something to give the court a jurisdiction it did not possess. Mere respectful acquiescence in, or submission to, the ruling of a court, will not amount to a waiver of a right to complain of an illegal decision. *Beaudry* v. *Montreal* (*Mayor*), 11 Moore, P. C. 399; 6 W. R. 346.

Mere laches in asserting a right to an interest executed is not sufficient in itself to disentitle a party to relief from a court of equity, but he may by standing by waive or abandon his right. *Clarke* v. *Hart*, 6 H. L. Cas. 633; 27 L. J., Ch. 615.; 5 Jur. (N.S.) 447.

Practice — Waiver by One Plaintiff.] — Acquiescence by one of several co-plaintiffs precludes the interference of the court upon an interlocutory application as much as upon decree; although some of the co-plaintiffs are infants. *Marker* v. *Marker*, 9 Hare, 15; 20 L. J., Ch. 246; 15 Jur. 663.

Parties cannot be said to aqcuiesce in the claims of others unless they are fully cognisant of their right to dispute them. *Ib.*

—— **Waiver by One Defendant.**]—When a plaintiff's case wholly fails, it cannot be aided by the gift or waiver of one defendant, as against his co-defendant. *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492; 21 L. J., Ch. 722.

—— **Demurrer.**]—Acquiescence merely prevents the special protection by injunction, but on a demurrer it must be such as to disentitle the plaintiff to any relief whatever. *Gordon* v. *Cheltenham Ry.*, 5 Beav. 229.

Knowledge of Rights—Onus Probandi.]—A. mortgaged leaseholds. On his death his executors took possession, received the rents, paid the interest on the mortgages, and applied the surplus for the benefit of the beneficiaries. The property proved insufficient to pay the mortgage debt:—Held, that the onus of proving acquiescence is on the person alleging it, and to show acquiescence he must show a standing by with a full knowledge of what was being done, and an acquiescence in the devastavit; and that this had not been proved. *Marsden, In re, Bowden* v. *Layland*, 54 L. J., Ch. 640; 26 Ch. D. 784; 51 L. T. 417; 33 W. R. 28.

Acquiescence in what has been done will not be a bar to relief when the person alleged to have acquiesced has acted, or abstained from acting, through being ignorant that he possessed rights. *Beauchamp* (*Earl*) v. *Winn*, L. R. 6 H. L. 223; 22 W. R. 193.

Waiver or acquiescence, like election, presupposes that the person is fully cognisant of his rights, and neglects to enforce them. *Vyvyan* v. *Vyvyan*, 30 Beav. 65.

Where acquiescence is relied on, it must be shown that the person acquiescing was aware of the matter in which he acquiesced, and of the effect of such acquiescence. *Strange* v. *Fooks*, 4 Giff. 408.

Acquiescence without full knowledge of the circumstances cannot be of any avail. *Prideaux* v. *Lonsdale*, 1 N. R. 565; 32 L. J., Ch. 317; 9 Jur. (N.S.) 488; 8 L. T. 109; 11 W. R. 531.

There can be no acquiescence in acts in which the party is ignorant that he has a right to dispute. *Cholmondeley* v. *Clinton*, 2 Mer. 362; 16 R. R. 167.

A party is not bound by acquiescence when ignorant of his rights. *Chambers, Ex parte*, 2 Mont. & Ayr. 476.

Acquiescence imports full knowledge, and a cestui que trust cannot be bound unless he has been fully informed of his rights, and of all the material facts. *Life Association of Scotland* v. *Siddall*, 7 Jur. (N.S.) 785; 4 L. T. 311.

A waiver must be an intentional act with knowledge. *Darnley* (*Earl*) v. *L. C. & D. Ry.*, 36 L. J., Ch. 404; L. R. 2 H. L. 43; 16 L. T. 217; 15 W. R. 817.

A party by acquiescing may raise such difficulties as to prevent the court from interfering to remove temporary bars. To charge a party with acquiescence he must be affected with knowledge of the facts acquiesced in. *Blennerhasset* v. *Day*, 2 Ball & B. 137.

Where the facts constituting fraud are in the knowledge of the party, and he lies by for twenty-five years, he cannot get relief. *Id.* 118.

A party acquiescing and receiving money under a misapprehension of his rights, not bound by it as in case of a contract for a disputed title or the compromise of a litigated right. *Id.* 128.

—— **Submission to Wrongful Act.**]—Semble, that mere submission to a wrongful act completed without the knowledge of the person whose right is infringed, cannot bar his right of action; although it may afford a ground for refusing relief under some circumstances. *De Bussche* v. *Alt*, 47 L. J., Ch. 381; 8 Ch. D. 286; 38 L. T. 370.

—— **Solicitor.**]—Where there was no acquiescence with knowledge of rights, a lapse of ten years was held not to affect the rights of a client seeking to set aside a purchase by his solicitor. *Austin* v. *Chambers*, 6 Cl. & F. 1.

—— **Presumptive Notice.**]—Upon one of the sections of a railway, deposited with the clerk of the peace, there was a note that a particular road, therein delineated, was to be stopped up, and another was to be substituted for it:—Held, that the public were not thereby affected with notice, so as, upon the ground of acquiescence, to be precluded from obtaining an injunction on the company's proceeding to stop up the road. *Att.-Gen.* v. *G. N. Ry.*, 4 De G. & Sm. 75; 15 Jur. 387.

—— **By both Parties.**]—Silence as to a legal right, when the facts are known to both parties, will not be an acquiescence in equity to bind the silent party. *Crofts* v. *Middleton*, 2 K. & J. 194; 1 Jur. (N.S.) 1133.

And see cases under next section.

Fraud.]—No act will amount to a confirmation of an impeachable transaction unless the party has become aware of the fraud, and that his act will have the effect of confirming it. *Murray* v. *Palmer*, 2 Sch. & Lef. 486. And see *Blennerhasset* v. *Day*, supra.

—— **What Constitutes Fraud.**]—The doctrine of acquiescence is founded upon conduct with a knowledge of one's legal rights. The acquiescence which will deprive a man of his legal rights must amount to fraud. To constitute fraud of this description—(1) the plaintiff must have made a mistake as to his legal rights; (2) he must have expended money or done some act on the faith of his mistaken belief; (3) the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff; (4) the defendant must know of the plaintiff's mistaken belief of his rights; (5) the defendant must have encouraged the plaintiff in the expenditure of money, or in the other acts which he has done, either directly or by abstaining from asserting his legal rights—Per Fry, J. *Willmott* v. *Barber*, 49 L. J., Ch. 793; 15 Ch. D. at p. 105; 43 L. T. 95; 28 W. R. 911.

—— **Waiver of Security.**]—Property, including a leasehold house, was mortgaged by A. to C., who was afterwards induced, by a representation from A. that a purchaser had been found for the house, to waive that portion of his security, and accept a part of the principal. The representation was untrue:—Held, that the waiver, which was made upon a fraudulent representation, did not affect the right of C. to insist upon his security for the balance of the principal as against A., and subsequent equitable incumbrancers under A. *Jones* v. *Thomas*, 11 W. R. 50.

Fraud cannot be condoned unless there is full knowledge of the facts and of the rights arising out of those facts, and the parties are at arm's length. *Moxon* v. *Payne*, 43 L. J., Ch. 240; L. R. 8 Ch. 881.

—— **Contract.**]—The right of a person dealing with a company to set aside a contract, founded on the latter's unintentional misrepresentation, may be waived or released, expressly or indirectly. *Bank of Hindustan, China and Japan, In re, Campbell, Ex parte*, 42 L. J., Ch. 771; L. R. 9 Ch. 1; 29 L. T. 519; 22 W. R. 113.

—— **Ratification.**]—The manager of a bank obtained an advance for himself on his personal credit. On liquidation of the bank, the accounts were debited with this advance as made to the bank, and the bank, in ignorance of the facts, acquiesced in this:—Held, that acquiescence must be founded on a full knowledge of the facts, and must be in relation to a transaction which may be valid in itself, and not illegal, and that there was no ratification by the bank. *Banque Jacques-Cartier* v. *Banque D'Epargne de Montreal*, 57 L. J., P. C. 42; 13 App. Cas. 111—P. C.

Bankruptcy.]—A bankrupt was refused his certificate on the ground of fraudulent concealment of property. Subsequently a consent order for annulling the bankruptcy was obtained. After this the assignees discovered that other property had been concealed by the bankrupt, and they presented a petition to discharge the annulling order, and filed a bill to restrain the bankrupt from getting in the concealed property. The petition was dismissed on the ground that the assignees having been aware of previous fraudulent concealment, could not be held to have consented to the order on the faith of the bankrupt having made a full disclosure of his property:—Held, that the proceedings in the cause ought to be stayed without costs. *Elsey* v. *Adams*, 2 De G. J. & S. 147; 3 N. R. 696; 10 Jur. (N.S.) 459; 10 L. T. 492; 12 W. R. 586.

—— **Creditors.**] — Creditors having, subsequently to the appointment, signed resolutions authorising the assignees to do certain acts which they could not have performed without such authority, are debarred from questioning the validity of the appointment upon grounds of which they were aware at the time of signature. *Nash, Ex parte, Wyatt, In re*, 1 Deac. & C. 445.

Voluntary Arrangement.]—In 1841 sisters voluntarily surrendered to their brother his promissory notes for money owing to them:—Held, that the transaction could not be set aside nineteen years after, when all the actors in it were dead. *Mackintosh* v. *Stuart*, 36 Beav. 21.

Shareholder.]—A shareholder who had acquiesced in the recommencement of the works afterwards sold his shares to a purchaser, who objected to the further prosecution of the works:—Held, that the purchaser was bound by the acquiescence of his vendor. *Effooks* v. *L. & S. W. Ry.*, 1 Sm. & G. 142; 17 Jur. 365; 1 W. R. 175.

Lease.]—An intending lessee cannot throw any responsibility upon the solicitor of the lessor, by a simple appeal that "he was sure the solicitor would not let him do anything wrong." *Haberdashers Co.* v. *Isaac*, 3 Jur. (N.S.) 611.

Effect of, as Estoppel.]—Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts, or words, or neglect his now averring the truth or asserting the demand would work some wrong to some other person, who has been induced to do something, or to abstain from doing something, by reason of what he has said or done, or omitted to say or do. *Adamson, Ex parte, Collie, In re*, 47 L. J., Bk. 106; 8 Ch. D. 817; 38 L. T. 920; 26 W. R. 892.

Statutory Rights by Person Benefited.]—Edward III., granted by charter to the citizens of London that no market within seven miles round about the city should be granted by the king or his heirs to any one. In 1682, by charter, Charles II. granted to the predecessors in title of the plaintiffs the right to hold a market in or about Spital Square on Thursdays and Saturdays:—Held, that the charter of Edward III. had the validity of a private act of parliament; that its intention was that no market should be granted for seven miles round the city; that there being evidence of user of the market at the least since 1723, the city must be taken to have waived their rights under the charter of Edward III. *G. E. Ry.* v. *Goldsmid*, 54 L. J., Ch. 162; 9 App. Cas. 927; 52 L. T. 270; 33 W. R. 81; 49 J. P. 260—H. L. (E.)

d. Confirmation.

And see, infra, 4 c.

Knowledge of Law and Facts.]—In order to work confirmation, the party said to confirm must know the law as well as the fact. *Cockerell* v. *Cholmeley*, 1 Russ. & M. 418.

In order to make out a case of confirmation, it is necessary to prove, not only knowledge of facts, but of the rights flowing from them. *Sandeman* v. *Mackenzie*, 1 J. & H. 613; 30 L. J., Ch. 838; 7 Jur. (N.S.) 1231; 5 L. T. 175.

Confirmation must be by a person acquainted with his rights, and knowing that the transaction was impeachable. *Dunbar* v. *Tredennick*, 2 Ball & B. 317. S. P., *Roche* v. *O'Brien*, 1 Ball & B. 339.

Deed of confirmation must be free from fraud. Equity will not relieve a party apprised of his rights, confirming former acts. *Ib.*

No act will amount to a confirmation of an impeachable transaction, unless the party has, become aware of the fraud; and is also aware that his act will have the effect of confirming it. *Murray* v. *Palmer*, 2 Sch. & Lef. 486.

All acts to effect confirmation must be voluntary, and done with the intent to rectify that which the party knows he is entitled to disaffirm. *Molony* v. *L'Estrange*, 1 Beat. 413.

—— **Undue Influence.**]—There can be no confirmation of a fraudulent gift obtained through undue influence by a donee standing in a confidential relationship towards the donor unless there is full knowledge on the part of the latter of the facts and the rights arising out of them, and an absolute release from the undue influence. *Moxon* v. *Payne*, 43 L. J., Ch. 240.

A woman under the influence of her stepfather executed a bond as surety for an advance to him. On action brought on the bond, she executed a second bond as surety to secure the amount of the judgment and costs. She had no independent advice. Six years after on action brought on the second bond, she filed a bill to set them aside:—Held, that she was not barred by laches. *Kempson* v. *Ashbee*, 44 L. J., Ch. 195; L. R. 10 Ch. 15; 31 L. T. 525; 23 W. R. 38.

Sale by Tenant for Life.]—Where A. sold an estate, and conveyed it in fee simple, with the usual covenant for further assurance, and became bankrupt, and it was considered that he was tenant in tail only, it was ordered that the commissioner should execute a deed of confirmation to purchaser. *Fripp, Ex parte, Phelps, In re*, 1 De G. 293.

Tenant for life made a lease exceeding his power, with a covenant for quiet enjoyment, and he and the remainderman conveyed the estate in fee subject to the leases:—Held, that this did not amount to a confirmation of the lease by the remainderman. *Brangan* v. *Gorges*, 7 Ir. Eq. R. 283.

A deed executed by a tenant for life, and his son, an infant, tenant in quasi tail in remainder, was held to have been rendered a valid bar by subsequent dealings of the son with the property. *Allen* v. *Allen*, 1 Con. & L. 427; 2 Dr. & War. 307; 4 Ir. Eq. R. 472.

Settlement—Lease not Within Power.]—By settlement, A. was tenant for life, with remainder to J. for life, with remainder to the first and other sons of J. in tail male, with remainder to J. in fee; and A. and J. were empowered to make leases. By lease not according with the power, A. and J. demised part to G., and covenanted for quiet enjoyment. On the marriage of F., the eldest son of J., J. and F. joined in resettling the estates, which were limited in the usual course of family settlements; and J. and F. covenanted that the lands were free from encumbrances, "such leases as have been heretofore really and bonâ fide made only excepted." J. having died, F. obtained judgment for possession of the lands leased:—Held, that by the settlement, F. had confirmed the lease and an injunction was granted. *Gray* v. *Knox*, 5 Ir. Eq. R. 465.

—— **Confirmation by Will.**]—Where a settlement, incomplete as to part of the property comprised in it is subsequently confirmed by the will of the settlor, the confirmation perfects the settlement, as a testamentary instrument, so that the doctrines of ademption and lapse apply. *Bizzey* v. *Flight*, 45 L. J., Ch. 852; 3 Ch. D. 1269; 24 W. R. 957.

——**Lunacy of Settlor.**]—A testator having left his son 10,000*l.* by will, expressed an intention, verbally, of settling 10,000*l.* stock on the son's marriage, and became insane. The marriage took place, and the 10,000*l.* stock was settled accordingly. The testator then had a lucid interval, and on being told of the transaction did not disapprove thereof:—Held, that the testator confirmed the settlement by not expressing any disapprobation during this lucid interval.

Browne v. *Browne*, 11 L. J., Ch. 57; 5 Jur. 1053.

Party Confirming Deed.]—If a deed of confirmation is executed under a mistake, and the party confirming is dead, it is doubtful whether a court of equity would permit parties claiming under him to take advantage of the mistake. *Cholmondeley* v. *Clinton*, 4 Bligh, 1; 22 R. R. 83.

Agreement when Impeached.]—An agreement confirmed, not to be impeached without clear proof of imposition. *Halhed* v. *Marke*, 3 Swanst. 444.

Decree setting aside an agreement as having been signed by the plaintiff under pressure or duress, reversed, the court being of opinion that the plaintiff, with a knowledge of all the facts, had voluntarily acted under the agreement, to the prejudice of the defendant. *Ormes* v. *Beadel*, 2 De G. F. & J. 333; 30 L. J., Ch. 1; 6 Jur. (N.S.) 1103; 3 L. T. 344; 9 W. R. 25.

Lease.]—That which can be avoided by entry may be made good by confirmation. *Boyle* v. *Lysaght*, 1 Ridgw. P. C. 395.

Agent—Purchase by.]—An agent employed by a young man to sell a reversionary legacy shall not be purchaser at an under-value, and nothing shall amount to a confirmation until the vendor be fully apprised that he might be relieved against the original transaction. *Crowe* v. *Ballard*, 2 Cox, 253; 1 Ves. J. 215; 3 Bro. C. C. 117; 1 R. R. 22.

An agent employed to sell an estate, secretly buys it himself in the name of a trustee. He cannot call for an execution of the trust until the transaction is confirmed by the vendor. *Woodhouse* v. *Meredith*, 1 J. & W. 204.

2. By what Persons.

a. Infant.

Infant Defendant.]—Infancy of defendant no excuse for plaintiff's delay. *Jones* v. *Turberville*, 2 Ves. J. 11; 4 Bro. C. C. 115.

Bankruptcy.]—A petition to annul an adjudication in bankruptcy on the ground of the infancy of the bankrupt, which was not presented until after the time limited by the 233rd section of the Bankrupt Act, 1849 (12 & 13 Vict. c. 106), dismissed as out of time. *West, In re*, 3 De G. M. & G. 198; 22 L. J., Bk. 71; 1 W. R. 421.

Encroachment.]—An encroachment of a watercourse was made in the infancy of the ancestor, who acquiesced for twenty-one years after he became of age. The court would not afterwards notice his complaint. *Guernsey (Lord)* v. *Rodbridges*, Gilb. Eq. Rep. 3.

Executory Agreement.]—An infant cannot excuse the non-assertion of his right under an executory agreement made with his ancestor where the immediate performance of his part is essential to the interest of the other party. *Griffin* v. *Griffin*, 1 Sch. & Lef. 352; 9 R. R. 51.

Lease—Acceptance of Rent.]—Where a building lease was granted during the minority of infants, with a covenant that they, when of age, should confirm it, and the infants accepted rent for ten years after coming of age, decreed, that the lease should be established. *Smith* v. *Low*, 1 Atk. 489.

Mortgage by Infant.]—Where a party takes a lease of infant's lands, and the infant on coming of age mortgages the property to the lessee by deed referring to the lease, this is a confirmation of the lease. *Story* v. *Johnson*, 3 Y. & C. 586.

Laying out Money.]—Expenditure on an estate claimed with plaintiff's knowledge, but chiefly in his minority, held no defence. *Scott* v. *Scott*, 11 Jr. Eq. R. 487.

b. Married Woman.

Improper Investment.]—Quære, whether a married woman entitled to the interest of a fund to her separate use, without restraint upon anticipation, can be bound by acquiescence in an improper investment of the fund. *Davies* v. *Hodgson*, 27 L. J., Ch. 449; 4 Jur. (N.S.) 252; 6 W. R. 355.

General Rule.]—The inattention or laches of a married woman cannot hurt her right. *Blandford* v. *Marlborough*, 2 Atk. 545.

Settlement.]—On the marriage of a female infant, property in reversion was settled to her separate use for life, remainder to her children. Part of the property fell into possession during the life of the first husband, and the other part during the life of a second. She married again, her third husband having notice of the settlement:—Held, that the wife not having repudiated the settlement upon her first discoverture, must be considered as having adopted it, it being for her benefit to do so, and that it was binding on the husband who had notice of it. *Ashton* v. *McDougall*, 5 Beav. 56; 11 L. J., Ch. 344; 6 Jur. 447.

Discoverture.]—A promise during coverture does not bind a wife; but if repeated after the husband's death, it is a confirmation. *Smith* v. *French*, 2 Atk. 245.

Where husband and wife assign for value a share of a fund in which the wife had a vested interest in remainder expectant on the death of a tenant for life, and the wife and the tenant for life outlive the husband, the wife is entitled to the whole of the fund against such assignee. *Honner* v. *Morton*, 3 Russ. 65; 27 R. R. 15. S. P., *Watson* v. *Dennis*, 3 Russ. 90.

If the wife, after her husband's death, executes an assignment, which recites former assignments by the husband, and purports to be made subject to them, she does not thereby confirm them. *Ib.*

The wife does not acquiesce in those assignments, by forbearing to impeach them till the death of the tenant for life. *Ib.*

E., a single woman, transferred stock into the joint names of herself and trustees; and executed an indenture, which declared that the trustees should hold the property in trust, to pay the dividends to E. for her life, for her sole and separate use, independent of any husband; and after her death, as E. should by will, notwithstanding coverture appoint, and, in default, in trust for E. E. married, and by deed, reciting the settlement, and executed by her husband and herself, she assigned the dividends of the stock in trust, for the payment of an annuity granted by her hus-

band :—Held, that joining the husband in the deed of assignment was confirmatory of the deed of settlement, and consequently the assignment by the wife was valid. *Maher* v. *Hobbs*, 2 Y. & J. 317 ; 6 L. J., Ex. Eq. 12.

c. Company.

Permitting Expenditure.]—Where a company stands by and permits works to be executed where its premises are situated, the effect, for acquiescence, will be the same as in the case of an individual. *Laird* v. *Birkenhead Ry.*, Johns. 500 ; 29 L. J., Ch. 218 ; 6 Jur. (N.S.) 140 ; 1 L. T. 159 ; 8 W. R. 58.

Where a company has stood by and seen works performed, it will be held to have assented to them, as much as if the company had been an individual. *Hill* v. *South Staffordshire Ry.*, 11 Jur. (N.S.) 192 ; 12 L. T. 63—L.JJ.

Consent in Writing.] — A board having statutory power to consent in writing to a particular act is not bound by tacit acquiescence. *Kerr* v. *Preston (Corporation)*, 46 L. J., Ch. 409 ; 6 Ch. D. 463 ; 25 W. R. 264. *And see* cases infra, col. 1746.

3. Notice and Duty to Inquire.

Lease for Lives.]—The assignee of a lease for lives, which contained a covenant for renewal upon the dropping of any life, provided application were made within six months, omitted to apply for a renewal within six months :—Held, that he might have known the facts if he had used reasonable diligence, and acted with ordinary prudence. *Harries* v. *Bryant*, 4 Russ. 89 ; 28 R. R. 15.

Contents of Deed.]—Where D. was entitled to possession of lands under a deed of gift in his possession, but allowed C. to remain in possession :—Held, that as D. had been guilty of laches in not finding out the mistake earlier, he was entitled to an account only for six years before the filing of the bill, and an additional period during which he was abroad. *Denys* v. *Shuckburgh*, 4 Y. & C. 42 ; 5 Jur. 21.

Next of Kin — Distribution of Estate.]—Though the distribution of an intestate's estate under a decree among the next of kin does not conclude the rights of persons who may have an equal title, yet the court will not assist other next of kin who, with full notice of the proceedings, neglected to prosecute their claims. *Sawyer* v. *Birchmore*, 1 Keen, 825 ; 2 Myl. & Cr. 611 ; 6 L. J., Ch. 277.

Notice that Claim will be Resisted.]—Effect of notice that a claim will be resisted, in excluding an objection to relief, on the ground of laches. *Morison* v. *Moat*, 9 Hare, 266 ; 20 L. J., Ch. 513 ; 15 Jur. 787.

Sale by Agent—Account.]—The plaintiff consigned a ship to G., for sale, fixing a minimum price of $90,000. G. employed the defendant with the plaintiff's knowledge, and he bought the ship himself for $90,000, and resold it for $160,000. Four years after the plaintiff filed a bill for an account of the profits :—Held, that there had been no such laches on the part of the plaintiff as to disentitle him to relief. *De Bussche* v. *Alt*, 47 L. J., Ch. 381 ; 8 Ch. D. 286 ; 38 L. T. 370.

Disclaimer of Landlord's Title.]—The act of a tenant disclaiming his landlord's title shall not affect his landlord's title, if he have no knowledge of such act. *Hovenden* v. *Annesley (Lord)*, 2 Sch. & Lef. 624 ; 9 R. R. 119.

But if the landlord, having notice of such disclaimer, does not proceed for the forfeiture, the Statute of Limitations will run against him. *Ib.*

Voluntary Deed.]—A person seeking to set aside a voluntary deed, on the ground of undue parental influence, must not be guilty of unreasonable delay. *Turner* v. *Collins*, 41 L. J., Ch. 558 ; L. R. 7 Ch. 329 ; 25 L. T. 779 ; 20 W. R. 305.

T., entitled to certain funds, was persuaded by his father to settle such funds on trusts. Fourteen years after T. filed a bill to have the deed rectified :—Held, that though in its inception the transaction was voidable as having been brought about by undue influence, the plaintiff had by delay forfeited his right to set aside the deed except as to part which had never been explained to him. *Ib.*

Lease — Representation.] — Where intended lessors, in executing an agreement, acted upon a representation by the lessee as to what had taken place between their own solicitor and him, and their attention was directed whether this representation was correct ; but they took no step to question it for three years :—Held, that the delay was strongly confirmatory of the fairness of the transaction. *Martin* v. *Pycroft*, 2 De G. M. & G. 785 ; 22 L. J., Ch. 94 ; 16 Jur. 1125 ; 1 W. R. 27, 58.

—— **Specific Performance.**]—Specific performance of agreement to grant lease refused, plaintiff having delayed to file his bill for more than two years since notice from defendant of his intent not to perform contract. *Heapy* v. *Hill*, 2 Sim. & S. 29.

Contract to lease mines not completed in time, and defendant gave notice to rescind unless the plaintiff complied with certain requisitions within fourteen days, and later on he stated his intention of abiding by that notice. A bill was filed five months after. A demurrer allowed, the notice having put the parties at arm's length the plaintiff had been guilty of unreasonable delay in taking proceedings. *Huxham* v. *Llewellyn*, 28 L. T. 577 ; 21 W. R. 570.

Breach of Trust.]—Breach of trust by not making proper investment in 1837. Bill filed in 1849 by plaintiffs, who had notice of the state of the investment :—Held, that they were barred by laches and lapse of time. *Browne* v. *Cross*, 14 Beav. 105.

Charter-party.]—A shipowner on the 20th of March chartered his ship to A. for a voyage to Hong Kong. The freight was payable "on the delivery of a certificate to the charterers, signed by the consignees," of the delivery of the cargo. On the 24th March the shipowners assigned the freight to C., who gave no notice to A. until November. It turned out that on the 23rd of March A. had sub-chartered the ship to B., whose agent at Hong Kong had paid the freight to the agent there of the shipowner :—Held, that A. was liable to C. for the freight, and that C.'s laches in giving notice had not deprived him of his rights. *Young* v. *Lindsay*, 27 Beav. 405.

4. What Acts Amount to.

a. Laches or Delay.

Judgment not satisfied.]—Upon a bill filed by a creditor before the 3 & 4 Will. 4, c. 27, to enforce a judgment of twenty-eight years' standing, the plaintiff gave evidence of the insolvency of his debtor during the greater part of that period:—Held, that such evidence would not avail against the fact of his not having sooner attempted to enforce the judgment. *Grenfell* v. *Girdlestone*, 2 Y. & C. 662; 7 L. J., Ex. Eq. 42; 1 Jur. 940.

Mines—Breaking Boundaries.]—The boundaries between two coal mines were settled by agreement in 1862, and in 1864 a release was executed, by which all previous wrongful acts were condoned and released on both sides. In 1863 the defendants broke into the plaintiffs' mine, but the plaintiffs were not aware of this when they executed the release with the defendants:—Held, that the wrongful acts committed in 1863 were not condoned by the release of 1864, the plaintiffs having no reason to suspect that the settlement made in 1862 had been broken. *Ecclesiastical Commissioners* v. *N. E. Ry.*, 4 Ch. D. 845; 36 L. T. 174.

Held, also, that there were no laches attributable to the plaintiffs for not having discovered the damage prior to 1870. *Ib.*

Nuisance.]—Plaintiff and defendant were neighbours from 1832 till 1851, when new works of the defendant's were put up, and the plaintiff brought an action for damages in 1854 and on arbitration obtained damages and costs. In the same year the defendants put up larger works. The plaintiff thereupon filed his bill:—Held, that the plaintiff had not been guilty of laches. *Broadbent* v. *Imperial Gas Co.*, 2 Jur. (N.S.) 1132.

Arrears of Rent.]—Neglect to enforce payment of rent deprives a lessor from recovering more than six years' arrears of rent; but, as to accruing payments, the right is constantly renewed, and therefore the doctrine of laches would not apply. *Archbold* v. *Scully*, 9 H. L. Cas. 360; 7 Jur. (N.S.), 1169; 5 L. T. 160.

—— **Tenant for Life.**]—Held, that the merely lying by during a tenancy for life, by persons who could not until its termination have received the money, and who, possibly, might not become entitled to the estate, did not constitute laches. *Kirwan* v. *Kennedy*, Ir. R. 3 Eq. 472.

Lease—Specific Performance.]—A. assigns his interest in lands to B., in consideration that B. shall make a lease back to A. of a portion of the lands, and in consideration also of a loan of 200*l.* by B. to A. B. covenants to execute the lease subject to the repayment of 200*l.* for which B. has a judgment; no lease actually made; but A. remains in possession of his portion; B. lends further sums to A., and obtains judgments, and then conveys the lands, and assigns the judgments to C. C. issues writs of fi. fa. on the judgments, and procures a sale of A.'s equitable interest, and on ejectment brought, A. is turned out of possession; A. files his bill for relief and execution of a lease, but from embarrassment in his circumstances does not further prosecute the suit. More than twenty years later the house of lords decreed specific performance. *Moore* v. *Blake*, 4 Dow, 230.

Mere Assertion of Rights.]—A continual claim without any active steps in support of it will not keep alive a right which would otherwise be barred by laches. *Lehmann* v. *McArthur*, L. R. 3 Ch. 496; 18 L. T. 806; 16 W. R. 877.

Held, that the continual assertion by the plaintiffs of their rights, without taking any steps to enforce them, had no effect in removing the bar arising from lapse of time. *Clegg* v. *Edmondson*, 8 De G. M. & G. 787; 26 L. J., Ch. 673; 3 Jur. (N.S.) 299.

—— **Trust.**]—If a person who claims a trust fund, and has served the trustees with notice, does not exercise due diligence in asserting his right before the court, the court will authorise the trustees to disregard the notice. *Lonergan* v. *Stourton*, 9 L. T. 196; 11 W. R. 984.

Patent—Infringements.]—The owners of a patent for wheels, having discovered that several companies were violating their patent, brought an action against one of such companies, but did not give notice to the other companies. The action was not decided until after the patent had expired. Thereupon the plaintiffs filed a bill for an account of profits, and an injunction against another of the companies, complaining of acts done nine years before:—Held, that the delay was not excused by the pendency of the action, but was fatal. *Smith* v. *L. & S. W. Ry.*, 1 Kay, 408; 23 L. J., Ch. 562; 2 Eq. R. 428; 2 W. R. 310.

Practice—Injunction.]—Laches may be a defence to an application for an injunction by way of information as well as upon a bill. Effect of a protest in negativing laches. *Att.-Gen.* v. *Sheffield Gas Consumers*, 3 De G. M. & G. 304; 22 L. J., Ch. 811; 17 Jur. 677; 1 W. R. 185.

Creditor having been restrained from proceeding at law on account of decree obtained, allowed to prosecute suit, where proceeding on decree delayed for some years. *Powell* v. *Wallworth*, 2 Madd. 183.

Creditor—Security.]—A creditor having it in his power to obtain warrants for payment of an American loyalist's debt out of his estate there, is bound, on being referred to that property by the defendant, to make it available, as far as he can; but where the creditor is not informed of that property, no laches can be imputed to him. *Peter* v. *Irving*, 3 Bro. C. C. 54.

Trust to pay Debts.]—A trust of real estate for payment of debts does not remove from a creditor the consequences arising from his negligence or acquiescence. *Harcourt* v. *White*, 28 Beav. 303; 30 L. J., Ch. 681; 6 Jur. (N.S.) 1087; 8 W. R. 715.

Under-Lease — Renewal.]—An under-lessee, entitled to a renewal upon payment of the proportion of his fines and expenses ought, if he complains of the amount of such proportion, to apply without delay to a court of equity to assess the sum which he ought to pay, and if instead, after notice from his mesne landlord, he should delay the payment, the objection that the sum demanded was unreasonable will not excuse his laches. *Chesterfield* v. *Mann*, 9 Hare, 206.

Agent sued by Principal.]—The character of the defendant as agent deprives him of the

benefit of an objection that might be competent to another person, as the neglect of the plaintiff in not bringing forward the demand at an earlier period. *Beaumont* v. *Boultbee*, 5 Ves. 485.

Contract—Rescission.]—When a plaintiff to a bill for specific performance has allowed five months to elapse after the defendant has rescinded the contract before filing his bill, it is not a sufficient explanation to state that the defendant's solicitor was suffering from mental aberration. *Huxham* v. *Llewellyn*, 28 L. T. 577; 21 W. R. 766.

Poverty of Plaintiff.]—The objection of length of time is not answered by proof of distress or fraud. Courts of equity have noticed poverty in a plaintiff, anterior to the commencement of the suit. But there is no case in which the court has said that that which would be a bar to a rich man shall not be a bar to a poor man. *Byrne* v. *Frere*, 2 Moll. 157.

The court cannot attend to circumstances of distress or embarrassment as an excuse for laches, whereby the demand has been barred by lapse of time. *Hovenden* v. *Annesley* (*Lord*), 2 Sch. & Lef. 639; 9 R. R. 119.

Payment of Money by Mistake.]—The plaintiff, by mistake, paid tithe rent-charge in respect of lands not in his occupation. The plaintiff did not discover the mistake until the two years, limited by 6 & 7, Will. 4, c. 71, had expired, and the defendants had lost their remedy against the lands actually chargeable:—Held, that there was no duty cast on the plaintiff which made his delay in discovering the mistake laches on his part; and that he was entitled to recover back the amount paid. *Durrant* v. *Ecclesiastical Commissioners*, 50 L. J., Q. B. 30; 6 Q. B. D. 234; 44 L. T. 348; 29 W. R. 443; 45 J. P. 270.

Effect of, where Party not Prejudiced.]—Directors of a company made payments of dividends that had not been earned to 1878. In 1886 the company was wound up. In 1890 the liquidator brought an action against directors to recover the amounts improperly paid:—Held, that the creditors ought not to lose their rights on account of the liquidator's delay, since the defendants had not been prejudiced by it. *Masonic Life Assurance Co.* v. *Sharpe*, 61 L. J., Ch. 193; [1892] 1 Ch. 154; 65 L. T. 806; 40 W. R. 241—C. A.

b. Acquiescence.

i. *Permitting Expenditure.*

What Evidence Necessary.]—The relief in respect of expenditure, under an erroneous opinion of title, or an expectation of a larger interest, or that the enjoyment would not be disturbed, with the knowledge or permission of the other party, requires a case of bad faith clearly made out. *Dann* v. *Spurrier*, 7 Ves. 231; 6 R. R. 119.

Where acquiescence is relied on, it must be shown that the person acquiescing was aware of the matter in which he acquiesced, and of the effect of such acquiescence. *Strange* v. *Fooks*, 4 Giff. 408.

—— **Fraud.**]—The acquiescence which will deprive a man of his legal rights must amount to fraud. The following are necessary elements:—(1) the plaintiff must have made a mistake as to his legal rights; (2) he must have expended money or done some act on the faith of his mistaken belief; (3) the possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff; (4) the defendant must know of the plaintiff's mistaken belief of his rights; (5) the defendant must have encouraged the plaintiff in the expenditure of money, either directly or by abstaining from asserting his legal rights. *Willmott* v. *Barber*, 49 L. J., Ch. 792; 15 Ch. D. 105; 43 L. T. 95; 28 W. R. 911.

Rights of Stranger.]—If owner stands by and suffers a stranger to build on his land without notice of title, stranger shall have the land, but there must be no title or colour of title in the stranger to build. *Att.-Gen.* v. *Balliol College*, 9 Mod. 411. *See also* 1 Anstr. 185; Gilb. Eq. R. 85.

Where a man, conusant of his right, suffers another to build on his ground without setting up a right till afterwards, the court will oblige the owner to permit the person building to enjoy it quietly. *East India Co.* v. *Vincent*, 2 Atk. 83; and see *Kenney* v. *Brown*, 3 Ridgw. 518.

Knowledge of Title.]—The equitable rule as to the effect of a person's lying by and allowing another to spend money on his property, does not apply where the money is expended with knowledge of the real estate of the title. *Rennie* v. *Young*, 2 De G. & J. 136; 27 L. J., Ch. 753.

During Minority.]—Expenditure on an estate claimed with plaintiff's knowledge, but chiefly in his minority:—Held, no defence. *Scott* v. *Scott*, 11 Ir. Eq. R. 487.

Making Canal — Compensation.] — An act authorised the making of a canal through lands of A., and upon payment of the compensation the land was to vest in the company. No arrangement was made in respect of compensation with A. The canal was made "with the full consent and approbation of and in accordance with the wishes of A.," whose name was mentioned in the act:—Held, in equity, that A., having sanctioned the formation of the canal, was not entitled to retake possession, but only to a fair compensation:—Held, secondly, that persons who had bought A.'s property, with notice as to the canal, were bound by the same equity:—Held, thirdly, that this court might determine the amount of compensation. *Beaufort* (*Duke*) v. *Patrick*, 17 Beav. 60; 1 Eq. R. 41; 22 L. J., Ch. 489; 17 Jur. 682; 1 W. R. 280.

Family Agreement.]—Specific performance decreed of parol agreement as to land, made as a family compromise, where there had been possession and improvements, and acquiescence near nineteen years. *Stockley* v. *Stockley*, 1 V. & B. 23; 12 R. R. 184. See also *Stapleton* v. *Stapleton*, 1 Atk. 2.

Agent and Principal.]—Where an agent had permitted his principal to expend money on an estate, which the agent afterwards claimed as his own, and to which his real representative established a legal title by ejectment, the court granted an injunction to restrain an action brought by the agent's representative for mesne profits. *Cawdor* (*Lord*) v. *Lewis*, 1 Y. & C. 427.

Right of Way.]—A company had constructed its line so as to leave the passage for a private road two intervals of nine feet three inches each. The interval required by the Railway Clauses Act was twelve feet. The plaintiff's right of way was not disputed; but he had allowed the railway works to proceed, and the damage was of small amount:—Held, that the court would not grant an injunction to restrain the infringement on the legal right. *Wintle* v. *Bristol and South Wales Union Ry.*, 6 L. T. 20; 10 W. R. 210.

Tunnel—Condition as to Building.]—A company sold land over a tunnel to B., subject to the condition that he was to erect no buildings nor make any excavations, &c., but according to a specification approved in writing by the principal engineer. B. sent in plans for the approval of the principal engineer. The resident engineer never submitted them to the principal, but told B. verbally that he might proceed. B. proceeded with the works till the principal engineer saw them, and he at once condemned them as unsafe for the tunnel:—Held, first, that the approval of the company's resident engineer was not binding on the company; and, secondly, that B. having been allowed to continue his works from August to the 26th October, was not an acquiescence on the part of the company. *Att.-Gen.* v. *Briggs*, 1 Jur. (N.S.) 1084.

Private Road.]—A company made excavations for diverting the water of a stream, and in their work obstructed a private road. The plaintiffs, owning a mill, alleged that the diversion of the water was illegal, and that the company were interfering with the road without performing the conditions imposed by the act:—Held, that the plaintiffs must be held to have had notice of the intended works; and had by an acquiescence for eighteen months precluded themselves from asking for an injunction. *Illingworth* v. *Manchester and Leeds Ry.*, 2 Railw. Cas. 187.

Person holding Shares as Nominee.]—To a scire facias against a shareholder in a company, on a judgment obtained against the company, a plea that he became transferee of the shares he held, as nominee of certain persons for their benefit, and not for his own, upon the representation of the plaintiff and others that he should incur no liability in respect of them; that he never was to derive or did derive any benefit from the shares or the company; that the plaintiff knew the circumstances under which he became transferee of the shares, and stood by and permitted him to become such, and was unjustly and inequitably, and contrary to that representation, and in fraud thereof, seeking to charge and make him responsible as a shareholder, is bad. *Bill* v. *Richards*, 2 H. & N. 311; 26 L. J., Ex. 409; 3 Jur. (N.S.) 520; 5 W. R. 650.

Light and Air.]—The plaintiff, on 28th March, allowed the defendant, a neighbour, to commence erecting a building, the plaintiff being under a mistake as to the spot where the building would be. The building was begun on 8th April, and on the 24th a complaint was made, and on 5th May a bill filed for an injunction and damages:—Held, that although there had been sufficient acquiescence to justify the court in refusing an injunction, there had not been such acquiescence as to justify the dismissal of the bill. *Johnson* v. *Wyatt*, 2 De G. J. & S. 18; 33 L. J., Ch. 394; 9 Jur. (N.S.) 1333; 12 W. R. 234.

Where Remedy at Law.]—To an action for obstructing the plaintiff's lights and depriving him of support to his buildings, an equitable plea, that the grievances complained of were occasioned by his pulling down a house and erecting another in its place, which he did with the acquiescence and consent of the plaintiff, and on the faith of such acquiescence and consent he incurred expenses. Replication, that the plaintiff acquiesced and consented on the faith of false representations of the defendant, i.e., that the grievances complained of would not result from his works:—Held, that the plea and the replication were respectively good. *Davies* v. *Marshall*, 10 C. B. (N.S.) 697; 31 L. J., C. P. 61; 7 Jur. (N.S.) 1247; 4 L. T. 581; 9 W. R. 866. See *Smith* v. *Hayes*, Ir. R. 1 C. L. 333.

The court will not entertain a suit where a party has had ample opportunity of trying his right at law, and no action had been brought. *Swaine* v. *G. N. Ry.*, 3 N. R. 109; 9 Jur. (N.S.) 1196; 9 L. T. 571.

Where a party had lain by and allowed expenditure to be incurred, and a trade, which might be a nuisance, to be established, and carried on for a considerable period:—Held, that he was precluded by acquiescence from obtaining relief in equity. *Ib.*

—— **Nuisance.**]—To have a work, erected at great expense, removed by this court as a nuisance, the person complaining should have given notice not to proceed, otherwise the court will leave the complainant to law. *Jones* v. *Royal Canal Co.*, 2 Moll. 319. And see *Anon.*, 2 Eq. Ca. Abr. 522, infra, col. 1770.

—— **Draining.**]—Injunction against draining, with prejudice to a canal, before establishing a right at law, refused, upon laches of two years' permitting expenditure. *Birmingham Canal Co.* v. *Lloyd*, 18 Ves. 515; 11 R. R. 245.

Canal—Permission to use Water.]—Agreement that as long as plaintiffs continued customers of the defendant, who owned a canal, they should be allowed to use the superfluous water for works, of which they were occupiers under an agreement for a lease with the defendant. The use of the water was not essential to the plaintiffs' works:—Held, that such an understanding did not form the foundation of an equitable right. Secus, if the plaintiffs, with the knowledge of the defendant, had incurred expense in establishing a manufacture for which the use of the water was necessary. *Bankart* v. *Tennant*, 39 L. J., Ch. 809; L. R. 10 Eq. 141; 23 L. T. 137; 18 W. R. 639.

An act for making a canal provided that "it should be lawful for owners of lands to take water from the canal for the sole purpose of condensing the steam used in working any engine, but for no other purpose." The defendants were the owners of two mills, and were allowed by the defendants to lay down pipes for water to be used for other purposes than that mentioned in the act. After a lapse of several years:—Held, that the defendants were precluded by the acquiescence from disputing the right of the owners of the mill to obtain water for those purposes. *Rochdale Canal Co.* v. *King*, 22 L. J., Ch. 604; 17 Jur. 1001; 1 W. R. 278.

Building by Tenant.]—Remainderman lying by, and suffering the tenant to lay out money without giving him notice of his intention to impeach his title, a ground of relief against the remainderman. *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 73.

If a man stands by and allows another to erect a building on his ground, and he afterwards agrees as to the rent to be paid for it, he cannot dispute the right of the builder to use the land. *Mold* v. *Wheatcroft*, 27 Beav. 510; 29 L. J., Ch. 11; 6 Jur. (N.S.) 2; 1 L. T. 236.

Where a landlord stands by and sees a tenant lay out money on the faith of a promised lease, this may raise an equity analogous to that which is raised when one stands by and sees his neighbour spending money on his land. Semble. *Nunn* v. *Fabian*, 35 L. J., Ch. 140; L. R. 1 Ch. 35: 11 Jur. (N.S.) 861; 13 L. T. 343.

Where a tenant under a void lease makes great improvements, with the knowledge and approbation of the landlord, he is entitled in equity to a valid lease. Semble. *Hardcastle* v. *Shafto*, 1 Anstr. 185.

A. made a lease to the plaintiff, who afterwards took a new lease for years, which was invalid, and expended 2,800*l.* in rebuilding. Defendant, the eldest son of A., during these improvements, told his father he had no right to make such a lease, but he never told the plaintiff, and plaintiff wrote to him to desire he would keep one of the mills in repair:—Held, that the plaintiff was entitled to possession as the son, knowing the imperfection of his father's lease, suffered the plaintiff to rebuild. *Hanning* v. *Ferrers*, Gilb. Eq. R. 85.

If a stranger builds upon the land of A., supposing it to be his own, and A. remains wilfully passive, equity will not allow him to profit by the mistake; but if the stranger knows that the land upon which he is building belongs to A., then A. may assert his legal rights, and take the benefit of the expenditure. And a tenant building on his landlord's land, in the absence of such special circumstances, acquires no right against him at the expiration of the tenancy. *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; 12 Jur. (N.S.) 506; 14 W. R. 926.

If a tenant at will builds on the land in the belief that he thereby acquires a title to claim a lease, and the landlord allows him to build, knowing that he is acting in that belief, semble, that equity will interfere to compel the grant of a lease. *Ib.*

And see *Rennie* v. *Young*, supra, col. 1742.

The owner of land agreed with a corporation to take a lease of certain waste lands, to construct thereon a terrace walk, and the corporation passed resolutions accepting the proposal and providing for the stumping out of boundaries by a committee. The owner objected to the boundaries proposed, but took possession of such land as he considered necessary, and constructed the terrace:—Held, that he was entitled to a lease, the corporation being bound by its acquiescence. *Crook* v. *Seaford Corporation*, L. R. 6 Ch. 551; 25 L. T. 1; 19 W. R. 938.

Consent to Underletting.]—A. made a lease of lands, with a condition against sub-letting without the consent of A., under his hand and seal. The lessee made an agreement for a lease of a part of the lands, with the consent of A., by letter, not under seal. B. purchased A.'s reversion, subject to the agreement. C., the lessee's administratrix, applied to B. for permission to make a lease to E. B. encouraged C. to make the lease, stood by while a large sum was expended by E. on the lands, and witnessed the execution of the lease. B. did not know that the consent of A. was not valid in law:—Held, that the court had power to relieve the tenant. *Burke* v. *Prior*, 15 Ir. Ch. R. 106.

Company.]—Where a company has stood by and seen works performed, it will be held to have assented to them, as much as if it had been an individual. *Hill* v. *South Staffordshire Ry.*, 11 Jur. (N.S.) 192; 12 L. T. 63—L.JJ.

Whether a corporation of governors would be bound by the acquiescence of some, permitting expenditure, &c., quære. *Macher* v. *Foundling Hospital*, 1 V. & B. 188.

The plaintiff entered into negotiations with a railway company for the construction of a tunnel at his own expense, and the directors expressed their assent to the project. The plaintiff with the acquiescence of the company, and the approval of their engineer, executed the necessary works, and the communication was used by the plaintiff for two years and a half; but no formal agreement was ever executed:—Held, that the company was bound by acquiescence, notwithstanding the want of a formal contract; and that the plaintiff had acquired a right of user which the company had no power to terminate. *Laird* v. *Birkenhead Ry.*, 1 Johns. 500; 29 L. J., Ch. 218; 6 Jur. (N.S.) 140; 1 L. T. 159; 8 W. R. 58.

Partnership.]—A partnership at will in a mine held under a lease was determined by the managing partners giving notice of dissolution to the others. Subsequently a new lease was granted to the managing partners, who thenceforth carried on the concern at their own risk. The partners who were excluded never assented to these proceedings, but continually insisted on their right to a share in the benefits of the new lease; they took no legal proceedings to enforce their rights for nine years:—Held, that the plaintiffs, having, with the full knowledge of their rights, allowed the managing partners to carry on a mining concern so long without taking any steps to assert those rights, could not be permitted to assert them now. *Clegg* v. *Edmondson*, 8 De G. M. & G. 787; 26 L. J., Ch. 673; 3 Jur. (N.S.) 299.

Held, also, that the continual assertion by the plaintiffs of their rights, without taking any steps to enforce them, had no effect in removing the bar arising from lapse of time. *Ib.*

ii. *Permitting the Settlement or Disposition of Property.*

Jointure.]—A., on marriage with M., settled a jointure on her, with the approbation of B., his father, who witnessed the deed. A. died. Afterwards B. discovered that A. was only tenant for life, with remainder to himself in fee, and he recovered at law. Per curiam, it is plain that the father thought the son had the fee, and that he knew of the settlement; considering the near relation of father and son, the widow shall not be compelled to resort to the son's covenant, and make good the jointure out of his personal estate. *Teasdale* v. *Teasdale*, Sel. Ca. Ch. 59.

Absolute Conveyance—Defeasance.]—A. made an absolute conveyance of lands to B. and his heirs, in consideration of 1,500*l.*, but on the next

day B. executed a defeasance, declaring that, if A. or his heirs should within sixteen years pay B. the 1,500*l.*, the conveyance should be void. B. entered, and, three years afterwards, made a settlement upon his marriage to which A. was privy, but took no notice of the defeasance. After B.'s death, A. set up the defeasance:—Held, that the intent of the conveyance to enable B. to obtain a marriage settlement was fraudulent, and a perpetual injunction was awarded against A., to stop proceedings under the defeasance. *Webber* v. *Farmer*, 4 Bro. P. C. 170.

Settlement.]—A. in consideration of marriage, and of 500*l.* portion which he is to have with his wife by settlement, empowers his wife to dispose of 200*l.* by her will; they live together, the wife gives the 200*l.* by her will. The husband, not admitted to say he had not 500*l.* with his wife, but shall pay the money. *North* v. *Ansell*, 2 P. Wms. 618.

A. by marriage articles, in consideration of his wife conveying her lands to him, covenants to settle certain lands of his own in jointure. Neither the wife nor her trustees executed the articles. After marriage the husband settles his lands and recites the settlement to be in performance of the articles, but never requires her to convey her lands. The wife is a party to this settlement. This settlement is a waiver by the husband of the proposed conveyance by the wife. *Lucy* v. *Moore*, 4 Bro. P. C. 343.

—— **Strict Settlement Impossible.**—Bill for a strict settlement after long acquiescence by plaintiff's ancestors, and when impossible to bar the remainder, dismissed. *Parker* v. *Phillips*, 1 Ves. sen. 530.

—— **By Court.**]—A settlement made under the court ought to provide for the children; but where that has been omitted, and the order acquiesced in for a long time, it will not be supplied. *Johnson* v. *Johnson*, 1 J. & W. 479.

—— **Construction—Mistake.**] — A court of equity will not direct payment made under a mistaken construction of doubtful clause in a settlement to be refunded after many years of acquiescence by all parties, and after the death of one of the authors of the settlement. *Clifton* v. *Cockburn*, 3 Myl. & K. 76.

Feme Covert—Copyholds.]—Feme covert without husband's joining, but in his presence, surrenders her copyhold to use of her will or appointment, and devises it. Quære, whether good. *Taylor* v. *Phillips*, 1 Ves. sen. 229.

—— **Assignment by Husband.**]—The wife does not acquiesce in assignments by forbearing to impeach till the death of the tenant for life. *Honner* v. *Morton*, 3 Russ. 65; 27 R. R. 15. S. P., *Watson* v. *Dennis*, 3 Russ. 90.

Release by Legatee.]—A release and conveyance by a legatee and devisee to the trustee and executor held confirmed by acquiescence for six years before, and many intermediate acts of recognition. *De Montmorency* v. *Devereux*, West, 64; 7 Cl. & F. 188; 2 Dr. & Wal. 410.

Imbecility of Settlor.]—A. entitled to real estate by voluntary conveyance settled it in strict settlement. After the decease of the settlor, his heir-at-law, who was also tenant for life under the settlement, conveyed all his interest in the lands upon trusts. Quære, can he afterwards insist that the voluntary settlement was void because A. was in a state of mental imbecility when he executed it. *Roddy* v. *Williams*, 3 Jo. & Lat. 1.

Covenant not to supply Water in District.]—The B. company, possessing springs of water, covenanted, upon selling to the A. company a portion of those springs, that they would not supply any part of the district which the A. company was authorised to supply by Act of Parliament. The B. company afterwards supplied lessees of their own in the district with water:—Held, that a delay of twelve years in making the complaint did not amount to acquiescence. *Hartlepool Gas and Water Co.* v. *West Hartlepool Harbour and Ry.*, 12 L. T. 366.

Reference.]—A. having a claim on property which he knew was the subject of a reference between C. and D., suffered the award to be made without bringing forward his claim:—Held, that he was bound by the award. *Govett* v. *Richmond*, 7 Sim. 1.

Tithes—Payment by Mistake.]—If tithes claimed by vicar are supposed to be payable to rector, and he makes no claim, but stands by and allows the vicar to take them, he is bound as between him and vicar by the effect of such laches. *Manby* v. *Lodge*, 9 Price, 231.

Executor dealing with Assets.] — If an executor, in pursuance of directions contained in the will, carries on the testator's business, and in so doing contracts debts, the fact that he has carried on the business in his own name, and that the testator's assets employed in it are ostensibly the executor's own property, will not entitle a judgment creditor of the executor to take in execution the testator's assets. Lapse of time and enjoyment of the assets in a manner inconsistent with the trusts of the will, coupled with the consent of the beneficiaries, may, however, raise an inference of a gift of the assets by them to the executor, and entitle his judgment creditor to take them in execution. *Ray* v. *Ray* (G. Cooper, 264) distinguished. *Morgan, In re, Pillgrem* v. *Pillgrem*, 50 L. J., Ch. 834; 18 Ch. D. 93; 45 L. T. 183.

Mortgage.]—A voluntary deed, by which a father purported to convey his property to his son absolutely, but which did not carry into effect the whole arrangement between them, was set aside at the instance of the father after the son's death. *Hughes* v. *Scanor*, 18 W. R. 1122.

A mortgage effected by the son upon the property, the father, though in possession, allowing the son to act as if absolute owner, upheld. *Ib.*

Contract — Concealment.] — A charter-party made one-half of the freight at a certain sum per ton payable by the merchant to the owner of the ship in monthly instalments. There was also a memorandum of agreement providing that the parties should be liable for the expenses and interested in the profits in equal moieties. The shipowner deposited the charter-

party with his bankers as security for his account and the merchant paid the instalments as they became due. The shipowner became bankrupt:—Held, that the merchant having enabled the shipowner, by means of the charter-party, to hold himself out as entitled to the whole freight, and having neglected to undeceive the bankers as soon as he had found that they had taken a security upon such apparent title, he was precluded from afterwards asserting any equity inconsistent with that title. *Mangles* v. *Dixon*, 1 Mac. & G. 437; 1 Hall & Tw. 542; 19 L. J., Ch. 240.

Tenant by the Curtesy.]—A father being advised that his daughter was entitled in fee to parts of freehold estates, subject only to a question whether he was not entitled to the rents thereof for life, as tenant by the curtesy, instituted a suit, to which he was not a party, but in which he acted as next friend of his infant daughter, and obtained a decree, inconsistent with any title in himself as tenant by the curtesy, and the father, still acting as next friend in the suit, obtained an order approving of a deed containing a conveyance of the estates to the daughter in fee:—Held, that the proceedings and conduct of the plaintiff from the commencement of the suit were tantamount to a waiver, as against his daughter and her husband, of his right to curtesy out of the estates in question. *Stone* v. *Godfrey*, 5 De G. M. & G. 76; 2 Eq. 866; 23 L. J., Ch. 769; 18 Jur. 524.

Trustees—Transfer of Securities to Executors of Cestui que trust.—Sub mortgages made of leaseholds, the mortgagees, who were trustees, relying solely upon a valuation and report, which purported on the face of it to have been made at the request of the borrower, and which founded the supposed value of the houses upon a statement of prospective rents, none of the houses being let, nor were any deductions made for insurance or repairs. The sub-mortgages were transferred by the trustees to the executors of the deceased cestui que trust under the settlement. The evidence showed that the executors, when accepting the transfers, had no information of the circumstances under which the investments had originally been made:—Held that the executors, by accepting the transfers, must not be taken to have acquiesced in or adopted the securities. *Smethurst* v. *Hastings*, 55 L. J., Ch. 173; 30 Ch. D. 490; 52 L. T. 567; 33 W. R. 496.

c. Confirmation.

And see supra 1. d.

Advance by Father to Son.]—A father, having advanced a child in his infancy, upon his coming of age takes a bond from him to a greater amount than the sums advanced. The bond to be set aside altogether. Loose expressions in a letter from the son held not to be a confirmation. *Carpenter* v. *Heriot*, 1 Eden, 338.

Deed of Gift.]—In a suit to impeach a deed of gift to an agent, it was held that though it was voidable in its origin, yet the subsequent acts of the party impeaching it, assisted by his legal advisers, made it binding on him. *De Montmorency* v. *Devereux*, 7 Cl. & F. 188; West, 64; 2 Dr. & Wal. 410.

Power of Attorney.]—Where a merchant gave a power of attorney, and the attorney deposited deeds with an insurance company to secure 12,000*l.*, though the power of attorney was not sufficient, the merchant wrote to the company requesting the loan of 6,000*l.* "to be secured on his Essex property, which you now hold, in addition to the 12,000*l.* already advanced," and professing his readiness to execute the mortgage deed:—Held, that this was a confirmation of the security. *Manning* v. *Bury*, Tam. 147.

Sale of Legacy.]—A., having 500*l.* given him, in case he should survive the testator's wife, sells it for 100*l.* to be paid by 5*l.* per annum, but that if the testator's wife should die before A., the rest of the money to be paid within a year next. A. does survive the testator's wife, and knowing the legacy was due, confirms the bargain; he shall be bound thereby. *Cole* v. *Gibbons*, 3 P. Wms. 290.

Perpetual Annuity.]—A., by will, gave an annuity (which he directed W. to pay) to B. for life, with power to her to dispose of same by writing. B., by will, devised the same to her sons. W., by will, "ratified and confirmed the annuity so given to B., and by her bequeathed to her sons":—Held, that the annuity was a perpetual one, and not merely for the life of B. and her children. *Burke* v. *Lambert*, 2 Dr. & Wal. 608.

Lease—Intoxication.]—Lease set aside with costs, as obtained by the contrived and habitual intoxication of the lessor, immediately on coming of age, at a very inadequate rent; and acts of confirmation held not sufficient. *Say* v. *Barwick*, 1 V. & B. 195.

—— Acceptance of Rent.]—Devisees in trust, having the legal estate with a power of leasing in possession, until the cestuis que trustent attained twenty-one; leases not conformable to the power void in equity, and not confirmed by acceptance of rent. *Bowes* v. *East London Waterworks Co.*, Jacob, 324; 23 R. R. 84.

A lease was made by A., the heir-at-law, who had no power of leasing:—Held, void, and not confirmed by A. accepting rent. *Robson* v. *Flight*, 34 L. J., Ch. 226; 11 Jur. (N.S.) 147; 11 L. T. 725; 13 W. R. 393.

Devise by Alien—Naturalisation.]—Alien devisee, in trust to sell, joins in conveyance, and afterwards obtains an act of naturalisation. This act does not operate to confirm the title of the purchaser under a conveyance made previously. *Fish* v. *Klein*, 2 Mer. 431.

Solicitor—Fraud.]—A., a solicitor, was entrusted by a client with money to be lent on mortgage. He appropriated the money to his own use, and afterwards being pressed by B. his client, obtained from another client, C., fraudulently, and without consideration, mortgages of equitable estates belonging to C. which he handed over to B. A. became bankrupt, and nearly three years afterwards C. discovered, for the first time, the nature of the transaction between A. and B.:—Held, that his claim had not been barred by acquiescence or confirmation whilst he was ignorant of the facts constituting his equity. *Wall* v. *Cockerell*, 1 N. R. 486; 8 L. T. 1; 11 W. R. 442.

5. Particular Cases.

a. Objections to Jurisdiction.

No Jurisdiction.]—No appearance or answer will give a jurisdiction to a limited court. *Green* v. *Rutherforth*, 1 Ves. sen. 471. *Penn* v. *Baltimore*, 1 Ves. sen. 446.

A total want of jurisdiction cannot be cured by the assent of parties. *Jones* v. *Owen*, 5 D. & L. 669; 18 L. J., Q. B. 8; 13 Jur. 261. S. P., *Foster* v. *Underwood*, 47 L. J., Ex. 30; 3 Ex. D. 3; 37 L. T. 389; 26 W. R. 94; *Buse* v. *Roper*, 41 L. T. 457; *Wellesley* v. *Withers*, 4 El. & Bl. 759; 3 C. L. R. 1187; 24 L. J., Q. B. 134; 1 Jur. (N.S.) 134.

Sheriff—3 & 4 Will. 4, c. 42.]—Where in an action for damages the sum indorsed on the writ was 8*l.* 18*s.*, and the jury returned a verdict for 3*l.* 14*s.* 2*d.*:—Held, the sheriff had no jurisdiction under 3 & 4 Will. 4, c. 42 (Writ of Trial Act), s. 17, to try this cause, and that the objection was not too late, although an assent to try before the sheriff had been given by both parties. *Lawrence* v. *Wilcock*, 11 A. & E. 941; 3 P. & D. 536; 8 D. P. C. 681; 8 L. J., Q. B. 284.

Prohibition—Suit by the Crown.]—Prohibition lies not to an inferior court after the defendant has pleaded there, for by pleading the defendant submits to the jurisdiction. But at the suit of the king prohibition lies, though the defendant has pleaded. *Anon.*, 1 Vern. 301.

Filing Cross Bill.]—Filing a cross bill prevents any objection to the jurisdiction. *Burgess* v. *Wheate*, 1 Eden, 190; 1 W. Bl. 121.

Ecclesiastical Court.]—If, in an ecclesiastical court, a party is cited as resident within the jurisdiction, and appears and pleads without objection, he cannot afterwards put that fact in issue. *Chichester* v. *Donegal*, 6 Madd. 275.

Filing Affidavit—Bankruptcy.]—Where there was a contest as to priority between the solicitor of a bankrupt and the equitable mortgagee by deposit of title deeds, on a petition by the solicitor:—Held, that there was no jurisdiction in bankruptcy, to determine the priority of lien; and that the mortgagee was not precluded from objecting to the jurisdiction by filing affidavits as to the merits. *Allison, Ex parte*, 1 Glyn & J. 210.

A creditor, resting upon a common law lien, without proving under the commission, previously to the Bankruptcy Court Act, appeared in opposition to a petition before the vice-chancellor, who ordered that the matter should be referred to the commissioners, to ascertain the rights of the several parties. The creditor attended the inquiry before the commissioners, but did not draw up the order of the vice-chancellor:—Held, that this did not bring him within the jurisdiction of the court:—Held, also, that filing an affidavit is not a waiver of any objection to the jurisdiction. *Reid, Ex parte, Mills, In re*, 1 Deac. & C. 250.

—— **Cross Examination on.**]—Objection by defendant to a summons to set aside a compromise. After this the plaintiff filed his affidavits; the defendant then filed his affidavits and cross-examined the plaintiff's witnesses:—Held, that the defendant had not waived the objection. *Emeris* v. *Woodward*, 59 L. J., Ch. 230; 43 Ch. D. 185; 61 L. T. 666; 38 W. R. 346. See also *Moore* v. *Gamgee*, 59 L. J., Q. B. 505; 25 Q. B. D. 244; 38 W. R. 669.

Foreign Contract.]—Company formed in England to work an American mine. P. came over to this country to superintend the English company, but B. remained throughout in America. A suit was instituted here to restrain P. from selling certain shares of the English company, for an account, and for other relief. P. did not object to the jurisdiction. An order was made in the suit to serve process upon B. in America, which was done:—Held, that as it did not appear that P. was B.'s agent, his not objecting to the jurisdiction did not operate as a waiver by B. of any objection which he (B.) might have to it. *Davis* v. *Park*, 42 L. J., Ch. 673; 28 L. T. 295; 21 W. R. 301.

Irregularity—Service of Motion—Attachment.]—There must be a personal service of a notice of motion for committal, and the appearance of the contemnor upon the hearing of the motion to commit in order to take an objection to an irregularity in the service of the notice of motion does not operate as a waiver of the irregularity, since the liberty of the subject is in question. *Mander* v. *Falcke*, 61 L. J., Ch. 3; [1891] 3 Ch. 488; 64 L. T. 791; 40 W. R. 31.

Mandamus not Injunction the proper Remedy.]—Bill filed in 1863 for an injunction to restrain a local board from polluting a brook. An answer put in and an interlocutory injunction granted. On the trial of the action in 1890, the objection was taken that the court had no jurisdiction; that the only remedy was by mandamus:—Held, that the defendants ought not to be allowed to raise that objection now; and that the case must be dealt with as if the defendants had waived any objection on this ground. *Warwick and Birmingham Canal* v. *Burman*, 63 L. T. 670.

Appeal—Grounds for.]—Before sessions were held appellants gave notice to the clerk of the justices that objection would be made "if any justices who were rated in Yarmouth heard the appeals." At the hearing this objection was made, and it was overruled:—Held, that the appellants were not precluded from contending, in support of the rule for a certiorari, that the chairman was disqualified by reason of his being himself a litigant; although this latter objection was not specifically mentioned in the notice, or made before the justices. *Reg.* v. *Great Yarmouth JJ.*, 51 L. J., M. C. 39; 8 Q. B. D. 525; 30 W. R. 460.

b. Delay in Prosecuting Suit.

Neglect of Solicitor.]—In a cause which has been much delayed, the court will not, at the expense of further delay, relieve the plaintiff from the consequences of the gross neglect of his solicitor. *Turner* v. *Turner*, 1 Swanst. 156.

Rights at Commencement of Suit.]—Delay, however great, in the progress of a suit cannot deprive the plaintiff of rights which existed at the time of its commencement. *Foster* v. *M'Mahon*, 11 Ir. Eq. R. 287.

Interest.]—When a suit has been instituted for the purpose of raising a sum of money bearing interest, the court has no jurisdiction to withhold from the plaintiff the interest which accrued after filing the bill, on the ground of laches in the prosecution of the suit, however gross. *Reilly* v. *Fitzgerald*, 1 Dr. 122; 6 Ir. Eq. R. 335.

Where Possession Claimed.]—Where the court summarily interferes against the legal possession, it has a right to expect a plaintiff to proceed with the most complete and honest diligence to obtain a decree. Delay in his proceedings constitutes an objection to the proposed interference. *Owen* v. *Homan*, 4 H. L. Cas. 997; 17 Jur. 861.

Taxing Bill—Bankruptcy.]—A fiat was sued out on the 7th June by an attorney against his debtor, for his bill of costs, and the bankrupt was shortly afterwards discharged, having inserted the amount of the attorney's bill in his schedule. The bankrupt passes his last examination; and on the 4th December petitions for an order to tax the attorney's bill, with a view of superseding the fiat:—Held, that the bankrupt could not, after lying by so long, and after his previous admission of the debt, apply for such an order. *Gingell, Ex parte*, 2 Deac. & C. 546; 2 L. J., Bk. 22.

Issue to try Bankruptcy.]—After bankrupt has surrendered and acquiesced a year and a half since the taking out the commission, an issue at law will not be directed to try the bankruptcy. *Mitt, Ex parte*, 1 Atk. 102.

Administration—Trust.]—W., as administrator with the will annexed, was entitled to a mortgage of a colliery, W., C. W., and N. being entitled in equal shares to the mortgage money. W. was also receiver of the colliery and other estates held under the same title, in a suit in which the title of the mortgagor was disputed, and to which W. was a party. This suit was compromised in 1847. In February, 1853, W. entered into an agreement with Y. for the purchase from him of the colliery. In June, 1853, C. W. filed a bill to have it declared that W. had made the purchase of February, 1853, as trustee. In July, 1853, W. answered C. W.'s bill. In February, 1855, C. W. allowed his bill to be dismissed for want of prosecution. C. W., in 1857, filed a second bill, to have it established that the purchase of 1853 was made by W. as a trustee:—Held, that C. W. had, by his conduct, disentitled himself to the relief sought. *Whalley* v. *Whalley*, 2 De G. F. & J. 310.

Pleading.]—The waiver in the first instance of giving in an allegation on the common condidit:—Held, not to operate as a renunciation altogether of the right. *Hitchings* v. *Wood*, 2 Moore, 355.

Presumption after Judgment.]—After a judgment in ejectment for non-payment of rent, everything, after an acquiescence for seventeen years, will be presumed to have been regularly done. *Blennerhassett* v. *Day*, 2 Ball & B. 124.

c. Proceedings before Arbitrators.

Carrying out Award.]—If the terms of an agreement are to be ascertained by an award, being so ascertained it shall be specifically performed, unless there has been acquiescence. *Blundell* v. *Brettarch*, 17 Ves. 241.

Objection to Arbitrator.]—Objection to appointment of arbitrator waived by attending him. *Harcourt* v. *Ramsbottom*, 1 J. & W. 511.

—— **Agent of one Party.**]—A. having acted as agent for a purchaser of land, was afterwards appointed arbitrator on behalf of the purchaser, and the vendor appointed an arbitrator to act with him in settling the price to be paid:—Held, that the vendor had waived any objection to the purchaser's arbitrator. *Elliot and South Devon Ry., In re*, 2 De G. & Sm. 17; 12 Jur. 445.

—— **Umpire.**]—Y., the claimant's arbitrator, selected W. as umpire. The parties went before the umpire on 11th October. On 3rd November W. gave evidence on behalf of the respondents with respect to the value of other property in the neighbourhood, on claims against the respondents. The award was made on 22nd November, and on 20th December the claimant objected to W. as not being a disinterested person:—Held, that the claimant had sufficient knowledge of the position of W. before the award was made, and having given no notice he must be taken to have consented to W. acting as umpire. *Clout and Metropolitan and District Ry., In re*, 46 L. T. 141.

Setting aside Award.]—After a submission of all matters in difference, and an award made, a release given, and acquiescence of nine years, the award shall not be set aside upon a suggestion that the umpire had particular matters only under his consideration. *Jones* v. *Bennett*, 1 Bro. P. C. 528.

Owner Lying by.]—A. having a claim on property which he knew was subject to a reference between C. and D., suffered the award to be made without bringing forward his claim:—Held, that he was bound by the award. *Govett* v. *Richmond*, 7 Sim. 1.

One Party Absent.]—The parties to an arbitration met on the business, and one of the parties was present only part of the time. On the following day the party had an interview alone with the arbitrator on the business of the award. After this the arbitrator made his award. The court refused to set aside the award, holding that, on the evidence, the party absent at the interview must be taken to have acquiesced in it. *Hamilton* v. *Bankin*, 19 L. J., Ch. 307; 15 Jur. 70.

Umpire Communicating with Party.]—Pending a reference, the umpire held a communication with the agents of one of the parties; this fact being known to all the parties at the time, and the award having been made:—Held, that it was too late for either party to object on the ground of such communication. *Mills* v. *Bowyers Society*, 3 K. & J. 66.

Valuation—Acceptance "Under Protest."]—A plaintiff disputed an award of valuers, on the ground that it was made upon a wrong principle. On settlement he took the sum awarded, and signed a receipt, writing, "under protest," at the

top. He waited nine months:—Held, that he was precluded by delay and what amounted to acquiescence from disputing the valuation. *Parrot* v. *Shellard*, 16 W. R. 928.

Award out of Time.]—Award enforced, although made after the prescribed time, where both parties, without objection, allowed the arbitrators to proceed after that time. *Hawkesworth* v. *Brammall*, 5 Myl. & Cr. 281.

Where an award was not made within the specified time, but one of the parties, not knowing that fact, takes it up and pays the charge for it, his doing so will not amount to a waiver of the condition as to time. *Darnley (Earl)* v. *L. C. & D. Ry.*, 36 L. J., Ch. 404; L. R. 2 H. L. 43; 16 L. T. 217; 15 W. R. 817.

Submission to Arbitration.]—In a bankruptcy matter a submission to arbitration was made without the leave of the court:—Held, that a creditor having acted under the submission, was precluded from objecting to its informality, and was bound by the award. *Wyld, Ex parte* and *In re*, 30 L. J., Bk. 10; 7 Jur. (N.S.) 294; 3 L. T. 794; 9 W. R. 421—L.JJ.

Partners.]—An action against the managing partner of a colliery, for trespass and damages by the adjoining owner, was referred to arbitration. The co-partners had no knowledge of the action until after the reference had been agreed to. They attended the reference, and did not object. The arbitrator assessed the damages at 6,000*l.*:—Held, that the co-partners had acquiesced in the arbitration, and were bound by the award. *Thomas* v. *Atherton*, 48 L. J., Ch. 370; 10 Ch. D. 185; 40 L. T. 77.

Assignees of Bankrupt.]—If the assignees of a bankrupt attend meetings under a reference to which the bankrupt was a party, and make no objection, they will be bound by the award. *Dod* v. *Herring*, 1 Russ. & M. 153.

Arbitrators Exceeding their Authority—Protest.]—If a party to a reference objects that the arbitrators are considering a matter not referred to them, and protests against it, and the party, still under protest, continues to attend and cross-examines the witnesses, he does not thereby waive his objection, nor is he estopped from saying that the arbitrators have exceeded their authority. *Davies* v. *Price*, 34 L. J., Q. B. 8; 11 L. T. 205; 12 W. R. 1003—Ex. Ch. S. P., *Ringland* v. *Lowndes*, 17 C. B. (N.S.) 514; 33 L. J., C. P. 337; 10 Jur. (N.S.) 850; 12 W. R. 1010—Ex. Ch.

Specific Performance.]—On an award relating to patent matters the arbitrator directed that neither of the parties should grant any licence of or work any of the patents, save under a licence from the trustees to be appointed under the award, which required the parties to nominate trustees within fourteen days, and to signify their election to take licences within two calendar months from the date of the award. The submission was made a rule of a common law court. In a suit for a specific performance of the award:—Held, that although one party had nominated trustees and signified an election to take licences, there had not been such an acquiescence in the award as to justify the court in enforcing a specific performance of it against him on that ground. *Nichells* v. *Hancock*, 7 De G. M. & G. 300; 3 Eq. R. 689.

d. Matters of Contract and Agreement.

Negotiations to Vary.]—Treaty and negotiations for a variation of the terms of a contract will not amount to a waiver, unless the circumstances show that it was the intention of the parties that there should be an absolute abandonment and dissolution of the contract. *Robinson* v. *Page*, 3 Russ. 114; 27 R. R. 26.

When First Impeached.]—Where a party rests satisfied with an agreement, and for some time treats it as fair, it is most material to ascertain the time he first impeaches it; for although he may be entitled to relief, by delay he may lose it. *Morony* v. *O'Dea*, 1 Ball & B. 118.

After Action brought on the Contract.]—A. and B. entered into a contract, and, a dispute having arisen, B. commenced an action in respect of a portion of the contract. A. filed a bill for a specific performance:—Held that B. could not, after having commenced an action on the contract, set up in equity the defence of an alleged previous waiver of it. A valid contract cannot be waived unless both parties assent, at the same time, to the proposal to put an end to it. *Whittaker* v. *Fox*, 13 L. T. 588; 14 W. R. 192.

What Evidence Necessary.]—The waiver of a contract is itself a contract, and must be acquiesced in by both parties, and, when relied on against a tenant, must be established by clear and unequivocal evidence. *Carolan* v. *Brabazon*, 3 Jo. & Lat. 200.

Where A. wrote to C. stating that he would lease certain lands to C. for a stated term at a named rent and A. for some time received the rent named, but refused to execute a lease, A. was decreed to execute a lease on the terms mentioned and to pay costs. *Ib.*

A waiver of a stipulation in an agreement must, to be effectual, be made intentionally, and with knowledge of the circumstances. *Darnley (Earl)* v. *L. C. & D. Ry.*, 36 L. J., Ch. 404; L. R. 2 H. L. 43; 16 L. T. 217; 15 W. R. 817.

Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangemeut for the written agreement, he must clearly show not merely his own understanding as to the new terms of agreement, but that the other party had the same understanding. *Ib.*

Foreign Contract.]—A. and B. were entitled to real estate in Chili. A., who was residing there, wrote to B. in this country, offering to purchase his interest in the property. B. replied in terms which would warrant A. in concluding that he had accepted the offer. Nothing further was done during the period of thirteen years:—Held, that B. was barred by lapse of time from disputing the existence of the contract. *Cood* v. *Cood*, 33 Beav. 314; 3 N. R. 275; 33 L. J., Ch. 273; 9 Jur. (N.S.) 1335.

Parol Waiver.]—Though a parol waiver of a written contract amounting to a complete abandonment, and clearly proved, would bar a specific performance, or even parol variations so acted upon that the original agreement could no longer

be enforced without injury to one party, variations verbally agreed upon are not sufficient to prevent the execution of a written agreement, the situation of the parties remaining the same. *Price* v. *Dyer*, 17 Ves. 356; 11 R. R. 102.

A written agreement can only be waived by written waiver, it seems; but strong proof of parol waiver would at least be required. *Buckhouse* v. *Crossby*, 2 Eq. Ca. Abr. 33. But see *Inge* v. *Lippingwell*, Dick. 469.

—— **Agreement Relating to Land.**]—Parol waiver of a date fixed by a written agreement to perform a contract relating to land:—Held, void, being in contravention of the Statute of Frauds. *Stowell* v. *Robinson*, 3 Bing. (N.C.) 928; 5 Scott, 196; 6 L. J., C. P. 326. And see *Harvey* v. *Grabham*, 5 A. & E. 61; 6 N. & M. 154; 5 L. J., K. B. 235.

Statutory Power to Consent in Writing.]—A board having statutory power to consent in writing to a particular act is not bound by tacit acquiescence. *Kerr* v. *Preston Corporation*, 46 L. J., Ch. 409; 6 Ch. D. 463; 25 W. R. 264.

Specific Performance — Possession.]—Vendor being in possession for fifty years, and purchaser having done acts inconsistent with his being the owner, specific performance of agreement to sell refused, as amounting to waiver. *Rosse (Earl)* v. *Sterling*, 4 Dow, 442.

If the plaintiff in a suit for specific performance has delayed to enforce the agreement, acquiescence in a breach of the agreement will not be imputed to the defendant by reason of a similar delay on his part in repudiating it, though accompanied by possession. *Lamare* v. *Dixon*, 43 L. J., Ch. 203; L. R. 6 H. L. 414; 22 W. R. 49.

The fixed rule of equity that specific performance of an agreement for a lease will not be granted after a long lapse of time will not be relaxed merely on account of possession and payment of rent during such time. *Powis* v. *Dynevor (Lord)*, 35 L. T. 940.

—— **Rescission.**]—Notice to rescind a contract in September unless plaintiff complied with requisitions within fourteen days, and in October notice of intention to abide by that decision. Bill for specific performance filed next April. A demurrer allowed on the ground that, the notice having put the parties at arm's length, the plaintiff had been guilty of unreasonable delay. *Huxham* v. *Llewellyn*, 28 L. T. 577; 21 W. R. 570.

When a plaintiff to a bill for specific performance has allowed five months to elapse after the defendant has rescinded before filing his bill, it is not sufficient explanation to state that the defendant's solicitor was suffering from mental alienation. *Ib.*

Delay, after the parties were at arm's length, of three calendar months and thirteen days, in filing a bill for specific performance of a contract for the sale and purchase of a colliery:—Held, a bar to relief. *Glasbrook* v. *Richardson*, 23 W. R. 51.

Time of the Essence.]—If it is of the essence of the contract that an act should be completed by a fixed date, an extension of the time only substitutes the extended time for the original time. *Barclay* v. *Messenger*, 43 L. J., Ch. 449; 30 L. T. 351; 22 W. R. 522.

Agreement to Inclose.—The lord of the manor entered into an agreement with his copyhold tenants for inclosing part of a common and the tenants consented to the inclosure, and released their right of common in the ground; and the lord released each particular tenant from all quit-rent and other services. The inclosure was prevented from taking effect, and the tenants continued to enjoy their right of common, pay their quit-rents, and do suit and service as before:—Held, that this agreement was mutually waived. *Lanesborough* v. *Ockshott*, 1 Bro. P. C. 151.

Purchase Money—Interest.]—Effect of acquiescence by a railway company as to the payment of interest on purchase-money, pending the investigation of title. *Hardwicke (Earl), Ex parte*, 1 De G. M. & G. 297.

Share of Profits.]—Master of vessel agrees on behalf of owners that each of crew shall have a specific share of profits of voyage; before return of vessel owner sells a quarter of cargo. The custom of trade is for cooper to estimate quantity of oil; this was done, and plaintiff settled accordingly:—Held, that owners had no right to sell part of cargo; but the plaintiff having settled, could not then come for relief to equity. *Cockle* v. *Whiting*, Tam. 55.

Person Nominated for Neglected Contract.]—By agreement between the post office and persons supplying horses for the mails, the postmaster-general cannot exercise the power of nominating a new party to perform neglected duty, without notice to all the parties to the agreement, who have the option of performing the neglected duty themselves. On an action for an account:—Held, although no notice had been given by the postmaster-general, the defendant knew of the nomination of the plaintiff, and that his conduct was equivalent to a waiver of the option. *Lovegrove* v. *Nelson*, 3 Myl. & K. 1.

Exported Goods.]—Bill alleging fraud as to quantity and quality of goods sold not discovered till they were exported to America, and that they were in consequence sold at a loss, and that plaintiff, being threatened with action, paid the original price, under protest.—Demurrer allowed. *Kemp* v. *Pryor*, 7 Ves. 237.

Alternative Bond.]—A. agreed to lend B. 600*l.* navy stock; he sold the stock for 522*l.*, which was paid to B.; a bond was drawn to repay "the sum of 522*l.* (being the produce of 600*l.* navy 5 per cents., or such other sum as would replace the stock) with interest." B., on discharging the bond, refused to replace stock; A. received the money and gave up the bond:—Held, that, after having received the money, he could not come into equity for relief. *Barnham* v. *Munn*, Tam. 86.

Legacy.]—A. having 500*l.* given him in case he should survive the testator's wife, sells it for 100*l.*, to be paid by 5*l.* per annum; but if the testator's wife should die before A., and the legacy becomes due, the rest of the money to be paid within a year. A. does survive the testator's wife, and knows the legacy was to become due to him, and confirms the bargain; he shall be bound thereby. *Cole* v. *Gibbons*, 3 P. Wms. 290.

Sale by One of Two Owners.]—Discussion of the principles on which a binding assent to a contract is to be presumed from silence, acquiescence, or circumstances of conduct. *Bigg* v. *Strong*, 3 Sm. & G. 592. Affirmed 4 Jur. (N.S.) 983; 6 W. R. 536.

There being two proprietors of an estate, where one, without any express authority from the other, agrees to sell the whole, and without express authority, signs a contract for sale on behalf of both, and the other never expressly assents or signs the contract; but does not, within a reasonable time, disavow it or express absolute dissent, a presumption of his assent arises; and unless the presumption is rebutted, he will be held bound. So if he knowingly enjoys a benefit from the contract to which, but for the contract, he would not be entitled. *Ib.*

Administrator Buying Shares.]—A. was the administrator of an estate, to one-third of which C. and D. were entitled. A. wrote to B. and C., offering to pay each of them 1,000*l.*, his share. B. accepted the offer, and C. wrote to say that whatever B. determined "would meet with his approbation." A. and B. acted on the contract as complete, and C. never repudiated it. Seventeen years afterwards, C. insisted that there was no contract binding on him:—Held, that C. had acquiesced, and was bound by the contract. *Cood* v. *Cood*, 33 Beav. 314; 3 N. R. 275; 33 L. J., Ch. 273; 9 Jur. (N.S.) 1335.

Contract Enforced though no Agreement under Seal.]—A corporation passed a resolution agreeing to let land to C., to be stumped out by a committee at his expense. The corporation did not stump out the land, and C. afterwards stumped out the land himself, took possession of it, erected a terrace, and paid rent:—Held, that he was entitled to a decree for specific performance, the corporation having acquiesced in all that he had done. *Crook* v. *Seaford Corporation*, L. R. 6 Ch. 551; 25 L. T. 1; 19 W. R. 938.

Partners — Shares.]—At a meeting of the partners in a cost-book mine, a call was made upon each of the six shares in the mine. Two of the partners did not pay this call, and were in arrear for other calls. At subsequent meetings the shares of these partners were declared to be forfeited. These two partners took no steps as to the mine for more than six years:—Held, that the plaintiffs could not, after lying by for more than six years, successfully assert their claim to be partners. *Clarke* v. *Hart* (supra, col. 1715) distinguished. *Rule* v. *Jewell*, 18 Ch. D. 660; 29 W. R. 755.

Company — Memorandum of Association — Special Resolutions—Ratification.]—The memorandum of association of a company stated that certain shares were to be preference as to dividend. The directors applied the profits in substantial accordance with the provisions in the articles of association till 1872, when the company passed special resolutions which altered the priorities and payments of the net revenue as between the preference and ordinary shareholders, and they were acted upon without any objection being raised till 1883, when the company passed a special resolution by which the original appropriation of the revenue was restored:—Held, that even if the resolutions of 1872 would be valid if ratified by every member of the company, there was no evidence on which the court ought to infer that every member had ratified such resolutions with full knowledge of what had been done. *Ashbury* v. *Watson*, 54 L. J., Ch. 985; 30 Ch. D. 376; 54 L. T. 27; 33 W. R. 882—C. A.

Vendor's Lien.]—Trustees of a charity conveyed land in Yorkshire to R. and W., part of the purchase-money remaining unpaid, and allowed R. and W. to register the conveyance, knowing that they wanted to do so in order to resell the land in lots:—Held, that the trustees had, by their conduct, precluded themselves from asserting their lien for unpaid purchase-money against bonâ fide sub-purchasers without actual notice. *Kettlewell* v. *Watson*, 53 L. J., Ch. 717; 26 Ch. D. 501; 51 L. T. 135; 32 W. R. 865—C. A.

Waiver of Condition in Contract of Sale.]—Dealings between a vendor and a purchaser, to amount to a waiver of a condition as to the time for completion, must be in reference to facts then known to the parties and in reference to which the negotiations were going on. *Dyas* v. *Rooney*, 25 L. R., Ir. 342.

e. Breaches of Covenant.

Repairs—Injunction.]—Remedy by injunction to restrain an action on breach of covenant to repair, there having been no waiver or abandonment on the part of the defendant. *Hannam* v. *South London Waterworks Co.*, 2 Mer. 65.

No relief against covenant to repair in a given time, though no request by landlord; and though tenant was suffered to continue in possession merely without rent, &c., the quantum of damage is no criterion. *Bracebridge* v. *Buckley*, 2 Price, 200.

Licence to Assign.]—Covenant not to assign without licence once dispensed with, the condition is gone, but the principle questionable, and not to be extended, for instance, to a mere act where the licence is to be in writing. *Macher* v. *Foundling Hospital*, 1 V. & B. 191.

Proviso in a lease for re-entry upon assignment, without licence, ceases by assignment with licence, though to a particular individual. *Brummell* v. *Macpherson*, 14 Ves. 173.

Covenant to Renew.]—Lease by A. to B. with a proviso determining the lease, on non-performance of any of the covenants, and A. covenanted that at the end of the term, if it should not be sooner determined by B.'s acts, he would grant to B. a further term. B. continued in possession after the term had expired. A. then brought an ejectment against him for breaches of covenant during the term. Motion by B. for an injunction to restrain the action refused. *Thompson* v. *Guyon*, 5 Sim. 65.

Forfeiture.]—A letter written by the landlord's attorney after the eviction, offering to account with the tenant for rent received since the habere, a waiver of landlord's right to insist on the forfeiture. *Sheridan* v. *Casserly*, Beat. 249.

To permit a tenant to remain in possession and expend money in building, with the knowledge of the landlord, after an eviction, is a waiver of

the forfeiture. Acceptance of rent with notice of forfeiture is a waiver thereof at law. *Hume* v. *Kent*, 1 Ball & B. 554, 561.

—— **Acceptance of Rent.**]—In an action of ejectment for breaches of covenants in leases, the defendant pleaded that after the bringing of the action the plaintiff, with the intention of waiving the breaches of covenant, accepted rent which accrued due after the bringing of the action :—Held, a good statement of defence. *Evans* v. *Wyatt*, 43 L. T. 176 ; 44 J. P. 767.

—— **Term Void without Entry.**]—A term for years, conditioned to be void upon non-performance of acts, becomes void without entry, and there can be no waiver. *Freeman* v. *Boyle*, 2 Ridgw. 79.

But where the condition is annexed to a freehold (in which case an entry is necessary) there may be a waiver after the breach and before entry ; for until an entry be made the entry is not complete. *S. C.*, Vern. & S. 414.

—— **Building Agreement.**]—A building agreement between a landowner and a builder contained a stipulation that the landowner, upon the default of the builder in fulfilling his part of the agreement, might re-enter upon the land and expel the builder, and that on such re-entry all the materials then in the premises should become the property of the landowner "as and for liquidated damages." Semble, that if the ground of forfeiture was the omission to complete the buildings on the day appointed, and the landowner had after that day made advances for the purposes of the agreement, or had in any way treated the agreement as still subsisting, he would have waived the forfeiture. The interest of the builder in the materials being a defeasible one, the right of the landowner to seize is not defeated by the commission of an act of bankruptcy by the builder before the seizure. *Newitt, Ex parte, Garrud, In re*, 16 Ch. D. 522 ; 44 L. T. 5 ; 29 W. R. 344—C. A.

Covenant running with Land—Injunction to Pull down.]—On a purchase of lands adjoining a railway in 1867 the purchaser covenanted "for himself, his heirs, executors, administrators and assigns, that he would not erect or build any erections within ten feet of the roadway or viaduct of the plaintiffs, without their permission in writing first obtained." The purchaser sold to A., who had no express notice of the covenant. A. in 1869 built, infringing the covenant, and demised the lands, but the lessee had no notice of the covenant. The buildings were increased in height in 1881 by the assignee of the lease. The plaintiffs had no notice of either building till 1881 :—Held, that the plaintiffs were entitled to an injunction to the defendants, requiring them to pull down the said erections. *L. C. & D. Ry.* v. *Bull*, 47 L. T. 413.

—— **Covenant not to Use as Beer-house.**]—A. was the purchaser of premises, part of an estate, all the purchasers of which (including A.) were under a covenant not to use the premises, or any part, as a beer-shop. A. built a shop at the back of his premises, and without the consent of the plaintiffs opened it as a beer-shop. He leased the beer-shop to B., who carried on the same business without the consent of the plaintiffs, who served B. with a notice to desist. It appeared that a purchaser of another house on the same estate had, also without consent on the part of the plaintiffs, opened a beer-shop :—Held, that the conduct of the plaintiffs did not amount to such a degree of acquiescence and waiver as to preclude them from the right of enforcing the covenant. *Mitchell* v. *Steward*, 35 L. J., Ch. 393 ; L. R. 1 Eq. 541 ; 14 L. T. 134 ; 14 W. R. 453.

The court will grant an injunction to restrain a breach of a covenant, although the covenantee has allowed the breach to go on for a few months, if such breach has been of a gradual and not conspicuous character. *Ib.*

Trivial Breach. — Acquiescence in a trivial breach of covenant does not preclude a plaintiff from relief in respect of a breach of an important character. *Richards* v. *Revitt*, 47 L. J., Ch. 472 ; 7 Ch. D. 224 ; 37 L. T. 632 ; 26 W. R. 166.

Acquiescence in the violation of a covenant to a certain extent :—Held, a sufficient objection to an interlocutory application for an injunction against a greater violation of it. *Child* v. *Douglas*, 5 De G. M. & G. 739 ; 1 Kay, 575 ; 2 Jur. (N.S.) 350 ; 2 W. R. 461, 701.

Acquiescence in a breach of covenant not attended with substantial damage will not bar the right to restrain a subsequent breach so attended. *Western* v. *MacDermot*, 36 L. J., Ch. 76 ; L. R. 2 Ch. 72 ; 12 Jur. (N.S.) 366 ; 15 L. T. 641 ; 15 W. R. 265.

Injunction to restrain the breach of a covenant, that buildings shall be erected upon a general plan, refused, the covenantee having acquiesced in a partial deviation from the plan, and not having made immediate application to the court. *Roper* v. *Williams*, Turn. & R. 18 ; 23 R. R. 169.

A landlord who relaxes, in favour of some of his tenants, a covenant entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing that covenant. *Ib.*

The owner of an estate covered it with houses, and sold some subject to a covenant not to carry on any trade, business, or calling therein to the annoyance of any of the houses on the estate :—Held, that the carrying on of a girls' school was a breach of the covenant, and that the covenantee had not waived the benefit of the covenant, though he had permitted other houses held under the like covenant to be used as schools. *Kemp* v. *Sober*, 1 Sim. (N.S.) 517 ; 20 L. J., Ch. 602 ; 15 Jur. 458.

And see VENDOR AND PURCHASER (COVENANTS).

Composition with Creditors.] — A person entered into a composition with his creditors, agreeing to pay them 1,500*l.* by instalments of 500*l.* One of the terms of the deed was that the debtor should insure his life in 1,500*l.*, and, on failing to do so, that the deed should be void. The debtor, after paying 500*l.*, effected the insurance in 1,000*l.* One of the creditors who had signed the deed brought an action against the debtor. The court, on a bill filed by the debtor :—Held, that the creditor had waived his right to take advantage of the alleged breach of covenant. *Watts* v. *Hyde*, 17 L. J., Ch. 409 ; 12 Jur. 661.

Specialty Creditor.] — There is no rule in equity, any more than at law, that the mere

non-suing by a specialty creditor for any period within the statutory limit is such negligence as deprives him of the right of requiring payment of the debt. S. covenanted with B. for immediate payment of a sum of money. S. died without having been called on to pay that sum, leaving property sufficient to meet it, but her executor, being empowered by the will so to do, left her estate, consisting of shares in a bank, unconverted:—Held, that the executors of B. were entitled, after a lapse of eighteen and a half years, to enforce that covenant against the estate of S. *Baker, In re, Collins* v. *Rhodes*, 51 L. J., Ch. 315; 20 Ch. D. 230; 45 L. T. 658; 30 W. R. 858—C. A.

Covenant to Settle.]—Where a mother, tenant for life, with remainder to her son in fee, who was under age, covenanted, on his marriage, that they would settle within two years an estate on the heirs male of the marriage, a great length of time having elapsed, and none of the parties having asserted their rights, the court refused specific performance. *Howarth* v. *Deem*, 1 Eden, 351.

f. Debtor and Creditor.

Suit by Creditor—Contribution.]—If, in a creditor's suit, plaintiff does not call for contribution, according to decree, before creditors are admitted to prove, he waives all claim to contribution. *Shortly* v. *Selby*, 5 Madd. 447.

Partnership.]—No rule fixing any period within which a creditor not making his demand on the surviving partners is held to have waived his equity against the estate of the deceased partner. *Devaynes* v. *Noble*, 1 Mer. 569; 15 R. R. 151.

Specialty Creditor.]—Specialty security not waived by a promissory note taken for the balance of the account of interest. *Curtis* v. *Rush*, 2 V. & B. 416. And see *Baker, In re*, supra.

Trust for Creditors—Delay in Prosecuting Suit.]—In 1799 D., being tenant for life of estates in Ireland, conveyed them to trustees for ninety-nine years, upon trust to pay him an annuity of 10,000*l.* a year, and to pay the surplus in payment of his debts. In 1802 a creditor filed a bill in England against the trustees and D., to carry the trusts of that deed into execution, and a decree was made against the trustees for an account, and a receiver appointed, but D., who was out of the jurisdiction, in Ireland, continued in possession of the rents. In 1807 he come to England, and a supplemental bill was filed against him; upon which an injunction was granted restraining him from receiving the rents, and afterwards the decree in the original cause pronounced as against him, and the injunction and receiver continued by the decree. But no proceedings were taken to give effect to this decree till 1836. D. continued in possession until 1819, when he granted, for valuable consideration, certain annuities chargable upon his annuity of 10,000*l.* In 1828 the creditors claiming under the original deed filed a bill in Ireland to obtain the benefit of the decree made in the English suit; and, in 1835, obtained a decree for payment, and an account, upon the footing of the original decree. After such decree of 1835, the assignees of the derivative annuities filed a bill in Ireland to enforce their claim under the annuities granted in 1819, to which bill they made the plaintiffs in the other suits defendants, who, by their answer, claimed a lien upon the 10,000*l.* to make good the surplus of the rents and charges which D. had received in contravention of the trust deed of 1799, and they filed a supplemental bill to establish that claim:—Held, that such creditors had forfeited by their laches whatever equity they had to have the 10,000*l.* applied in making good the surplus rents and profits received by D. *Houlditch* v. *Wallace*, 5 Cl. & F. 629; 1 Dr. & Wal. 490.

Acknowledgment of Indebtedness.]—Acknowledgment by conusor of judgment in reply to inquiry by intended assignee, that the sum secured by the judgment is justly due to the conusee, shuts out the equitable defence which the conusor may have had against the conusee, subject, however, to inquiry as to the bonâ fides of the transaction. *Hickson* v. *Aylward*, 3 Moll. 1.

Release of Debt by Executor.]—Where, from will, executor, who was residuary legatee, had power to release debtor of testator, and he waived the debt by writing, but did not formally release, executor of executor might, it seems, withhold annuity given in consideration of whole debt being paid. *Hemming* v. *Gurrey*, 2 Sim. & S. 311. *See* 25 R. R. 209.

Charge of Debts—Sale.]—Where bond creditors acquiesce in sale of lands, charged by will with their debts, and for sixteen years receive interest, they shall not disturb purchaser. *Elliot* v. *Merriman*, 2 Atk. 41; Barnard. 78.

Judgment Lien.]—Bringing debt upon a judgment is no waiver of lien created by that judgment. *Erby* v. *Erby*, 1 Salk. 80.

Debenture deposited on Trust.]—A debenture was deposited by an intestate with his bankers, one of whom received the dividends and placed them to the credit of the intestate's account. The intestate died in 1801, and a commission issued against the bankers in 1810, but the same partner continued to receive the dividends and pay them to the intestate's widow up to 1822, after which the assignees of the bankers claimed a lien on the debenture for a debt due from the intestate to the banking-house:—Held, that the assignees could not now support such claim; and that the debenture had been deposited as in the nature of a trust. *Douglas, Ex parte*, 3 Deac. & C. 310.

Mere Silence.]—The mere fact that a judgment creditor, who is entered in the statement of affairs as having no security, is present in silence at the first meeting of the creditors, not taking any part in the proceedings, will not raise an equity against him so as to prevent his levying an execution on his judgment, and thus acquiring a valid security for his debt. *McLaren, Ex parte, McColla, In re*, 50 L. J., Ch. 203; 16 Ch. D. 534; 44 L. T. 36; 29 W. R. 389—C. A.

Bond—Action on the Case.]—A party against whom a commission of bankruptcy had been maliciously obtained, and to whom, after superseding the commission, the lord chancellor had assigned

the petitioning creditor's bond, having brought an action on the case against the petitioning creditor :—Held, that an action on the case is a waiver of a right of action on the bond. *Holmes* v. *Wainwright*, 1 Swanst. 20.

Action against Agent—Election.]—The creditors of A., having issued a fiat in bankruptcy against him, and having received notice, by means of the examination of the bankrupt, that A. was only the agent of B., proceeded to sign A.'s certificate :—Held, that this was not an election by the creditors to treat A. as their sole debtor. *Taylor* v. *Sheppard*, 1 Y. & C. 271.

Authority to Assignees to Act.]—Creditors having, subsequently to the appointment, signed resolutions authorising the assignees to act generally as assignees, are debarred from questioning the validity of the appointment upon grounds of which they were aware at the time of signature. *Nash, Ex parte, Wyatt, In re*, 1 Deac. & C. 445.

Solicitors to the Commission—Set-off.]—A. and B., partners, were solicitors to the commission. More than six years back they received sums of money on account of the estate, having a set-off in respect of their bill of costs, which bill they did not deliver to the assignee till within six years. Beyond the six years, A. and B. dissolved partnership, and the assignee continued to employ A. alone as the solicitor to the commission, and no attempt was made to charge B. with the moneys received till an official assignee was appointed :—Held, first, that, as between B. and the creditors, neither laches nor other conduct of the assignee would operate as a bar, A. and B. being solicitors to the commission. But, secondly, that as the assignee was able to recoup the estate, he could not call on B. to account. *Gould, Ex parte, Robertson, In re*, 4 Deac. & C. 547 ; 2 Mont. & Ayr. 48 ; 4 L. J., Bk. 7.

Army Agents—Partner retiring.] — In 1780 A. and B. were partners as army agents, receiving money from the government for the pay of certain regiments. A. retires, and B. and C. carry on the business as before, but without coming to any account with the crown. In 1783 B. and C. render accounts to the government for the several regiments during the period of the existence of the firm of A. and B., and of B. and C., which they do without any break, but these do not state any debtor and creditor account as between the respective firms and the crown, but show simply the sums issued in respect of each regiment, and how they have been applied. On the formation of the firm of B. and C., the old ledgers are used ; there was no agreement to take to the liabilities of A. and B., and everything is carried on in the same manner till 1783, when the 23 Geo. 3, c. 30, was passed. B. and C., in 1804, became bankrupts, and a balance of 150,000*l.* is found due to the crown ; and in 1820 it is found that 91,000*l.*, part of the 150,000*l.*, was due at the time of the retirement of A. Semble, under these circumstances, that B. and C. could not be presumed to have adopted the debt of A. and B., and that the government could not be presumed to have assented thereto, had such adoption existed ; and, consequently, that the government had no right to prove the entire sum of 150,000*l.* against B. and C.'s estate. *Clayton's Case* (1 Mer. 572 ; 15 R. R. 161) discussed. *Sandham, Ex parte*, 4 Deac. & C. 818.

Action Pending—Petition to Stay Certificate.] Creditor, by petitioning to stay certificate, makes his election to come in under the commission for every provable debt ; and therefore the bankrupt must be discharged from any action pending against him by creditor in respect of any such debt. *Bostock, Ex parte, Wright, In re*, 1 Deac. & C. 383.

Solicitors' Lien.]—Proof under a commission is equivalent to payment ; therefore, when solicitors had obtained an order to have their bill taxed, and to prove for the amount :—Held, that they had relinquished their lien upon the papers in their hands. *Hornby, Ex parte*, Buck, 351.

—— **Executors.**]—A. and B., a solicitor, were executors. B. deposited some deeds in the trust box, to secure money due to the testator's estate. The box remained in B.'s possession, and on his death the deeds were found to have been abstracted from it. The legal personal representative of B. then deposited certain specific deeds, selected by A., as a security for the debt : —Held, assuming that A. had a general lien on all B.'s deeds, he had waived it by taking the particular security. *Mason* v. *Morley*, 34 Beav. 471 ; 34 L. J., Ch. 422 ; 11 Jur. (N.S.) 459 ; 12 L. T. 414 ; 13 W. R. 669.

Annuity—Personal Security.]—The plaintiff having parted with title-deeds, on which she had a lien, to enable her debtor to raise a sum of money on annuity, the defendant, in writing, undertook to pay that annuity to the plaintiff, in case it should not be paid by the grantor ; the annuity fell into arrear, and the plaintiff paid it. On a bill for specific performance and adequate security :—Held, that the plaintiff having taken this personal security, a court of equity would not interfere. *Brough* v. *Oddy*, Tam. 215.

Director's Fees.]—Where a director was entitled to a remuneration for his attendance :—Held, that non-claim for a number of years amounted to a waiver of his rights and of his lien. *Arigna Iron Mining Co., In re*, 1 Eq. R. 269.

Composition Deed—Bill of Exchange.]—Held, that the provision in a composition agreement for the revivor of the original debt upon default being made in any of the conditions was not a penalty, but that on the dishonour of the third bill the creditor was remitted to his original right, and that he had not waived that right by suing the acceptor. *Burden, Ex parte, Neil, In re*, 16 Ch. D. 675 ; 44 L. T. 525 ; 29 W. R. 879. And see *Watts* v. *Hyde*, supra, col. 1762.

Bond—Interest Accepted when Overdue.]—At the time of executing a bond, the obligors procure a letter from the obligee, stating his intention not to call in the money within a specified period, if the interest be regularly paid. Payments of interest made one or even two days after they become due are no defeasance of the undertaking, if the grantor accepts them. *Norton* v. *Wood*, 1 Russ. & M. 178.

Mortgage—Date Fixed.]—If, in an agreement, it is one of the stipulations that a mortgage is

to be given on a certain day, and it is not given till two days afterwards, and is then accepted by the creditor, such acceptance, though a waiver as to the mortgage, is not a waiver of the creditor's general rights on the contract. *Thompson* v. *Hudson*, 38 L. J., Ch. 431; L. R. 4 H. L. 1.

—— **Waiver, by whom.**]—After a mortgagor has assigned his interest in the property mortgaged, he cannot waive a notice as against the other persons interested. *Selwyn* v. *Garfit*, 57 L. J., Ch. 609; 38 Ch. D. 284; 59 L. T. 233; 36 W. R. 513.

—— **Mortgagor and Mortgagee.**]—A mortgagee takes a bond from the assignee of the devisee, for the arrears of interest then due, and gives a receipt; the bond is unpaid; the interest is still secured by the mortgage. *Hardwick* v. *Mynd*, 1 Anstr. 111; 3 R. R. 562.

—— **Remedies of Mortgagee.**]—A mortgagee, who has taken the body of his debtor in execution for the mortgage debt, is, nevertheless, entitled to the benefit of his mortgage security. *Davis* v. *Battine*, 2 Russ. & M. 76.

—— **Sale.**]—Although an equitable mortgagee may waive his privilege to bid, the assignees must still have the conduct of the sale. *Smith*, *Ex parte*, 2 Deac. & C. 60.

The petitioner obtained an order for a sale, at which 950*l.* was bid for the mortgaged premises, but they were bought in. The petitioner afterwards applied to the commissioners for another sale, but did not accept their order; and the assignees afterwards obtained another order, when the highest bidding was only 650*l.*:—Held, that the petitioner, by applying for a second sale, waived any claim against the assignees for the difference in the amount of the biddings at the first and second sales. *Baldock*, *Ex parte*, 2 Deac. & C. 60.

—— **Agreement not to Call in.**]—Agreement in writing not to call in a mortgage for two years, the mortgagor fulfilling his covenants. On one occasion within the two years interest was not paid on the day, and the mortgagee, after giving notice that he was no longer bound by the agreement, demanded and received payment of the interest and incidental costs:—Held, a waiver of the default. *Langridge* v. *Payne*, 2 J. & H. 423; 7 L. T. 23; 10 W. R. 726.

A mortgagee agreed with the mortgagor that if the interest was punctually paid the principal should remain for two years. Six months' interest became due and demanded, but not paid, and the mortgagee then demanded payment of principal and interest. Three days afterwards the mortgagor paid the six months' interest, which was received by the mortgagee:—Held, that the mortgagee had not waived his right to call in the principal. *Keene* v. *Biscoe*, 47 L. J., Ch. 644; 8 Ch. D. 201; 38 L. T. 286; 26 W. R. 552.

g. Testamentary Provisions.

Charge of Debts—Sale.]—Where bond creditors acquiesce in sale of lands charged by will with their debts, and for sixteen years receive interest, they shall not disturb purchaser. *Elliot* v. *Merriman*, 2 Atk. 41; Barnard. 78.

Heir—Devastavit.]—When the heir-at-law had for many years acquiesced and acted as a devisee in trust:—Held, to have lost his right to an issue devastavit vel non, and even an issue to try the question of parcel or not. *Man* v. *Ricketts*, 7 Beav. 93; 13 L. J., Ch. 194; 8 Jur. 159.

Devisee in Remainder—Conversion.]—Whether a devisee in remainder, the executor of the testator, could, after having acquiesced for thirty years in the tenant receiving the rents, insist that the property ought to have been immediately converted, quære. *Pickering* v. *Pickering*, 4 Myl. & Cr. 289; 8 L. J., Ch. 336; 3 Jur. 331.

Copyholds.]—Plaintiff, devisee of A., taking it for granted that certain copyhold premises did not pass by A.'s will, allowed defendant to enter and to hold for twenty years, plaintiff paying her rent as tenant. If plaintiff had come in in time, he would have been relieved, notwithstanding his acquiescence. *Davie* v. *Beardsham*, 1 Ch. Ca. 39.

Election.]—The plaintiff, with full notice, accepted benefits under A.'s will, which prohibited him from setting up any claim in the execution of the trusts of her father's will:—Held, that he could not maintain a suit against the executor of the father's will. *Egg* v. *Devey*, 10 Beav. 444; 16 L. J., Ch. 509; 11 Jur. 1023.

Freeman's Widow.]—Acquiescence material to determine property; as where a freeman's widow acquiesces under husband's will she is bound thereby. *Pawlet* v. *Delavel*, 2 Ves. sen. 668.

Purchase of Annuities—Postponement.]—Where testator directs annuities to be purchased for his wife within a given time, and the wife assents to postpone the purchase, and dies, her personal representatives will be entitled to the sum which would have purchased the annuity. *Dawson* v. *Hearn*, 1 Russ. & M. 606; Tam. 465; 8 L. J. (o.s.) Ch. 153; and 9 *Id.* 249.

Legacies.]—Direction in will to sell and invest proceeds, in the first place as to 400*l.* for his wife for life, and then to C., and out of residue of proceeds to invest 400*l.* for R. for life, and then over with other trusts for other persons. The executor made no purchase, but paid interest on 400*l.* to each legatee and applied the assets to his own use, and afterwards became bankrupt:—Held, that by that dealing the two legatees had waived whatever priority the will might have given to them. *Chadwin*, *Ex parte*, 3 Swanst. 380; 19 R. R. 219.

Legacy at twenty-one, the interest for maintenance, not satisfied by a legacy, larger, but of a different nature, received under the will of the executor, there being no positive relinquishment, though no demand for ten years. *Lee* v. *Brown*, 4 Ves. 362; 4 R. R. 208.

A. was entitled to the income of a legacy for her life. By a change in the investment of testator's property a loss took place, and the solicitor of the executor informed A. that she might have a right against the residuary legatee to be paid the whole of the interest on her legacy, but advised her to submit to the loss, and proposed that it should be borne ratably between A. and the residuary legatees. A. continued to receive income on her legacy on that footing for

fourteen years:—Held, that A. had precluded herself by acquiescence from all right to be paid the deficiency. *Stafford* v. *Stafford*, 1 De G. & J. 193; 4 Jur. (N.S.) 149.

Delay in following Assets—Claim against Residuary Legatees.]—The right of mortgagees of real estate whose security proves insufficient, to come against the residuary legatees of the mortgagor, amongst whom his personal estate has been distributed, is a purely equitable right, and the court will not enforce it if there are circumstances which would make it inequitable to do so. *Blake* v. *Gale*, 55 L. J., Ch. 559; 32 Ch. D. 571; 55 L. T. 234; 34 W. R. 555—C. A.

Mortgagees of a freehold farm were informed that the personal estate of testator was less than the mortgage, but they allowed the personal estate to be distributed among the testator's children, the farm being carried on by two of the children. The interest on the mortgage was paid for more than twenty years, when owing to agricultural depression, the security proved insufficient. The mortgagees then brought an action against the children to recover the shares of personalty which they had received:—Held, that the mortgagees having assented to the distribution of the personal estate among the residuary legatees, could not, after this lapse of time, claim it back. *Ib.*

—— **Right to sue Executor for Devastavit.**]—Mere laches in abstaining from calling upon the executors to realise for the purpose of paying his debt will not deprive a creditor of his right to sue the executors for devastavit, unless there has been such a course of conduct, that the executors have been thereby misled into parting with the assets. *Birch, In re, Roe* v. *Birch*, 54 L. J., Ch. 119; 27 Ch. D. 622; 51 L. T. 777; 33 W. R. 72.

Compromise.]—Bill against the devisee and personal representative, on the ground of an election by the testatrix to take under a will, dismissed, on the conduct of the plaintiff, who eighteen years ago had compromised a suit instituted by him upon the subject, in consequence of which the right to compel an election was not ascertained, and the party possessed under the will during her life, had disposed of her estate, real and personal, by will. *Yate* v. *Moseley*, 5 Ves. 480.

Effect on Family Arrangement.]—A. appointed his sons, J. and S., executors, and bequeathed his property to them on trust for his children as joint tenants. Ten years after his death questions arose as to the illegitimacy of three children, of whom J. was one. A deed was executed by all the adult children, by which it was agreed that all the children should share equally as tenants in common. Bill filed in 1872 by children who came of age in 1859 and 1861:—Held, that the arrangement come to between the members of the family to avoid litigation was a sufficient consideration as between the parties to it, and that the children were bound by acquiescence. *Smith* v. *Mogford*, 21 W. R. 472.

Bond for Debt due to Testator.]—M. was a beneficiary under a will, and J. the testamentary guardian. In 1810 a debtor of the testator executed a bond for his debt, and delivered it to the agent of the testator. J. died in 1870, and M. in 1871 filed a bill against J.'s representatives, alleging neglect in J. not realising the bond. M. knew of the bond in 1833:—Held, without reference to other objections, that the plaintiff had, by her acquiescence, disentitled herself to any relief. *Sleeman* v. *Wilson*, L. R. 13 Eq. 36; 25 L. T., 408; 20 W. R. 109.

Breach of Trust.]—Although as between the cestui que trust and a stranger the claim of the cestui que trust is barred by lapse of time operating against his trustee, lapse of time is no bar as between cestui que trust and trustee. *Cross, In re, Harston* v. *Tenison*, 51 L. J., Ch. 645; 20 Ch. D. 109; 45 L. T. 777; 30 W. R. 376—C. A.

Devisee of freehold land to B. Portions of the land were, at the date of the will, under contract for sale to a railway company. The company had taken possession before the will, but the conveyance was not completed until after the testator's death. On completion the trustee was advised by counsel to pay the devisee the purchase money, which he did accordingly, and informed the plaintiff of the result, but no settlement of accounts was come to between the plaintiff and the trustee, and the plaintiff had not executed any release to the trustee. On action brought five years after:—Held, that no case of acquiescence was made out against the plaintiff, and that he was entitled to recover from the trustee's estate the moneys received from the railway company, and the devisee was to recoup the trustee. *Jackson, In re, Wilson* v. *Donald*, 44 L. T. 467. *And see cases*, supra, col. 1724.

h. Tortious Acts.

Copyright.]—Injunction refused to restrain infringement of copyright, before trial where the conduct of the plaintiffs had been such as to induce the defendants to believe that the course taken by them would not be objected to by the plaintiffs. *Saunders* v. *Smith*, 3 Myl. & Cr. 711; 7 L. J., Ch. 227; 2 Jur. 536.

Fraud by Partner.]—As to fraudulent abstraction by one partner being converted into contract by subsequent acquiescence so as to debar right of proof against such partner's joint estate. See *Turner, Ex parte*, 4 Deac. & C. 169; 1 Mont. & Ayr. 337; and cases therein cited.

Several Co-plaintiffs.]—Acquiescence by one of several co-plaintiffs precludes the interference of the court upon an interlocutory application, as upon decree; and the rule is the same although some of the co-plaintiffs are infants. *Marker* v. *Marker*, 9 Hare, 15; 20 L. J., Ch. 246; 15 Jur. 663. And see *Hollingsworth* v. *Shakeshaft*, supra, col. 1730.

Nuisance.]—To have a work, erected at great expense, removed by this court as a nuisance, the person complaining should have given notice not to proceed, otherwise the court will leave the complaint to law. *Jones* v. *Royal Canal Co.*, 2 Moll. 319.

Where party allows and acquiesces in erecting a nuisance, he shall be stayed in action at law. *Anon.*, 2 Eq. Ca. Abr. 522.

Encroachment.]—An encroachment of a watercourse was made in the infancy of the ancestor, who acquiesced for twenty-one years after he

became of age. The court would not afterwards notice his complaint. *Guernsey* (*Lord*) v. *Rodbridges*, Gilb. Eq. Rep. 3.

Using Water—Nominal Damages.]—The defendants who were authorised by act of parliament to draw water from a canal for condensing steam, used the water for other purposes, in consequence of which the plaintiff brought an action and obtained a verdict against them for nominal damages. The defendants continued to use the water as before, whereupon the bill was filed for an injunction to restrain them:—Held, that the plaintiffs had sufficiently established their title at law, and that but for their acquiescence they would have been entitled to the injunction, notwithstanding they had recovered only nominal damages. *Rochdale Canal Co.* v. *King*, 2 Sim. (N.S.) 78; 20 L. J., Ch. 675; 15 Jur. 962.

Assertion of Right.]—Turning cattle upon alluvium by the proprietor of land not separated from it by any boundary, although without interruption, is not an assertion of right so acquiesced in as to raise a presumption of title. *Att.-Gen.* v. *Chambers*, 4 De G. & J. 55; 5 Jur. (N.S.) 745; 7 W. R. 404.

Statute or Charter.]—A statute, or charter, may be waived by the party for whose benefit it was enacted, so as to render the acts of persons disregarding it legal. *Goldsmid* v. *G. E. Ry.*, 53 L. J., Ch. 371; 25 Ch. D. 511; 49 L. T. 717; 32 W. R. 341.

Unlawful Exercise of Statutory Powers.]—To constitute acquiescence in the unlawful exercise of statutory powers, even where public works have been constructing during several years, there must be either actual knowledge by the parties injured of the fact that the works were not in accordance with the statute, or fraudulent abstention from acquiring such knowledge. *Herron* v. *Rathmines Commissioners*, 27 L. R., Ir. 179—C. A.

Onus probandi.]—Trustees placed money in the hands of their solicitors for investment, and the solicitors, by means of a fraud, induced A. to execute a mortgage of property to the trustees, handed to them the deeds, and appropriated the money to their own use. No part of the consideration-money was paid to A. The solicitors became bankrupt:—Held, that A. was entitled to have the deeds cancelled. The onus of proving acquiescence was on the mortgagees, and could not be discharged except by proving that the mortgagor was aware of the manner in which the mortgagees' money was deposited with the solicitors, and of the fact that no part of it had been applied for the use and benefit of the mortgagor. *Wall* v. *Cockerell*, 10 H. L. Cas. 229; 1 N. R. 486; 32 L. J., Ch. 276; 9 Jur. (N.S.) 447; 8 L. T. 4; 11 W. R. 442.

Claim for Compensation.]—Held, that a claim for compensation was no acquiescence, because plaintiff was then ignorant that they were doing an illegal act, and took proceedings as soon as he was aware of it. *Pentney* v. *Lynn Paving Commissioners*, 12 L. T. 818; 13 W. R. 983.

Mere Submission.]—Semble, that mere submission to a wrongful act which has been completed without the knowledge of the person whose right is infringed cannot, without conduct amounting to accord and satisfaction, or a release under seal, bar his right of action; although, under the name of laches, it may afford a ground for refusing relief under some circumstances. *De Bussche* v. *Alt*, 47 L. J., Ch. 381; 8 Ch. D. 286; 38 L. T. 370.

i. Voidable Deeds.

General Rule.]—Length of time, or long acquiescence in a transaction, may bar relief, in cases where the transaction, if impeached within a reasonable time, would be set aside. *Hickes* v. *Cooke*, 4 Dow, 16; 16 R. R. 1.

Annuity Assignment.]—A grantor discovering that his annuity was bad, and complaining of distress or circumvention after he had joined the grantee in an assignment of it, which he ratified and undertook to pay, has but a slender equity, and the assignee ought not to be assisted; account directed of the consideration paid by original grantee, with interest at 5 per cent., and of the payments of the annuity to the grantee, or any person claiming under him by assignment, which was ordered to be applied in discharge of the principal and interest. *Bromley* v. *Holland*, 7 Ves. 3; G. Cooper, 9; 6 R. R. 58.

Lease.]—Very clear and strong evidence is necessary to impeach a lease at a distance of time, on the ground of fraud originally practised in obtaining it. *Chandos* v. *Brownlow*, 2 Ridgw. P. C. 397.

Voluntary agreement endorsed on lease by one not a party to it, not binding. *Dowling* v. *Mill*, 1 Madd. 541.

—— **Minority.**]—Where a building lease was granted during the minority of infants, with a covenant that they, when of age, should confirm it, and the infants accepted rent for ten continued years after coming of age;—Decreed, that the lease should be established. *Smith* v. *Low*, 1 Atk. 489.

If a person of age grant a lease, having no title, and the lands afterwards descend to him the lease shall enure by way of estoppel; otherwise if he had been an infant. *Ib.*

—— **Resettlement.**]—Lease by tenant for life in exercise of a power, covenanting for quiet enjoyment. Subsequently recoveries suffered by tenants for life, and in tail and property resettled subject to existing lease. Semble, the mere lapse of time, and acquiescence from 1767 to 1848, would bar relief. *Donegal* (*Marquis*) v. *Greg*, 13 Ir. Eq. R. 12.

—— **Copyhold for Lives.**]—B. purchases of lord copyhold for lives, who makes lease of freehold of soil to A., reserving rent, and after levies a fine of manor to B., who accepts rent from A. Quære, is B.'s copyhold gone. *Compton* v. *Brent*, 1 Dyer, 30. pl. 207.

Payment to Receiver.]—A tenant at a bulk rent of lands, over a part of which a receiver was appointed, having for years made payments to receiver, and allowed him to allocate them partly to the credit of the cause, and partly to the person to whom the rent of the land not in the cause belonged:—Held, that he is bound by such

acquiescence. *Colthurst* v. *Colthurst*, 7 Ir. Eq. R. 305.

Reversioner—Acceptance of Rent.]—Where tenant for life and remainderman joined in the lease for years to the steward, in which rights of disputed title were omitted, but in respect of which valuable allotments were afterwards made, and the reversioner afterwards accepted the rent for five years:—Held, that the lease could not after so long acquiescence be impeached for fraud; although the transaction might have been questioned recently after. *Selsey* v. *Rhoades*, 1 Bligh. (N.S.) 1; 30 R. R. 1.

There is no policy which prevents a steward from being a lessee of his employer, nor from receiving a beneficial lease; but steward must prove he gives full consideration, but where transaction was mixed with motives of bounty, he must show that employer was aware of every circumstance relating to transaction. *S. C.*, 2 Sim. & S. 49; 25 R. R. 150.

Acceptance of Rent.]—*See cases*, supra, and col. 1750.

Lease for Lives.]—F., tenant for life, with a power of leasing for years, demises for lives to his attorney; M., his son, tenant in tail, four years afterwards, executes an agreement to confirm the demise, and renew for a further term of lives:—Held, that the case was too suspicious to come within the principle of specific performance, and the length of time did not imply acquiescence. *Blakeney* v. *Baggott*, 1 Dow (N.S.) 405; 3 Bligh (N.S.) 237.

Statutes by Remainderman.]—A., tenant for life, remainder to first, &c., son in tail, remainder to B. B. enters into statutes to C. for payment of ten for one upon the death of A. in case he died without issue male in the life of B. B., in the lifetime of A., declares the bargain fairly made, and that he would seek no relief against it. B. brings a bill against the executor of C., and he is relieved against the bargain on payment of principal and interest. *Wiseman* v. *Beake*, 2 Vern. 121.

Agreement by Owners.]—The several owners of lands in the parish of C. enter into an agreement that a particular common should be enjoyed as a cow pasture for ninety-nine years; and this is signed by the bailiff of one of the owners "so far as he had power." After an acquiescence of above thirty years, this owner shall be bound by the act of his servant. *Tufton* v. *Wentworth*, 1 Bro. P. C. 165.

Acquiescence by Shareholders.]—The commissioners of a canal make an agreement for letting the tolls, not warranted by the act, and prejudicial to the public; this agreement is acquiesced in for forty-seven years, without complaint of the shareholders, and the lessee remains in undisturbed possession; the court will not at the suit of the shareholders disturb his possession. *Gray* v. *Chaplin*, 2 Russ. 126; 3 L. J. (O.S.) Ch. 47; 26 R. R. 22.

Voluntary Settlement.]—Voluntary settlement of property. After the decease of the settlor, his heir-at-law, who was also tenant for life under the settlement, upon his marriage, reciting the voluntary settlement, conveyed all his interest in the lands upon trust for his wife. Quære, can he afterwards insist that the voluntary settlement was void because the settlor was in a state of mental imbecility. *Roddy* v. *Williams*, 3 Jo. & Lat. 1.

Vendor Impeaching Sale.]—If a vendor who has a right, upon equitable grounds, to impeach the sale by subsequent deeds, adopts the sale, and acts upon it as binding, he cannot afterwards impeach the title of equitable mortgagees, who, subsequently, advanced their money without notice. *Nagle* v. *Baylor*, 3 Dr. & War. 60.

Settlement of Wife's Property.]—On the marriage of a female infant, her reversionary interest in choses in action were settled under the court for her separate use for life, with remainder to her children. She afterwards contracted two subsequent marriages, but no further settlement was executed:—Held, that the third husband, who had notice of the settlement, and had for some years acquiesced in it, was bound thereby. *Ashton* v. *M'Dougall*, 5 Beav. 56; 11 L. J., Ch. 344; 6 Jur. 447.

A feme covert was entitled to a reversionary interest in money vested in her husband and another as trustees. By deed made between the tenant for life and the trustees, the tenant for life, who alone executed the deed, declared that the trustees should hold the fund on trusts whereby the wife had a power of appointment. The wife died, having appointed the reversionary interest. The husband afterwards died, and the reversionary interest came into possession:—Held, that the husband ought to be deemed to have acquiesced in the arrangement, and accepted the trusts. *Inman* v. *Whitley*, 7 Beav. 337.

Deed of Gift.]—In a suit to impeach a deed of gift to an agent and trustee, it was held that, though it was voidable in its origin, yet that the subsequent deliberate acts of the party impeaching it, assisted by his legal advisers, made it valid. *De Montmorency* v. *Devereux*, 7 Cl. & F. 188; West, 64; 2 Dr. & Wal. 410.

Release.]—Where a release has been executed, and the parties have for a long space of time acquiesced in it, the mere proof of errors will not, in the absence of fraud, induce the court either to set it aside or to give leave to surcharge and falsify. *Miller* v. *Craig*, 6 Beav. 433.

Deed apportioning Rent.]—A deed, apportioning rent between A. and B., executed without any consideration by his agent, without authority, and in ignorance that the rent had been conclusively apportioned by a former deed, not enforced against A. But A., when apprised of his rights, obtaining from B. a settlement according to the former apportionment and for years after paying the whole rent, without demanding contribution, not entitled, after the death of B., to an account against his assets. A. entitled to contribution according to the former apportionment against C., the remainderman from the death of B., when he went into possession. *Stratford* v. *Aldborough* (*Lord*), 1 Beat. 228.

Recovery.]—A tenant in tail in remainder when just of age, joined his father, tenant for life, in a recovery, for the purpose of raising 3,000*l.* for the father, and resettling the estate

the son taking back only an estate for life, with remainder to his sons, &c. Whatever equity he might have had against that settlement was lost by his marriage and acquiescence till after the death of his father. *Brown* v. *Carter*, 5 Ves. 862; 5 R. R. 191.

Assignment of Policy.]—A. by deed, for a nominal consideration, assigned a policy of assurance upon his own life to trustees for his children, of whom B. was one, and the entire interest in the policy became vested in B. and C. No notice of the deed was ever given to the assurance company. C. married D., and by deed, reciting that she was entitled to one moiety of the policy, the moiety was then put in settlement. A. afterwards, by deed, without consideration, professed to assign the residue of the policy to D. B. declined to execute the deed, but did not allege during the life of A. that he had any claim on the produce of the policy. D. gave to the company notice of the assignment, and paid premiums during A.'s life:—Held, that B. was precluded by his own conduct from enforcing his claim upon the produce of the policy. *Justice* v. *Wynne*, 10 Ir. Ch. R. 489.

j. Accounts.

When opened—Fraud.]—Account opened, and general account decreed against an agent who was also tenant to his principal, in respect of fraud; and laches in landlord under the circumstances not an objection. *Beaumont* v. *Boultbee*, 7 Ves. 599.

Accounts may be opened after an acquiescence of five years, if circumstances tending to show fraud are then discovered. *Orphan Board (President)* v. *Van Reenen*, 1 Knapp, 100.

—— **Mines.**]—The right to an account, even in the case of mines, may be lost by laches. *Parrott* v. *Palmer*, 3 Myl. & K. 632.

To what Time—Rent.]—Account of rents and profits confined to filing of the bill under laches by the cestui que trust in not asserting his right. *Pettiward* v. *Prescott*, 7 Ves. 541.

Interest.]—In a long unsettled partnership account rendered intricate by the neglect of a party, he shall have no interest on the balance when settled. *Bodham* v. *Ryley*, 2 Bro. C. C. 2.

Partnership.]—A. and B., partners, were solicitors to the commission. More than six years back they received various sums on account of the estate, having a set-off in respect of their bill of costs, which they did not deliver to the assignee till within six years. Beyond the six years A. and B. dissolved partnership; and the assignee, with knowledge of this fact, continued to employ A. alone as the solicitor to the commission, and no attempt was made to charge B. with the moneys received by A. and B. till an official assignee was appointed:—Held, first, that, as between B. and the creditors, neither laches, nor other conduct of the assignee, would operate as a bar. But, secondly, that as the assignee was able to recoup the estate, he could not, under such circumstances of conduct on his part, call on B. to account. *Gould, Ex parte, Robertson, In re*, 4 Deac. & C. 547; 2 Mont. & Ayr. 48; 4 L. J., Bk. 7.

Bill by assignees of a bankrupt, claiming a debt, which had been paid to his partner, as paid after notice of dissolution of the partnership, that partner retiring, and the bankrupt continuing, dismissed; the terms of the alleged arrangement not being made out. *Duff* v. *East India Co.*, 15 Ves. 198.

B., a retiring partner, borrowed money, undertaking to pay out of his share of the partnership capital, and C., a remaining partner, undertook to pay the lenders (the plaintiffs) the amount of B.'s capital, and bound himself to give the plaintiffs a full and perfect lien thereon, such as they might think necessary to secure to them an exclusive title to the balance. No steps were taken till after the death of B. and C.:—Held, that there were no laches. *Glyn* v. *Hood*, 29 L. J., Ch. 204; 6 Jur. (N.S.) 153; 8 W. R. 248.

Stated Account.]—Where persons have mutual dealings, signing the accounts is not necessary to make it a stated one; but it is keeping it any length of time without making any objection which binds the person to whom it is sent, and prevents his entering into an open account afterwards. *Willis* v. *Jernegan*, 2 Atk. 252. But *see* 1 Ball & B. 428.

Trust—Possession without Title.]— Upon possession for many years, the origin not appearing, and no title, except as cestui que trust, under a term, the court would not presume any other title, and decreed the plaintiff to be let into possession on payment of the charge; but upon the laches, refused an account of the rents even from the filing of the bill. *Acherley* v. *Roe*, 5 Ves. 565.

—— **Where Right Clear.**]—The representatives of the cestui que trust held not barred from the right to an account of the laches of twelve years, when otherwise the right was clear. *Dickinson* v. *Holland (Lord)*, 2 Beav. 310.

General Account.]—The court refused to open an account acquiesced in during twenty-two years, though it was of a general and summary nature, not containing the items, and though the personal representative of the party giving such account had, upon being first applied to, rendered accounts of matters included in such account; but the court decreed an account, limited to the subsequent receipts, which it was admitted had taken place. *Scott* v. *Milne*, 5 Beav. 215. Affirmed 12 L. J., Ch. 233; 7 Jur. 709.

Annuity.]—Account taken under decree in 1817, in a suit by the grantee of an annuity, charged upon lands against judgment creditors of the grantor, who were in possession by elegit of what was due to the grantee, and a receiver appointed over the lands. The grantee having died, his executors in 1848 filed a bill against the co-heiresses of the grantor for an account of what was due for arrears:—Held, that by reason of the acquiescence of the grantor for twenty-five years, and of the defendants for six years afterwards they were not entitled to an account de novo of what was due in 1817, but that they might surcharge and falsify. *L'Estrange* v. *White*, 1 Ch. Rep. 15.

After Action at Law.]—Demurrer to a bill for a general account and for an injunction allowed

on the grounds that the statement in the bill did not furnish such a case of account between the parties as to entitle the plaintiff to interference of the court on the principles of equity, and if it had been a stronger case, the plaintiff, after having suffered the action to be tried at nisi prius, had come too late to ask the interference of the court. *Cooper* v. *Hatton*, 12 Price 502.

Semble, mere delay of a defendant at law coming to equity in matters of account forms no reason for refusing relief where the nature of the account is such as a court of law cannot deal with. *S. E. R.* v. *Brogden*, 3 Mac. & G. 8; 14 Jur. 795.

Remarks as to the difference between a court of equity originally assuming jurisdiction in a matter of account, and withdrawing a matter of account from a court of law. *Ib.*

E. E. H. B.

WALES.

Public-houses—Sunday Closing.]—By s. 3. of the Sunday Closing (Wales) Act, 1881, "This Act shall commence and come into operation with respect to each division or place in Wales on the day next appointed for the holding of the general annual licensing meeting for that division or place" :—Held, that "the day next appointed" is the day which shall, after the passing of the act, be next appointed for the holding of the meeting. *Richards* v. *Macbride*, 51 L. J., M. C. 15; 8 Q. B. D. 119; 45 L. T. 677; 30 W. R. 120; 46 J. P. 247.

Endowed School.]— Wales is a district of England within the Endowed Schools Act, 1869; and if a college holds a fund in trust for exhibitioners to be selected from a particular district in England, and whose exhibitions are tenable at the university, such college must give the endowed schools commissioners any information they may require as to the fund. *Meyricke Fund, In re*, 41 L. J., Ch. 553; L. R. 7 Ch. 500; 26 L. T. 596; 20 W. R. 715.

Customs of.]—The 34 & 35 Hen. 8, c. 26, s. 101, did not interfere with the private rights claimed by the lords marchers of Wales, as lords of manors or owners of the land. *Beaufort (Duke)* v. *Smith*, 4 Ex. 450; 19 L. J., Ex. 97.

The custom of England for rectors and vicars to leave their vicarages in repair to their successors was transferred to Wales by 27 Hen. 8, c 26. *Bunbury* v. *Hewson*, 3 Ex. 558.

By the laws of Howel Dda, whosoever owneth land on the side of the shore, he owneth the breadth of his land on the shore, and he may make a weir upon it if he will; but if the sea cast anything on the land or on the shore, the king owneth it, for the sea is a packhorse of the king. Quære, whether this law is still in force by virtue of 12 Edw. 1 and 27 Hen. 8, c. 26, s. 31. *Att.-Gen.* v. *Jones*, 2 H. & C. 347; 33 L. J., Ex. 249; 6 L. T. 655.

Highways.]—*See* WAY.

Prince of Wales—Bond.]—The condition of a bond, after reciting the grant of an annuity by the Prince of Wales (afterwards Geo. 4) to C., an assignment of the same to the obligee with assent of the Prince, and an agreement that the obligor should give his bond as an additional security, was declared to be, that if the Prince or his treasurer, or any person for him, should pay the annuity quarterly to the obligee, the bond should be void :—Held, that upon failure of payment the obligee was entitled to sue the obligor, without having first presented a particular of his demand to the Prince's treasurer, pursuant to 35 Geo. 3, c. 125, s. 7. *O'Kelly* v. *Sparkes*, 10 East, 369.

—— **Rights of, in respect of Duchy of Cornwall.**]—*See* CROWN.

WAR.

1. *In General*, 1778.
2. *Foreign Enlistment.*
   a. Cases decided under Act of 1870, 1781.
   b. Cases decided under Act of 1819, 1783.
3. *Prize of War.*
   a. Rights as to, 1786.
   b. Jurisdiction of English Courts, 1793.
   c. Foreign Prize Courts, 1794.
4. *War Indemnity*, 1795.

1. In General.

Existence of.]—A state of war may exist de facto between two countries, although there has been no formal declaration of war by their governments; but there must be an actual commencement of hostilities. *The Teutonia*, 8 Moore, P. C. (N.S.) 411; 41 L. J., Adm. 57; L. R. 4 P. C. 171; 26 L. T. 48; 20 W. R. 421.

If a foreign power takes prisoner an enemy, and thereby obtains possession of documents establishing his right to a debt due from another to him in his private capacity, the prisoner is entitled to relief; and the circumstance that the foreign power is also the debtor, will not alter the right; but if such documents are the property of the prisoner in his sovereign character, and are taken possession of by the conqueror in the exercise of his sovereign and political rights, the court cannot interfere. *Coorg (Rajah)* v. *East India Co.*, 29 Beav. 300; 30 L. J., Ch. 226; 7 Jur. (N.S.) 350; 3 L. T. 646; 9 W. R. 247.

Declaration of.]—To ascertain the date of a declaration of war, the declaration from the ambassador of the court abroad, transmitted by him to the secretary of state's office, is evidence. *Thelluson* v. *Cosling*, 4 Esp. 266. (Usually proved by the production of a copy of a royal proclamation, announcing its existence, printed by the printers of the crown, under 8 & 9 Vict., c. 113, s. 3.)

—— **Effect of.**]—The effect of a declaration of war is to dissolve contracts of affreightment made before but which remain to be executed at the time. *Esposito* v. *Bowden*, 7 El. & Bl. 763; 27 L. J., Q. B. 17; 3 Jur. (N.S.) 1209; 5 W. R. 732—Ex. Ch.

A declaration of war by this country against a foreign power imports a prohibition of commercial intercourse with the subjects of that power

Burrick v. *Buha*, 2 C. B. (N.S.) 563; 26 L. J., C. P. 280; 5 W. R. 665.

A Prussian ship, carrying a cargo of nitrate of soda (contraband of war), arrived off Dunkirk, to which port she had been ordered by the consignees of cargo, and whilst lying there waiting for the tide, her master heard that war had broken out between France and Prussia, and he thereupon put back to the Downs, where he arrived on July 17th, to make inquiries, but hearing nothing more, and being stopped by his owner, he put into Dover on the 18th, and there getting intelligence, refused to proceed to Dunkirk. The ship was running under charter entitling her to be sent to a safe port. War was not actually declared till July 19th, but was imminent on July 16th:—Held, that the ship on July 16th was not bound to go to Dunkirk, as she would have been liable to penalties for trading with the enemies of her country and capture by French cruisers; that even if war did not actually exist till July 19th the master was justified in pausing for a reasonable time to make inquiries, and that under the circumstances he did not exceed that time by staying in Dover till after the declaration of war. *The Teutonia*, 8 Moore, P. C. (N.S.) 411; 41 L. J., Adm. 57; L. R. 4 P. C. 171; 26 L. T. 48; 20 W. R. 421.

Whilst the ship was lying at Dover, the consignees demanded the delivery of cargo without any payment of freight. The master refused to deliver without payment:—Held, that he was entitled to freight. *Ib.*

Validity of Contracts.]—The shipping of a cargo from an enemy's port, even in a neutral vessel, is an act of dealing and trading with the queen's enemies, and is therefore illegal. *Esposito* v. *Bowden*, supra.

A neutral, while a war is imminent, or even after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid whether the subject of it is lying in a neutral or an enemy's port. *Sorensen* v. *Reg.*, 11 Moore, P. C. 141.

The sale of a ship absolutely and bonâ fide by an enemy to a neutral imminente bello, or even flagrante bello, is not illegal. *Ib.*

Enemy or Neutral.]—The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of trade, as a subject of the power under whose dominion he carries it on, and as an enemy of those with whom that power is at war. *The Gerasimo*, 11 Moore, P. C. 88; 5 W. R. 450.

A temporary occupation of a territory by an enemy's force does not, of itself, necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies. *Ib.*

Merchants, subjects of neutral states, resident in the territories of an ally, are, for the purposes of war, considered as domiciled in the territories of the ally, and prohibited from trade with a belligerent. *The San Spiridione*, 2 Jur. (N.S.) 1238; 5 W. R. 102.

Contraband.]—Account decreed where one party had freighted ship with contraband goods. *Dover* v. *Opey*, 2 Eq. Abr. 7.

A seller abroad of contraband goods is entitled to prove unless he be a participator in smuggling them. *Cavaliere, Ex parte*, 2 Glyn & J. 227.

A debt arising out of a contract to convey British goods to a market in an enemy's country cannot be proved under a commission of bankrupt after peace has been established between that country and Great Britain. *Schmaling, Ex parte*, Buck, 93.

A joint adventure between the subjects of a neutral power for running a blockade, established by one of two foreign belligerents against the ports of the other, with a cargo of arms and ammunition, is not an unlawful contract, but one from which the ordinary rights of property result. *Chavasse, Ex parte, Grazebrook, In re*, 4 De G. J. & S. 655; 34 L. J., Bk. 17; 11 Jur. (N.S.) 400; 12 L. T. 249; 13 W. R. 627.

International law subjects a neutral merchant who transports contraband of war to the risk of having his ship and cargo captured and condemned by the belligerent power for whose enemy the contraband is destined; but the commerce which was lawful for the neutral with either belligerent country before the war is not made by the war unlawful or capable of being prohibited by both or either of the belligerents. *Ib.*

A breach of blockade by neutrals is not an offence against the municipal law of this country, and therefore an agreement contemplating a breach of blockade is not illegal. *The Helen*, 35 L. J., Adm. 2; 11 Jur. (N.S.) 1025; 13 L. T. 305.

Defence of the Realm—Compensation.]—Where lands of a corporation had been taken by government for fortification purposes, under 43 Geo. 3, c. 55, and 45 Geo. 3, c. 95, and the compensation paid into court, to be disposed of under its order:—Held, that since the 5 & 6 Will 4, c. 76, s. 92, the court has no authority to direct it to be applied in discharge of corporation debts incurred since the statute; although the dividends must be so applied, yet the capital is to be preserved. The trusts of the latter act apply to personal as well as real estate. *Hythe Corporation, Ex parte*, 4 Y. & Coll. 55.

Where the purchase-money for land taken by the secretary of state for war under the Defence of the Realm Act, 5 & 6 Vict. c. 94, had, in 1860, been paid into court, and an application by petition was made for its investment in consols subsequently to the 23 & 24 Vict. c. 112, the court made the order, and directed the costs to be paid by the secretary of state, and that future applications in respect of money paid into court under the acts should be made at chambers. *Maynard's Trusts, In re*, 30 L. J., Ch. 344; 7 Jur. (N.S.) 232; 3 L. T. 773; 9 W. R. 330.

A pond which supplied a stream by which a flour-mill was worked, was purchased by the ordnance under the 5 & 6 Vict. c. 94. The water being diverted, the tenant for life of the mill claimed compensation, and before an award was made he erected a steam-engine and suitable buildings for the mill, expending thereon 1,300*l.* Compensation, amounting to 920*l.*, being awarded to him, the court permitted this sum to be paid to the tenant for life in respect of the permanent alterations he had made. *Wellington (Duke), In re*, 3 De G. F. & J. 13; 30 L. J., Ch. 187; 3 L. T. 525; 9 W. R. 173.

Under 23 & 24 Vict. c. 112, lands were taken absolutely by the secretary of state for war, and other lands were required to be kept free from buildings. The amount of compensation for both classes of land was agreed upon; and the parties claimed interest at 5*l.* per cent. on the amount paid as compensation for the lands required to be kept free from buildings from the date of the agreement to the time of payment:—Held, that the compensation paid for lands required to be kept clear of buildings was only a payment for damage, and did not carry interest. *Suffolk (Earl)* v. *Lewis*, 1 Hem. & M. 369; 32 L. J., Ch. 232; 8 L. T. 350; 11 W. R. 521.

Upon a petition to obtain out of court the purchase money for land taken under the Defence Act of 1860 (23 & 24 Vict. c. 112), it is not necessary to serve the secretary of state, who paid it in. *Morshead, Ex parte*, 33 Beav. 254; 10 Jur. (N.S.) 61; 9 L. T. 597; 12 W. R. 236.

A fund paid into court for the purchase, under this act, of lands which were subject to contingent charges, was ordered to be paid out to the trustees, they having powers to sell the lands, and to give discharges for the purchase money without bringing the persons interested in the charges before the court. *Ib.*

A person whose land has been valued by a jury and sold under the 5 & 6 Vict. c. 94, is not entitled to the expenses and costs which he has necessarily incurred in bringing the matter to trial. *Ordnance Officers and Lands, In re*, 1 Ex. 441; 4 D. & L. 688; 17 L. J., Ex. 126.

Cp. cases sub tit. LANDS CLAUSES ACT.

2. FOREIGN ENLISTMENT.

a. Cases Decided under Act of 1870.

Despatch of Ship.]—The employment of an English steam-tug for the purpose of towing a prize to the captor's waters, is a despatching a ship from the United Kingdom for the purpose of being employed in the naval service of a foreign state, within s. 8 of the Foreign Enlistment Act, 1870. *The Gauntlet*, 41 L. J., Adm. 65; L. R. 4 P. C. 184; 26 L. T. 45; 20 W. R. 497.

By s. 8 of the Foreign Enlistment Act, 1870, if any person within her majesty's dominions, without her majesty's licence, despatches any ship with intent that the same shall be employed in the military or naval service of any foreign state at war with any friendly state, the ship in respect of which any such offence is committed and her equipment shall be forfeited to her majesty:—Held, that a vessel despatched to furnish and lay a submarine telegraph cable along the French coast between Cherbourg and Verdun was not despatched to be employed in the military service of France. *The International*, 40 L. J., Adm. 1; L. R. 3 Adm. 321; 23 L. T. 787.

Release of Ship.]—Application to release such a vessel granted, but without costs and damages. *Ib.*

When a cause is instituted against a ship in respect of which an offence against the Foreign Enlistment Act, 1870, is alleged to have been committed, the court may, with or without the consent of the crown, order the ship to be released on bail. *The Gauntlet*, L. R. 3 Adm. 319; 24 L. T. 597.

When such order is made, bail will be required for the full value of the ship and her equipment, but not for any further sum for costs. *Ib.*

—— **Indemnity for Detention.**]—In an application to the court of admiralty for indemnity by the crown in respect of the detention of vessels under s. 24, where the secretary of state has released the vessels without issuing his warrant stating reasonable and probable cause for the detention, the proper form of procedure is by motion upon affidavit. *The Great Northern and The Midland*, 25 L. T. 201.

The crown is entitled to time to answer the affidavits in support of the application, so as to raise any questions of law and fact. *Ib.*

Preparing or fitting out Naval or Military Expedition.]—The offences created by ss. 11 and 12 of the Foreign Enlistment Act, 1870, is complete if a person, without the licence of her majesty, in a place within her dominions where the act is in operation, prepares, or assists in, or aids, or abets in the preparation of a military or naval expedition, with the intention that it should proceed against the dominions of a friendly state, whether or no it should have in fact so proceeded. *Reg.* v. *Jameson*, 65 L. J., M. C. 218; 60 J. P. 662.

A person may commit the offence created by ss. 11 and 12, although not himself within her majesty's dominions, when he so engages, or assists, or aids, or abets, or counsels the preparation or fitting out of such expedition. *Ib.*

A person may commit the offence of taking employment in such an expedition, although he has not engaged, or assisted, or aided in the preparation of the expedition, and although he accepts employment in it outside the limits of her majesty's dominions. *Ib.*

An expedition to proceed against the dominions of a friendly state is one which intends either by actual force or show of force—(*a*) to interfere with the constituted government, laws, or administration of such a state; (*b*) to bring about by such means the reform of those laws or that administration; (*c*) to substitute for the protection of any class in such a state its own protection in the place of the protection of any existing law and its administrators; or (*d*) to join with others either within or without the dominions of such friendly state in overawing or coercing the government of such state to obtain any change in such law or administration. It is none the less such an expedition because it may not be aimed at the overthrow of such a government, or because its participators may be actuated by motives of philanthropy or humanity. *Ib.*

The offence of fitting out and preparing an expedition within the queen's dominions against a friendly state, under s. 11 of the Foreign Enlistment Act, 1870, is sufficiently constituted by the purchase of guns and ammunition in this country, and their shipment for the purpose of being put on board a ship in a foreign port, with a knowledge of the purchaser and shipper that they are to be used in a hostile demonstration against such state, though the shipper takes no part in any overt act of war, and the ship is not fully equipped for the expedition within any port belonging to the queen's dominions. *Reg.* v. *Sandoval*, 56 L. T. 526; 35 W. R. 500; 16 Cox, C. C. 206; 51 J. P. 709.

—— **Indictment—Form—Matter of Inducement—Material Facts—General Averment.**]—A count in an indictment stating that the defendants "within the limits of her majesty's

dominions and after the coming into operation therein of the Foreign Enlistment Act, 1870, and without the licence of her majesty, were engaged in the preparation of a military expedition to proceed against the dominions of a friendly state," is a valid count, inasmuch as it contains a reasonable and intelligible statement that the defendants, in a place within her majesty's dominions in which the act was in operation, were engaged in the preparation of an expedition which would be an offence against the act. *Reg.* v. *Jameson*, 65 L. J., M. C. 218; [1896] 2 Q. B. 425; 75 L. T. 77; 18 Cox, C. C. 392; 60 J. P. 662.

It is not necessary in a count in an indictment under the Foreign Enlistment Act, 1870, which concludes with the allegation that the offence is against the form of the statute and against the peace of the queen, to state that the defendants are in fact, if they be so, subjects of the queen. *Ib.*

Proclamation—Where Necessary.]—It was intended by s. 3 of the Foreign Enlistment Act, 1870, that the necessity for proclamation of the act should apply to possessions existing as such at the date of the passing of the act. *Reg.* v. *Jameson*, 65 L. J., M. C. 218; 60 J. P. 662.

—— **Declaration of War—Illegality—Right of Seamen to quit Ship and recover Wages for Entire Voyage.**]—The defendants, who had agreed with the Japanese government, in consideration of a lump sum, to transport a ship of war, the property of the latter, from this country, where the ship had been built, to Japan, agreed with S. that he should enter their service as captain of the ship, and should remain in the capacity of captain during the voyage from this country to Japan. The plaintiff engaged with S. to serve as seaman on board the ship for the voyage. The ship started from this country upon her voyage flying the Japanese flag and pennant. Before the completion of the voyage the Japanese government declared war with China, and at Aden the proclamation of British neutrality under the Foreign Enlistment Act, 1870, was read by the British governor to the crew. The plaintiff thereupon refused to complete the voyage and left the ship. In an action (which it was agreed should be treated as an action against S.) by the plaintiff to recover the amount of his wages for the entire voyage:—Held, that, notwithstanding the terms of the agreement between S. and the defendants, there was evidence that S. was a servant of the Japanese government, and that, the voyage having been altered by the act of his principals from an ordinary voyage into a voyage of increased risk, the plaintiff was justified in refusing to continue to serve on board the ship, and was entitled to recover his wages for the entire voyage. *O'Neill* v. *Armstrong*, 65 L. J., Q. B. 7; [1895] 2 Q. B. 418; 14 R. 703; 73 L. T. 178; 8 Asp. M. C. 63—C. A. Affirming 43 W. R. 554.

b. Cases Decided under Act of 1819.

What Governments.]—Sect. 7 (repealed) of the Foreign Enlistment Act, 1819, provided that if any person shall, without the leave, &c., equip, furnish, or fit out, any ship or vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state as a transport, &c., every such person shall be guilty of a misdemeanor, and every such ship shall be forfeited. A ship was fitted out as a transport for the service of certain persons in the island of Cuba, who had revolted from Spain, and had assumed to exercise government, and were conducting hostilities against Spain. It did not appear who the persons were or over what part of Cuba they assumed to exercise government:—Held, that, inasmuch as the persons in whose service the ship was employed assumed to exercise government, there was a breach of the provisions of the act, and the ship was liable to forfeiture. *The Salvador*, 6 Moore, P. C. (N.S.) 509; 39 L. J., Adm. 33; L. R. 3 P. C. 218; 23 L. T. 203; 18 W. R. 1054.

Building Ship.]—If a British shipbuilder builds a vessel of war in an English port, and arms and equips her for war bonâ fide on his own account as an article of merchandise, and not under or by virtue of any agreement, understanding or concert with a belligerent power, he may lawfully, if acting bonâ fide, send the ship so armed and equipped for sale as merchandise in a belligerent country, and will not in so doing violate the provisions or incur the penalties of the Foreign Enlistment Act, 1819 (repealed). *Chavasse, Ex parte, Grazebrook, In re*, 4 De G. J. & S. 655; 34 L. J., Bk. 17; 11 Jur. (N.S.) 400; 12 L. T. 249; 13 W. R. 627.

The building, in pursuance of a contract, with intention to sell and deliver to a belligerent power, the hull of a vessel suitable for war, but unarmed, and not equipped, furnished, or fitted out with anything which enables her to cruise or commit hostilities, or do any warlike act whatever, was not a violation of the Foreign Enlistment Act, 1819 (repealed). *The Alexandra*, 2 H. & C. 431; 33 L. J., Ex. 92; 10 Jur. (N.S.) 262; 11 L. T. 223; 12 W. R. 257. *S. C.*, at nisi prius, 3 F. & F. 646.

Serving on board Ship.]—Serving on board a vessel used as a store-ship in aid of a belligerent ship, the fitting out of which to be so used is an offence within s. 7 (repealed), is a serving on board a vessel used or fitted out for a warlike purpose in the service or in aid of a foreign state within s. 2. *Burton* v. *Pinkerton*, 36 L. J., Ex. 137; L. R. 2 Ex. 340; 16 L. T. 419; 15 W. R. 1139.

In an action for taking a steam-vessel, the defendant pleaded that he was an admiral in the Portuguese navy, and that he took the vessel as a lawful prize, which was condemned by the supreme tribunal of marine, at Lisbon, and became forfeited to the queen of Portugal. In other pleas the trespass was justified under the authority of the queen of Portugal, jure belli. Replication, that the defendant being a natural-born subject of this kingdom, in contravention of the Foreign Enlistment Act, 1819 (repealed), accepted the commission of admiral, without the leave and licence of the king of England:—Held, that the pleas were a conclusive bar to the action, and that the replication afforded no answer to the pleas. *Dobree* v. *Napier*, 2 Hodges, 84; 2 Bing. (N.C.) 782; 3 Scott, 201; 5 L. J., C. P. 273.

On an indictment, that at Liverpool the defendants engaged and procured men to enlist as sailors in the service of a belligerent state, the

evidence being that the men were engaged by the defendants at Liverpool to enter themselves as the crew of a vessel lying there for a voyage to China, and that afterwards, when the vessel was off the coast of France, the men were, in the presence of one of the defendants, enlisted in the belligerent service, the jury was directed, that if the defendants engaged the men with the intention that they should afterwards be enlisted abroad in the belligerent service, the indictment was sustained. *Reg.* v. *Jones*, 4 F. & F. 25.

On an indictment against a British subject, it appeared that he engaged men in this country to serve on board a vessel which he then took to Madeira, and there met and signalled a ship of the belligerent power, and went with it to anchor off an island which belonged to a foreign state, and there received on board the former vessel an officer of the belligerent power, to whom he handed over the command, and who in his presence used incitements to his men to induce them to enlist, all of them, however, refusing to do so except one or two, not proved to have been British subjects. The jury was directed to find whether, when the defendant originally engaged the men, he had the intention not only to take the vessel out to deliver her over to the belligerent commander, but also to enable him to incite and induce them to enlist, the question being reserved whether that would constitute an offence under the statute. *Reg.* v. *Corbett*, 4 F. & F. 555.

On an indictment for causing men to enlist or engage in the Confederate service as sailors, and also for counselling men here to enlist in such service abroad, and for assisting in the equipment of a vessel for such service, the evidence showing that an old gunboat, dismantled of all warlike equipments, was purchased at Sheerness, with a view to her being engaged in the Confederate service; that the defendant took an active part in repairing her, and fitting her for sea, and also in engaging men to go in her as firemen or stokers for a trial trip: that she went over to Calais, and that there the Confederate flag was hoisted, and a Confederate captain came on board, who attempted to enlist the men; and that, after this, the defendant was on board, and still used his endeavours to send men on board the vessel as stokers:—Held, that the material point was his knowledge of the ultimate destination of the vessel; that his acts after knowledge of it were evidence of his having had such knowledge before the acts of engagement in this country; that the acts abroad were evidence of the intention of the acts in this country; that the mere repairing of the vessel for a trial trip was not an equipping; and that the clause as to enlistment applied to the engagement of men in any capacity connected with the navigating of the vessel, as firemen, stokers, or engineers. *Reg.* v. *Rumble*, 4 F. & F. 175.

Capture—Running Blockade.]—Notwithstanding the Foreign Enlistment Act, 1819 (repealed), a British subject, who, in the service of a foreign state at peace with Great Britain, captures a British vessel, which is lawfully condemned as a prize for breaking blockade, is not liable to an action at the suit of the owner of the vessel. *Dobree* v. *Napier*, 2 Bing. (N.C.) 781; 3 Scott, 201; 2 Hodges, 81; 5 L. J., C. P. 273.

Indictment—Corporation.]—An incorporated company demurred to a bill, because the discovery thereby sought might subject it to criminal prosecution under the Foreign Enlistment Act, 1819 (to prevent the enlisting of his majesty's subjects for foreign service, and the fitting out, in his majesty's dominions, vessels for warlike purposes without his licence):—Held, that a corporation was not liable to be indicted under that act, and demurrer overruled. *Two Sicilies (King)* v. *Willcox* or *Peninsular and Oriental Co.*, 1 Sim. (N.S.) 334; 19 L. J., Ch. 488; 14 Jur. 751.

Contracts—Validity.]—A bill will not be entertained for an account and payment of moneys due for expenses incurred in fitting out and supporting certain troops called the Irish Legion, in the service of the republic of Colombia. *S. C.*, nom. *Macnamara* v. *Devereux*, C. P. Cooper, 489; 3 L. J. (O.S.) Ch. 156.

3. Prize of War.

a. Rights as to.

Forfeiture of Goods.]—Goods which are contraband of war, in the course of transport from a neutral port to a neutral port, in a neutral ship, are not by the law of nations liable to seizure by the cruisers of a belligerent state, even though the shipper may know or intend that they shall ultimately reach a port belonging to the enemies of the captors. To render goods contraband of war liable to seizure, they must be taken in delicto, that is, in the actual prosecution of a voyage to an enemy's port. *Hobbs* v. *Henning*, 17 C. B. (N.S.) 791; 34 L. J., C. P. 117; 11 Jur. (N.S.) 222; 12 L. T. 205; 13 W. R. 431.

Forfeiture of Ship.]—Nor does the mere fact that the ship carries simulated papers per se operate as a forfeiture of either ship or goods, though it may afford evidence from which a prize-court may infer that the ship was or the goods were enemy's property, or that her destination was to a blockaded port or to an enemy's port with contraband of war. *Ib.*

—— **Effect of Transfer or Sale.**]—A ship, originally the property of a Russian, was by him given to his son, domiciled in Denmark, as a part of the son's share in the father's property. The transfer took place in 1853. It was argued, on behalf of the captors, that to allow a voluntary transfer without valuable consideration at the beginning or on the probability of a war, would open a way of safety to the whole mercantile navy of a belligerent. *The Benedict*, 4 W. R. 165.

An absolute bonâ fide sale or transfer of an enemy's ship to a subject of a neutral state made imminente bello, was held not to be illegal, the transfer having been effected and the ship having come fully into the possession of a purchaser at a port at which she stopped in the course of a voyage, before arriving at her ultimate destination. The rule of prize-courts, that the transfer of a ship in transitu is ineffectual, does not apply to such a case. *The Baltica*, 6 W. R. 308—P. C.

An absolute bonâ fide sale or transfer of a ship by an enemy to a subject of a neutral state, without fraud or collusion, made in contemplation of war, is not illegal, though a part only of the purchase-money is paid at the time, and the remainder is payable out of the ship's freight. *The Ariel*, 5 W. R. 427—P. C.

A. being sole possessor of a ship, gave a claim on behalf of B. The evidence showed that A. was the real owner, having, for purposes not fraudulent on the belligerent, made a colourable sale to B. Claim allowed to be amended and proved on further proof. *The Panaghia Rhomba*, infra.

—— **Breach of Blockade.**]—A neutral vessel, seized near the Gulf of Riga by one of her majesty's ships of war for an alleged breach of blockade, was condemned by sentence of the court of admiralty:—Held, on appeal, that a ship belonging to a neutral state cannot be condemned, unless the port for which she was sailing was legally in a state of blockade, and was known to be so by the master or owner; and, there having been great doubt about the existence of the blockade in question, and whether, if established, it was one that would be recognised by the British government, a restitution of the proceeds of the ship and freight must be advised, but without costs to the claimant. *The Franciska*, 4 W. R. 100—P. C.

A neutral vessel, on coming out of the port of Riga, was seized by one of her majesty's ships of war for an alleged breach of blockade:—Held, that the master of the ship having had full knowledge of the blockade when he left the port, the sentence of the court of admiralty, condemning the vessel, must be affirmed. *The Johanna Maria*, 4 W. R. 106—P. C.

Where the excuse for going into a blockaded port is the leaky state of the ship, captors allowed to give further proof as to condition of the vessel. *The Panaghia Rhomba*, 3 Jur. (N.S.) 23; 5 W. R. 104.

A voyage is not illegal by the circumstance that the ship's destination is a port which, according to the latest accounts, was under blockade, if it appear that no violation of it was intended. *Dalgleish* v. *Hodson*, 5 M. & P. 407; 7 Bing. 495; 9 L. J. (O.S.) C. P. 138.

The purpose of a blockade was declared to be for preventing the import of provisions to the enemy in possession of a neutral's country. Semble, that the fact of a neutral ship bringing out a cargo of corn is not a breach of such blockade. *The Gerasimo*, 11 Moore, P. C. 88; 5 W. R. 450.

—— **Neutral, not Sole Owner.**]—A vessel with a neutral flag was seized on suspicion of being the property of the enemy. On her papers being examined, it was found that the claimant, who professed to be the subject of a neutral state, was not the sole owner, but that one of the subjects of the enemy's country had also an interest in the vessel:—Held, that the sentence of the court of admiralty, condemning the vessel, must be affirmed, and that the application on the part of the claimant to be allowed to produce further proof must be refused. *The Nina*, 4 W. R. 319—P. C.

Privateer.] — Privateer sailing and taking prize without letters of marque, the prize belongs to the king as a droit of the crown. *Nicol* v. *Goodall*, 10 Ves. 155.

English Ship Captured by Enemy—Sale to Englishman.]—If a British ship, captured by an enemy, is afterwards purchased by a subject of this realm, she is still the property of the person from whom she was captured. *Woodward* v. *Larking*, 3 Esp. 286.

How Property may Pass.]—The property in a prize of war may pass to the captors without the prize being taken into a port belonging to the country of the captors, or being condemned by a prize court. *The Gauntlet*, 40 L. J., Adm. 34; L. R. 3 Adm. 381; 25 L. T. 69. *S. C.*, reversed, 41 L. J., Adm. 65; L. R. 4 P. C. 184; 26 L. T. 45; 20 W. R. 497. But not on this point.

Ship of War—What is.]—A prize of war (a merchantman), with a prize crew on board, is not a ship of war. *Ib.*

Foreign Enlistment Act.]—In an action for taking a steam-vessel, the defendant pleaded that he was an admiral in the Portuguese navy, and that he took the vessel as a lawful prize, which was condemned by the supreme tribunal of marine, at Lisbon, and became forfeited to the queen of Portugal. In other pleas the trespass was justified under the authority of the queen of Portugal, jure belli. Replication, that the defendant being a natural-born subject of this kingdom, in contravention of the Foreign Enlistment Act, 1819, accepted the commission of admiral, without the leave and licence of the king of England:—Held, that the pleas were a conclusive bar to the action, and that the replication afforded no answer to the pleas. *Dobree* v. *Napier*, 2 Hodges, 84; 2 Bing. (N.C.) 782; 3 Scott, 201; 5 L. J., C. P. 273.

Distribution.]—As to the general principles and adjudication and distribution of booty and prize of war, see *Banda and Kirwee Booty case*, 35 L. J., Adm. 17; L. R. 1 Adm. 109; 12 Jur. (N.S.) 819; 14 L. T. 293.

The admiral who is in command at the time when the prize is taken, is entitled to the flag-officer's share of prize. *Pigot* v. *White*, 1 H. Bl. 265, n.; 4 Dougl. 302.

Where, from a change in the command on a station, it becomes doubtful to which admiral the flag-officer's share of a prize taken by a ship detached for the purpose of cruising belongs, it is clear that it does not belong to the captain in command of such ship. *Taylor* v. *Paulett* (*Lord*), 1 H. Bl. 264, n.

A captain of marines who happens to be on board a man-of-war when she takes a prize, but does not belong to her complement, shares only as a passenger. *Wemyss* v. *Linsyee*, 1 Dougl. 324.

The captain of a ship actually on board at the time of the capture is entitled to prize-money though under arrest at the time, and though another officer had been sent on board to command the ship. *Lumley* v. *Sutton*, 8 Term Rep. 224.

If a prize is taken by two or more privateers, they are to share proportionally according to the number of men of which their respective crews consist. *Roberts* v. *Hartley*, 1 Dougl. 311.

An admiral who supersedes another admiral, and takes him under command, is entitled to one-eighth part of prizes captured after such command, but under orders issued by the admiral who has been superseded. *Pigot* v. *White*, 4 Dougl. 302.

A captain in the army sent with his company on board a man-of-war (by order of the admiral of the fleet with which they were sailing), and there acting as marines, is not entitled to share prize-money as captain of marines. *Mackenzie* v. *Maylor*, 4 Dougl. 3.

A prize was taken by a revenue cutter, during the suspension of the commander, by the mate, who acted as commander under an order from the commissioners of customs:—Held, that he was entitled to the commander's share under the king's warrant of distributions. *Taylor* v. *Pile*, 8 Taunt. 805.

If an admiral is appointed by the admiralty, and actually has given an order to a fleet, he is entitled to share in captures, though he was not within the station at the time they were made. *Captures on the Jamaica Station*, 1 Hag. Adm. 129.

Charter-party of affreightment between the owners of the ship M. and the commissioners of transports for and on behalf of his majesty; during its continuance in the transport service the ship makes a capture, which is condemned, and upon petition to the treasury, two-thirds of a moiety of the proceeds arising from the capture were ordered by warrant from the crown to be paid to the owners. These proceeds are entirely at the discretion of the crown; and upon motion for payment into court of a sum, admitted by the commissioners of transports to be due for freight under the charter-party, which motion was resisted on the ground that the commissioners were entitled to set off the amount of the proceeds received by the owners under the warrant, payment was ordered accordingly, without prejudice to the question of ownership. *Thurgar* v. *Morley*, 3 Mer. 20.

—— **Apprentice.**]—The prize-money, gained by an apprentice serving on board a letter of marque ship, does not belong to the master of the apprentice; the usage being proved to be that such money is the property of the apprentice. *Carsan* v. *Watts*, 3 Dougl. 350.

—— **Jurisdiction—Account.**]—A court of equity has jurisdiction upon a bill by officers of the army and the East India Company, on behalf of themselves and all others, &c., for an account of prize-money received beyond the due proportion, and for a distribution according to the king's grant and usage, considering the defendants as trustees; but upon the construction of the grant, as not creating a trust, a demurrer was allowed. *Brown* v. *Harris*, 13 Ves. 552; 9 R. R. 221.

Bill by one of the officers and crew of a privateer against the owner, for an account of captures according to the articles. Leave given to amend, by stating that the bill was on behalf of the plaintiff and all others; upon that amendment the account was decreed. *Good* v. *Blewitt*, 13 Ves. 397.

Two captains of ships of war enter into an agreement that all prizes taken by either of them, whether in the ships they then had, or in any other ship which they might thereafter command, should be equally divided between them. One of them changed his ship, which, meeting with an accident, was ordered to be laid up, and it was some time before he got another. The other captain continued cruising all the time, but objected to account for the prizes which he took during the interval of his partner's being unemployed:—Held, that he was accountable for all the prizes taken from the date of the agreement. *Ogle* v. *Sansom*, 1 Bro. P. C. 149.

Bill for an account and share of prize-money dismissed, the sum being certain, and the remedy at law against the prize agents. *Ogle* v. *Haddock*, 1 Ves. 161.

—— **Assignment of Interest.**]—No interest complete vested in prizes before condemnation; but upon condemnation it is considered the property of the captor from the time of the capture. The crown in prize grants puts what is strictly bounty upon the footing of right, considering the claim as transmissible to the legal representatives of the claimant, deceased before the grant, subject to his will, &c., as his other property. *Stevens* v. *Bagwell*, 15 Ves. 139; 10 R. R. 46.

Military prize, when captured, is capable of being effectually assigned by the captor, before any interest in it has been vested in him by a grant from the crown. A warrant of the crown, conveying military prize to trustees upon trust, to collect, recover, and receive the same, and directing the trustees, as soon as the case would permit, to prepare a scheme for the distribution thereof, conformably to certain principles therein stated, and to submit such schemes to the lords of the treasury, for the signification of the royal pleasure thereon, is not an absolute or final grant: it creates no vested interest in any particular individuals, as objects of the bounty; nor can persons claiming to be cestuis que trustent compel a distribution under it by a suit in equity against the trustees. Semble, the crown may at any time before distribution alter or revoke a grant of military prize. *Alexander* v. *Wellington* (*Duke*), 2 Russ. & M. 35; 9 L. J. (o.s.) Ch. 36.

A captor of a prize may legally assign his share therein before condemnation. *Morrough* v. *Comyns*, 1 Wils. 211.

Assignment of sailor's share of prize money at great undervalue, set aside for fraud, but still to stand as security for what really advanced. The same equity as to an under-assignment. *How* v. *Weldon*, 2 Ves. 516.

Sale of a seaman's prize money, and subsequent agreement in confirmation, set aside. *Taylour* v. *Rochfort*, 2 Ves. 281.

—— **Condemnation Reversed.**]—The plaintiffs, together with others, being owners of one ship, and the defendant of another, a prize as taken, condemned and shared by agreement between them; afterwards the sentence of condemnation was reversed, and restitution awarded with costs, which were paid solely by the plaintiffs; an action cannot be brought by the plaintiffs alone for their share of the restitution money and costs, because it was either a partnership transaction, when the other parties ought to be joined, or not, when separate actions should be brought by each of the persons paying. *Graham* v. *Robertson*, 2 Term Rep. 282.

—— **Grant to Secretary of State "in Trust."**]—The crown, by royal warrant, "granted to the secretary of state for India in council for the time being" certain booty taken in war "in trust for the use of" certain persons, who had been adjudged entitled to it upon a reference to the court of admiralty, to be distributed among them, with a further provision that in case any doubts should arise in the course of the distribution the decision of the secretary of state should be final, unless the crown should otherwise order:—Held, (1) That the secretary of state for India in council could only sue or be sued as a corporation under 21 & 22 Vict. c. 106, s. 65, in proceedings which might have been taken by or against the late East India Company; (2) That the royal warrant constituted the secretary

of state for India in council an agent of the crown for the purpose of the distribution of the fund under the control of the crown, but did not constitute him a trustee for the persons interested subject to the control of a court of equity. *Alexander* v. *Wellington* (*Duke*) (2 Russ. & My. 35) discussed. *Brown* v. *Harris* (13 Ves. 552; 9 R. R. 221) distinguished. *Kinloch* v. *Secretary of State for India*, 51 L. J., Ch. 885; 7 App. Cas. 619; 47 L. T. 133; 30 W. R. 845—H. L. (E.)

—— **Parties who may bring the Suit.**]—The actual captors, though they may institute the suit, are plaintiffs only in name, as the burthen of proof rests with those claiming a right to share in the booty. *Banda and Kirwee Booty case*, supra.

Prize Agent.]—Claims being made on a prize agent by several persons for the prize money due to a sailor, he was permitted, as a public officer, to pay the money into court for the benefit of that claimant who should prove his authority to receive it. *Edwards* v. *Minett*, 1 Taunt. 166.

Two warrants for bounties, each for a distinct capture made by the same two vessels jointly, were made out in the joint names of their respective agents, and the proceeds paid on their joint receipts; each agent took possession of a portion of bounties, but no regular severance or appropriation was made; one of the agents became a bankrupt with the proceeds of one warrant in his hands; the other agent is bound to distribute the proceeds of the other warrant between the two vessels. *Vecua* (*Gomez*), 2 Hag. Adm. 346.

A. and B. being joint prize agents, A. is imposed on by persons falsely pretending to be sailors, to whom he pays a sum of money, which he is subsequently compelled to pay again to the person really entitled. B. is not bound to contribute to the sum so paid. *M'Ilreath* v. *Margetson*, 4 Dougl. 278.

Limited responsibility of a foreign prize agent who acted a fair part, and did everything for the best under the circumstances of the case. *The Trabacolos*, 1 Hag. Adm. 294.

A prize agent makes certain advances to captors prior to a regular distribution of the proceeds, and becomes a bankrupt:—Held, that the sureties and their representatives are liable for his deficiencies in the first instance: inforcement of a monition to refund suspended. *The Triton*, 1 Hag. Adm. 290.

Proof of Title.]—If any doubt exists as to the character of a ship claimed to be the property of a neutral, being still enemy's property, the rule of the prize court is, that the claimant shall be put to strict proof of ownership, and any circumstance of fraud, or contrivance or attempt at imposition on the court, in making out his title, is fatal to the claimant; condemnation of the ship as enemy's property necessarily follows. *Batten v. Reg.*, 11 Moore, P. C. 271.

Imprisonment consequent on taking Prize—No Action.]—No action at common law lies for false imprisonment, where the imprisonment was merely in consequence of taking a ship as prize, although the ship has been acquitted. *La Caux* v. *Eden*, 2 Dougl. 594.

Restitution.]—In the case of a vessel which has been seized as being the property of subjects of an enemy, but which was clearly shown to have become neutral property before the declaration of war, an order for restitution was advised by the judicial committee of the privy council to the claimants, to whom the property in the ship had been formally transferred, and who were thus invested with the character of owners, there being no other party who could set up a title against them. *The Maria*, 5 W. R. 825—P. C.

Joint Capture.]—In cases of joint capture "being in sight" means being seen by the prize as well as the captor, and the claim for joint capture may be pronounced for in the absence of evidence from the prize. The time of surrender is not the time of taking possession, but the striking of colours, or other plain sign of abandoning the intention of flight or resistance. *The Brazil*, 4 W. R. 375.

The principles of joint capture in prize cases, apply to vessels associated in the capture of ships engaged in the slave trade; therefore, when the actual capture was made by one of two vessels associated for such purpose, the other, which had joined in the chase and rendered subsequent assistance:—Held, entitled to share in the bounty for the slaves, and in the proceeds of the ship, stores, and cargo. *The Aviso*, 2 Hag. Adm. 31.

A vessel which had chased a slave ship into a situation from which she could not escape, and then (being herself forced by a leak to abandon the chase) informed the capturing vessel thereof:—Held, not entitled as a joint captor. *The Orestes*, 2 Hag. Adm. 38, n.

In joint captures, only the actual force present shares in the prize; therefore when a tender of one ship was joint captor with another ship, the prize was shared proportionally between the capturing ship and the tender. *The Zepherina*, 2 Hag. Adm. 317.

An abandonment of pursuit and a return to the former course of the ship, before the act of capture, defeats the claim of joint capture, notwithstanding some assistance may have been rendered at the early part of the chase. *The Rattlesnake*, 2 Dods. 32.

Where a prize, coming out of a blockaded harbour, was captured by one of the blockading squadron stationed off the mouth of the port; it was determined that the other vessels of the squadron, although stationed at some distance, were entitled to share in the prize. *The Henrietta*, 2 Dods. 96.

Where two vessels join for the purpose of effecting a capture, the continuance of the chase is sufficient to create the right of joint capture, whether the vessels are in sight of each other or not. *The Etoile*, 2 Dods 106.

A general claim of joint capture may be supported by a king's ship, on the ground of right only; but this general rule is liable to exceptions. *The Melam*, 2 Dods. 122.

One of his majesty's ships of war being in itinere, and barely seeing or hearing a firing on the land, is not entitled to take any share in the beneficial effects of an attack made by a force with which she had rendered no assistance, or had any communication. *The Genoa and Savona*, 2 Dods. 88.

That is clearly a conjunct expedition, which is directed by competent authority, combining together the actions of two different species of

force for the attainment of some common specific purpose. *Booty in the Peninsula*, 1 Hag. Adm. 39.

Place of Capture.]—Captors' evidence is not in general admissible to prove the place of capture, where the ship's papers and depositions in preparatory are consistent and on the face of them satisfactory. *The Aline and Fanny*, 2 Jur. (N.S.) 143 ; 4 W. R. 321.

Liability of Captors.]—Where upon the ship's papers and depositions in preparatory no probable cause of seizure appears, captors condemned in costs and damages. Evidence in their behalf not admissible generally. *The Fortuna*, 2 Jur. (N.S.) 71 ; 4 W. R. 166.

Although a captor be only actuated by feelings of public duty, in destroying the property he has taken, yet he is responsible to the claimant, and must apply to his own government for indemnification. *The Acteon*, 2 Dods. 51, 52, 53.

Captors having a bonâ fide possession, and using due care, are not responsible for losses occasioned by mere misfortune. *The John Beck*, 2 Dods. 336.

A seizor is clearly entitled to be indemnified his expenses, when nothing vexatious can be objected against him. *The Woodbridge*, 1 Hag. Adm. 63.

Captors, though bonâ fide possessors, are liable for value of stores embezzled after capture and before the ship is taken possession of by custom house authorities. *The Aline and Fanny*, 3 Jur. (N.S.) 24 ; 5 W. R. 153.

b. Jurisdiction of English Courts.

None as to Booty till 3 & 4 Vict. c. 65.]—The court of admiralty had no jurisdiction with respect to booty until the 3 & 4 Vict. c. 65, the 22nd section of which, enacting that the court "shall proceed as in cases of prize of war," must be understood to mean, not that in all respects the distribution of booty should be assimilated to that of prize, but that the ordinary course of proceeding in prize should be adopted. *Banda and Kirwee Booty case*, 35 L. J., Adm. 17 ; L. R. 1 Adm. 109 ; 12 Jur. (N.S.) 819 ; 14 L. T. 293.

As to Capture—Exclusive.]—The jurisdiction over all matters of prize, and everything consequential to a capture, belongs exclusively to the court of admiralty. *Lindo* v. *Rodney*, 2 Dougl. 613, n.

The question of prize or no prize, or by whom taken, cannot be tried at common law, but must be decided by the judge of the court of admiralty; and the jurisdiction depends not upon the locality, nor upon the parties, but upon the nature of the question, which is such as cannot be tried by any rules of common law, but by the general law of nations, which is there administered by forms best adapted to the subject of its jurisdiction, and the interests of the parties. *Mitchell* v. *Rodney*, 2 Bro. P. C. 423.

The prize courts and courts of lords commissioners of appeals have the sole and exclusive jurisdiction over the question of prize or no prize, and who are the captors, notwithstanding any of the prize acts ; and if they pronounce a sentence of condemnation, adjudging also who are the captors, the courts of common law cannot examine the justice or propriety of it. *Camden (Lord)* v. *Home*, 6 Bro. P. C. 243 ; 2 H. Bl. 533 ; 4 Term Rep. 382.

Where a ship is bonâ fide seized as prize, the owner cannot sustain an action in a court of common law for the seizure, though she is released without any suit being instituted against her ; his remedy, if any, being in the court of admiralty. *Faith* v. *Pearson*, 2 Marsh. 133 ; 6 Taunt. 439 ; 4 Camp. 357 ; Holt, 113 ; 16 R. R. 649.

The court of chancery has admiralty jurisdiction. Letters of marque and reprisal may be repealed in chancery after a peace, though there is a clause in the letters patent that no treaty of peace shall prejudice them. *Rex* v. *Carew*, 1 Vern. 54 ; 3 Swanst. 669.

Where a privateer had taken a prize without having letters of marque, and the court of admiralty had sentenced her as a droit to the crown, the court of chancery refused, with costs, to restrain the parties from receiving, or the registrar of the admiralty from paying, the proceeds under a treasury warrant. *Nicol* v. *Goodall*, 10 Ves. 155.

Prohibition to enjoin judge of prize court from proceeding in a question of prize or no prize, refused. *Lynch, Ex parte*, 1 Madd. 15.

If an ally actually co-operates in effecting a capture, he cannot recover any proportion of the prizes in the common law courts of this country ; he must sue in the prize courts. *Duckworth* v. *Tucker*, 2 Taunt. 7.

—— **After Termination of War.**]—The court of admiralty has jurisdiction to entertain prize proceedings commenced after the cessation of war. *Katharina, Cargo Ex*, Lush. 142 ; 30 L. J., Adm. 21 ; 3 L. T. 597.

A British ship was taken by the Americans, and afterwards retaken by one of the British crew, brought into port, and condemned. A writ of prohibition to enjoin the judge of the prize court from proceeding after the termination of the war, at the suit of the American owners, to try the question of the recapture, was refused ; it being a case clearly within the jurisdiction of a court of prize, and such jurisdiction not being determined by the cessation of the hostilities. *The Harmony*, G. Cooper, 325.

c. Foreign Prize Courts.

Sentence—Effect of.]—The sentence of a court of admiralty, sitting under a commission from a belligerent power, in a neutral country, will not be recognised in our courts ; and that is to be considered a neutral country for this purpose, in which the forms of an independent neutral government are preserved, although the belligerent may have such a body of troops stationed there as in reality to possess the sovereign authority. *Donaldson* v. *Thompson*, 1 Camp. 429 ; 10 R. R. 717. And see *Smith* v. *Surridge*, 4 Esp. 25 ; 6 R. R. 837.

A sentence of a foreign court of prize is conclusive evidence upon every matter within the jurisdiction of such court upon which it has professed to decide. *Bolton* v. *Gladstone*, 5 East, 155 ; 1 Smith, 372 ; 2 Taunt. 85 ; 7 R. R. 674 ; 11 R. R. 532.

And if it can be discerned on the face of the sentence that the court condemned on the ground that the property was enemy's property,

the sentence is conclusive evidence in the courts here that the property was not neutral. *Ib.*

A sentence of a foreign court of admiralty is only conclusive here as to the express ground of the sentence, but not as to any of the premises (noticed in the consideration part of the sentence) that led to the adjudication. *Christie* v. *Secretan*, 8 Term Rep. 192.

The sentence of a foreign court of admiralty is evidence only of what it positively and specifically affirms in the adjudicative part of it, not of what may be gathered from it by way of inference. *Fisher* v. *Ogle*, 1 Camp. 418.

The sentence of the foreign court of admiralty, condemning a vessel for attempting to violate a blockade, is not conclusive, unless the fact upon which the condemnation proceeded appears, on the face of the sentence, free from doubt and ambiguity; it cannot be collected by mere inference, nor can it be left to uncertainty, whether the vessel was condemned upon one ground, which would be a just ground of condemnation by the law of nations, or on another ground which would only amount to a breach of the municipal regulations of the condemning country. *Dalgleish* v. *Hodgson*, 5 M. & P. 407; 7 Bing. 495; 9 L. J. (O.S.) C. P. 138.

A sentence of condemnation of a prize taken by a French privateer and carried into Spain by a French court sitting there (Spain being then a belligerent ally of France in the war against Great Britain) was valid: and such condemnation, proceeding on the ground of the property being enemy's and British, is conclusive in an action on a policy against the underwriter by the assured, who had insured it as Danish, which in fact it was, Denmark being then neutral. *Oddy* v. *Bovill*, 2 East, 473; 6 R. R. 482.

In an action on a policy of insurance on goods warranted American on board a ship from London to Virginia, a sentence of a foreign court, which, after reciting that "forasmuch as the true destination of the vessel was for the English islands, having been hired and loaded at London, and having on board eighty barrels of gunpower," declared the ship and cargo a good prize, is not conclusive evidence against the warranty of neutrality; because the special grounds assigned for the sentence do not necessarily lead to such a conclusion. *Calvert* v. *Bovill*, 7 Term Rep. 523; 4 R. R. 517.

The sentence of a prize court condemning a vessel is not conclusive as to any matter of fact which was the ground of condemnation, unless that matter of fact is clearly and certainly stated in the judgment as a ground of condemnation. *Hobbs* v. *Henning*, 17 C. B. (N.S.) 791; 34 L. J., C. P. 117; 11 Jur. (N.S.) 223; 12 L. T. 205; 13 W. R. 431.

Although the finding of a matter of fact in the judgment of a prize court may, when adduced in evidence, be conclusive evidence of the fact so found, it cannot be pleaded as an estoppel. *Ib.*

4. War Indemnity.

Who Entitled to.]—The foreign wife of a British subject is not entitled to compensation for the loss of her separate property under a treaty, providing such a compensation for British subjects, unless she has herself acquired a domicile in Great Britain at the time of her loss. A foreigner domiciled in Great Britain is, under such a treaty, entitled to claim compensation for his losses. *Conway's case*, 2 Knapp, 364.

The son of a British father who had entered into the service of France, and taken the oath of a Knight of the Order of St. Louis, is entitled to the character of a British subject, although he himself was born in France of a French mother, and had served in the French army. *Wall's case*, 3 Knapp, 13.

A person who possesses the characters both of a French subject under the municipal law of France, and of a British subject under the stat. 13 Geo. 3, c. 26, as the grandson of a natural-born British subject, although he himself and his father were born in a foreign country, is not entitled to claim compensation for the loss he has sustained from a confiscation of his property by the French government, under a treaty between Great Britain and France, giving compensation for such a loss to British subjects. *Drummond's case*, 2 Knapp, 295.

A corporation of Irishmen, existing in a foreign country, and under the control of a foreign government, must be considered as a foreign corporation, and is not therefore entitled to claim compensation for the loss of its property under a treaty, giving the right of doing so to British subjects. Semble, it makes no difference whether the purposes for which such a corporation existed were or were not contrary to the law of Ireland. *Long* v. *Claims Commissioners*, 2 Knapp, 51.

A corporation of British subjects in a foreign country, existing for objects in opposition to British law, and under the control of a foreign government, is not entitled to claim any compensation from the government of the country in which they existed, for the confiscation of their property, under a treaty giving that right to British subjects. The individual members of such a corporation are also equally incapacitated from making any claim, as British subjects, for the loss of their income, arising from the funds of such a corporation. *Daniel* v. *Claims Commissioners*, 2 Knapp, 23.

The French government having, in consequence of a decree confiscating the property of British subjects, seized the books and papers of a British mercantile house, amongst which were the obligations for certain rents the property of the house, but purchased in and standing in the name of a French subject, who was afterwards executed for high treason to France:—Held, that the partners of the house were entitled to compensation. *Genesse's case*, 2 Knapp, 345.

By the terms of French contract, rentes viagères, for two lives in succession, were after death of first life payable with all arrears to survivor. The representative of first life relieved against the loss of arrears occasioned by the revolution. *Hachett* v. *Pattle*, 6 Madd. 4.

A country re-conquered from an enemy reverts to the same state that it was in before its conquest. The British inhabitants of a part of the French dominions which was conquered by the Dutch and afterwards re-conquered by the French, ought therefore to have had, after its re-conquest, the same protection that they were entitled to under the treaty of commerce of 1786; and were awarded compensation in respect of losses, after the re-conquest, by sequestration of their property in contravention of that treaty by the French government. *Gumbes's case*, 2 Knapp, 369.

In Respect of what Matters.]—Under a treaty providing compensation for loss of movable and immovable property unduly confis-

cated:—Held, that no compensation was provided for confiscations of immovable property out of the territory of one of the contracting powers. *Webster's case*, 2 Knapp, 386.

The matrices des roles, or assessments to the land tax of the year 1791, the primary evidence required by the Convention No. 7, for the purpose of ascertaining the value of confiscated estates, not being forthcoming, it was held by the judicial committee, that the commissioners for liquidating the claims of British subjects in France were at liberty to adopt any other evidence which might appear to them most satisfactory in respect to the estate which was to be valued, such as the original purchase-money; the valuation of the parties themselves in any subsequent transactions; where there was a lease, the rack rent; the rent, allowing a certain number of years' purchase, or the sum for which the property had been sold at the time of the confiscation. *Wall's case*, 3 Knapp, 13.

A loss arising from a forced loan to a government, which is afterwards nominally repaid by it in a depreciated currency, is such a loss as entitles the lender to compensation from that government, under a treaty providing it for losses by illegal confiscation or sequestration. *Johnston's case*, 2 Knapp, 336.

In order to establish a claim for compensation for a loss, in consequence of a decree confiscating all debts belonging to British subjects, it must be shown that the confiscating government exercised some control over the debt in question. *Bourdieu's case*, 2 Knapp, 353.

The mere circumstance of a French debtor having, in consequence of a decree confiscating all debts to British subjects, made a declaration to the French government of his debt to a British creditor, is not sufficient to entitle that creditor to compensation for the loss of it, unless there is evidence of the French government having done some act respecting it. *De Tastet's case*, 2 Knapp, 358.

A loss arising from the depreciation of the currency, during the imprisonment of a British subject, does not entitle him to compensation under a treaty, providing it to British subjects for the value of their property, movable or immovable, illegally confiscated by the French government; as also for the total or partial loss of their debts, or other property illegally detained under sequestration since the year 1793. *Salvin's case*, 2 Knapp, 350.

A state having issued a decree confiscating all the debts due to the subjects of its enemy's country, held that the confiscation was complete of a debt which a subject of the confiscating state acknowledged, before the proper authorities, to be due from him to a subject of the enemy, although he was excused from actually paying it over to the state, and the decree of confiscation was consequently repealed. After the repeal of the decree of confiscation, the debtor paid into the national treasury of the confiscating state, in the name of his creditor, the amount of his debt, in the currency of the time; which, however, was very much depreciated since the date of his declaration of his debt under the decree of confiscation:—Held, that the confiscating state, having entered into a treaty to make compensation for all undue confiscations and sequestrations, were answerable for the debt in the currency at the time of the debtor's declaration, it not being a case between a debtor and creditor, but a reparation by a wrong-doer. *Pilkington* v. *Claims' Commissioners*, 2 Knapp, 7.

Whether Underwriters Entitled.]—The respondents effected with underwriters valued policies of insurance (including war risks) on a cargo, which was afterwards destroyed by the Alabama, a Confederate cruiser, and the underwriters paid to the respondents as on an actual total loss the valued amounts, which were less than the real value. The United States, out of a compensation fund created after the loss and distributed under an act of congress passed subsequently to the loss, paid to the respondents the difference between their real total loss and the sum received from the underwriters. Under the act of congress no claim was allowed for any loss for which the party injured should have received compensation from any insurer, but if such compensation should not have been equal to the loss actually suffered, allowance might be made for the difference; and no claim was allowed by or on behalf of any insurer either in his own right or in that of the party insured:—Held, that the underwriters were not entitled to recover the compensation from the respondents. *Burnand* v. *Rodocanachi*, 51 L. J., Q. B. 548; 7 App. Cas. 833; 47 L. T. 277; 31 W. R. 65—H. L. (E.)

Where satisfaction is made to shipowners under a royal proclamation, for a distribution of prizes, such of the underwriters as have paid are entitled to a restitution of the insurance money; but those who have compounded and renounced salvage are not; and the underwriters who are foreigners are entitled to the benefit of the proclamation equally with British subjects. *Blauwpot* v. *Da Costa*, 1 Eden, 130.

Surplus Funds—Remedy against.]—A., a British subject, claimed to be entitled to compensation for certain losses suffered by him through confiscation of his property in the first French Revolution. The governments of England and France entered into conventions respecting compensation to be afforded to British subjects. The English government received all the money agreed upon between the two governments as the amount of compensation, and undertook to satisfy all the claimants. An act of parliament was passed declaring how claims were to be preferred and liquidated. A. presented his claim to commissioners appointed under the act, and adopted the modes of proceeding provided by it; his claim was rejected. After payment of the claims, which were established to the satisfaction of the commissioners, a surplus remained, which, in accordance with one of the provisions of the act, was paid over to the lords of the treasury. A proceeded to make his claim afresh, under a petition of right:—Held, that he had no remedy except under the provisions of the statute. *De Bode* v. *Reg.*, 3 H. L. Cas. 449.

Lien on.]—Under the conventions made with France in 1814, funds were set apart for compensation to be awarded to English subjects whose property had been confiscated during the French Revolution:—Held, that French mortgages on such property had no lien on the compensation so awarded to an English subject. *St. Victor* v. *Devereux*, 8 Jur. 946.

Title to.]—If a party claims before the commissioners appointed under the conventions for

indemnifying British subjects for the confiscation of their property by the French revolutionary government, in a character which he really sustains, and an award is made to him in that character, this court has no jurisdiction to interfere at the suit of a party claiming to have a better title to the compensation. *Lloyd* v. *Trimlestown* (*Lord*), 4 Sim. 296.

Under the convention with France for indemnifying British subjects for the confiscation of their property by the French revolutionary government, and the act of the 59 Geo. 3, c. 31, compensation for an estate and the movable property on it was awarded by the commissioners to A. as executor and residuary legatee of B.; a bill was filed by one of the co-heiresses of the wife and children of B., all of whom had died in his lifetime, alleging that, by the then existing laws of France, the will of B. was inoperative, and that a moiety of the property did not belong to him, but to his wife, from whom it had descended to the children, and from them to the plaintiff and another person, co-heiress with her, and claiming for such co-heiress a moiety of the compensation. No claim had been duly made before the commissioners, in respect of the alleged title which the plaintiff sought to enforce; neither had there been any discussion before them as to that title; but the facts out of which it arose were disclosed or alluded to in the proceedings which led to the award:—Held, that under such circumstances, the court of chancery would not interfere to relieve the plaintiff. *Hill* v. *Reardon*, 2 Russ. 608. Affirming 2 Sim. & S. 431; 4 L. J. (O.S.) Ch. 127.

Effect of Trust, &c.]—Where a person, in whose favour an adjudication, under these conventions, has been made by the commissioners of the privy council, is affected by a trust or by fraud, the court has jurisdiction to enforce the trust, or relieve against the fraud. *Ib.*

Semble. These conventions and treaties, and the act for carrying them into effect, do not exclude the jurisdiction of a court of equity to examine and enforce equities attaching upon the compensation in the hands of the person in whose favour the award of the commissioners has been made. *Ib.*

Notwithstanding a decision of the commissioners appointed by the stat. 59 Geo. 3, c. 31, and the commissioners for liquidating the claims of British subjects on the French government, or of the privy council on appeal, in favour of a claimant, his right may be disputed, and he may be declared a trustee of the sum awarded to him for other persons showing themselves to be entitled, semble. Injunction refused, the affidavits of the plaintiffs not being positive. *S. C.* Jac. 84.

No appeal from commissioners of British claims, &c., to chancery. *Ib.*

Duty to Resort first to Fund or Property Confiscated.]—The plaintiff was guarantee to the owner of an American ship, for a merchant who freighted her to Bordeaux; she was detained there by an embargo, and dismissed by the freighter. The French government having declared themselves bound to indemnify all neutral owners for the effects of the embargo, and the plaintiff (an English subject), not being able to take advantage of that order, the defendant must endeavour to get an indemnity in France, before he can sue the plaintiff. *Cottin* v. *Blane*, 2 Anstr. 544.

The loyalists' estates in America were, under the Forfeiture Acts, to be sold for the payment of debts. This is no ground for an injunction to restrain an action here on a bond. *Kempe* v. *Antill*, 2 Bro. C. C. 11.

The plaintiff's testator's property in America being confiscated, subject to his debts, a creditor there ought first to apply to make that property available for payment of his debts before he sues him personally here. *Wright* v. *Nutt*, 3 Bro. C. C. 326; 1 H. Bl. 136.

The property of an American loyalist, having been confiscated during the American War, subject to the claims of such of his creditors as were friendly to American independence, to be made within a limited time, and in fact, according to evidence, farther restrained to inhabitants of particular state, a bill to have bond delivered up, or to compel the creditor in the first instance to resort to the fund arising from the confiscation, was dismissed on the ground, that it did not appear that creditor had the clear means of making his demand effectual against that fund. The lord chancellor, also, expressing an opinion in favour of the right to sue personally, even in that case, against the authority of *Wright* v. *Nutt*, supra. *Wright* v. *Simpson*, 6 Ves. 714.

A creditor having it in his power to obtain warrants for payment of an American loyalist's debt out of his estate there, is bound, on being referred to that property by the defendant, to make it available as far as he can; but where the creditor is not informed of that property, no laches can be imputed to him; he therefore shall not be restrained by injunction from prosecuting his suit here; although the debtors shall have liberty to make use of the creditor's name to obtain the warrants, to make them available, as far as may be. *Peters* v. *Erving*, 3 Bro. C. C. 54.

J. M.

WARD.

See INFANT.

WAREHOUSEMEN, WHARFINGER AND WHARF.

1. *Wharfs.*
2. *Rights and Liabilities.*—*See* BAILMENT.
3. *Lien.*—*See* LIEN.
4. *Delivery Orders.*—*See* SALE OF GOODS—NEGOTIABLE INSTRUMENTS.

1. WHARFS.

Nature of.]—Where the London Dock Company having built warehouses in which wines were deposited, upon payment of such a rent as they and the owners agreed upon, accepted afterwards a certificate from the board of treasury, under 43 Geo. 3, c. 132, whereby it became lawful for the importers to lodge and secure the wines there without paying the duties for them in the first instance; and it did not

appear that there was any other place in the port of London where the importers had a right to bond their wines:—Held, that such a monopoly and public interest attaching upon their property, they were bound by law to receive the goods into their warehouses for a reasonable hire and reward. *Allnutt* v. *Inglis*, 12 East, 527; 11 R. R. 482.

Wharfs must be assigned in open places only. *London Wharf's case*, 1 W. Bl. 581.

In justifying in a plea to an action for the use of a crane in a public wharf, it is sufficient to say, that "it is a public, open, and lawful wharf," without claiming the right by immemorial usage; for the public has a right to use the cranes erected on public quays. *Bolt* v. *Stennett*, 8 Term Rep. 606; 5 R. R. 486.

Market Overt.]—If the owner of goods sends them to a wharf in the borough of Southwark, where goods of the same sort are usually sold; and the wharfinger, without any authority, sells them to a bonâ fide purchaser, who duly pays for them; this is not a sale in market overt to change the property, and trover lies for the goods at the suit of the owner against the purchaser. *Wilkinson* v. *King*, 2 Camp. 335.

Landing Goods at Sufferance Wharfs.]—The acts relating to landing goods at a sufferance wharf were intended for the protection of the shipowner. *Barber* v. *Meyerstein*, 39 L. J., C. P. 187; L. R. 4 H. L. 317; 22 L. T. 808; 18 W. R. 1041.

Right of Access to River.]—The owner of land abutting on a tidal navigable river has, jure naturæ, a right of access to and from the stream wholly distinct from the right of navigation which he enjoys in common with the rest of the public. *Lyon* v. *Fishmongers' Co.*, 46 L. J., Ch. 68; 1 App. Cas. 662; 35 L. T. 569; 25 W. R. 165—H. L. (E.)

There is no distinction between the position of a riparian owner of land abutting on a tidal and that of an owner of land abutting on a non-tidal stream, as far as regards right of access from the stream to his own land, and vice versâ. *Ib.*

Such right of access is a private right distinct from the right of navigating the stream, which is common to the riparian owner and the rest of the public, and it is not to be interfered with by a licence to embark, under s. 53 of the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), but is protected by s. 179 of that act. *Ib.*

A riparian owner has a right to moor a vessel of ordinary size alongside his wharf for the purpose of loading or unloading at reasonable times and for a reasonable time. *Original Hartlepool Collieries Co.* v. *Gibb*, 46 L. J., Ch. 311; 5 Ch. D. 713; 36 L. T. 433. See also *Bell* v. *Quebec Corporation*, 49 L. J., P. C. 1; 5 App. Cas. 84.

The court will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel even though the vessel may overlap his own premises; though such would not be allowed to interfere with the proper right of access to the neighbouring premises if used as a wharf, nor to the free entrance to or exit from such premises, if used as a dock, by other vessels. *Ib.*

The plaintiffs were owners of a wharf 125 feet long on a navigable river, and of a collier boat 176 feet long, which stopped there at intervals of time for the purpose of unloading, and while there necessarily projected over part of the defendant's wharf, close to the entrance of a dock where he carried on the business of repairing ships, the wharf itself not being used. The defendant moored a raft or timber used in his business in front of his own wharf so as to interfere with the access of the collier to her berth:—Held, that the raft was an obstruction to the navigation; and that the collier had a right to come at reasonable times to, and to remain a reasonable time alongside of, the wharf of the plaintiffs, although she projected over the defendant's wharf while doing so. *Ib.*

Right to other Easements.]—A dock and an adjoining strip of land and a coal wharf were held in fee by the same person, and whenever a ship of any size was taken into the dock to be repaired her standing bowsprit projected over and across the adjoining strip of land. All the properties were put up for sale by auction under particulars of sale which stated that the dock was capable of holding two vessels of large size, and that at low water several vessels or a steamer of the largest class would safely lie on the ways for repairs; and wherein the strip of land was described as a freehold coal wharf, capable of being rendered worth a very large rental by a comparatively small outlay; but nothing was stated to show that the dock or its owners either had or were intended to have any right or privilege over the adjoining premises. The strip of land and coal wharf were sold and conveyed to the purchaser in fee absolutely and in the most unqualified manner, and under such purchaser the defendant claimed. Afterwards the dock was sold and conveyed to the purchaser thereof, under whom the plaintiff claimed:—Held, on a bill for an injunction to restrain the defendant from preventing or interfering with the plaintiff's full use and enjoyment of the dock as the same had theretofore been used by allowing the bowsprit of any vessel in the dock to overlie or overhang the strip of land and coal wharf: first, that there was no legal ground for holding that the owner of the dock retained or had, in respect of that tenement, any right or easement over the adjoining tenement of the strip of land and wharf after the sale and alienation of the latter. *Suffield* v. *Brown*, 4 De G. J. & S. 185; 3 N. R. 340; 33 L. J., Ch. 249; 10 Jur. (N.S.) 111; 9 L. T. 827; 12 W. R. 356.

Held, secondly, that the purchaser or grantee of the wharf was not to be considered as having been bound to know, at the time of his purchase, that the use of the dock would require that the bowsprits of large vessels received in it should project over the land he bought, or as having bought with notice of this necessary use of the dock, and the absolute sale and conveyance to him was not to be cut down and reduced accordingly. *Ib.*

Held, thirdly, that the easement claimed by the plaintiff was neither continuous, apparent, nor necessary. *Ib.*

The plaintiff was possessed of a wharf on the Thames, in front of which was a pile which had more than twenty years ago been driven into the bed of the river by the then occupiers of the wharf, and had remained there without interruption from the crown or the conservators of the river, and which was essential to the use and enjoyment of the wharf:—Held, the fact of the

ownership not being disputed, that the court was justified in presuming that the pile had been placed there in virtue of an easement, with the consent of the owners of the soil, and that a sufficient possession remained in the plaintiff to entitle him to maintain an action against the defendant for negligently running against and destroying the pile. *Lancaster* v. *Eve*, 5 C. B. (N.S.) 717; 28 L. J., C. P. 235; 5 Jur. (N.S.) 683; 7 W. R. 260.

By an agreement between G. and C. it was agreed "that the dock between their wharves, on the eastern side of the line of separation, shall for ever remain open as it now stands; that is to say, that neither of them shall fill it up with wharves or other incumbrances, whereby the convenience of the same may be damaged to either party":—Held, that the effect of this agreement was to create an easement that the dock should remain open as it then stood for the convenience of either party to use it as a dock; and that if it was intended that one party should have a more limited right therein than the other, such limited easement should have been created by express words. *Morton* v. *Snow*, 29 L. T. 591.

Negligence.]—A. was possessed of a wharf, and had a mast projecting therefrom over the river. B. moored his vessel at the adjoining wharf, with her bowsprit overhanging the front of A.'s wharf, and on the falling of the tide, the bowsprit of B.'s vessel, coming in contact with A.'s mast, broke it:—Held, that B. was not responsible. *Dalton* v. *Denton*, 1 C. B. (N.S.) 672; 5 W. R. 203.

Rights in Respect of Goods Infringing Trade Marks.]—The plaintiffs, who were wharfingers, warehoused certain wines. They were afterwards informed that those wines bore a spurious trade mark; that an injunction had been or would forthwith be applied for by the party injured by such mark, to restrain the plaintiffs from selling the wines; and they were requested not to part with them. The holder of the dock warrants then applied to the plaintiffs to deliver the wines to him, but they refused to do so, whereupon he brought an action against the wharfingers to recover damage for the detention of the wines. Upon a bill filed, and motion made for an injunction to restrain such action:—Held, that the plaintiffs were justified in their conduct, and the injunction should be granted. *Hunt* v. *Maniere*, 11 L. T. 469; 13 W. R. 212.

In an action to restrain the infringement of a trade mark, a wharfinger, who had received goods bearing the pirated trade mark in the ordinary course of business without any knowledge of the fraud, was made a co-defendant, and in his statement of defence, disclaimed all interest in the matter in dispute, and submitted to act as the court should direct, on having his charges for warehouse rent and his costs of the action paid or provided for. At the trial of the action he contended at the bar that the plaintiff ought not to touch the goods for the purpose of removing the trade mark without first paying his charges:—Held, that the wharfinger was entitled to be paid his costs of the action by the plaintiff, and had a lien on the goods in his possession for his warehouse charges in priority of the lien (if any) which the plaintiff might have thereon for his costs. *Moet* v. *Pickering*, 47 L. J., Ch. 527; 8 Ch. D. 372; 38 L. T. 799; 26 W. R. 637—C. A.

Agency of.]—Semble, that a wharfinger holding goods in transitu cannot turn himself into an agent for the consignee, so as to put an end to the transitus without the express authority of the consignee. *Barrow, Ex parte, Worsdell, In re*, 46 L. J., Bk. 71; 6 Ch. D. 783; 36 L. T. 325; 25 W. R. 466.

Public Wharf.]—The absentee owner and manager of a public wharf in the island of Jamaica is liable in law, having reference to the provisions of the 7 Vict. c. 57, to be sued as a public wharfinger for the negligence of his agent in the conduct of such wharf. *Lindo* v. *Barrett*, 4 W. R. 316.

Shipowners and Wharfingers.] — As to effect of the Merchant Shipping Act (25 & 26 Vict. c. 63), s. 38, on the rights of shipowners and wharfingers. See *Lowther* v. *Belfast Harbour Co.*, 13 Ir. Ch. R. 34; 17 Ir. Ch. R. 54.

Liability—Obstruction in Bed of River—Negligence.]—The appellants were the proprietors of a wharf, but, according to the finding of the house of lords, were neither owners nor lessees of the foreshore upon which their wharf abutted. Their foreman invited the respondents, owners of the vessel, to unload at a particular berth at their wharf, stating the draught of water which might be expected at a particular time, but adding, "Your pilot will tell you what to do." Some time before the top of the tide the vessel attempted to get in, though the pilot declined to incur the risk on his own account, and only expressed his willingness to do so if the captain would undertake responsibility for the consequences. There were mud deposits on the bed of the river, which formed, by the pressure of vessels successively moored to the wharf, ridges of accumulated mud. These ridges the wharfingers, by the tacit consent of the owners of the river bed, but not of right, were in the habit periodically of removing or levelling. The "Calliope," in her attempt to reach the berth, came upon one of these ridges, and her stern stuck fast in the mud, and damage was sustained to her hull for which her owners sought to make the appellants liable:—Held, that they were not so liable. *The Moorcock* (14 P. D. 64) distinguished. *The Calliope*, 60 L. J., P. 28; [1891] A. C. 11; 63 L. T. 781; 39 W. R. 641; 6 Asp. M. C. 585; 55 J. P. 357—H. L. (E.)

Persons navigating a river have a right to discharge their vessels at any convenient wharf, and when a vessel grounds and lies near a wharf for the purpose of discharging, that is a natural use of the river, and the ship's situation and the discharge are as much a matter of her concern as they are of the wharfinger's. It is erroneous, therefore, to hold the wharfinger, in such circumstances, responsible for the state of the bed of the river.—Per Lord Herschell. *Ib.*

The defendants, wharfingers, in consideration of charges for landing and storing the cargo, agreed to allow the plaintiff, a shipowner, to discharge his vessel at the defendants' jetty, which extended into the river Thames, where the vessel must necessarily ground at low water. The bed of the river adjoining the jetty was vested in the conservators. The defendants had no control over the bed of the river, and had taken no steps to ascertain whether it was or was not a safe place for a vessel to lie upon. The vessel, on grounding, sustained damage from

the uneven condition of the bed of the river adjoining the jetty :—Held, that the defendants were liable; for the use of their premises by the plaintiff could not, under the circumstances, be had without the vessel grounding, and the defendants must, therefore, be deemed to have impliedly represented that they had taken reasonable care to ascertain that the bottom of the river adjoining the jetty was in such a condition as not to cause injury to the vessel. *The Moorcock*, 58 L. J., P. 73; 14 P. D. 64; 60 L. T. 654; 37 W. R. 439; 6 Asp. M. C. 373—C. A.

See also SHIPPING, vol. xiii. col. 878 et seq.

J. M.

WARRANT.

Justices.]—*See* JUSTICE OF THE PEACE.

Of Apprehension.]—*See* CRIMINAL LAW.

Of Commitment.] — *See* ATTACHMENT OF PERSONS — CONTEMPT OF COURT — DEBTORS ACT.

Of Attorney.]—*See* WARRANT OF ATTORNEY AND COGNOVIT.

WARRANT OF ATTORNEY AND COGNOVIT.

1. *Who may Give*, 1805.
2. *Operation of*, 1807.
3. *Validity of*, 1809.
4. *Form and Execution of.*
   a. Generally, 1810.
   b. Given in Ireland to confess Judgment in England, 1811.
   c. By Joint and Several Parties, 1811.
   d. In the Case of the Death of Parties, 1812.
   e. Defeasance, 1813.
   f. Attestation, 1814.
5. *Stamping*, 1819.
6. *Filing*, 1820.
7. *Amount Secured.*
   a. Instalments, 1821.
   b. Conditions as to, 1822.
   c. The Amount itself, 1823.
   d. Continuing Security, 1825.
8. *Judgment.*
   a. Leave of Judge to Enter, 1826.
   b. Affidavit, 1828.
   c. Signing, 1833.
9. *Execution*, 1833.
10. *Setting Aside*, 1834.

1. WHO MAY GIVE.

Infants.]—A warrant of attorney given by an infant is absolutely void. *Saunderson* v. *Marr*, 1 H. Bl. 75; 2 R. R. 723.

A cognovit given by a minor, authorising an attorney to appear for him and confess an action brought against him for a precise sum for necessaries provided for him by the plaintiff, with an undertaking "not to bring any writ of error, nor do any act to prevent the plaintiff from entering up judgment or suing out execution," is bad, on three grounds: first, because an infant cannot appoint nor appear by attorney, but only by guardian; secondly, because he cannot state an account; and, thirdly, because he cannot deprive himself of his right to bring a writ of error, or any right to which he is entitled. *Olliver* v. *Woodroffe*, 4 M. & W. 650; 7 D. P. C. 166; 1 H. & H. 474; 8 L. J., Ex. 105.

And where a joint warrant of attorney is given by two or more persons, one of whom is an infant, the court will order it to be vacated as against the latter, and to stand against the other parties. *Ashlin* v. *Langton*, 4 M. & Scott, 719; 3 L. J., C. P. 264. S. P., *Motteux* v. *St. Aubin*, 2 W. Bl. 1133.

To entitle a defendant to relief from a judgment signed on a warrant of attorney, given by him for the price of goods, on the ground of infancy, he at the time keeping a shop, and acting as if of age, he ought to make out a clear case; merely swearing that he is an infant of the age of twenty years, and giving an extract from a register of births, is not sufficient for the court to act upon. *Weaver* v. *Stokes*, 4 D. P. C. 724; 1 M. & W. 203; 1 Gale, 380; 1 Tyr. & G. 512.

Married Women.]—The court refused to set aside, upon a summary application, a judgment entered up on a warrant of attorney given by a feme covert. *M'Lean* v. *Douglass*, 3 Bos. & P. 128.

The separate estate of a married woman, which she is restrained from anticipating, cannot, either directly or indirectly, be made the subject of a security. *Stanley* v. *Stanley*, 47 L. J., Ch. 256; 7 Ch. D. 589; 37 L. T. 777; 26 W. R. 310.

A warrant to confess judgment given to the person entitled to a mortgage debt by a husband and wife is of no effect so far as regards the separate estate of the wife, and a charging order cannot be obtained upon funds in court constituting the separate estate after judgment recovered against the husband and wife upon the warrant. *Ib.*

Where a feme covert, sole trader, gave a bond and a warrant of attorney, to enter up judgment, on which the plaintiff afterwards took out execution, the court set the judgment aside, as entered up without authority. *Read* v. *Jewson*, 4 Term Rep. 362.

—— **When Divorced.**]—The court on motion set aside a judgment on a warrant of attorney given by a feme covert, although she had been divorced a mensâ et thoro. *Quirthorne* v. *Blaquire*, 6 M. & S. 73.

—— **Before Marriage.**]—The court allowed judgment to be entered up against husband and wife, on a warrant of attorney given by the latter dum sola. *Hartford* v. *Mattingly*, 2 Chit. 117. S. P., *Anon.*, Lofft, 329; *Perrier* v. *Henchey*, 1 Alcock & Napier, 185.

Judgment may be entered up against a husband on a warrant of attorney given by his wife dum sola. *Higginbottom* v. *Higginbottom*, 8 D. P. C. 126; 1 W., W. & H. 407.

Where judgment is signed by mistake against a married woman alone, on a warrant of attorney given by her dum sola, a rule nisi only will be granted for vacating that judgment and signing another against the husband and wife. *Pocock* v. *Fry*, 8 D. P. C. 126; 1 W. W. & H. 408.

2. OPERATION OF.

When it may be Given.]—A cognovit may be given after process sued out, and before it is served. *Kerbey* v. *Jenkins*, 2 Tyrw. 499 ; 1 L. J., Ex. 152.

It is not necessary to declare previously to signing judgment. *Morley* v. *Hall*, 2 D. P. C. 494. S. P., *Webb* v. *Aspinall*, 7 Taunt. 701 ; 1 Moore, 428 ; 18 R. R. 631.

A cognovit given by a defendant who is in custody in execution on a judgment for debt and costs, in consideration of his discharge, is valid if a writ has been sued out to support it ; and it lies upon the party impeaching its validity to show that no writ has been sued out. *Shanley* or *Shawdy* v. *Colwell*, 6 M. & W. 543 ; 8 D. P. C. 373 ; 9 L. J., Ex. 176.

Judgment not Entered.]—The mere existence of a warrant of attorney, given under s. 87 of 1 & 2 Vict. c. 110, to enter up judgment against an insolvent debtor, has not the same effect as if a judgment had been actually entered up. *Hawker* v. *Hallewell*, 23 L. J., Ch. 778 ; 18 Jur. 783 ; 2 W. R. 605.

Bankruptcy—Sale of Real Estate.]—Where the defendant, after a judgment obtained under a warrant of attorney, took the benefit of the Insolvent Act :— Held, that the judgment creditor was a necessary party to the conveyance of the insolvent's real estate, notwithstanding the 1 & 2 Vict. c. 110, which applies only to personal estate. *Hotham* v. *Somerville*, 9 Beav. 63 ; 14 L. J., Ch. 385 ; 9 Jur. 702.

As an Answer to Action for Money Secured on it.]—A warrant of attorney is an answer to an action for money secured by it only when judgment has been entered upon it. *Davison* v. *Overend*, 6 Car. & P. 222.

When Waived.]—A subsequent assignment of goods for the sum secured by a warrant of attorney is not a waiver of such warrant. *Anon.*, 2 Chit. 423.

When given, coupled with Condition not to bring Action.]—Where, after the arrest, a party applied to a judge at chambers to be discharged out of custody ; and it being represented, that by his continuing in prison he would commit an act of bankruptcy, the judge, on the 4th of December, 1827, ordered him to be discharged out of custody as to the action, upon giving a fresh warrant of attorney, with a defeasance for payment of part on the 4th of January, and the remainder, with the interest, on the 4th of August, with liberty to issue execution for the first sum if not duly paid, and afterwards for the latter sum if default made in the payment ; and upon giving such warrant of attorney the judgment be set aside, and a mortgage to remain as security, the defendant undertaking not to bring any action for the imprisonment ; and the prisoner did not avail himself of the order :— Held, that this order embodied an absolute agreement of the parties, founded upon good consideration, that he should be forthwith discharged out of custody, and that he should bring no action for false imprisonment, and, therefore, that such an action was not maintainable. *Wentworth* v. *Bullen*, 9 B. & C. 840.

Merger.]—A promissory note was made by A. and B. payable to C., to secure advances from C. to A. After the note became due, it was agreed between C. and A., without the privity of B., that A. should execute a warrant of attorney to D., as a trustee for C., to secure the amount of the note, and a further advance made by C. to A. :—Held, that the note was not merged in the warrant of attorney. *Bell* v. *Banks*, 3 Man. & G. 258 ; 3 Scott (N.R.) 497.

When a Charge on Land.]—One borrows 70*l.* of A., and as a security gives him a warrant of attorney for a judgment in ejectment of three closes of land, upon a feigned demise for twenty years. This is a defective security, but a good agreement in equity to charge the land. *Dale* v. *Smithwick*, 2 Vern. 151.

Where one, who had joined in a bond as surety for another, afterwards gave a letter of attorney to the creditor, authorising him to take and keep possession of a rectory and glebe lands, and also of freehold lands, of which he was seised in fee, until the payment of the debt secured by the bond :—Held, that the letter of attorney operated as a charge, which did not determine, as to the freehold lands, by the death of the party giving it. *Spooner* v. *Sandilands*, 1 Y. & Coll. C. C. 390.

A warrant of attorney to confess judgment, though by such judgment the lands of the debtor may become charged, is not a charge upon land. *Lane* v. *Horlock*, 5 H. L. Cas. 580 ; 25 L. J., Ch. 253 ; 2 Jur. (N.S.) 289 ; 4 W. R. 408.

Giving—How far a Breach of Covenant "not to Incumber."]—A lease of an opera house contained covenants by the lessee, first, that he would not convert the same to any other use than for performing operas, but would use his utmost endeavours to improve the same for that use and purpose ; secondly, that he would not grant, let or charge the boxes for a longer period than one year or season, nor charge nor incumber the theatre, or the term thereof, by mortgaging or granting rent-charges, or any other incumbrance :—Held, that the latter part of covenant 2 was not broken by giving bonâ fide warrants of attorney, the defeasance of which disclosed that they were given with the intention that judgments should be entered thereon, and that such judgments should be registered, and should stand as securities for debts, upon default in payment of which by a day named execution should issue, although, by 1 & 2 Vict. c. 110, s. 13, on registration, such a judgment operates in all respects as a charge upon the lease, and also although this might be taken in execution under the judgment confessed. *Croft* v. *Lumley*, 6 H. L. Cas. 672 ; 27 L. J., Q. B. 321 ; 4 Jur. (N.S.) 903 ; 6 W. R. 523.

Aliter, if the intention of the parties was clear and manifest to evade the covenant, and charge the lease in a circuitous manner. *Ib.*

Trust during the life of H. "to pay and apply the interest and annual produce of trust property to him for his own benefit if he did not make any assignment or mortgage of, or charge upon, the same, or any part thereof, by any mode of anticipation, or do any act whereby such interest, if made payable to him without any restriction, would become payable to any other person or persons," with a gift over on the happening of any such event. H. having executed a warrant of attorney under which judgment was entered up against him :—Held, that

this, being a proceeding in invitum, did not work a forfeiture of his life interest. *Arison* v. *Holmes*, 1 Johns. & H. 530; 30 L. J., Ch. 564; 7 Jur. (N.S.) 722; 4 L. T. 617; 9 W. R. 550.

3. Validity of.

When obtained by Fraud.]—The court has summary jurisdiction over a warrant of attorney alleged to be fraudulent, on the application of any person interested in impeaching it, although such person may not be a party to the warrant of attorney itself. *Harrod* v. *Benton*, 2 M. & Ry. 130; 8 B. & C. 217; 6 L. J. (O.S.) K. B. 270.

A cognovit obtained by fraud will be set aside on motion. *Anon.*, 1 Chit. 268.

A. being indebted for rent to her landlord, the latter proposed to C., her son-in-law, to take his promissory note as security. C. said he would give an answer in a week or ten days. The landlord then asked him whether A. owed him anything; he replied that she did not, or what she did owe he considered as a gift. Within the ten days A. executed a warrant of attorney to C., upon which judgment was entered up, execution issued, and C. took possession of the goods. The court, considering the representations and conduct of A. to have been intended to defraud the landlord, set aside the warrant of attorney at his instance. *Martin* v. *Martin*, 3 B. & Ad. 934; 1 L. J., K. B. 224.

An action will not lie by the party against whom a fi. fa. has issued on a subsisting judgment, to recover the sum levied under it, on the ground that such judgment was signed on a warrant of attorney which was obtained by fraud or duress. *De Medina* v. *Grove*, 10 Q. B. 152; 15 L. J., Q. B. 287; 10 Jur. 428.

Collusion.]—Where a statute enacts that in case any person in insolvent circumstances voluntarily or by collusion with a creditor gives a confession of judgment, cognovit actionem, or warrant of attorney to confess judgment, with intent to defraud or delay his creditors, or to give undue preference to a particular creditor, pressure by such creditor is no answer to a case which alleges collusion, "collusion" in such an enactment means agreement or acting in concert. *Edison General Electric Co.* v. *Westminster and Vancouver Tramway Co.*, 66 L. J., P. C. 36; [1897] A. C. 193; 75 L. T. 438; 4 Manson, 244—P. C.

Given without Consideration.]—Where a party gives a warrant of attorney to another without consideration, in order that the latter may protect the goods of the former from execution, and judgment and execution are signed and issued against good faith, a court of law will not interfere. *Dukes* v. *Saunders*, 1 D. P. C. 522.

Where goods were vested in trustees for the benefit of infant children, the trustees refusing to act, upon which the grandmother, with whom the infant children were living, took part away and suffered a portion to remain in the possession of the stepfather on his giving a warrant of attorney, the court refused to set aside the warrant of attorney on the ground of want of consideration. *Gay* v. *Hill*, 2 B. C. Rep. 322; 5 D. & L. 422; 18 L. J., Q. B. 12; 13 Jur. 124.

Other Cases of Illegality.]—A warrant of attorney, given by an attorney to induce a party to stay proceedings against him on a rule for striking him off the roll, is illegal and void, and the court will direct it to be taken off the file and cancelled. *Kirwan* v. *Goodman*, 9 D. P. C. 330; 5 Jur. 293.

The court refused to set aside a warrant of attorney given to secure a debt, on the ground that it was obtained from the defendant by a threat of prosecution for felony, it not distinctly appearing that there was an agreement by the plaintiff, either express or necessarily implied, to abstain from prosecuting upon the security being given. *Ward* v. *Lloyd*, 6 Man. & G. 1066; 1 D. & L. 763; 7 Scott (N.R.) 499; 13 L. J., C. P. 5.

But where a charge of embezzlement was pending before a magistrate, who entertained doubts whether a partnership did not exist between the prosecutor and the accused party:—Held, that a warrant of attorney given to secure the payment of the moneys charged to be embezzled, the charge being afterwards withdrawn, was invalid, as at the time of giving it there was a charge of a criminal nature pending, which it was calculated to bring to an end. *Critchley, Ex parte*, 2 D. & L. 527; 1 B. C. Rep. 7; 15 L. J., Q. B. 124; 10 Jur. 112.

Filling in Date after Execution.]—Does not avoid the instrument. *Keane* v. *Smallbone*, 17 C. B. 179; 25 L. J., C. P. 72; 4 W. R. 11.

Must be Attested.]—It is absolutely essential that there should be an attesting witness. *Kinnersley* v. *Mussen*, 5 Taunt. 264; 14 R. R. 750. *And see* post, Attestation.

4. Form and Execution of.

a. Generally.

When Deed is Necessary.]—It seems that a warrant of attorney to release errors requires to be under seal. *Brutton* v. *Burton*, 1 Chit. 707.

A warrant of attorney need not be by deed. *Kinnersley* v. *Mussen*, 5 Taunt. 264; 14 R. R. 750.

Signing Judgment.]—A warrant of attorney to confess judgment generally of a term, is regular if the judgment is signed on a particular day of term. *Todd* v. *Gompertz*, 6 D. P. C. 296. See *Cobbold* v. *Chilver*, 1 D. (N.S.) 726; 11 L. J., C. P. 173.

Mistake in Name of Parties.]—A., as surety for B., executed a joint bond and warrant of attorney to secure an annuity to C. After the execution by A. and B. it was discovered that part of A.'s christian name had been omitted in the body of those instruments, and he re-executed them after such name had been inserted, without the knowledge of B. In an action brought against A., in K. B., on the bond, he pleaded a judgment recovered against him and B. The court of C. P. afterwards refused to set aside a joint judgment entered up on the warrant of attorney, on the application of A., as that instrument was not defeated by the insertion of his christian name, and as he had recognized the validity of the judgment in the action brought against him on the bond. *Coke* v. *Brummell*, 2 Moore, 495; 8 Taunt. 439.

A mistake in the defendant's name in a judgment upon a warrant of attorney is not amendable. *Sale* v. *Compton*, 1 Wils. 61; 2 Stra. 209

Evidence to Prove that Cognovit was Conditional.]—Parol evidence is inadmissible to prove that a cognovit, absolute in its terms, was given upon a condition that the defendant should have three months' time. *Woodman* v. *Ford*, 2 Jur. 11.

Need not be Read to Party giving it.]—It is not necessary that a warrant of attorney to confess a judgment should be read over to the party giving it. *Taylor* v. *Parkinson*, 2 H. Bl. 383.

Filling in, after Execution.]—Filling in the date of a warrant of attorney when it is left in blank after execution is not such an alteration as will avoid the instrument. *Keane* v. *Smallbone*, 17 C. B. 179; 25 L. J., C. P. 72; 4 W. R. 11.

To release Errors.]—A warrant of attorney in the ordinary form authorising the attorney to enter up judgment in the principal's name, and as his act and deed to execute a release of all errors, &c., does not authorise a release of errors in process of outlawry. *Solomon* v. *Graham*, 5 El. & Bl. 309; 24 L. J., Q. B. 332; 1 Jur. (N.S.) 1070.

b. Given in Ireland to confess Judgment in England.

Where judgment had been obtained in Ireland against a public officer, a warrant of attorney, under 6 Geo. 4, c. 42, s. 12, to confess a judgment in England for a less sum than that for which judgment was obtained in Ireland, is a nullity. *Walker* v. *Goodyere*, 7 El. & Bl. 960; 3 Jur. (N.S.) 1078; 5 W. R. 707.

By 11 & 12 Vict. c. 45, ss. 50 and 57, the official manager was brought within 6 Geo. 4, c. 42, s. 12, so that upon a judgment against him obtained in Ireland, a warrant of attorney to confess judgment in England might be given, in pursuance of 6 Geo. 4, c. 42, s. 12, which has the same effect as a judgment against the public officer. *Ib.*

c. By Joint and Several Parties.

Generally.]—Judgment cannot be entered up against two on a warrant of attorney, purporting to be an authority to confess judgment against three persons one of whom refused to execute. *Harris* v. *Wade*, 1 Chit. 322.

A warrant of attorney, under seal, executed by one person for himself and his partner, in the absence of the latter, but with his consent, is a sufficient authority for signing judgment against both. *Bratton* v. *Burton*, 1 Chit. 707.

Where a joint warrant of attorney was entered into by two persons, with an unconditional defeasance; and the plaintiff, by letter, stipulating that the money should be payable by instalments, pledged himself not to proceed against the parties unless he apprehended failure:—Held, that if he was apprehensive of the failure of one, he might enter up judgment against the other, before the first instalment became payable. *Partridge* v. *Herbert*, 1 Moore, 54; 7 Taunt. 307.

On a joint and several warrant of attorney, given by two, judgment was signed against one only; but, as the attorneys were authorised to enter up judgment against both, the court allowed it to be done. *Stoveld* v. *Eade*, 2 M. & Scott, 361.

A joint warrant of attorney, given to enter up judgment upon a joint and several bond, will not authorise the entering up judgment against the survivor only. *Gee* v. *Lane*, 15 East, 592; 13 R. R. 534.

What is Joint and Several.]—A warrant of attorney executed by two authorising attorneys to appear "for us and each of us," and to receive a declaration "for us and each of us," in an action, and after judgment entered up, "for us and in our name, and as our act and deed," to execute a release of errors, &c., is joint only, and not joint and several, and does not authorise a judgment against one of the parties executing it, but only against both. *Dalrymple* v. *Fraser*, 2 C. B. 698; 3 D. & L. 818; 15 L. J., C. P. 193.

One Party to Cognovit signing after the Others—Relation back.]—Where one of several parties to a cognovit signs after the others, his signing relates back to the time of their signing. *Perry* v. *Turner*, 1 D. P. C. 300; 2 C. & J. 89; 2 Tyr. 128; 1 L. J., Ex. 13.

d. In the Case of the Death of Parties.

As a Rule becomes a Nullity.]—A warrant of attorney is a personal authority, and dies with the person, and his executors cannot put it in force. *Short* v. *Coglin*, 1 Anst. 225.

Where a warrant of attorney authorises a person to enter up judgment against the defendant, and the defeasance states that the warrant of attorney is given to secure payment to that person, his heirs, &c., judgment cannot be entered up upon it by his executrix, as it only authorises the testator himself to enter up judgment. *Henshall* v. *Matthew*, 1 D. P. C. 217; 5 M. & P. 157; 7 Bing. 337; 9 L. J. (O.S.) C. P. 117.

The court will not allow judgment to be entered up at the instance of an executor, where the testator only has been mentioned in the warrant, although it is stated in the defeasance that his executors and administrators might enter up judgment in the event of a certain sum not being paid. *Foster* v. *Clagget*, 6 D. P. C. 524.

Where a warrant of attorney gives to an individual, and his executors and administrators, power to enter up judgment, it cannot be objected that such individual was the registered officer of a banking company under 7 Geo. 4, c. 46, s. 9; and that, therefore, the debt not surviving to his personal representative, judgment could not be entered up by the latter. *Edwards* v. *Holiday*, 9 D. P. C. 1023; 5 Jur. 989.

To more than One—Judgment may be entered up by Survivors.]—A warrant of attorney to confess a judgment to two, may be entered up for the survivor. *Futcher* v. *Smith*, 2 W. Bl. 1301. S. P., *Spong* v. *Tucker*, 1 Y. & J. 206; *Johnson* v. *Jenkins*, 1 D. P. C. 367.

For a judgment on a warrant of attorney may be entered up at the suit of, but not against, a survivor. *Raw* v. *Alderson*, 1 Moore, 145; 7 Taunt. 453; 18 R. R. 535.

Where a warrant of attorney is executed to two persons, and one dies, the survivor may enter up judgment in his own name. *Hind* v. *Kingston*, 6 D. P. C. 523.

A warrant of attorney to confess a judgment to three, and one dies, the court will permit judgment to be entered up by the survivors.

Fendall v. *May*, 2 M. & S. 76; 14 R. R. 593. S. P., *Harper* v. *Jackson*, 1 H. & W. 214.

Where a warrant of attorney is given to three, for a joint debt due to them, though no mention is made, either in the warrant or defeasance, of survivors, judgment may be entered up at the suit of the survivors. *Build* v. *Wightman*, 1 D. P. C. 545.

e. Defeasance.

What is.]—The defeasance of a warrant of attorney is not a contract, but merely a description of the object of the security and of the means of enforcing payment. *Cook* v. *Fowler*, 43 L. J., Ch. 855; L. R. 7 H. L. 27.

Not correctly stated.]—Where judgment had been signed on a warrant of attorney, the defeasance of which did not contain the true terms of the agreement upon which it was to be void, and the judgment appeared to have been signed before certain bills of exchange, for which it was given as collateral security, had become due, the court referred it to the master to ascertain what was due to the plaintiff, and ordered that, upon payment of that sum and the costs of the proceedings, the bills of exchange should be delivered up to the defendant, and satisfaction should be entered on the judgment. *Joel* v. *Dicker*, 5 D. & L. 1; 2 B. C. Rep. 127; 16 L. J., Q. B. 359; 11 Jur. 589.

An understanding between the parties that a warrant of attorney is to operate to a greater extent than the terms of the defeasance imply, cannot be allowed to be of any avail. *Bell* v. *Tidd*, 6 Jur. 59.

It is not sufficient that the defeasance shows the amount of the sum secured by the judgment; it must also notice all collateral securities by which it is secured. *Morell* v. *Dubost*, 3 Taunt. 235; 12 R. R. 644.

A warrant of attorney to confess judgment is not void for omitting to state in the defeasance a collateral security for the same debt. *Sansom* v. *Goode*, 2 B. & Ald. 568; 1 Chit. 311.

When Indorsement of Necessary.]—If a warrant of attorney is given to confess judgment absolutely for a certain sum, although it is understood between the parties that it is given only to indemnify the plaintiff against his suretyship for a smaller sum, that is not such a defeasance as needs to be indorsed, and the plaintiff needs not to defer execution till the contingency happens. *Barber* v. *Barber*, 3 Taunt. 465.

More than a year having elapsed after judgment entered up on a warrant of attorney, the defendant agreed to waive the necessity of a scire facias:—Held, that such agreement was no part of the defeasance or condition, and did not render the warrant of attorney void as against his assignees for want of enrolment. *Harmer* v. *Johnson*, 3 D. & L. 38; 14 M. & W. 336; 14 L. J., Ex. 292.

Annexed on separate Paper.]—It is no objection that part of the defeasance is written on a separate sheet of paper annexed. *Burdekin* v. *Potter*, 1 D. (N.S.) 134.

Not Inserted — Negligence of Solicitor.]—Neglect of the attorney employed to prepare a warrant of attorney to insert the defeasance on the warrant, does not avoid the security against the innocent party; but the attorney is guilty of a breach of duty imposed on him by the court, and answerable for it on motion. *Shaw* v. *Evans*, 14 East, 576. S. P., *Partridge* v. *Fraser*, 7 Taunt. 307; 1 Moore, 54.

Implied Contract contained in — Right of Action on.]—An action will not lie upon the implied contract contained in the defeasance of a warrant of attorney. *Sherborn* v. *Huntingtower (Lord)*, 13 C. B. (N.S.) 742; 11 W. R. 344.

An attempt to enforce a warrant of attorney nearly twenty years old by a motion to enter up judgment thereon having been defeated by the bankruptcy and certificate of the defendant, an action was afterwards brought upon the implied contract contained in the defeasance:—The court set aside the proceedings as being against good faith. *Ib.*

f. Attestation.

Validity.]—A defendant employed an attorney to prepare a bond and warrant for entering judgment thereon in favour of the plaintiff, who being present, employed the same attorney to enter judgment on the warrant, and the latter consented to do so; the attorney subsequently prepared the bond and warrant, and duly witnessed and attested the execution thereof by the defendant, for which he was paid by the latter; and afterwards entered judgment on the warrant for the plaintiff:—Held, that there was non-compliance with 35 & 36 Vict. c. 57, s. 23, and that the warrant and judgment entered thereon should be set aside. *Walsh* v. *Nally*, Ir. R. 11 C. L. 337.

Form of—Statement that Witness is Solicitor for Party giving.]—A cognovit attested by an attorney thus:—"Witnessed by J. B., one &c., attending for the said W. N., at his request, to, and did, inform him of the nature and effect of the above cognovit, before the execution thereof by him," is insufficient; the attestation not declaring him to be the attorney for the party, and that he subscribed his name as such. *Potter* v. *Nicholson*, 8 M. & W. 294; 9 D. P. C. 808; 10 L. J., Ex. 311.

An attorney, proposed by the plaintiff, prepared a warrant of attorney to confess judgment, explained its nature and effect to the defendant, and subscribed it as a witness, but omitted to state that he did so as "attorney for the defendant":—The court set aside the judgment which had been entered on the warrant. *Lucey* v. *Murphy*, Ir. R. 7 C. L. 494.

It is not requisite that the attorney of the defendant, in the attestation of a cognovit, should state himself to be an attorney, named by the defendant; it is sufficient, if he declares himself to be an attorney for the defendant; nor need the attorney be originally named by the defendant; it is sufficient, if the latter adopts the attorney named by the plaintiff. *Olliver* v. *Woodroffe*, 7 D. P. C. 166; 4 M. & W. 650; 8 L. J., Ex. 105.

A cognovit attested thus:—"Witnessed by me W. P., as the attorney of the said W. B., attending at the execution hereof at his request, and expressly named by him. W. P., attorney, Prescot, Lancashire," is insufficient, as not containing an express declaration that the attesting witness was the attorney for the party executing the instrument. *Hibbert* v. *Barton*, 10 M. & W. 678; 2 D. (N.S.) 434; 12 L. J., Ex. 70.

The attestation to a warrant of attorney or a cognovit must contain words which show with

certainty that the subscribing attorney is the attorney of the person executing it, and that he attests or subscribes the execution as the attorney of such person. *Elkington* v. *Holland*, 9 M. & W. 659; 1 D. (N.S.) 643.

A warrant of attorney attested as follows:—"Signed, sealed and delivered by the above-named A. B. in the presence of me, the attorney expressly named by him, and acting at his request, and by whom the above written warrant of attorney was read over, and the nature and effect thereof explained to A. B. before the execution thereof by him," and subscribed merely with the name of the attorney, is not sufficient, for not containing an express declaration that the attesting witness subscribed his name as the attorney for the party executing the instrument. *Everard* or *Edwards* v. *Poppleton*, D. & M. 322; 5 Q. B. 181; 13 L. J., Q. B. 1; 7 Jur. 991.

In an attestation it is not necessary that the precise words of 1 & 2 Vict. c. 110, s. 9, should be followed; it is enough if it appears by necessary inference that the witness attended as the attorney for the party, at his request, and that he subscribed his name as such attorney. *Lewis* v. *Kensington* (*Lord*), 2 C. B. 463; 3 D. & L. 637; 15 L. J., C. P. 100.

A warrant of attorney attested in the following form:—"Signed in the presence of me, A. J. C., and I declare myself to be the attorney of the said R. G., expressly named by him, and attending at his request, and subscribe myself accordingly," is sufficient. *Lindley* v. *Girdler*, 1 D. & L. 699; 13 L. J., Q. B. 53; 8 Jur. 61. S. P., *Knight* v. *Hasty*, 12 L. J., Q. B. 293.

So the following attestation is sufficient:—"Duly executed by the above-named R. G., in the presence of me, the undersigned S. B., attorney on behalf of R. G., expressly named by him and attending at his request: and I hereby declare, that I subscribe my name as witness to the due execution hereof by R. G., and as his attorney; and that, previous to the execution thereof by R. G., I informed him of the nature and effect thereof. Signed, S. B.," &c. *Phillips* v. *Gibbs*, 16 M. & W. 208; 4 D. & L. 275; 16 L. J., Ex. 48; 10 Jur. 971. S. P., *Holt* v. *Kershaw*, 5 D. & L. 419.

A cognovit signed by W. T., and attested thus: "Witness, J. B., of &c., attorney at law." "Signed in the presence of me, the undersigned; and I hereby certify and declare, that I am the attorney of the said W. T., and that I attended at his request, to inform him of this cognovit, and that I have informed him of the nature and effect thereof; and I hereby subscribe my name as his attorney. R. R.," is sufficiently attested, and the words "signed in the presence," &c., must be taken to refer to the signature of W. T. *Ledgard* v. *Thompson*, 11 M. & W. 40; 2 D. (N.S.) 766; 12 L. J., Ex. 229; 7 Jur. 239.

An attestation in the following form:—"Signed, sealed and delivered by the said H.H." (the defendant), "in my presence; and I declare myself to be attorney for the said H. H., and that I subscribe my name as such attorney. (Signed) G. O., solicitor," is sufficient. *Gay* v. *Hall*, 5 D. & L. 422; 2 B. C. Rep. 322; 18 L. J., Q. B. 12; 13 Jur. 124.

Held, also, that it need not appear on the face of the attestation, in express words, that the attorney attesting the defendant's signature attended at the defendant's request, and that he was named by him. *Ib.*

An attestation as follows, "Signed, sealed and delivered in the presence of me H. C., who, at the request and in the presence of the said J. H. B., J. C. and J. H. P., have set and subscribed my name as the attorney on their behalf attesting the execution hereof, having first read over and explained to them, and each of them, the nature and contents thereof," is insufficient, inasmuch as it does not by necessary implication declare the witness to be attorney for the parties executing the warrant of attorney. *Pocock* v. *Pickering*, 18 Q. B. 789; 21 L. J., Q. B. 365; 16 Jur. 760.

After Alteration in the Instrument.]—A warrant of attorney to confess judgment for 1,000*l.* was executed by the defendant, and an attestation of the execution was subscribed by an attorney. An alteration was afterwards made, by consent, in the sum, by substituting 2,000*l.*; and the defendant retraced his signature with a dry pen, and re-delivered the instrument. The attorney, who was present, wrote his initials opposite to the alteration, and drew a dry pen over the attestation, and over each letter of his own signature:—Held, that it was not duly attested. *Bailey* v. *Bellamy*, 9 D. P. C. 507.

Double Attestation.]—A double attestation (the first being insufficient) does not invalidate a cognovit. *Ledgard* v. *Thompson*, 11 M. & W. 40; 2 D. (N.S.) 766; 12 L. J., Ex. 229.

When Instrument Executed Abroad.]—If a warrant of attorney executed abroad is intended to be enforced in this country, it must be attested by an attorney, according to the form prescribed by statute. *Davis* v. *Trevanion*, 2 D. & L. 743; 14 L. J., Q. B. 138; 9 Jur. 492.

Effect of Insufficient Attestation.]—Where a warrant of attorney is not attested in the manner required by 1 & 2 Vict. c. 110, s. 9, the objection can only be made by the party executing the instrument, or some person authorized by or claiming under him. *Lewis* v. *Tankerville* (*Earl*), 11 M. & W. 109; 2 D. (N.S.) 754; 12 L. J., Ex. 234. S. P., *Hume* v. *Wellesley* (*Lord*), 8 Q. B. 521.

The provision in 1 & 2 Vict. c. 110, s. 9, is for the benefit of the defendant only, and therefore a third party, who may be prejudiced by a judgment against his debtor, cannot object that no attorney attested the execution of the warrant of attorney on which such judgment is founded. *Chipp* v. *Harris*, 5 M. & W. 430; 9 L. J., Ex. 64.

—— **Objections to, when to be Raised.**]—In applying to set aside judgment and execution on a warrant of attorney, on the ground of an invalid or informal attestation, delay is immaterial, for the warrant is a nullity; and the application may be made by the assignees of a defendant. *Cocks* v. *Edwards*, 2 D. (N.S.) 55; 7 Jur. 199. See *Hirst* v. *Hannan*, 17 Q. B. 383.

After verdict for the plaintiff, the court refused to entertain an objection to the warrant of attorney, that it was not attested. *Kemp* v. *Finden*, 12 M. & W. 421; 13 L. J., Ex. 137; 8 Jur. 65.

By what Solicitor.]—In order to make a cognovit valid, its execution must be attested by an attorney attending on behalf of the defendant, other than the attorney acting for the plaintiff.

Mason v. *Kiddle*, 5 M. & W. 513; 8 D. P. C. 207; 9 L. J., Ex. 37. S. P., *Rising* v. *Dolphin*, 8 D. P. C. 309.

Where a warrant of attorney was attested, on behalf of the defendant, by an attorney, who, besides practising on his own account, was acting at the time as clerk to another attorney, and the latter was acting as attorney both for the plaintiff and defendant in the transaction:—Held, not a sufficient attestation within 1 & 2 Vict. c. 110, s. 9. *Durrant* v. *Blurton*, 9 D. P. C. 1015.

An attorney acting on behalf of the plaintiff cannot validly attest the execution of a warrant of attorney, although named by the defendant himself, who knows him to be the plaintiff's attorney. *Cocks* v. *Edwards*, 2 D. (N.S.) 55; 7 Jur. 199.

The country agent of the plaintiff's attorney is not a competent witness to the execution of a cognovit, though expressly named by the defendant. *Mason* v. *Riddle*, 8 D. P. C. 207.

Where an attorney who attested the execution of a warrant of attorney was London agent to the plaintiff's attorney (who mentioned the name and address in town), and acted as such in filing the instrument, and made charges against the country attorney, with which he was debited:—Held, that the attorney so attesting was in substance the plaintiff's attorney, and that he could not, therefore, stand in that independent situation which the statute requires. *Pryor* v. *Swaine*, 2 D. & L. 37; 13 L. J., Q. B. 214; 8 Jur. 423.

A warrant of attorney was attested by an attorney introduced by the plaintiff, and who had on one former occasion acted professionally for the plaintiff, and who afterwards acted as the plaintiff's attorney in entering up judgment and issuing execution upon the warrant of attorney. The court set it aside. *Cooper* v. *Grant*, 12 C. B. 154; 21 L. J., C. P. 197.

If three defendants go to a particular attorney, named by the plaintiff, and give him instructions to prepare a joint warrant of attorney from them to the plaintiff, and each freely recognises the attorney as acting for him, the warrant is good. *Haigh* v. *Frost*, 7 D. P. C. 743.

Where a defendant was about to give a cognovit, and was unacquainted with any attorney, and, at his request, the plaintiff's attorney sent his clerk for one, who came and acted in that capacity for the defendant, a request to that effect being written by the plaintiff's attorney in the margin of the cognovit, the court set aside that instrument. *Barnes* v. *Pendrey*, 7 D. P. C. 747.

When there was but one attorney present who had previously acted for the plaintiff, and who, on that occasion, made out his bill to the plaintiff, but delivered it to the defendant, and was paid by him:—Held, that he was not such an attorney, acting on behalf of defendant, as required by 1 & 2 Vict. c. 110, s. 9. *Sanderson* v. *Westley*, 8 D. P. C. 412; 6 M. & W. 98; 9 L. J., Ex. 204.

The defendant having agreed to give the plaintiff a warrant of attorney to secure his debt to him, the plaintiff employed P., an attorney, to prepare it. P. called with it on the defendant, and told him it must be signed in the presence of some professional man, and that he should procure Mr. S. to attest it; and the defendant accordingly went to procure S.'s attendance, but met him in the street, when P. told him they were coming to his, S.'s office, that he might witness the execution of a warrant of attorney by the defendant. The defendant then suggested that they had better go to P.'s office, which was nearer. They went there accordingly; P. placed the paper in S.'s hands, and S. then read over and explained the warrant of attorney to the defendant, and asked him whether he wished him to witness the execution of it as his attorney. The defendant replied that he did, and then signed it, and S. attested it. P. offered to pay S. for his attendance, but he said, as it would come out of the defendant's pocket, he should make no charge; for which the defendant expressed himself obliged:—Held, that S. was not expressly named by the defendant and attending on his behalf, as to satisfy the statute; and the warrant of attorney and judgment signed thereon were set aside. *Gripper* v. *Bristow*, 6 M. & W. 807; 8 D. P. C. 797; 9 L. J., Ex. 324.

A warrant of attorney to confess judgment as a security for advances was attested in due form by an attorney acting for the defendant, and as his attorney and at his request, but who also acted for the plaintiff in the transaction. The defendant was informed that the attorney had been consulted by the plaintiff. The warrant was executed on the 6th of March, 1847, and a fi. fa. shortly afterwards issued, but was not executed. The plaintiff, after the judgment was signed, gave fresh credit to the defendant in the way of his trade. On the 28th of June, 1850, a levy was made. None of these facts were concealed. The defendant was adjudged a bankrupt on the 29th of July, 1850. A rule to set aside the warrant of attorney and all subsequent proceedings was obtained in Trinity Term, 1851:—Held, that by 1 & 2 Vict. c. 110, s. 9, the attorney acting for the plaintiff could not act as attorney for the defendant, and that the objection being made must prevail. *Hirst* v. *Hannan*, 17 Q. B. 383.

Where a cognovit had been attested on behalf of the defendant by an attorney who accompanied the plaintiff's son to the defendant's residence, and who subsequently carried the instrument to the queen's bench office to be filed, and there subscribed his name upon the back of it, as the plaintiff's attorney's agent, the court set aside the instrument. *Rice* v. *Linsted*, 7 D. P. C. 153; 6 Scott, 895.

—— **Uncertificated.**]—A warrant of attorney is sufficiently attested by an uncertificated attorney. *Holgate* v. *Slight*, 2 L. M. & P. 662; 21 L. J., Q. B. 74.

Nomination and Attendance of Solicitor.]—A warrant of attorney is not vitiated by the fact that the name of the attorney who attests it on behalf of the defendant was first suggested by the plaintiff's attorney, if he was expressly adopted by the defendant as his attorney for that purpose. *Taylor* v. *Nicholl*, 6 M. & W. 91; 8 D. P. C. 242; 9 L. J., Ex. 78.

It is not necessary that the party executing a cognovit should first name the attorney to attest the execution thereof, nor is it necessary that such attorney should be the regular attorney of the party giving the cognovit: it is sufficient if he is merely employed for the occasion, provided the person giving the cognovit shall ultimately exercise a free discretion in the adoption of him. *Pease* v. *Wells*, 8 D. P. C. 626.

Where a defendant, who is about to execute a warrant of attorney, declines the attendance of his own usual attorney, but adopts freely an

attorney suggested by the plaintiff's attorney, that is a sufficient nomination of an attorney by the defendant. *Hale* v. *Dale*, 8 D. P. C. 599.

To constitute an express naming of attorney, it is sufficient if the attorney is named by another party, and adopted by the defendant, who calls upon him to request him to attest the execution of the cognovit; and it is not necessary that he should be in the first instance named by the defendant. *Olliver* v. *Woodroffe*, 4 M. & W. 650; 7 D. P. C. 166; 8 L. J., Ex. 105.

It is not necessary that the defendant should actually nominate the attorney attesting a warrant of attorney on his behalf; it is sufficient if, of his own free will, he adopts an attorney suggested by the plaintiff. *Joel* v. *Dicker*, 5 D. & L. 1; 2 B. C. Rep. 127; 16 L. J., Q. B. 359; 11 Jur. 589.

A warrant of attorney, prepared by a law stationer, according to the instructions of the defendant himself, was attested by an attorney introduced to the defendant by the plaintiff. The defendant had written and signed an authority to the attorney to act as his attorney on the signing and executing the warrant. The attorney was named in the warrant as having authority to enter up judgment thereon, and had subsequently done so, and issued execution upon the judgment:—Held, that the attestation was good. *Levinson* v. *Syer*, 2 L. M. & P. 557; 21 L. J., Q. B. 16; 15 Jur. 1011.

Where a defendant who was about to execute a warrant of attorney, not having an attorney of his own, was introduced to one by the plaintiff's attorney, and repeated after the plaintiff's attorney these words, which occurred in the body of the warrant, "I have expressly named W. J. M., and requested him to attend on my behalf":—Held, in the absence of fraud, to be a sufficient nomination. *Walton* v. *Chandler*, 1 C. B. 307; 2 D. & L. 802; 14 L. J., C. P. 149; 9 Jur. 257.

Duty of Solicitor.]—If a defendant informs the attorney attending on his behalf that the warrant has been read over to him, and that he understands it, the attorney need not read it over and explain it to the defendant. *Taylor* v. *Nicholl*, 8 D. P. C. 242.

A cognovit need not be read over to the defendant before execution, if he is informed of its nature and effect. *Olliver* v. *Woodroffe*, 4 M. & W. 650; 7 D. P. C. 166; 8 L. J., Ex. 105.

Nor is it necessary that the attorney should be cognisant of the facts under which a warrant of attorney is given, or that he should consult with the defendant in private previously to signing; it is enough if the attorney is there, willing to give the defendant the advice if he asks it; and he cannot complain afterwards that his interests were not protected, if he withholds from the attorney the necessary information. *Joel* v. *Dicker*, 5 D. & L. 1; 2 B. C. Rep. 127; 16 L. J., Q. B. 359; 11 Jur. 589.

If an attorney, properly appointed by a defendant on his behalf, neglects his duty to his client (if without collusion with the plaintiff), it is no objection to the instrument; if, therefore (without collusion), he neglects to inform his client of the nature and effect of the warrant, that is not an objection available to the defendant. *Haigh* v. *Frost*, 7 D. P. C. 743.

5. Stamping.

When necessary.]—*See* Revenue.

Effect of not Stamping.]—A judgment signed on an unstamped warrant of attorney is not available against subsequent judgments, and will be set aside on the application of a judgment creditor. *Semple* v. *Nicholson*, 4 H. & N. 298; 28 L. J., Ex. 217.

The court will not permit a warrant of attorney to be taken off the file for the purpose of being stamped on payment of the penalty, until the judgment signed on it is first set aside. *Ib.*

No warrant of attorney will henceforth be permitted to be filed without being properly stamped. *Ib.*

Where a rule nisi was obtained to set aside the judgment and execution on a warrant of attorney, on the ground of a fraudulent preference, and where, at the time of obtaining the rule, the instrument was not properly stamped, but the defect had been remedied by affixing a proper stamp before showing cause, the court discharged the rule without costs. *Bainbridge* v. *Wildman*, 1 D. (N.S.) 774.

6. Filing.

Within Twenty-one Days—Calculation of.]—The twenty-one days are to be counted exclusively of the day of the execution of the warrant of attorney; and therefore a warrant executed on the 9th day of the month may be filed on the 30th. *Williams* v. *Burgess*, 9 D. P. C. 544; 4 P. & D. 443; 12 A. & E. 635; 10 L. J., Q. B. 10.

It was not necessary under 3 Geo. 4, c. 39, s. 3, to file a cognovit within twenty-one days, if judgment was signed within that period. *Bushell* v. *Boord*, 1 B. C. Rep. 260; 4 D. & L. 359; 16 L. J., Q. B. 57; 11 Jur. 268.

So in the case of a warrant of attorney, it was sufficient if judgment was signed within twenty-one days. *Green* v. *Wood*, 7 Q. B. 178; 14 L. J., Q. B. 217; 9 Jur. 756.

But under 12 & 13 Vict. c. 106, s. 136, a warrant of attorney to confess judgment thereon was void as against the assignees of a bankrupt, if the warrant of attorney had not been filed in the Queen's Bench within twenty-one days after the execution, with an affidavit of the time of execution, although judgment was signed within twenty-one days. *Acraman* v. *Herniman*, 16 Q. B. 999; 20 L. J., Q. B. 355; 15 Jur. 1008. See *Parker* v. *Watson*, 8 Ex. 404; 22 L. J., Ex. 167.

Affidavit of Execution.]—If a warrant of attorney is filed with an affidavit made by the attesting witness, which states that he "saw the warrant of attorney, bearing date the 25th April, 1827, duly signed, sealed, and delivered," but does not specify the day on which it was executed, the affidavit is not in conformity with the directions of the statute; and the warrant of attorney, and the judgment and execution thereon, are void as against the assignees of the defendant. *Dillon* v. *Edwards*, 2 M. & P. 550; 7 L. J. (O.S.) C. P. 110.

Where a warrant of attorney is filed in twenty-one days after execution, with an affidavit made by the attesting witness, stating that the deponent "was present on the 4th of April, 1844, and saw the within-named W. H. R. sign, seal, and as his act deliver the warrant of attorney," it is sufficiently shown that the deponent saw the defendant execute the warrant on the day and year named. *Robinson* v. *Robinson*, 3 D. & L. 134; 14 L. J., Q. B. 303; 10 Jur. 356.

Omission to File.]—By an agreement between

bankers, a customer and a surety, the surety guaranteed the balance due or to become due from the customer, subject to a limit and to a proviso empowering the surety at any time to determine by notice his liability as to subsequent dealings. The customer afterwards obtained a loan from the bank beyond the limit of the guarantee on a warrant of attorney, and simultaneously with it a second agreement was entered into between the bankers, the customer and surety, that the warrant of attorney should not prejudice or affect the former agreement, and that the bank would, at any time when requested by the surety, enter up judgment and issue execution. The bank omitted to file the warrant of attorney, and the customer became bankrupt:—Held, that by the omission to file the warrant of attorney the surety was discharged. *Watson* v. *Allcock*, 4 De G. M. & G. 242; 22 L. J., Ch. 858; 17 Jur. 568; 1 W. R. 399.

Where a cognovit not having been filed nor judgment signed or execution issued thereon within twenty-one days, pursuant to 3 Geo. 4, c. 39, and 1 & 2 Vict. c. 110, s. 60, the cognovit and the judgment and execution thereon were void as against assignees; and the latter were consequently entitled to recover the whole of the proceeds of the levy, deducting only the sum paid for taxes. *Biffin* v. *Yorke*, 5 Man. & G. 428; 6 Scott (N.R.) 222; 12 L. J., C. P. 162. S. P., *Bittleston* v. *Cooper*, 14 M. & W. 399.

Where an indenture, by virtue of which the judgment was entered up, was, in legal effect, a cognovit, or if not, was a contrivance to defeat the provisions of 3 Geo. 4, c. 39, and not having been filed with the proper officer within twenty-one days after its execution, and judgment not having been entered up within that period, as required by the statute, the court, upon application by the assignees of the obligor, who had become bankrupt, ordered the execution to be withdrawn. *Hurst* v. *Jennings*, 5 B. & C. 650; 8 D. & R. 424.

Copies.]—Where a copy of a warrant of attorney has been filed, such copy is good evidence, without proof of collation of the contents with the warrant of attorney, at least against the party filing it, and all claiming under him. *Sylvester* v. *Anthony*, 3 M. & Scott, 191; 9 Bing. 746; 2 L. J., C. P. 103.

7. Amount Secured.

a. Instalments.

Default in Payment of.]—Where defendants gave a warrant of attorney to secure a sum certain to be paid half-yearly by instalments, with interest on specified days, and that the plaintiff should be at liberty to enter up judgment thereon immediately, but no execution to be issued till default made in payment of the said sum, with interest, by the instalments and in the manner thereinbefore mentioned:—Held, that the plaintiff might issue execution for the whole on default in payment of the first instalment. *Leveridge* v. *Forty*, 1 M. & S. 706.

Under a cognovit, by which it is agreed that no judgment is to be signed or execution issued, unless default made in payment of a certain sum, with costs, by instalments, the plaintiff may sign judgment and issue execution for the whole sum, if default is made in one instalment. *Rose* v. *Tomlinson*, 3 D. P. C. 49.

Where in a cognovit it was provided that judgment should not be entered up until default should be made in the due payment of the debt, which it was subsequently declared should be paid by instalments, together with costs, to be taxed by the master as between attorney and client:—Held, that the plaintiff was entitled to enter up judgment on default being made in the payment of one of the instalments, although he had not taxed his costs, but that the taxation must take place before issuing execution. *Barrett* v. *Partington*, 7 D. P. C. 447; 5 Bing. (N.C.) 487; 7 Scott, 595; 2 Arn. 30.

b. Conditions as to.

Performance of—What is.]—A. gave a cognovit for 37*l.*, payable by monthly instalments; but if default was made in payment of any instalment, judgment was to be entered up for the whole sum, or so much as remained due; and B. agreed that A. should attend at the office of C. on the seventh day after "any notice," so that if any instalments were not paid, A. might be taken on a ca. sa. The first instalment was not paid, and judgment was entered up for the whole sum, and a ca. sa. sued out. Notice was given to B. for A. to attend at C.'s office at a certain time. A. did so, but C. gave him a week's time:—Held, that this was a complete performance of B.'s agreement; and that, if after this another notice was given for A. to attend on another day, and A. did not attend, no action would lie against B. *Turner* v. *Pyne*, 6 Car. & P. 310; 3 N. & M. 354; 1 A. & E. 34; 3 L. J., K. B. 120.

A cognovit was given, with a condition that if the ultimate decision of certain chancery suits between the parties should be for the plaintiff, the defendant should pay him 500*l.* within one month after such decision, or else execution should issue. The vice-chancellor made his decree in those suits for the plaintiff, who, at the end of a month, issued execution, the 500*l.* being unpaid. The decree had not been passed by the registrar, though the minutes had been settled; and the defendant had lodged a caveat, intending, as he stated, to appeal to the lord chancellor:—Held, that the chancery suits had not been ultimately decided within the meaning of the condition, and that the execution, consequently, was irregular. *Dummer* v. *Pitcher*, 3 B. & Ad. 347.

Where in a cognovit it is stipulated that judgment shall not be entered up until after the final hearing of a chancery suit, and the final decree or order thereupon, when, in the event of the final decree or order being in favour of the plaintiff, the judgment and execution upon the cognovit are to operate in accordance with the decree or order, and the plaintiff is to be entitled to levy for the amount decreed, and no more; the plaintiff is not authorised to enter up judgment, pending an appeal to the lord chancellor, against a final decree at the Rolls dismissing the defendant's bill. *Jones* v. *Reynolds*, 3 N. & M. 465; 1 A. & E. 384.

A defeasance to a warrant of attorney, dated 5th June, 1824, stated that it was given to secure the payment of 420*l.* (with costs of judgment, if signed) on the 5th December, 1826, and that it was agreed that the plaintiff should enter up judgment thereon at his pleasure, and issue execution:—Held, that the plaintiff was restrained by this defeasance from suing out execution before the 5th December, 1826. *Hiscocks* v. *Kemp*, 5 N. & M. 113; 3 A. & E. 676; 1 H. & W. 384.

A defendant gave a warrant of attorney to the plaintiff to secure the payment of a debt by instalments. Shortly before the first instalment was due, the defendant told the plaintiff that he feared he could not meet it, and that unless time was given him, he would make over his effects for the benefit of his creditors. An agreement was then entered into between them, that the defendant should give his acceptance for a part, and pay the rest by instalments according to his ability, so as to discharge all before April 1, 1836, and that the plaintiff should not enter up judgment, unless the defendant should dispose of his business, or become bankrupt or insolvent. The defendant paid the acceptance when due. Afterwards, and before April 1, 1836, the defendant asked the plaintiff to make him a bankrupt, in order to relieve him from his difficulties, and said that he could not pay 20*s.* in the pound, and that his assets were 200*l.* and his debts 300*l.* :—Held, that the plaintiff might enter up judgment and take out execution, the defendant appearing to be insolvent in the sense contemplated in the agreement; and that the facts stated did not show that the plaintiff, at the time of the agreement, knew the defendant to be insolvent in that sense. *Buddicombe* v. *Bond*, 4 A. & E. 332; 1 H. & W. 612.

A defendant gave a cognovit, whereby it was stipulated that no judgment should be entered up thereon, unless default should be made in payment of the debt, with interest and costs, on the 9th November; and in case the defendant made default in payment as aforesaid, the plaintiff was to be at liberty to enter up judgment and proceed to execution, and take the whole of the debt and costs, together with the costs of such judgment and execution :—Held, that no default could be made until the plaintiff had furnished the defendant with a bill of the costs, and given her notice of taxation; and not having done so, the judgment signed on the 10th November was irregular, although the defendant had paid no part of either the debt or costs. *Booth* v. *Parker*, 3 M. & W. 54; 6 D. P. C. 87; 7 L. J., Ex. 5.

Necessity of Demand before Entering up Judgment.]—Where a defeasance on a warrant of attorney stated that it was given to secure the payment of a sum on demand, and that, in case default should be made, judgment was to be entered up, an actual demand must be made, and a proposal to settle amicably does not amount to such a demand. *Nicholl* v. *Bromley*, 5 Moore, 307; 2 Br. & B. 464.

When a defeasance requires anything to be done on demand before judgment can be entered up, there must be an actual demand upon a person capable of giving a substantial answer; therefore, a demand made upon an insane person is not sufficient to authorise the judgment to be entered. The only remedy is by an application to equity. *Capper* v. *Dando*, 2 A. & E. 458; 4 N. & M. 335; 1 H. & W. 11; 4 L. J., K. B. 97.

c. The Amount itself.

Not more than Penalty in Warrant.]—Judgment cannot be entered up for more than the penalty in the warrant of attorney. *Nicholas* v. *Merrett*, 1 W. P. C. 3; 9 D. P. C. 101.

Signing Judgment for more than is mentioned in Warrant.]—Signing judgment for a sum larger than that mentioned in the warrant, is only an irregularity, which may be waived by the laches of the defendant. *Stopford* v. *Fitzgerald*, 4 D. & L. 725; 16 L. J., Q. B. 310; 11 Jur. 454.

Ascertainment of.]—A warrant of attorney having been given by defendant for 800*l.* judgment was signed thereon, and execution levied for the full amount. The defendant having died, an application was made by his executor for a rule directing that the amount due on the warrant of attorney should be ascertained, and the overplus, if any, refunded by the plaintiff. The application was made on an affidavit of the applicant, that the defendant had told him shortly before his death that he was not indebted to the plaintiff in the amount claimed :—Held, that there was no ground for the application. *Pettit* v. *Pettit*, 2 C. L. R. 73.

Costs.]—A warrant of attorney empowered the plaintiff to sign judgment and issue execution for the amount of the debt, but omitted the words "together with costs of suit." A judgment was signed for the amount of the debt and costs :—Held, that such judgment was not authorised by the warrant and was irregular. *Page* v. *South*, 2 D. & L. 108; 13 L. J., Q. B. 291.

Where a plaintiff brought an action upon an annuity deed, and afterwards took a warrant of attorney for the sum due, with a provision, that, if within a certain time the annuity was not paid, he should be at liberty to take out execution for the sum specified, together with all costs incurred for or by reason of the non-payment of the annuity :—Held, that he was not at liberty to issue execution for the costs of the action. *Delane* v. *Mott*, 2 Chit. 423.

Interest.]—A judgment creditor is entitled to interest on his debt, where the warrant of attorney authorises the judgment to be entered up for double the amount actually due. *Tunstall* v. *Trappes*, 3 Sim. 299.

Where the warrant makes no mention of interest on the principal, but the defeasance does, the court will allow execution to be issued for the principal and interest. *Shipton* v. *Shipton*, 1 D. P. C. 518. See *Atkinson* v. *Jones*, 2 A. & E. 439.

Where a warrant of attorney had been given to secure a debt and interest, the sum for which judgment was to be confessed being for the amount of the debt only, the court granted a rule to enter up judgment for the debt, and so much for interest as the master should find to be due thereon. *Chalk* v. *Walton*, 5 Man. & G. 573; 6 Scott (N.R.) 693; 1 D. & L. 39.

A memorandum indorsed on a warrant of attorney stated that it had been given to secure the payment on the 2nd of June, 1864, of a sum of money, with interest thereon at the rate of 5*l.* per cent. per month; that judgment was forthwith to be entered up, and that if the debt and interest were not paid on the day aforesaid, execution was to issue. The debt was not paid at the time appointed, and judgment was not entered up :—Held, that after the day named for payment the debt carried interest at 4*l.* per cent. per annum only. *Robinson* v. *Wood*, 18 W. R. 32.

Money was advanced by L. to H. on his acceptances at three months, bearing interest at 60*l.*

per cent., before the 17 & 18 Vict. c. 90, which abolished the usury laws, for which subsequent acceptances were given. A warrant of attorney to confess immediate judgment was given to secure the payment of these acceptances, which judgment was entered up the following day. H. was possessed of real estate of considerable value, but heavily encumbered. L. required to be furnished with the particulars of H.'s estate and its encumbrances before he would lend the money, which he investigated, but no reference was made to the estate in the warrant of attorney, or in any agreement between the parties:—Held, that the transaction was not void for usury, but was protected by the 3 & 4 Will. 4, c. 98, s. 7. *Lane* v. *Horlock*, 5 H. L. Cas. 580; 25 L. J., Ch. 253; 2 Jur. (N.S.) 289; 4 W. R. 408.

To whom Payment may be made.]—Where a cognovit is given for the payment of a sum generally, the defendant may pay either the plaintiff or his attorney. *Anon.*, 1 D. P. C. 173.

Payment of an instalment to a clerk of the plaintiff's attorney after it has become due does not bind the plaintiff. *Perry* v. *Turner*, 2 C. & J. 189; 2 Tyr. 128; 1 D. P. C. 300; 1 L. J., Ex. 13.

d. Continuing Security.

What is.]—Where there was a running account between A. and B., and the former gave the latter a warrant of attorney, with a defeasance, stating it to be given as a security for 4,000*l.* and lawful interest thereon:—Held, that it was a continuing security, applicable to any balance which might at any time be due, and was not discharged by payments exceeding 4,000*l.* between the date of the warrant of attorney and the time of entering up judgment thereon. *Woolley* v. *Jennings*, 7 D. & R. 824; 5 B. & C. 165; 2 Car. & P. 144.

Where a trader contracted a debt, gave a warrant of attorney to secure its payment specifically, and the creditor sought to enforce that security against goods of the debtor, in respect of subsequent advances made by the creditor, the court, at the instance of the assignees, set aside the proceedings of the creditor. *Bett* v. *Tidd*, 9 D. P. C. 949; 6 Jur. 59.

A., a feme sole, being about to marry B., lent him 300*l.* upon his warrant of attorney, the warrant being given to her and C., who was to act as her trustee. The defeasance showed the loan to be in contemplation of marriage, and stipulated that B. was to be possessed of the money so long as C. should please, paying interest for the same to C.; and also, that upon the request of A., C. might require payment of the principal on giving a week's notice; judgment was to be forthwith entered up, and execution was to issue on default of payment after such notice. Judgment was accordingly entered up, and the marriage solemnized. After several years had elapsed, notice was given in pursuance of the warrant, and on default a fi. fa. issued, under which the goods of B. were taken and assigned by the sheriff. B. was then adjudged bankrupt, and a rule was obtained to set aside the execution, and for the delivery of the goods to his assignee, upon the grounds that the judgment should have been revived, and that it was discharged by the subsequent marriage of A. and B.:—Held, that the execution having been suspended by the consent of the parties, the judgment did not require reviving; and that, under the circumstances of the case, the warrant of attorney, being in the nature of a marriage settlement, remained a good security for the loan, and that the execution thereupon was valid. *Dolling* v. *White*, 1 B. C. C. 170; 22 L. J., Q. B. 327; 17 Jur. 505.

Evidence to show that Security is continuing.]—A defeasance to a warrant of attorney stated that it was for securing 1,300*l.*, with interest, on the 15th April, and authorised the plaintiff, in default of payment, to issue execution for the whole amount, with costs, interest, &c. At the time the warrant was given, the plaintiff was a creditor of the defendant for 514*l.*, and liable to a further sum of 237*l.* as surety. At the period of the issuing of execution, the amount of the debt was 1,110*l.* 14*s.*, a portion of which sum consisted of bills accepted by the plaintiff for the accommodation of the defendant after the warrant of attorney had been given. The sum actually levied was 1,085*l.*:—Held, that affidavits were admissible to show that the intention was, that the warrant of attorney should be a security not only for existing debts, but also for all future advances by the plaintiff, or payments to which he should become liable, not exceeding 1,300*l.* *Robinson* v. *Robinson*, 3 D. & L. 134; 14 L. J., Q. B. 303; 10 Jur. 356.

8. JUDGMENT.

a. Leave of Judge to Enter.

Application—When Necessary.]—Where the defeasance contains a provision that it shall not be necessary to apply to the court for judgment on the instrument after the lapse of a year and a day, it is not (as such a condition is valid) necessary to make an application for judgment on the warrant. *Sherran* v. *Marshall*, 1 D. & L. 689; 13 L. J., Q. B. 66; 8 Jur. 469.

A plaintiff may enter up judgment on a cognovit given before appearance, and upon which no step has been taken for more than a year, without first giving a term's (now a calendar month's) notice, or obtaining leave. *Thompson* v. *Langridge*, 1 Ex. 351; 5 D. & L. 213; 17 L. J., Ex. 4.

—— **Where Made.**] — Application must be made to a judge at chambers, and not to the court. *Handley* v. *Roberts*, 17 Jur. 460.

When Rule for Judgment will be Granted.]—A tenant from year to year having given a warrant of attorney authorising his landlord to determine the tenancy by a notice to quit, and in default of such notice being given to sign judgment in ejectment and issue execution, the court, upon affidavit of the service of the notice, and of the expiration of the tenancy, and that the tenant refused to quit the premises, granted a rule for judgment on the warrant of attorney. *Doe* d. *Beaumont* v. *Beaumont*, 2 D. (N.S.) 972; 7 Jur. 854.

Though judgment cannot be entered up on a warrant of attorney more than one year old without leave, yet none but the defendant himself can object to any irregularity in this respect. *Jones* v. *Jones*, 1 D. & R. 558.

The court refused to allow judgment to be entered up on an old warrant of attorney, it appearing by the plaintiff's affidavit that she

was resident in an enemy's country. *De Luneville* v. *Phillips*, 2 Bos. & P. (N.R.) 97.

The court set aside a judgment on a warrant of attorney, entered up, even before the rule of H. T. 4 Will. 4, where the defendant was dead at the time of signing judgment, although in the defeasance it was stipulated that the plaintiff should, without leave of the court, be at liberty to enter up judgment, notwithstanding the defendant's death. *Heath* v. *Brindley*, 4 N. & M. 235; 2 A. & E. 365; 4 L. J., K. B. 68.

Where an instalment on a cognovit became due after the death of the defendant, the court refused to allow judgment to be entered up on the cognovit nunc pro tunc. *Blackburn* v. *Goodrick*, 9 D. P. C. 337.

It is no objection to entering up judgment, that the defendant, since the execution of it, has become insane. *Piggott* v. *Killick*, 4 D. P. C. 287; 1 H. & W. 518.

A debt having been secured by a policy of insurance effected on the life of one of the debtors, the debtors, by way of further security, executed a warrant of attorney to their creditor to enter up judgment for the debt, the defeasance of the warrant providing, that so long as the policy was kept on foot by the debtors, judgment should not be entered up, nor execution issued on the warrant. By indenture of even date with the warrant, and executed by the debtors, a similar stipulation was made as to execution on the warrant, with a further provision, that, on default by the debtors in payment of the premiums within a certain period after they should become due, the creditor might himself either keep the policy on foot, or effect a new policy in his own name, at the expense of the debtors. The debtors having failed to pay the premiums in due time, and the creditor not exercising his right to keep it on foot, the policy became forfeited. Four days afterwards the creditor, who was a director of the insurance company, paid up the premium and induced the office to renew the policy:—Held, that he was nevertheless entitled to enter up judgment, and issue execution on the warrant of attorney; and a bill by the debtors, seeking to restrain him from so doing, was dismissed. *Winthrop* v. *Murray*, 8 Hare, 214; 19 L. J., Ch. 547; 14 Jur. 302.

At what Time or of what Term.]—A warrant of attorney, dated 25th May, 1842, authorised certain attorneys to appear as "of Easter Term last past, Trinity Term now next, or any other subsequent term," "and then and there" to receive a declaration, and thereupon to confess the action, or to suffer judgment by nil dicit, or otherwise, &c. On the 27th of November, 1846, a judge's order was obtained for leave to sign judgment, and judgment was accordingly signed on the following day:—Held, that the judgment was regularly signed in pursuance of the authority by warrant of attorney, notwithstanding the Reg. Gen. H. T. 4 Will. 4, Part XI., r. 3, requiring all judgments to be "entered up of record, of the day and month, whether in term or vacation, when signed." *Alcock* v. *Sutcliffe*, 4 D. & L. 612; 1 B. C. Rep. 313; 16 L. J., Q. B. 129. S. P., *Jarvis* v. *South*, 13 M. & W. 152; 2 D. & L. 962; 13 L. J., Ex. 319; 8 Jur. 519.

In what Court.]—A warrant of attorney was directed to two attorneys of the queen's bench, and, after authorising an appearance to be entered for the defendants, the instrument omitted the words "in the said court:"—Held, that it sufficiently appeared, from the terms of the warrant, no other court being mentioned, that the proceedings were to be taken in the court of queen's bench. *Harris* or *Harrison* v. *Peck*, 2 D. & L. 106; 13 L. J., Q. B. 295; 8 Jur. 929.

Names of Parties.]—A judgment was entered up against Mr. H. under a warrant of attorney. In the judgment and warrant of attorney, he was named W. H., his proper name being W. B. H.:—Held, that the judgment was valid. *Hotham* v. *Somerville*, 9 Beav. 63; 9 Jur. 702.

Where a warrant of attorney is given to three trustees of a joint-stock bank, to secure a debt due to the bank, the judgment thereon is properly entered up in the name of the public officer under 7 Geo. 4, c. 46. *Bell* v. *Fisk*, 12 C. B. 493.

A warrant of attorney was given to A. B. and C. D., "public officers of the Yorkshire Banking Company," but not to them as public officers. The defeasance showed that the object of warrant of attorney was to secure to the plaintiffs, as public officers, money therein expressed to have been lent by them as public officers to the defendants, and such further sum as the company might advance. The affidavits showed the original debt to be unpaid, and a further sum to have been advanced by the company, but did not allege the debt to be still owing to the plaintiffs, one of them having ceased to be a public officer. The court permitted the company to enter up judgment in the names of A. B. and C. D., as individuals. *Howard* v. *Batho*, 5 D. & L. 396.

A cognovit having been given in an action brought by a public officer of a banking company, under 7 Geo. 4, c. 46, by which it was provided, that, upon default in payment of a sum of money, the plaintiff should be at liberty to enter up judgment and issue execution:—Held, to be sufficient to authorise signing judgment in the name of another public officer, upon a suggestion being entered of the removal of the original plaintiff. *Webb* v. *Taylor*, 1 D. & L. 676; 13 L. J., Q. B. 24; 8 Jur. 39.

Husband and Wife.]—A judgment on a warrant of attorney given to a wife dum sola, cannot be entered up after her marriage, without leave, though less than a year old. On application for such leave, the court requires an affidavit proving not only the marriage, but the due execution of the warrant of attorney, and the non-payment of the debt. *Metcalfe* v. *Booty*, 6 D. & R. 46; 3 L. J. (O.S.) K. B. 140.

It is necessary to obtain leave to enter up judgment against husband and wife, on a warrant of attorney executed by the wife dum sola. *Staples* v. *Purser*, 2 D. P. C. 764; 3 M. & Scott, 800.

And judgment entered up against husband and wife, upon a warrant given by wife while sole, without leave, was set aside, but not with costs. *Marder* v. *Lee*, 3 Burr. 1496.

b. Affidavit.

Title.]—Upon a motion to enter up judgment upon an old warrant of attorney, the affidavit is properly entitled in the cause in which the judgment is entered. *Bell* v. *Fisk*, 12 C. B. 493. S. P., *Sowerby* v. *Woodruff*, 1 B. & Ald. 567.

If given when no suit is pending, it need not

be entitled in any cause. *Davis* v. *Stanbury*, 3 D. P. C. 440.

An affidavit entitled "in the king's bench," but not in any cause, is sufficient. *Gregory, Ex parte*, 8 B. & C. 409.

Where a warrant of attorney was given to three persons, one of whom died, judgment was allowed to be entered up on an affidavit entitled with the names of the survivors, but not naming them survivors. *Lambert* v. *Lambert*, 5 Jur. 54.

Swearing.]—It is no objection to an affidavit sworn in Scotland, that it was taken before a justice of the peace, and not before a lord of session. *Watson* v. *Williamson*, 1 D. P. C. 607.

Must show that Defendant is Alive.]—It is necessary to show that the defendant was "alive," and not merely "seen," within a reasonable time before the application. *Chell* v. *Oldfield*, 4 D. P. C. 629.

There must be a positive affidavit that the defendant is alive, or has been seen alive within a reasonable period; mere inference is not sufficient, even though it appears that the defendant keeps out of the way. *Croft* v. *Egmont*, 8 D. P. C. 95.

—— **What is Sufficient Proof.**]—It is sufficient proof of the party being alive, to show that a cheque of his had been paid dated thirteen days before the application. *Jacobs* v. *Griffith*, 5 D. P. C. 577.

It is insufficient to swear that the deponent believes the defendant to be alive, from information which he has received, unless he also swears that he believes the information to be true. *Reeder* v. *Whip*, 5 D. P. C. 576.

It is not sufficient to show by the hearsay statement of a deponent that the defendant was alive within a reasonable time previously to the application. *Key* v. *Mountague*, 1 D. (N.S.) 853.

It is not sufficient "to swear that the defendant is now living, the deponent having seen him on the 16th instant"; for the affidavit should state that he saw him alive on the 16th instant. *Watson* v. *Matthews*, 2 D. (N.S.) 670; 12 L. J., Q. B. 139; 7 Jur. 627.

But an affidavit stating that the deponent believed the defendants to be alive, having seen and conversed with two of them, and "been in company" with the third on a recent day, is sufficient. *Howard* v. *Batho*, 5 D. & L. 396. S. P., *Powell* v. *Howard*, 6 Scott, 826; 8 L. J., C. P. 16.

Where a defendant was seen alive on the 24th of March, and a motion to enter up judgment was made on the 15th of April, the court granted the application. *O'Neill* v. *Coghlan*, 2 D. & L. 5; 13 L. J., Q. B. 204; 8 Jur. 361.

—— **Several Parties.**]—Where a warrant of attorney is joint, and not joint and several, and it is sought to enter up judgment against one of the parties giving the warrant, the affidavit must show that both are alive, and not merely the one against whom it is sought to enter up judgment. *Lot* v. *Anderson*, 1 D. (N.S.) 305.

—— **Waiver.**]—A party may by the terms of the warrant of attorney waive the necessity of an affidavit being made of his having been recently seen alive, in order to obtain leave to enter up judgment after a year and a day have elapsed. *Tripp* or *Chipp* v. *Stanley*, 5 D. & L. 262; 17 L. J., Q. B. 19; 11 Jur. 1062.

Defendant Abroad.]—Where a defendant is resident in the West Indies, judgment may be signed against him on a warrant of attorney, if seen alive four months before. *Fursey* v. *Pilkington*, 2 D. P. C. 452.

The court allowed judgment to be signed on an old warrant of attorney, the application being made on the 5th of November, although the defendant had not been seen alive since two or three days before the 1st of March previously, and then in New South Wales. *Johnson* v. *Fry*, 5 D. P. C. 215; 2 H. & W. 293.

On an affidavit stating that the last time the plaintiff had been able to obtain any intelligence of the defendant was eight months back, when he was at Newfoundland, but about to leave that island for America, and that his son and mother, who lived in this country, had declined to give any information respecting him, and that there was no other person to whom the plaintiff could apply, the court allowed judgment to be entered up against him. *Pemberton* v. *Browning*, 9 Moore, 389; 2 Bing. 204.

The court will not allow judgment to be signed against a defendant who is abroad, and has not been seen for three weeks, unless it is sworn that "it is believed that he is still alive." *Richardson* v. *Scholefield*, 2 D. (N.S.) 36; 6 Jur. 646.

An affidavit that the deponent has seen the defendant alive within three months, and that he is now residing in Paris, is insufficient, unless it also states that his residence there is unknown. *Tripp* or *Chipp* v. *Stanley*, 5 D. & L. 262; 17 L. J., Q. B. 19; 11 Jur. 1062.

Defendant Transported.]—A joint warrant of attorney having been given by two, and one of them having been transported for life, the court permitted judgment to be entered up against both, on an affidavit stating the conviction and a certificate from the home office certifying the transportation, and that no return of the convict's death had been made, and that by the practice of that office no return was made of a convict continuing alive, it being also sworn that the other person was still living. *Dalrymple* v. *Fraser*, 3 D. & L. 611.

Must show Debt Unpaid.]—An affidavit in support of a rule nisi, for entering up judgment on a warrant of attorney more than twenty years old, must show affirmatively either that the debt still remains unsatisfied, or some other facts rebutting the presumption of payment. *Hulke* v. *Pickering*, 4 D. & R. 5; 2 B. & C. 555.

An affidavit that the money is still due is necessary, unless its absence is accounted for, although the defendant has agreed that judgment shall be entered up. *Barton* v. *Turner*, 8 D. P. C. 122.

—— **What Sufficient Proof.**]—Where a warrant of attorney is given as a security to a person giving a guarantee, it is not necessary to swear that any sum is owing upon it, if it is sworn that the guarantee is still in force. *Pickering* v. *Carnell*, 8 D. P. C. 300.

An affidavit by the plaintiff's attorney, that the debt is unpaid, is sufficient, where the attorney swears that he has been employed in managing the money, and receiving and paying over the interest. *Ashman* v. *Bowdler*, 2 C. & M. 212; 4 Tyr. 84; 3 L. J., Ex. 23.

It is sufficient to prove that the money is still

due to produce an affidavit by the plaintiff's attorney's clerk that it is so due, he having received different payments on account of the warrant of attorney, and having lately seen the defendant, when he promised to pay a further instalment upon it. *Middleton* v. *Stockdale*, 1 D. (N.S.) 776.

Where the attorney negotiating the loan for which the warrant of attorney was given, still continuing the attorney of the plaintiff, deposed "that the defendant was indebted to the plaintiff in 150*l*., for money lent by the deponent on account of the plaintiff to the defendant, and that the defendant had not paid to the deponent or to the plaintiff, or, to the best of his knowledge and belief, to any person on behalf of the plaintiff, any portion of the money," and positively swore that there yet remained due and owing 150*l*., the court allowed judgment to be entered up without any affidavit from the plaintiff. *Hill* v. *Enow* or *Enoe*, 13 L. J., Q. B. 65; 7 Jur. 1038.

Discharge by Bankruptcy—Consideration.]—On an application for leave to enter up judgment on a warrant of attorney more than ten years old, it is for the plaintiff to satisfy the court that there was good consideration. And if the defendant shows a bar, primâ facie valid, as a certificate of discharge by bankruptcy, it is for the plaintiff to show sufficient ground for believing it can be avoided or defeated. *Sherborn* v. *Huntingtower* (*Lord*), 11 W. R. 145.

Where the plaintiff himself made an affidavit of the consideration, or that he had not had notice of the bankruptcy, and his attorney only made an affidavit of mere hearsay, as to gaming, which the defendant denied, the court refused leave to enter up judgment. *Ib.*

Proof of Execution of Instrument.]—On motion to enter up judgment, the subscribing witness, if any, must make affidavit at the execution. It is not sufficient for him to sign the affidavit in the character of the commissioner before whom it was sworn. *Field* v. *Bearcroft*, 2 C. & J. 217; 1 D. P. C. 308; 2 Tyr. 283; 1 L. J., Ex. 81.

Where a warrant of attorney refers to the plaintiff, "his executors and administrators," but the affidavit of execution makes no mention of "executors or administrators," the court will not allow judgment to be entered up. *Baldwin* v. *Thompson*, 2 D. P. C. 591.

—— **When Sufficient.**]—An affidavit by the plaintiff that the defendant was indebted to him on an old warrant of attorney, and that he had not paid the sum secured by it, that he saw the defendant execute it, and that the attesting witness was also present, but was now residing in France, and that the defendant was alive, is sufficient. *Taylor* v. *Leighton*, 3 M. & Scott, 423; 2 D. P. C. 746.

—— **Only Copy Filed.**]—A copy of an old warrant of attorney having been filed instead of the original, and search for the instrument itself proving ineffectual, the court, upon an affidavit of the due execution of the instrument by the attesting witness since dead, granted a rule for judgment. *Doe* d. *Beaumont* v. *Beaumont*, 2 D. (N.S.) 972; 7 Jur. 854.

On motion to set aside a judgment on the ground that the original warrant of attorney on which the judgment was founded had not been filed, in compliance with the rule of court, but a copy only:—Held, that it was incumbent on those who sought to set aside a judgment (which was of old standing) to show clearly that the omission to file the original warrant was the fault of the plaintiff or his attorney; and that, as it was consistent with the circumstances of the particular case, that the original had been tendered to the officer of the court, and that the copy, instead of the original, had been filed through his inadvertence, the application was refused. *James* v. *Heward*, 3 Q. B. 948; 3 G. & D. 264; 12 L. J., Q. B. 58; 7 Jur. 14.

—— **By Office Copies.**]—In order to obtain judgment on warrant of attorney, which has been filed pursuant to 3 Geo. 4, c. 39, ss. 1, 2, it is sufficient to prove the execution by an office copy of the affidavit of execution. *Bland* v. *Wilson*, 1 D. (N.S.) 260. S. P., *Webb* v. *Webb*, 4 D. P. C. 599.

—— **Affidavit verifying Handwriting of Attesting Witness.**]—Judgment cannot be entered up without an affidavit of an attesting witness, or an affidavit verifying his handwriting. *Jones* v. *Knight*, 1 Chit. 743.

And the acknowledgment of the defendant does not obviate the objection; but where the attesting witness is out of the jurisdiction of the court, an affidavit verifying his handwriting would be sufficient. *Appleton* v. *Bond*, 1 Chit. 744.

It is not a sufficient excuse for not producing an affidavit of the attesting witness, that an application to a person, acquainted with the witness's address, has been unsuccessful in obtaining it, although the handwriting of the defendant and of the witness to the warrant of attorney is verified. *Cope* v. *Lee*, 9 D. P. C. 102; 1 W. P. C. 37.

Where the attesting witness could not be found, judgment was allowed to be entered up on an affidavit that the defendant had acknowledged his liability, and admitted the handwriting of the witness, being informed of the purpose for which such admission was required. *Reid* v. *Forge* or *Ford*, 4 Scott (N.R.) 330; 1 D. (N.S.) 187; 3 Man. & G. 546.

Where the attesting witness had been transported seven years previously to an application to sign judgment, and no information respecting him could be obtained, the court allowed judgment to be signed on producing an affidavit of his handwriting, as well as of that of the defendant. *Edwards* v. *Penhey* or *Penny*, 2 D. (N.S.) 425; 7 Jur. 200.

—— **When Proof will be Dispensed With.**]—The affidavit of the attesting witness cannot be dispensed with merely on the ground of his illness. *Owen* v. *Holles*, 4 D. P. C. 572.

If the attesting witness cannot be found, his absence must be accounted for by affidavit, before the court will admit secondary evidence. *Waring* v. *Bowles*, 4 Taunt. 132.

If A. agrees to acknowledge an old warrant of attorney given by him, so as to enable B. to enter up judgment thereon, judgment may be entered up under a judge's order, without an affidavit of the subscribing witness. *Laing* v. *Kaine*, 2 Bos. & P. 85.

The court refused to enter up judgment where the attesting witness, an attorney of the court, refused from malice to make the necessary affidavit. *Mills* v. *Donoughoo*, 1 H. & W. 184.

c. Signing.

Production of Warrant.]—In order to sign judgment, it is indispensably necessary that the warrant itself should be produced. *Jacobs* v. *Neville*, 8 D. P. C. 125; 1 W., W. & H. 408.

But if a person who has given a warrant of attorney afterwards obtains possession of it, and refuses to give it up, judgment may be entered up on the copy of it which was filed under the statute. *Worthington* v. *Worthington*, 5 Jur. 320.

Appearance.]—The defendant gave a cognovit authorising the plaintiff's attorney to appear for him if necessary. The plaintiff's attorney signed judgment, and then entered an appearance nunc pro tunc. Judgment was set aside for irregularity. *Watson* v. *Dore*, 5 D. P. C. 584; 2 M. & W. 386.

It is no objection to a judgment on a warrant of attorney, that no appearance has been entered. *Burcham* v. *Tucker*, 8 Scott, 469.

Suggestion of Breaches Unnecessary.]—No suggestion of breaches under 8 & 9 Will. 3, c. 11, is necessary on a judgment by warrant of attorney. *Kinnersley* v. *Mussen*, 5 Taunt. 264; 14 R. R. 750. S. P., *Shaw* v. *Worcester (Marquis)*, 4 M. & P. 21; 6 Bing. 385; 8 L. J. (O.S.) C. P. 98.

And even though a bond also is given. *Austerbury* v. *Morgan*, 2 Taunt. 195.

Nor upon a warrant of attorney conditioned for payment by instalments. *Cox* v. *Rudbard*, 3 Taunt. 74.

9. Execution.

Issuing.]—The defeasance to a warrant of attorney contained an agreement, that no execution or executions should be issued upon the judgment entered up thereon until default in payment of an annuity; but that, in case of default, it should be lawful for the grantee, his executors, administrators or assigns, to sue out execution or executions thereon,—not saying from time to time. The defeasance also contained a proviso for entering satisfaction after the death of the grantor, and full payment of the annuity up to the day of his death:—Held, that the grantee was not restrained by this defeasance from issuing successive executions for arrears. *Cuthbert* v. *Dobbin*, 1 C. B. 278.

Where a warrant of attorney was given, bearing date on the face of it the 24th February, 1847, but was not in fact executed till the 20th March following, and the defeasance stated that it was given to secure the repayment of 285*l.* "on the 20th day of March next," judgment having been signed, and execution issued on the 30th March, 1847:—Held, that execution issued too soon; that the warrant of attorney must be taken to speak from the time of the execution, and not the date apparent on the face of it, in accordance with the rule laid down in Clayton's case (5 Co. Rep. 1), and therefore would not become due till the 20th March, 1848. *Browne* v. *Burton*, 5 D. & L. 289; 17 L. J., Q. B. 49; 12 Jur. 97.

Setting aside.]—An execution for more than the sum really due, but not for more than the sum authorised by the warrant of attorney, will only be set aside pro tanto for the excess. *Browne* v. *Burton*, 5 D. & L. 289; 2 B. C. Rep. 220; 12 Jur. 97.

Injunction to Restrain.]—An injunction to restrain a vendor from taking out execution on a warrant of attorney to confess judgment for the amount of the purchase money continued till the hearing. *Drake* v. *Plaistowe*, Romilly's Notes of Cases, 145.

10. Setting Aside.

In what Cases Application can be made.]—A defendant may apply to set aside a warrant of attorney, and the judgment thereon, on the ground of a non-compliances with the requisitions of the 1 & 2 Vict. c. 110, s. 9, although he has become bankrupt since the execution of the warrant. *Taylor* v. *Nicholl*, 6 M. & W. 91; 8 D. P. C. 412; 9 L. J., Ex. 78.

Where judgment has been entered up, and execution issued on a warrant of attorney, but a fiat in bankruptcy has issued against the defendant, and is still in operation, he is not therefore disqualified by want of interest from moving to set aside the execution on the ground of bad faith, though the debt, warrant and judgment are unimpeached. *Pinches* v. *Harvey*, 1 Q. B. 868; 1 G. & D. 236; 10 L. J., Q. B. 316.

A executed at Brussels, in 1843, a warrant of attorney to confess judgment, and judgment was entered on it. In 1846, a rule was obtained to set the warrant and judgment aside. There was nothing to show that A. authorised the application, except that the affidavit in support of the rule was made by a party who styled himself clerk to L., attorney for the defendant:—Held, that it ought to have appeared more expressly that the application was made on behalf of A.; and the court discharged the rule, but without costs. *Hume* v. *Wellesley (Lord)*, 8 Q. B. 521.

Where a judgment had been irregularly signed, the court would not grant a rule absolute in the first instance, to set it aside and sign a new judgment. *Bennett* v. *Simons*, 13 L. J., Q. B. 308. See *Coulson* v. *Clutterbuck*, 2 D. (N.S.) 391.

Where a defendant applied to set aside a warrant of attorney, judgment and execution, on the ground of usury, but the rule was discharged upon an objection that the applicant did not produce a verified copy of the instrument:—Held, that it was incompetent for him to come a second time, with a like motion upon the same materials, with the addition only of an affidavit verifying the warrant of attorney. *Levi* v. *Coyle*, 2 D. (N.S.) 932.

An application may be made at the instance of the defendant's assignees, where a warrant of attorney has not been attested according to the requirements of the 1 & 2 Vict. c. 110, s. 9; as the warrant is a nullity, and delay is immaterial in applying to set aside a judgment and execution signed and issued thereon. *Cocks* v. *Edwards*, 2 D. (N.S.) 55; 7 Jur. 199. See *Hirst* v. *Hannan*, 17 Q. B. 383.

Upon motion by assignees to set aside a warrant of attorney given by the bankrupt, the court will not enter upon the question whether the same was given by way of fraudulent preference. *Browne* v. *Burton*, 5 D. & L. 289; 2 B. C. Rep. 220; 17 L. J., Q. B. 49.

A warrant of attorney, as security for 560*l.* and interest, was executed by C., and by K. and F. as his sureties. Upon default in payment of interest, judgment was entered up and execution issued against K. for the principal and interest, which, with the costs, were paid by him; and he after-

wards, in an action against F., recovered one-half of the sums so paid. Subsequently F. obtained a rule to show cause why the warrant of attorney and subsequent proceedings should not be set aside on the ground that his signature was not duly attested. The court discharged the rule, on the ground that the objection should have been taken in the action for contribution. *Price* v. *Carter*, 14 L. J., Q. B. 140; 9 Jur. 637.

A woman, before her marriage in 1837, lent her future husband a sum, the repayment of which he secured to her by a warrant of attorney to confess judgment to her and S. The defeasance provided that the husband should hold the money as long as the wife pleased, paying her interest; but that S. might, upon her request, demand payment on one week's notice. Judgment was to be entered up forthwith, and execution to issue, on failure to pay after notice. Judgment was accordingly entered up, but was not afterwards revived. A demand was made in 1853, and execution issued: a few days after the sheriff's levy the husband was declared a bankrupt. The court refused on motion of the assignees to set aside the judgment, although it was insisted that the judgment was discharged or suspended by the marriage, and that, even if it was not, the execution was irregular, because the judgment had not been revived. *Dolling* v. *White*, 1 B. C. C. 170; 22 L. J., Q. B. 327; 17 Jur. 505.

When Condition attached to.]—The application for setting aside a warrant of attorney and the judgment and execution thereon, for want of the provisions of the 1 & 2 Vict. c. 110, s. 9, having been complied with, is in debito justitiæ, and the court has therefore no power to impose on the defendant, as a condition for setting it aside, that he should bring no action. *Adlam* v. *Noble*, 9 D. P. C. 322.

Staying Proceedings in Action against Sheriff.]—The court will not, on an application to set aside a warrant of attorney, and the judgment and execution thereon, direct a stay of proceedings in an action against the sheriff for an alleged false return to the execution sought to be set aside. *Cassell* v. *Glengall* (*Lord*), 5 D. P. C. 269; 2 H. & W. 313.

Affidavits supporting Application.]—An affidavit to support a rule to set aside a warrant of attorney, intitled as in a cause, with the words "plaintiff" and "defendant" added to the names of the parties, is good. *Thompson* v. *Vaux*, W. W. & D. 386.

In an application for the delivering up of a warrant of attorney, the affidavit may be intitled in a cause. *Thompson* v. *Vaux*, 5 D. P. C. 691.

J. M.

WARRANTY.

Of Horse.]—*See* SALE OF GOODS.

Of Ships.]—*See* SHIPPING.

On Insurance.]—*See* INSURANCE—SHIPPING.

In other Cases.]—*See* SALE OF GOODS—AUCTION AND AUCTIONEER.

WARREN.

See GAME.

WASTE AND TIMBER.

A. WASTE.
  1. *General Principles*, 1837.
  2. *What is*, 1838.
  3. *Tenant for Life.*
    a. Voluntary Waste, 1840.
    b. Equitable Waste.
      i. In General, 1841.
      ii. Without Impeachment of Waste, 1842.
      iii. Mansion House, 1843.
      iv. Ornamental Timber, 1844.
    c. Limitations to, without Impeachment of Waste, under Executory Trusts. *See* TRUSTS.
  4. *Permissive Waste*, 1848.

B. TIMBER.
  1. *Generally*, 1849.
  2. *Other Trees*, 1851.
  3. *Tenant for Life.*
    a. In General, 1851.
    b. Without Impeachment of Waste, 1853.
    c. Windfalls, 1854.
    d. Proceeds when Cut, 1856.
  4. *Cut by Order of Court*, 1860.

C. TENANT IN TAIL, 1861.

D. TENANT IN FEE WITH EXECUTORY DEVISE OVER, 1863.

E. TENANT IN COMMON, 1864.

F. COPYHOLDS, 1864.

G. JOINTRESS, 1865.

H. TRUSTEES, 1866.

I. MERE POSSESSOR OR TRESPASSER, 1868.

J. ACCOUNT, 1871.

K. INJUNCTION, PROCEEDINGS BY.
  1. *In General*, 1873.
  2. *Where Title Doubtful or Disputed*, 1876.
  3. *Affidavit in Support*, 1877.
  4. *Costs*, 1878.
  5. *Practice on Injunctions Generally.* *See* INJUNCTION.
  6. *At Suit of Receiver under Irish Leases.* *See* IRELAND.

L. DILAPIDATIONS, AND WASTE BY ECCLESIASTICAL PERSONS. *See* ECCLESIASTICAL LAW.

M. OPENING OR WORKING MINES. *See* COPYHOLD—MINES AND MINERALS.

N. RIGHTS OF MORTGAGEES AND MORTGAGORS. *See* MORTGAGE.

O. RIGHTS OF LANDLORDS AND TENANTS. *See* LANDLORD AND TENANT.

P. ACCOUNT, WHEN BARRED BY LAPSE OF TIME. *See* LIMITATIONS, STATUTE OF.

Q. RIGHTS AS TO TIMBER ON COPYHOLDS. *See* COPYHOLD.

R. RIGHTS AS BETWEEN VENDOR AND PURCHASER. *See* SPECIFIC PERFORMANCE.

A. WASTE.

1. GENERAL PRINCIPLES.

Who may be Restrained—At whose Suit.]—The court will restrain waste in an underlessee at the suit of the ground landlord. So against a first tenant for life, at the suit of the remainderman, notwithstanding an intermediate life estate; so, against a mortgagee (not applying the produce of timber in sinking the principal and interest), at the suit of the mortgagor; so, against a mortgagor committing waste to the prejudice of the mortgagee. *Farrant* v. *Lovel*, 3 Atk. 723.

—— **Lessee for Lives, Renewable.**]—A lessee for lives, renewable for ever, will, unless under special circumstances, be restrained from committing waste. The cases on this subject reviewed. *Coppinger* v. *Gubbins*, 3 Jo. & Lat. 397; 9 Ir. Eq. R. 304.

—— **Purchaser — Partner.**]—The court will restrain a purchaser from doing acts of waste and destruction, and will restrain a partner from doing an intentional serious injury to the partnership property. *Marshall* v. *Watson*, 25 Beav. 501.

Permanent Injury.] — The court will not interfere by injunction to prevent the cutting of hedges with a saw instead of with a hatchet or knife, and will not go into a consideration of the different modes of operation; all that it will look to being that no permanent injury to the inheritance is done. *Dunn* v. *Bryan*, Ir. R. 7 Eq. 143.

Inquiry to Inheritance.]—A court of equity will not grant an injunction to prevent waste unless there is some real and substantial injury to the inheritance. *Doherty* v. *Allman*, 3 App. Cas. 709; 39 L. T., 129; 26 W. R. 513—H. L. (Ir.)

Improvement of Property.]—The court will not refuse to restrain waste, by which the estate is not necessarily and permanently improved, on the mere ground that the party has done other acts which will benefit the estate; therefore, an injunction to restrain cutting turf will not be refused on the ground that the tenant has converted the cut-out bog into arable land. *Coppinger* v. *Gubbins*, 3 Jo. & Lat. 397; 9 Ir. Eq. R. 304.

Quære, whether the court will restrain acts of meliorating waste. *Ib.*

Waste will be restrained in chancery, although the act done may lead to the improvement of the land, if it immediately occasions any damage to the inheritance. *Ib.*

Action by Reversioner.]—To enable a reversioner to bring an action in the nature of waste, there must be an injury of a permanent nature. *Baxter* v. *Taylor*, 1 N. & M. 13; 4 B. & Ad. 72; 2 L. J., K. B. 65.

Down Land.] — The court of chancery will award a perpetual injunction to restrain waste, by ploughing, burning, breaking, or sowing of down land. *Worsley* v. *Stuart*, 4 Bro. P. C. 377.

Writ of Estrepement.]—Quære, what is the present extent and effect of the writ of estrepement. *Haigh* v. *Jagger*, 2 Coll. C. C. 231.

Limitation of Remedy.] — When after legal waste has been committed time has run so as to bar the legal remedy in respect thereof, the remedy in equity is also barred. *Higginbotham* v. *Hawkins*, 41 L. J., Ch. 828; L. R. 7 Ch. 676; 27 L. T. 328; 20 W. R. 955.

Jurisdiction.] — Where a lessee, bound by covenant not to commit waste, has committed acts of waste, for which damages merely nominal would be given, the court of chancery will not entertain a suit against him, founded on those acts of waste, where it appears that he does not contemplate committing any further waste, nor assert a right to commit it. *Doran* v. *Carroll*, 11 Ir. Ch. R. 379.

Practice—Discovery—Demurrer—Forfeiture.] —Where a tenant had cut down timber, and a bill was brought against him for a discovery, he demurred for that, as being waste, his answer would subject him to a forfeiture; demurrer allowed. *Att.-Gen.* v. *Vincent*, Bunb. 192.

2. WHAT IS.

Necessary Cutting.]— Cutting timber where necessary for the growth of underwood, not waste. *Burgess* v. *Lamb*, 16 Ves. 179.

Oak Coppice.]—All cutting of timber is not waste. In many places oak coppice is felled regularly every sixteen or eighteen years, leaving poles which are as regularly cut every second fall, i.e. every thirty-two or thirty-six years. *Bagot* v. *Bagot*, 32 Beav. 509; 2 N. R. 297; 33 L. J., Ch. 116; 9 Jur. (N.S.) 1022; 9 L. T. 217; 12 W. R. 35.

Young Trees.] — Cutting young trees under twenty years' growth, though of the kinds which may be timber by common law or by local custom, is not necessarily waste, but will be so if they are cut unseasonably, or in such a manner as to injure the reproductive power of the stools. In all cases it is a very important consideration that they have or have not been previously or usually cut. *Dunn* v. *Bryan*, Ir. R. 7 Eq. 143.

Decayed Timber.]— Cutting down decayed timber may be as much waste as cutting down any other. *Perrot* v. *Perrot*, 3 Atk. 95.

Willows.]—A tenant for years is not guilty of waste in cutting down willow trees for sale, which sprung up again from the stools, unless they serve to protect the house, or to support the bank of a stream. *Phillipps* v. *Smith*, 14 M. & W. 589; 15 L. J., Ex. 201.

Converting into Burial Ground.]—To convert

land into a cemetery is waste. *Cregan* v. *Cullen*, 16 Ir. Ch. R. 339. See also *Hunt* v. *Browne*, Sau. & Sc. 179.

Turning Meadow into Buildings.]—Held, not in nature of waste to turn meadow into buildings unless clearly injurious. *Att.-Gen.* v. *Foundling Hospital* (*Governors*), 2 Ves. J. 42; 4 Bro. C. C. 165.

Erecting New Building.]—The erection of a new building which increases the value of the property is not waste, unless it destroys the identity of the property, or impairs the evidence of title. *Jones* v. *Chappel*, 44 L. J., Ch. 658; L. R. 20 Eq. 539.

Reasonable User of Tenant.]—Semble, that an injury to or the destruction of demised premises, resulting from the use of them by the tenant in a reasonable and proper manner, having regard to the class of tenement to which they belong, is not waste. *Saner* v. *Bilton*, 47 L. J., Ch. 267; 7 Ch. D. 815; 38 L. T. 281; 26 W. R. 394.

Removing Dove-cote—Or Fixtures.]— Waste is committed by destruction of dove-cote, but not by removing presses, &c., unless fixed. *Kimpton* v. *Eve*, 2 V. & B. 349.

Leaving Land Uncultivated.]—It is not waste at common law, either wilful or permissive, to leave the land uncultivated. *Hutton* v. *Warren*, 1 M. & W. 472.

Planting Potatoes.]—Quære, whether planting grass land with potatoes is waste. *Deane* v. *Caffray*, 1 Hog. 23.

Rabbit Warren.]— To break up a rabbit warren, unless a warren by charter or prescription, is not waste at common law. *Lurting* v. *Conn*, 1 Ir. Ch. Rep. 273.

Old Meadows.]—Ploughing up an old meadow and converting it to arable is waste, and the tenant cannot give evidence, under the general issue of no waste done, that the meadow was ploughed according to the custom of the country, and to ameliorate; as the reason for altering the character of the land must be pleaded by way of justification. *Simmons* v. *Norton*, 5 M. & P. 645; 7 Bing. 640; 9 L. J. (o.s.) C. P. 185.

It cannot be decided, as a general proposition, without any exception, that the conversion of ancient meadow into arable is to be treated as waste. *St. Albans* (*Duke*) v. *Shipwith* or *Skipworth*, 8 Beav. 354; 14 L. J., Ch. 247; 9 Jur. 265.

Ploughing Up Land.]—It is not waste to plough up land held under lease, if the land was not ancient meadow or pasture at the date of the lease. *Morris* v. *Morris*, 1 Hog. 238.

In fee-simple estates a continuance in pasture for twenty years during the life of the donor impresses on land the character of ancient meadow. *Ib.*

Ploughing up Garden Produce.]—It is waste for an out-going tenant to plough up strawberry beds in full bearing, although when he entered he paid for them on a valuation to the person who occupied the premises before him; and although it may have been usual for strawberry beds to be appraised and paid for as between out-going and in-coming tenants. *Wetherell* v. *Howells*, 1 Camp. 227.

3. Tenant for Life.

a. Voluntary Waste.

Generally.]—A court of equity will not interfere, unless it is shown that there is danger from the mode in which a tenant for life in possession is dealing with the property. *Dutt* v. *Dossee*, 6 Moore, Ind. App. 433.

Collusion.]—By its inherent jurisdiction to restrain fraud, the court of chancery will, although the party may have a legal remedy, interfere to prevent waste being committed by a tenant for life in collusion with the owner of the first estate of inheritance, or by a person who unites both these characters in himself: and as such a suit may be instituted by trustees to preserve contingent remainders during the life of a tenant for life in remainder, so may it be instituted by the tenant for life in remainder himself. *Birch-Wolfe* v. *Birch*, 39 L. J., Ch. 345; L. R. 9 Eq. 683; 23 L. T. 216; 18 W. R. 594.

On the same principle, where waste has been committed by a tenant for life at a time when he was also owner of the first estate of inheritance, and when there was no one capable of bringing an action, a bill to make his estate accountable may, after his death, be brought by a tenant for life in possession. *Ib.*

But, before giving relief in a suit so instituted, the court must be satisfied that the acts of the deceased tenant for life were such as amounted to collusion between the two characters which he united in himself. *Ib.*

Taking Turf—Improvement.]— A tenant for life of farming lands let parts at low rentals, with liberty for the tenants to get turf, but under the obligation to level and prepare the surface for agricultural purposes. Large quantities of the turf, to the value of over 1,000*l.*, were taken away, but the value of the land was thereby increased for agricultural purposes:—Held, that the tenant for life was not liable to any proceedings for waste. *Harris* v. *Ekins*, 26 L. T. 827; 20 W. R. 999.

Keeping Property in Hand.]—The mere fact of a tenant for life keeping on hand for about three months part of the corpus for the alleged purpose of an eligible investment does not amount to waste, nor is in derogation of the rights of those entitled in reversion. *Dutt* v. *Dossee*, 6 Moore, Ind. App. 433.

Mines and Trees.]—One seised in fee conveys the lands and all trees and mines to trustees in fee, to the use of A. for life, remainders over; A. cannot open the mines or cut down the trees. *Whitfield* v. *Bewitt*, 2 P. Wms. 242.

Trees Wrongfully Cut.]— A tenant for life, cutting trees (not timber) wrongfully, is liable to action of waste. *Honywood* v. *Honywood*, 43 L. J., Ch. 652; L. R. 18 Eq. 306; 30 L. T. 671; 22 W. R. 749.

Statute of Gloucester.]— Quære, does the statute of Gloucester extend to tenancies for life, created by subsequent statutes? *Cockburn* v. *Hussey*, Wall. Lyn. 234.

Re-opening Mines.]—Semble, tenant for life may be entitled to recommence working abandoned or dormant mines which were not worked by the settlor. *Bagot* v. *Bagot*, 32 Beav. 509; 2 N. R. 297; 33 L. J., Ch. 116; 9 Jur. (N.S.) 1022; 9 L. T. 217; 12 W. R. 35.

Lien of Remainderman as against Mortgagee.]—O. being equitable tenant for life, mortgaged his life estate as a security to certain creditors, and afterwards committed waste by felling and selling large quantities of timber:—Held, that, as against the mortgagees and incumbrancers upon the life estate, the remaindermen had an equity to have the injury done to the inheritance made good, and had for that purpose a lien upon the rents and profits in the hands of the trustees of the settlement accrued during the life of O. *Briggs* v. *Oxford (Earl)*, 1 Jur. (N.S.) 817; 3 W. R. 588; 4 W. R. 38.

Mesne Remainder.] — A., tenant for life; remainder to B. for life, remainder over. A., though dispunishable of waste at law by reason of the mesne remainder for life, yet shall be enjoined from committing waste in a court of equity. But tenant for life, without impeachment of waste, shall not be enjoined from committing waste. *Tracy* v. *Tracy*, 1 Vern. 23.

b. Equitable Waste.

i. *In General.*

Generally.]—Doctrine of equitable waste considered. *Baker* v. *Sebright*, 49 L. J., Ch. 65; 13 Ch. D. 179; 41 L. T. 614; 28 W. R. 177.

What.]—Equitable waste is that which a prudent man would not do in the management of his own property. *Turner* v. *Wright*, Johns. 740. Affirmed, 2 De G. F. & J. 234; 29 L. J., Ch. 598; 6 Jur. (N.S.) 809; 8 W. R. 675.

Equitable waste by tenant for life is a breach of his trust, and his assets, after his death, are answerable for the same. *Ormond (Marquis)* v. *Kynnersley*, 5 Madd. 369; 21 R. R. 313.

Equitable waste has not been extended beyond trees planted or growing for ornament, as in avenues or vistas, or timber merely ornamental, viz. an extensive wood. *Burges* v. *Lamb*, 16 Ves. 174.

See also *Potts* v. *Potts*, 3 L. J. (O.S.) Ch. 176.

Principle of Doctrine as to.]—The court, by applying the doctrine of equitable waste controls and restrains the excessive use of the legal power incident to an estate unimpeachable of waste, but with reference only to the presumed will and intention of the party by whom the power was created. *Marker* v. *Marker*, 9 Hare, 1; 20 L. J., Ch. 246; 15 Jur. 663.

Doctrine as to, when Applicable.]—The doctrine of equitable waste applies equally to all cases of estates limited to go in a course of succession, whether that object is effected by creating life interests or estates in fee with executory devises over. *Turner* v. *Wright*, Johns. 740. Affirmed, 2 De G. F. & J. 234; 29 L. J., Ch. 598; 6 Jur. (N.S.) 809; 8 W. R. 675.

Injunction Against.]—The court will not maintain an injunction against equitable waste, unless it be proved that equitable waste either has been committed or is threatened. *Potts* v. *Potts*, 3 L. J. (O.S.) Ch. 176.

Where equitable waste of one kind only has been done or threatened, the injunction is not to be extended to equitable waste of other kinds. Semble, usual injunction in cases of equitable waste not extended to trees which protect the premises from the effect of the sea. *Coffin* v. *Coffin*, Jacob, 70; 23 R. R. 1.

In equitable as in legal waste, if one act of waste be established, the court will restrain equitable waste generally. *S. C.*, 6 Madd. 17; 23 R. R. 1.

Instigating Trustees to Commit.]—A bill filed against trustees and the tenant to prevent equitable waste was dismissed with costs as against the tenant, it not being shown that he had committed or intended to commit any waste, though some had been committed by the trustees at his request. *Campbell* v. *Allgood*, 17 Beav. 623.

Claim for Compensation.]—Upon a claim to compensation for equitable waste, the court does not consider whether the act complained of was or was not a sound exercise of discretion with reference to the state of the property and to the interests of the family to which it belongs, for a tenant for life has no right to alter the nature of property belonging to another person. *Leeds (Duke)* v. *Amherst (Earl)*, 2 Ph. 117; 10 Jur. 956. Affirming 14 Sim. 357; 15 L. J., Ch. 351.

ii. *Without Impeachment of Waste.*

Meaning of.]—The words "without impeachment of waste" will not permit a tenant for life to unlead a house and pull down the tiles. *Vane* v. *Barnard (Lord)*, 1 Term Rep. 56, n.

The words "without impeachment of waste" do not give a power inconsistent with an estate tail, or at least will not defeat it. *Bagshaw* v. *Spencer*, 2 Atk. 576.

Enlargement of Power.]—Power of tenant for life under general words "without impeachment for waste," not enlarged by implication from more extensive powers given to trustees for special purposes, after her death. *Downshire* v. *Sandys (Lady)*, 6 Ves. 107.

Reasonable Exercise of Right.]—The court will restrain tenants for life without impeachment of waste, to a reasonable exercise of the right. *Aston* v. *Aston*, 2 Ves. 264.

Injunction, Ground for.]—Injunction refused to restrain the father, who was tenant for life without impeachment of waste, from removing a deal floor he had placed, and young oaks he had planted, breaking up meadow land, &c. To ground such an injunction, there must be waste and spoliation, and no delay in applying for it. *Peirs* v. *Peirs*, 1 Ves. 521.

Where a bill, by the person next in remainder, charged that the tenant for life, who was dispunishable of waste, and who had power to make leases not dispunishable of waste, had demised a part of the lands to a third person, and that such person, in collusion with the tenant for life, was committing waste, by turning up, tilling,

and burning the land; and the defendant admitted the turning up, &c. but stated it was land which the tenant for life had reclaimed and laid down in grass thirty years before, the court refused to grant a motion for an injunction. Semble, that such pasture is not ancient meadow. *Davies* v. *Davies*, 2 Ir. Eq. R. 414.

A., on marriage of his son, settles a messuage on himself for life, sans waste, remainder to his son. The father, though his estate be sans waste, cannot pull down the house, nor commit any voluntary waste therein; if he does the court will grant an injunction to stay waste, and compel the father to put the messuage in as good repair as before the waste committed. *Vane* v. *Barnard* (*Lord*), 2 Vern. 738; Pre. Ch. 454; Gilb. Eq. Rep. 127; 1 Salk. 161.

Creation of Right—Revocation.]—A testator, by a codicil to his will, devised lands to trustees during the life of his daughter, without impeachment of waste, for her separate use, with restraint on anticipation. He subsequently conveyed the same and also other lands by a deed, which did not notice the codicil, to a different trustee, for the life of the daughter, but not making the trustee unimpeachable for waste, also for the separate use of the daughter, and with restraint on anticipation:—Held, that the daughter's life estate given by the codicil was revoked, with all its incidents, by the deed, and that she was impeachable of waste. *Lowndes* v. *Norton*, 33 L. J., Ch. 583; 11 L. T. 290—L.JJ.

Effect of "Strict Settlement."]—When an executory trust for the settlement of freehold estates in strict settlement directs, either expressly or by reference to the trusts of other property, that certain persons shall take life estates, the use of the words "in strict settlement" does not make the tenants for life dispunishable for waste. *Stanley* v. *Colthurst*, 39 L. J., Ch., 650; L. R. 10 Eq. 259; 23 L. T. 761; 18 W. R. 969.

iii. *Mansion-house.*

Injunction.]—Injunction granted to prevent tenant for life dispunishable for waste from pulling down a castle. *Vane* v. *Barnard* (*Lord*), 1 Salk. 161; 2 Vern. 738; Pre. Ch. 454; Gilb. Eq. Rep. 127.

A., on marriage of his son, settles a messuage on himself for life sans waste, remainder to his son; the father, though his estate for life be sans waste, cannot pull down the house nor commit any voluntary waste therein; if he does, the court will grant an injunction to stay waste, and compel the father to put the messuage in as good repair as before the waste committed. *Ib.*

Account.]—Account against the representative of tenant for life, without impeachment of waste, of dilapidations permitted by him, in and about the mansion-house, refused. *Lansdowne* v. *Lansdowne*, 1 J. & W. 522; 1 Madd. 116; 15 R. R. 225; 21 R. R. 227. See *Att.-Gen.* v. *Marlborough* (*Duke*), 3 Madd. 498; 18 R. R. 273.

A tenant for life without impeachment of waste pulled down a mansion-house, the abandonment of which had, in consequence of coal mines being thereunder, and also of the close proximity of copper works, been contemplated by the settlor (his father), and he used the materials thereof, so far as they were available for the purpose, in building, at his own expense, a new and suitable mansion-house on another part of the settled estates, where the settlor had himself, some years before the date of the settlement, made preparations for the same purpose. The settlement contained powers of sale and exchange, and of granting building leases extending over the whole of the settled estates. Upon a bill by a remainderman against the personal representative of the tenant for life, for the purpose of making the estate of the latter liable for equitable waste in having pulled down the mansion-house:—Held, that, under the circumstances of the case, the estate of the tenant for life was not chargeable with equitable waste. *Morris* v. *Morris*, 3 De G. & J. 323; 28 L. J., Ch. 329; 5 Jur. (N.S.) 229; 7 W. R. 249.

Semble, that, if any part of the materials of the old mansion-house had been sold, the estate of the tenant for life would have been liable to account. *Ib.*

Held, also, that, the answer and evidence setting up a primâ facie case to show that the whole of the personal estate of M. had been exhausted in the payment of his debts, the plaintiffs were not, after such a long lapse of time, entitled to the account prayed, without first meeting the primâ facie case set up by the answer. *S. C.*, 4 Jur. (N.S.) 964.

Receiver as Security for Re-building.]—A testator devised his estates to A. for life without impeachment for waste, "except voluntary waste in pulling down houses, and not re-building the same, or others of equal or greater value." A. pulled down the mansion-house, with the intention of forthwith building a better on the site, and was proceeding with all reasonable despatch to carry such intention into effect:—Held, that the person entitled to the next vested remainder was not entitled to have a receiver of the rents appointed in order to secure the re-building of the mansion. *Micklethwait* v. *Micklethwait*, 1 De G. & J. 504; 26 L. J., Ch. 721; 3 Jur. (N.S.) 1279; 5 W. R. 861.

iv. *Ornamental Timber.*

What is.]—A tree or trees may be highly ornamental, and yet not be entitled to the protection of the court as being planted or left standing for ornament. *Halliwell* v. *Phillips*, 4 Jur. (N.S.) 607; 6 W. R. 408.

Saplings are not within the doctrine. *Ib.*

Hedge-row trees, or any trees, however ornamental, if planted also for profit, are not within the doctrine. *Ib.*

Trees not planted or left standing exclusively for ornament are not necessarily excluded from the rule which protects ornamental timber. *Bedoyère* v. *Greville-Nugent*, 25 L. R. Ir. 143.

A testator left his mansion-house on the B. estate, went to reside on another estate, at the distance of about eight miles, pulled down the B. mansion-house, cut down some of the ornamental timber about it, turned the estate into a cover for game, and altogether acted so as to show that he had no intention that the mansion-house should be re-built:—Held, that the rest of what had originally been ornamental timber

on the B. estate was not, as between the parties claiming under the will, protected as ornamental, but might be cut by a tenant for life, whose estate was without impeachment of waste. *Micklethwait* v. *Micklethwait*, 1 De G. & J. 504; 26 L. J., Ch. 721; 3 Jur. (N.S.) 1279; 5 W. R. 861.

The testator, when he did the above acts, was only tenant for life in possession, with an ultimate reversion to himself in fee expectant on the failure or determination of a subsequent estate for life, and raising estates tail, which did not fall and determine till after his death:—Held, that, as between the parties claiming under his will, the case stood on the same footing as if he had been entitled in fee simple in possession. *Ib.*

Proper Course of Husbandry.]—A tenant for life without impeachment of waste will not be allowed to cut trees planted or left standing by any former owner, for the ornament or shelter of, or for the interception of any view from, the mansion-house, unless such trees have been ordinarily cut, or impede the growth of other ornamental timber. *Ford* v. *Tynte*, 2 De G. J. & S. 227; 3 N. R. 676; 10 Jur. (N.S.) 429; 10 L. T. 209; 12 W. R. 613.

The report of an expert, to whom a reference has been made by the court, is not final and conclusive. *Ib.*

A tenant for life sans waste will not be interfered with in the exercise of his legal powers, unless he is proceeding to use those legal powers in a manner inequitable towards those in remainder; and, therefore, he may fell and sell trees planted for ornament, if done in a proper course of husbandry. *Halliwell* v. *Phillips*, 4 Jur. (N.S.) 607; 6 W. R. 408.

A tenant for life without impeachment of waste has not a right to cut ornamental trees, though they are mature (from a mercantile point of view), nor even though they are largely decayed; and there is no legal limit to this doctrine, arising from the state or condition of the particular trees which it is proposed to cut; but if those trees are injuring others, also ornamental, which it is more desirable to preserve, the court will not, in that case, interfere with the tenant for life who cuts merely to save from destruction trees of greater value and importance. *Bedoyère* v. *Greville-Nugent*, 25 L. R. Ir. 143.

Tenant for life, with liberty to cut timber at seasonable times, is not to cut trees planted for ornament or shelter to the mansion-house. *Chamberlayne* v. *Dummer*, 3 Bro. C. C. 549; Dick. 600. And see *S. C.*, 1 Bro. C. C. 166.

Injunction.]—Injunction to stay tenant for life from committing waste by cutting trees growing for ornament. *O'Brien* v. *O'Brien*, Amb. 107; 1 Bro. C. C. 168 n.

Ornamental timber protected, though the mansion-house had been pulled down, and the bill did not complain of that act. *Morris* v. *Morris*, 15 Sim. 505; 16 L. J., Ch. 201; 11 Jur. 196.

A mansion-house, park, and pleasure grounds, with certain villas on the estates, were limited in strict settlement; and the trustees were empowered to grant building leases of the settled estates, and, at the request of the tenant for life, to pull down the mansion-house, sell the materials, and apply the proceeds in paying off incumbrances on the estates. The house was accordingly pulled down, but the tenant for life, unimpeachable of waste, was afterwards restrained from felling the ornamental timber in the park and grounds. *Wellesley* v. *Wellesley*, 6 Sim. 497.

Injunction against waste granted in favour of tenant for life, particularly as to ornamental timber, not so much upon his interest as his enjoyment. *Davies* v. *Lee*, 6 Ves. 784.

Injunction against cutting ornamental timber, upon the principle of equitable waste, extended to trees planted for the purpose of excluding objects from view. *Wheldale* v. *Wheldale*, 16 Ves. 375.

Injunction against cutting ornamental timber, confined to timber standing for ornament, or shelter; the court refusing to extend it by inserting the words "contribute to ornament." *Williams* v. *M'Namara*, 8 Ves. 70.

Without Impeachment of Waste.]—Injunction against tenant not impeachable, &c., for cutting down ornamental trees, &c. *Packington* v. *Packington*, Dick. 101.

Injunction granted to restrain tenant, not impeachable for waste, from cutting clumps of trees for ornament, two miles from house. *Downshire* (*Marquis*) v. *Sandys* (*Lord*), 6 Ves. 107.

The court, at the instance of a remainderman, restrained by injunction a tenant for life, without impeachment of waste, from cutting ornamental timber growing within a demesne, at a considerable distance from the mansion-house, some of the trees being visible from it and others not. *Bedoyère* v. *Greville-Nugent*, 25 L. R. Ir. 143.

Injunction granted to restrain tenant for life, without impeachment, from cutting timber and other trees, planted, &c., for ornament, &c., and from cutting, except in husband-like manner. *Tamworth* (*Lord*) v. *Ferrers* (*Lord*), 6 Ves. 419.

The court will restrain a tenant for life, without impeachment of waste, from cutting down trees in lines or avenues or ridings in a park, as they are for ornament; and whether trees grow naturally, or were planted, if they serve for ornament or shelter, it is the same thing. *Packington's case*, 3 Atk. 215.

Tenant for life, without impeachment, restrained from cutting timber, planted or left standing for ornament; and whether ornamental or fanciful; the protection extending beyond the mansion-house to rides through a wood at a considerable distance; but not to the whole wood, to prevent cutting other parts for repairs and sale. *Wombwell* v. *Belasyse*, cited, 6 Ves. 110 note (*a*).

Proceeds, Right to.]—Where tenant for life unimpeachable of waste, cuts and sells timber planted for ornament or shelter, the proceeds of that timber belong to the person having then the first vested estate of inheritance; and parties having intervening estates for life have no right to an account of the proceeds of the timber so cut, or to have such proceeds invested upon the same trusts with the lands. *Ormond* v. *Kynnersley*, 15 Beav. 10, n.; 7 L. J. (O.S.) Ch. 150; 8 *Id.* 67.

An equitable tenant for life, unimpeachable for waste, is entitled to the proceeds of ornamental timber cut by him, where the timber so cut is such as the court would itself direct to be cut for

the preservation and improvement of the remaining ornamental timber; but it does not follow that the court will not, at the instance of the remainderman, grant an injunction restraining the tenant for life from cutting any ornamental timber which it has become necessary and proper to cut, and direct that the cutting be done under its supervision. *Baker* v. *Sebright*, 49 L. J., Ch. 65; 13 Ch. D. 179; 41 L. T. 614; 28 W. R. 177.

—— **Assignees of Bankrupt.**]—The assignees of a bankrupt tenant for life have no right to cut ornamental timber any more than the tenant for life himself, and, if they do, the money proceeding from the sale will go to the first person entitled to the inheritance, and the assignees will be deprived of the income even during the life of the tenant for life. *Lushington* v. *Boldero*, 15 Beav. 1; 21 L. J., Ch. 49; 16 Jur. 140.

—— **Right, when Determined.**]—An estate was devised to A. for life without impeachment of waste, with remainder to his issue in tail; with remainder to B. for life without impeachment, &c.; with remainder to his issue in tail. A. had no issue, and, his assignees having committed equitable waste, it was held that the right to the produce could not be determined until the death of A., as he might have issue, who possibly would be entitled to an interest in such produce. *Lushington* v. *Boldero*, 13 Beav. 418.

Trust for Preservation, whether Enforceable.]—The case of a trust or restriction created for the preservation of ornamental timber is not like a trust for the purposes of benevolence (as to which the objects are unlimited, and no standard can be found); but, semble, is a trust or restriction which the court will endeavour to execute or enforce. *Marker* v. *Marker*, 9 Hare, 1; 20 L. J., Ch. 246; 15 Jur. 663.

There are cases in which the court may execute a trust for the application of money to purposes of taste or ornament, and in doing so may, in the absence of any prescribed standard, or if the standard be more or less indefinite, act upon the opinions of persons who are consulted by others in such matters, as it acts in other cases upon the opinions of persons of science. Semble. *Ib.*

The court may more readily act in enforcing a restriction on the exercise of the legal power in a matter of taste or ornament, where the restriction is connected with a trust, than in the common law case of equitable waste in the absence of any such trust. Semble. *Marker* v. *Marker*, 9 Hare, 1, 18; 20 L. J., Ch. 246; 15 Jur. 663.

Evidence of.]—Where an owner of an estate, with residence, purchases adjoining lands with ornamental woods, the court will not, from that fact alone, infer that he intended to be left standing for ornament all such trees as he did not in his lifetime cut down; there must be some act of dedication, e.g. planting an avenue, cutting a vista, erecting obelisks, &c. *Halliwell* v. *Phillips*, 4 Jur. (N.S.) 607; 6 W. R. 408.

Whether timber is intended for ornament, &c., by devisor of tenant for life, is to be proved from his conduct concerning it. *Lushington* v. *Boldero*, 6 Madd. 149; 22 R. R. 261.

Ornamental timber, though decayed and injurious to other trees, is not to be cut unless essential to objects of such devisor. *Ib.*

In the preservation of ornamental timber, the protection of the court is confined to timber planted and left standing for shelter or ornament; and the question, whether the protection should be extended to particular timber, is one of fact, and the determination must depend upon the evidence which can be collected to establish the fact. *Marker* v. *Marker*, 9 Hare, 1; 20 L. J., Ch. 246; 15 Jur. 663.

Measure of Right to Cut.]—What a prudent owner would do in the proper course of management is no measure of what a tenant for life without impeachment of waste may do as to cutting timber planted or left standing for ornament. *Ford* v. *Tynte*, 2 De G. J. & S. 127; 3 N. R. 676; 10 Jur. (N.S.) 429; 10 L. T. 209; 12 W. R. 613.

Damages.]—Although a reversioner is entitled as of right to have the tenant for life restrained from felling ornamental timber, yet, if he wait until after the felling of the timber, he will only be entitled to recover damages where actual damage to the reversion is proved. *Bubb* v. *Yelverton, Hastings, Ex parte*, 40 L. J., Ch. 38; L. R. 10 Eq. 465; 18 W. R. 1127, 1146.

Inquiry, Form of.]—Form of inquiry as to ornamental timber. *Baker* v. *Sebright*, 49 L. J., Ch. 65; 13 Ch. D. 179; 41 L. T. 614; 28 W. R. 177. S. P., *Ford* v. *Tynte*, supra.

The plaintiff was tenant in tail in remainder, and the defendant tenant pur autre vie of an estate settled in 1855. At the date of the settlement there was no mansion-house on the estate, but one was acquired in 1859 by exchange under a power in the settlement. The defendant felled certain trees in the vicinity of the mansion-house, marked others for cutting, and advertised a sale of timber; the plaintiff applied for an injunction:—Held, that there must be an inquiry in the form adopted in *Marker* v. *Marker* (9 Hare, 1), as to what trees could be cut without impairing the beauty of the place, or the shelter given to the mansion-house, as at the acquisition thereof in 1859; an undertaking by the plaintiff in damages, and an injunction as prayed, but conditional on the plaintiff giving such undertaking. *Ashby* v. *Hincks*, 58 L. T. 557.

4. Permissive Waste.

See Estate for Life.

When Action Lies.]—An action does not lie for permissive waste. *Gibson* v. *Wells*, 1 Bos. & P. (N.R.) 290; 2 Smith, 677; 8 R. R. 801.

—— **Tenant for Life.**]—An action for permissive waste will not lie against a tenant for life. *Barnes* v. *Dowling*, 44 L. T. 809; 45 J. P. 635, 767.

Courts of equity have no means of interfering in cases of permissive waste by a tenant for life of real estate. *Powys* v. *Blagrave*, 4 De G. M. & G. 448; 2 Eq. Rep. 1204; 24 L. J., Ch. 142; 2 W. R. 700. Affirming 1 K. & J. 495; 18 Jur. 462.

A house was devised to X. for life, subject to a condition to keep it in repair, with remainder to A. for life, with remainders over, the estates being all legal:—Held, that A. had no remedy in equity

against X. for breach of the condition. *Kinnersley* v. *Williamson*, 39 L. J., Ch. 788; 23 L. T. 39; 18 W. R. 1016.

A devise of premises for life provided that the tenant for life should keep the premises in repair. The tenant for life entered upon and enjoyed the premises during her lifetime, but left them at her death out of repair. The remainderman in fee brought an action against the executor of the tenant for life in respect of the non-repair of the premises within the period of limitation prescribed by 3 & 4 Will. 4, c. 42, s. 2, which gives a right of action against the executor of a person deceased in respect of wrongs committed by the testator to another in respect of his property:—Held, that an action of tort in respect of the permissive waste by non-repair of the premises would have lain at common law against the tenant for life in her lifetime, and consequently lay under the above-mentioned statute against her executor after her death. *Woodhouse* v. *Walker*, 49 L. J., Q. B. 609; 5 Q. B. D. 404; 42 L. T. 770; 28 W. R. 765; 44 J. P. 666.

—— Tenant by Lease.]—An action for permissive waste will not lie against a tenant by lease, who has not covenanted to repair. *Herne* v. *Benbow*, 4 Taunt. 764.

—— Tenant for Years.]—A tenant for years is liable for permissive waste. *Davies* v. *Davies*, 57 L. J., Ch. 1093; 38 Ch. D. 499; 58 L. T. 514; 36 W. R. 399.

—— Tenant from Year to Year.]—An action for permissive waste will not lie against a tenant from year to year. *Martin* v. *Gilham*, 7 A. & E. 540; 2 N. & P. 568; 7 L. J., Q. B. 11.

—— Tenant at Will.]—A tenant at will is not liable to an action for permissive waste. *Harnett* v. *Maitland*, 16 M. & W. 257; 4 D. & L. 545; 16 L. J., Ex. 134.

Implication of Trust against.]—A trust to keep premises in repair by a tenant for life will not be implied. *Powys* v. *Blagrave*, 4 De G. M. & G. 448; 2 Eq. R. 1204; 24 L. J., Ch. 142; 2 W. R. 700. Affirming 1 K. & J. 495; 18 Jur. 462.

B. TIMBER.

1. GENERALLY.

What is.]—A tree must attain a growth of twenty years before it can be deemed timber. *Dunn* v. *Bryan*, Ir. R. 7 Eq. 143.

Tenant for life, with liberty to cut timber at seasonable times, is not to cut sapling trees not fit to be cut or felled for timber. *Chamberlayne* v. *Dummer*, 3 Bro. C. C. 549; Dick. 600. S. P., v. *Dummer*, 3 Bro. C. C. 549; Dick. 600. S. P., *O'Brien* v. *O'Brien*, Amb. 107; 1 Bro. C. C. 168, n. And see *S. C.*, 1 Bro. C. C. 166.

A tenant for life, without impeachment of waste, in order to preserve the timber, assigned for valuable consideration "all timber and timber-like trees then growing and being, and which should thereafter grow and be, upon the estate":—Held, that this included both ordinary timber and that which, by the custom of the country, was considered timber and the thinnings, and the right of determining what were proper thinnings belonged to the grantees. *Gordon* v. *Woodford*, 27 Beav. 603; 29 L. J., Ch. 222; 6 Jur. (N.S.) 59; 1 L. T. 260.

D. provided, by a codicil to his will, that his wife, whom he had made a tenant for life, might cut timber for her own use and benefit, at seasonable times: what timber the tenant for life shall be restrained from cutting, quære. *Chamberlayne* v. *Dummer*, 3 Bro. C. C. 549; Dick. 600.

Chapter not being entitled to fell timber on the deanery lands, except for the purpose of repairs, a lease granted by them of certain "woods, groves, hedgerows, and springs," was construed not to include the right of felling timber; and a bill by the lessee for an account of timber felled during the lease by the lessors was dismissed with costs. *Herring* v. *St. Paul's (Dean)*, 3 Swanst. 492; 2 Wils. Ch. 1; 19 R. R. 259.

In a purchase, where timber is agreed to be valued, the custom of the country makes those trees timber which in their nature are not so; as birch, beech, etc. Pollard trees, if the bodies are sound, to be valued as timber; walnut trees, where of considerable value, to be estimated as timber. Where trees are of value, and the parties cannot agree in the valuation of them as timber, the court will send it to be tried, whether, by the custom of the country, any and which of these are timber trees. *Chandos (Duke)* v. *Talbot*, 2 P. Wms. 606.

Where beech is admitted to be timber by the custom of the country, the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties and privileges of timber at twenty years' growth. *Aubrey* v. *Fisher*, 10 East, 446.

When Ratable.]—Beech trees, though looked upon as timber by the custom of that part of the country where they grow, are ratable as salable underwood, within 43 Eliz. c. 2, s. 1, if they are cut and trained so as to produce, no matter at what interval, a succession of stems and shoots. *Fitzhardinge (Lord)* v. *Pritchett*, 8 B. & S. 216; 36 L. J., M. C. 49; L. R. 2 Q. B. 135; 15 L. T. 502; 15 W. R. 640.

See also RATES AND RATING.

Waste in Felling.]—See the cases of waste in felling timber. *Skelton* v. *Skelton*, 2 Swanst. 170; *Abrahall* v. *Bubb*, *Id.* 172.

Restraining Cutting.]—Court will restrain cutting underwood of insufficient growth. *Brydges* v. *Stephens*, 6 Madd. 279; 23 R. R. 217.

Injunction against cutting young saplings, wavers, and fruit trees. *Kaye* v. *Banks*, Dick. 431.

Owner's Right to Cut Timber on Land let for Shooting.]—A landowner who has demised for a term of years the right of shooting over his lands, is not thereby prevented from cutting timber as he thinks fit in the ordinary management of his land, although injurious to the shooting. *Gearns* v. *Baker*, 44 L. J., Ch. 334; L. R. 10 Ch. 355; 33 L. T. 86; 23 W. R. 543.

Cutting under Agreement with Owner's Predecessor.] — An owner of real estate can maintain an action against a person for, and prevent him from, entering on his land and cutting down his timber under an alleged verbal contract said to have been made with that person and the testator, although part of such timber may have been cut, carried away, and paid for

in the lifetime of the testator. *Wakley* v. *Froggatt*, 2 H. & C. 669; 33 L. J., Ex. 5; 9 Jur. (N.S.) 1248; 9 L. T. 340; 12 W. R. 86.

Interest of Infants in.]—Where A. is tenant for life, remainder to his children, and B. has an interest in the growing timber, which, in the usual course of management, will come to be felled during the continuance of A.'s estate, the infants can have no interest in, and cannot be made parties to, an agreement between A. and B. for the purchase of B.'s interest in the growing timber. Even if the master has reported that they have an interest, all the proceedings will be rescinded for irregularity, as having been a surprise on the court. *Anon.*, 1 L. J. (O.S.) Ch. 33.

2. Other Trees.

On Adjoining Premises.]—If a tree grows near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of that land in which the tree was first sown or planted. *Holder* v. *Coates*, M. & M. 112; 31 R. R. 724. And see *Waterman* v. *Soper*, 1 Ld. Raym. 737; *Masters* v. *Pollie*, 2 Roll. Rep. 141; *Anon.*, 2 Roll. Rep. 255.

Overhanging Highway.]—Suffering trees and underwood to grow over and across a highway so as to obstruct the free passage is not a wilful obstruction of the free passage within the meaning of 5 & 6 Will. 4, c. 50, s. 72. *Walker* v. *Horner*, 45 L. J., M. C. 34: 1 Q. B. D. 4; 33 L. T. 601; 24 W. R. 95. *See also* Way.

If a man knowingly plants in his own land and suffers to grow over the land of his neighbour a noxious tree, by which his neighbour's cattle are injured, an action will lie against him at the suit of such neighbour. *Crowhurst* v. *Amersham Burial Board*, 48 L. J., Ex. 109; 4 Ex. D. 5; 39 L. T. 355; 27 W. R. 95.

Poisonous Trees and Clippings.]—A declaration alleging that the defendant was possessed of yew trees, the clippings off which he knew to be poisonous, and that it was his duty to prevent the clippings from being placed on land not occupied by him, and that he took so little care of the clippings that they were placed upon land not occupied by him, whereby the horses of the plaintiff were poisoned, discloses no facts from which a duty can be inferred on the part of the defendant to take care of the clippings. *Wilson* v. *Newberry*, 41 L. J., Q. B. 31; L. R. 7 Q. B. 31; 25 L. T. 695; 20 W. R. 111.

3. Tenant for Life.

a. In General.

Right to Cut.]—Tenant for life impeachable of waste can only cut such timber as will be for the benefit of succession. *Hussey* v. *Hussey*, 5 Madd. 44; 21 R. R. 275.

A tenant for life impeachable for waste is entitled to the thinnings of plantations if properly made, and to the crops of all coppices cut in due rotation. *Bateman* v. *Hotchkin*, 31 Beav. 486; 32 L. J., Ch. 6.

A tenant for life may cut oak coppice in due course for his own benefit, when the custom of the country so permits, and may also take the profits which arise from the periodical thinnings of woods. *Bagot* v. *Bagot*, *Legge* v. *Legge*, 32 Beav. 509; 2 N. R. 297; 33 L. J., Ch. 116; 9 Jur. (N.S.) 1022; 9 L. T. 217; 12 W. R. 35.

As between tenant for life and remainderman, the thinnings of fir-trees under twenty years of age belong to the tenant for life. *Pidgeley* v. *Rawling*, 2 Coll. C. C. 275.

Although a tenant for life subject to impeachment for waste cannot cut timber at all (except periodically on a timber estate), or, as a general rule, trees which would become timber if they were of the age of twenty years or upwards, yet he may cut down timber like trees under twenty years of age for the necessary purpose of preserving or allowing the growth of other trees, and is entitled to the proceeds of such cuttings. *Honywood* v. *Honywood*, 43 L. J., Ch. 652; L. R. 18 Eq. 306; 30 L. T. 671; 22 W. R. 749.

Tenant for Lives, Renewable.] — Lord Ch. Manners would not restrain a tenant for lives, with covenant for perpetual renewal, from cutting timber, though it did not appear when planted. *Conolly* v. *Ely* (*Lord*), 2 Moll. 515. S. P., *Percy* v. *Shanly*, *Id.*

Demise of bog for a term of years renewable for ever gives the right to cut and use the soil. *Montgomery* v. *Cunninghame*, 2 Moll. 536. But, secus, if for sale. *Bouchier* v. *O'Grady*, *Id.*

—— **With Rent in Arrear.**]—Lessee for lives renewable for ever will be enjoined from committing waste by cutting timber, if he allows a large arrear of rent to become due. *White* v. *Nowlan*, Hog. 21. S. P., *Pim* v. *Davies*, Hog. 11.

Coming into Possession.]—Tenant for life has no property in the underwood till his estate comes into possession. *Pigot* v. *Bullock*, 1 Ves. J. 479; 3 Bro. C. C. 589; 2 R. R. 148.

Selling Timber.]—A tenant for life, liable to waste, having sold timber, cannot prevent the purchaser from cutting it. *Walworth* v. *Turner*, 3 Ves. 3.

Tenant for life entitled to timber for repairs cannot sell the same to reimburse herself expenses incurred in repairs. *Gower* v. *Eyre*, G. Cooper, 156.

Reimbursement for Wrongful Restraint.]—As to security for reimbursement of tenant for life, for loss sustained by being wrongfully restrained from cutting timber, &c. *Wombwell* v. *Belasyse*, cited, 6 Ves. 110.

Inclosure Acts.]—In case of lands exchanged under inclosing acts, tenants for life, impeachable for waste, cannot cut timber for inclosures, but must raise the money for the enclosure by mortgage, under the powers of the act. *Lee* v. *Alston*, 1 Bro. C. C. 194.

As between Husband and Wife.]—Husband of female tenant for life, with condition not to commit waste:—Held (in opposition to *Ormond* (*Marquis*) v. *Kynnersley*, 5 Madd. 369; 21 R. R. 313) liable for timber cut, and not the wife or her estate. *Kingham* v. *Lee*, 15 Sim. 396; 16 L. J., Ch. 49; 11 Jur. 4.

Allowance of income pending a suit to a married woman, who, having a life interest to her separate use, had with her husband cut timber. *Stacey* v. *Southey*, 1 Drew. 400.

Pending Appeal.]—Devise to A. and her heirs for ever, in the fullest confidence that after her decease she will devise the property to my family, being restrained to an estate for life by decree at the rolls, the devisee was enjoined from cutting timber pending an appeal. *Wright* v. *Atkyns*, 1 V. & B. 313; 13 R. R. 199. *See also* 19 Ves. 299; 17 Ves. 255; G. Cooper, 111; Turn. & R. 143.

Consent of Trustees — Reference.] — Power contained in a will, for the devisees for life, when in possession, to cut down timber, as four trustees, or the survivors or survivor of them, should assign, allow of, or direct; all the four trustees being dead:—Held, that the court would execute the trust by referring it to a master to see what timber was fit to be cut down from time to time. *Hewett* v. *Hewett*, 2 Eden, 332; Amb. 508.

b. Without Impeachment of Waste.

Right to Cut.]—Right of tenant for life, without impeachment of waste, to cut timber generally in a husbandman-like manner, independently of the effect upon the beauty of the place, except equitable waste. *Burges* v. *Lamb*, 16 Ves. 185; 10 R. R. 150.

A tenant for life without impeachment of waste, not restrained from felling trees fit for the purpose of timber, though young and not such as would be felled in a course of husbandman-like management of the estate. *Smythe* v. *Smythe*, 2 Swanst. 251; 1 Wils. Ch. 426; 19 R. R. 72.

Right of a tenant entitled to a life interest, in a term of years, unimpeachable of waste, to fell timber for his own benefit. *Bridges* v. *Stephens*, 2 Swanst. 150.

Land Devised for Sale.]—Devise of land to be sold, and other lands to be purchased in another county; A. to be tenant for life (sans waste) of the lands to be purchased, and the rents and profits of the lands to be sold to the same use; A. cannot cut down timber on the lands to be sold, since he thereby would have the benefit of double waste. *Plymouth* v. *Archer*, 1 Bro. C. C. 159. S. P., *Burges* v. *Lamb*, 16 Ves. 180; 10 R. R. 150.

As between Representative and Creditor.]—Tenant for life, sans waste, is restrained by injunction from selling timber; afterwards his creditors obtain an order for a sale, and receiver is appointed for the money arising from the sale; but the tenant for life dies before the timber is felled. Quære, whether his representatives are entitled to the benefit of the timber. *Partridge* v. *Pawlett*, Ridgw. t. Hardwicke, 254.

Construction.]—R. N., by his will, devised to F. N., and his assigns, for life, all his real estates in W., without impeachment of waste, except the timber growing in the park, avenues, demesne lands, and woods adjoining to the capital messuage, called Arbury, remainder in trust for C. N. N. for life, remainder to his first and other sons in tail male:—Held, that the restriction as to cutting timber was confined to the premises specified in the exception clause. *Newdigate* v. *Newdigate*, 8 Bligh (N.S.) 734; 2 Cl. & F. 601. Reversing 1 Sim. 131; 5 L. J. (O.S.) Ch. 52; 1 Jur. 636; 27 R. R. 180.

Infant—Inquiry, Form of.]—Upon a bill filed by an infant devisee for life, without impeachment of waste (except as to ornamental timber), praying the establishment of the will, the administration of the trusts, and maintenance, an inquiry was directed as to timber in the form adopted in *Tooker* v. *Annesley* (5 Sim. 235), excluding ornamental timber. *Consett* v. *Bell*, 1 Y. & C. C. C. 569; 11 L. J., Ch. 401; 6 Jur. 869.

Strict Settlement — Effect.] — Residue bequeathed in trust to be laid out in real estates, to be settled to the same uses as estates devised to the trustees for life successively, without impeachment of waste, with various limitations, in strict settlement, all the estates for life being without impeachment of waste, and the ultimate remainder in fee; the trustees laid out part of the fund in an estate, with a considerable quantity of timber upon it; taking that to be a sound exercise of discretion, the first tenant for life cannot cut the whole. *Burges* v. *Lamb*, 16 Ves. 174; 10 R. R. 150.

Exemption from Liability for Waste, subject to Discretion of Trustees.]—Exemption from liability to waste, annexed to a life estate, is a special power in the tenant for life to appropriate part of the inheritance:—Held, under the terms of a deed of settlement in this case, that it was made subordinate to a discretionary power of cutting timber conferred on the trustees. *Kekewich* v. *Marker*, 3 Mac. & G. 311; 15 Jur. 687.

Devise—Effect.]—A devise of the rents and profits of an estate to the husband for life, without impeachment of waste, shall not only be considered as annual profits, but will empower him to cut timber. *Partridge* v. *Pawlett*, 1 Atk. 467.

Settlement — Construction.] — By marriage settlement, an estate belonging to the husband was settled upon him for life, "without impeachment of or for any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses or buildings to go to decay, and in not repairing the same," with remainders over:—Held, that such a construction must, if possible, be put upon the exception as not to destroy the effect of the whole clause, and that the tenant for life was entitled to cut all such timber and wood, not planted or standing for ornament, as an owner of the estate in fee simple, having regard to his interest and the permanent advantage of the estate, might properly cut in a due course of management. *Vincent* v. *Spicer*, 22 Beav. 380; 25 L. J., Ch. 589; 2 Jur. (N.S.) 654; 4 W. R. 667.

c. Windfalls.

Generally.]—Windfalls of timber and other casualties, to whom the property belongs. Tenants for life. Remaindermen, &c. *Aston* v. *Aston*, 1 Ves. Sen. 396.

What Include.]—Branches of trees cut down for the king's use do not pass by a grant to a ranger of a forest of all wood blown or thrown down by the wind, and all dead wood, and the boughs and branches of trees and wood in the

forest cut off or thrown down. *Att.-Gen.* v. *Stawell* (*Lord*), 2 Anst. 592.

To whose Benefit.]—The tenant for life may gain a benefit indirectly by no act of his own, as in the case of timber thrown down by storm, etc. *Lushington* v. *Boldero*, 6 Madd. 149; 22 R. R. 261.

Where timber is blown down, a tenant for life impeachable for waste is absolutely entitled to such parts as he would be entitled to cut himself, as thinnings, etc., and also to the interest by the investment of the produce of the rest. *Bateman* v. *Hotchkin*, 31 Beav. 486; 32 L. J., Ch. 6.

To whom Belong.]—The first owner of the inheritance in esse shall have timber blown down; for the trees must become the property of somebody. *Garth* v. *Cotton*, 3 Atk. 755.

Where timber is blown down the property in it belongs to the owner of the first estate of inheritance. *Honywood* v. *Honywood*, 43 L. J., Ch. 652; L. R. 18 Eq. 306; 30 L. T. 671; 22 W. R. 749.

Proceeds of.]—Notwithstanding the popular notion to the contrary, the proceeds of windfalls of timber must be invested and dealt with as part of the corpus of the settled estate. *Bagot* v. *Bagot*, *Legge* v. *Legge*, 32 Beav. 509; 2 N. R. 297; 33 L. J., Ch. 116; 9 Jur. (N.S.) 1022; 9 L. T. 217; 12 W. R. 35.

—— **Capital or Income.**]—A large part of the income of a settled estate was derived from the thinnings and cuttings of larch plantations, and, during a tenancy for life, high winds blew down a very large proportion of the larches, and it became necessary for the good cultivation of the estate to remove almost the whole of those which remained. It was estimated that it would take forty years for the plantations to yield the same income as before:—Held, that the tenant for life was not entitled to receive the proceeds of sale either of the trees not blown down but which had to be removed, or of the trees which were actually blown down, but that the whole of the proceeds of sale must be invested as capital. But held, that the tenant for life was entitled to receive out of the income arising from the invested fund and the plantations a fixed annual sum, equal to the average income which would have been derived from the plantations if no gales had occurred—such sum, if necessary, to be made up out of capital; the trustees to be at liberty to have recourse to the investments or the income of the plantations for the purpose of fresh planting. *Harrison's Trusts*, *In re*, *Harrison* v. *Harrison*, 54 L. J., Ch. 617; 28 Ch. D. 220; 52 L. T. 204; 33 W. R. 240—C. A.

As between Executor and Devisee.]—A testator devised estates upon which there were plantations of larch trees. At the time of his death a great number of the larch trees had been more or less blown down by extraordinary gales. It was held by Pearson, J., that, as between the devisees and the executors of the testator, the trees which had been blown down to such an extent that they could not grow as trees usually grow were severed and belonged to the executors, and that the trees which were merely lifted but would have to be cut for the proper cultivation of the plantations belonged to the devisees:—Held, that, having regard to the maxim "quicquid plantatur solo, solo cedit," the principle applicable was that if a tree was attached to the soil it was real estate, and, if severed, personalty; that the life and manner of growth of any particular tree was no test of its attachment to the soil, and that the degree of attachment or severance was a question of fact in the case of each particular tree. *Ainslie*, *In re*, *Swinburne* v. *Ainslie*, 55 L. J., Ch. 615; 30 Ch. D. 485; 53 L. T. 645; 33 W. R. 910; 50 J. P. 180—C.A.

d. Proceeds when Cut.

See also A. 3, b. iv. ante, col. 1846, and next sub-head, post, col. 1860.

Right to.]—Where timber, ripe for cutting, is cut by a tenant for life, impeachable for waste, he is entitled to the income of the fund produced by the sale thereof, and the first person taking an estate unimpeachable for waste will, on coming into possession, be entitled to the capital. *Gent* v. *Harrison*, Johns. 517; 29 L. J., Ch. 68; 5 Jur. (N.S.) 1285; 1 L. T. 128; 8 W. R. 57.

An equitable tenant for life impeachable for waste cut timber not otherwise than in due course of management. The proceeds had been brought into court and the income ordered to be paid to her. On her death her son, being the next tenant for life dispunishable for waste, petitioned for payment to him of the timber money in court:—Held, that he was entitled to the money, as he would have been entitled to the trees which produced it. *Lowndes* v. *Norton*, 46 L. J., Ch. 613; 6 Ch. D. 139; 25 W. R. 826.

On a case submitted to the court by trustees, as to certain questions arising between the equitable tenant for life and the remainderman in the management of the estate:—Held, that the produce of the sale of underwood and of timber cut periodically, in the regular course of thinning, was to be treated as income, and that of timber not cut in the regular course, but to improve the growth of the remaining trees, as capital. *Cowley* (*Earl*) v. *Wellesley*, 35 Beav. 635; L. R. 1 Eq. 656; 14 L. T. 425; 14 W. R. 528.

The proceeds of timber cut and minerals won, with a proper regard to the benefit of an estate, by a tenant for life impeachable of waste, will, by the rules of the court of equity, be invested and dealt with as part of the corpus of the estate, the tenant for life, though impeachable of waste, receiving the income. *Bagot* v. *Bagot*, *Legge* v. *Legge*, 32 Beav. 509; 2 N. R. 297; 33 L. J., Ch. 116; 9 Jur. (N.S.) 1022; 9 L. T. 217; 12 W. R. 35.

The proceeds of timber and minerals improperly cut and won at a time when there is no person in esse unimpeachable for waste must be similarly dealt with, except that the tenant for life, improperly acting, cannot receive the income. *Ib.*

The proceeds of timber and minerals improperly cut and won by a tenant for life impeachable of waste, at the time when there is in existence a remainderman entitled indefeasibly to the first estate, unimpeachable of waste, belong absolutely to such remainderman. *Ib.*

When a tenant for life impeachable for waste improperly, knowingly, and wilfully commits waste, he cannot derive any benefit from the timber cut. *Ib.*

Principle as to.]—The doctrine and principle of the interference of a court of equity, in the case of a tenant for life cutting timber, is that no man shall obtain a benefit by his own wrong, and a tenant for life would do so if he were

allowed the interest of the fund produced by the sale of the timber. *Lushington* v. *Boldero*, 15 Beav. 1; 21 L. J., Ch. 49; 16 Jur. 140.

A tenant for life committing waste by cutting timber, can gain no advantage from his wrongful act, but the produce is invested and accumulated for the benefit of the first estate of inheritance. *Bateman* v. *Hotchkin*, 31 Beav. 486; 32 L. J., Ch. 6.

There are many cases in which the tenant for life cannot derive any benefit from timber improperly cut by him, knowingly and wilfully. *Bagot* v. *Bagot*, 32 Beav. 509; 2 N. R. 297; 33 L. J., Ch. 116; 9 Jur. (N.S.) 1022; 9 L. T. 217; 12 W. R. 35.

Property in Timber Cut.]—Where timber is cut down the property in it belongs to the owner of the first estate of inheritance. *Honywood* v. *Honywood*, 43 L. J., Ch. 652; L. R. 18 Eq. 306; 30 L. T. 671; 22 W. R. 749.

—— **Right of Tenant in Tail.**]—A., tenant for life, remainder to first, &c., sons in tail, remainder to B. for life, remainder to first, &c., sons in tail, remainder to C. in tail. A. cut down timber; A. and B. having no son born, C. is entitled to timber. *Rolt* v. *Somerville* (*Lord*), 2 Eq. Abr. 759. Both in law and equity. *Whitfield* v. *Bewitt*, 2 P. Wms. 240.

Account.]—Tenant for life, punishable for waste, with power, under an inclosing act, to mortgage for the expense of the inclosure, felled timber and applied the produce instead; decreed, to account to owner of next estate of inheritance. *Lee* v. *Alston*, 1 Ves. J. 78; 3 Bro. C. C. 37.

Devise—Payment of Debts.]—A. devises lands encumbered with debts to B. for life, remainder to C. in fee; B. cuts down timber from the estate; B. decreed to pay two-fifths of the debts, and C. the remaining three-fifths, and B. to account for the timber which he had cut, and this to be taken as part of the three-fifths, which the remainderman was to pay. *James* v. *Hales*, 2 Vern. 267; Pre. Ch. 44.

Settlement.]—A. tenant for life; remainder to his sons successively in tail male; remainder to B. for life, and to her sons in the same manner, the trustees to preserve contingent remainders. A., being also seised of the reversion in fee, cut and sold before the birth of a tenant in tail; afterwards, B. had a son, who died soon after his birth, and another son who survived A.; the produce of the timber was decreed to be laid out in the funds during the life of A., and upon his death, without having had a son, was decreed to be laid out in land, to be settled to the uses of the estate upon which the timber was cut. *Powlett* v. *Bolton* (*Duchess*), 3 Ves. 374; 4 R. R. 21; and *Williams* v. *Bolton*, 1 Cox, 72; 4 R. R. 21.

—— **Strict.**] — Devise of real estates to A. and B., and their heirs, to the use of them, and their heirs, in trust to permit C. to receive the rents and profits for life, and after her decease to stand seised of the same premises, in trust for the second son of D., and the heirs male of his body; remainder in trust for the third, fourth, and other sons of D. in tail male; remainder in trust for E. for life, without impeachment of waste; remainder to trustees to preserve, &c.; remainder to the first and other sons of E. in tail male, &c.; proviso, that, in case there should not be a second son born, the said trustees should pay the rents and profits of the said estates to such person as was next in remainder, and should be entitled to receive the same in case no son should be born. C. having cut timber, this was sold under an order of the court, and the produce paid into the bank. At C.'s death, D. had no son, and E. was dead, leaving F., his eldest son. The produce of the timber belongs to F. absolutely, and shall not abide the event of D.'s having a son. *Dare* v. *Hopkins*, 2 Cox, 110.

Cutting during Life of Late Tenant.]—The proceeds of timber, cut down during the life of a late tenant for life impeachable of waste, ordered to be paid to the tenant for life in possession, being unimpeachable of waste. *Phillips* v. *Barlow*, 14 Sim. 263; 14 L. J., Ch. 35.

—— **Base Fee.**]—No action lies by a reversioner and owner of the inheritance to recover the value of timber cut by a deceased tenant for life, after a fine levied by her, whereby she acquired a base fee, and before the avoidance of such fine and base fee by the entry of the reversioner for that purpose, such entry not revesting the reversioner's old estate by relation during the continuance of the base fee thus created, so as to entitle him to the timber and other mesne profits taken during that interval. *Hughes* v. *Thomas*, 13 East, 474.

—— **Back Interest.**]—Under no circumstances can a tenant for life, unimpeachable for waste, be entitled, on coming into possession, to back interest on the produce of timber, whether properly or improperly cut by a previous tenant for life impeachable for waste. *Gent* v. *Harrison*, Johns. 517; 29 L. J., Ch. 68; 5 Jur. (N.S.) 1285; 1 L. T. 128; 8 W. R. 57.

Trees not Timber.]—A tenant for life is entitled at law to the proceeds of trees (not timber) cut by him, whether rightfully or wrongfully. *Honywood* v. *Honywood*, 43 L. J., Ch. 652; L. R. 18 Eq. 306; 30 L. T. 671; 22 W. R. 749.

Timber not Ripe.]—Where timber, cut by a tenant for life impeachable for waste, is not ripe for cutting, semble the produce belongs immediately to the first person having an estate of inheritance, passing over all the intermediate life estates, whether impeachable for waste or not. *Gent* v. *Harrison*, supra.

Power to Sell.]—A tenant for life, without impeachment for waste, with power to sell, if he sells, is not entitled to the produce of the timber on the estate. *Doran* v. *Wiltshire*, 3 Swanst 699; 19 R. R. 287.

Settlement—Sale under Power.]—Settlement of estates on trustees and their heirs, during the joint lives of W. H. and his wife, without impeachment of waste, upon trust, out of the rents and profits, to pay all expenses and outgoings, and to raise and pay a sum by way of pin-money to the wife, and subject thereto to pay the clear residue of the rents, &c., to W. H., during the lives of himself and his wife; remainder to W. A. for life, without impeachment of waste; remainder over; with power for the

trustees to sell and lay out the produce in the purchase of other lands to the same uses; the land being sold under the power, W. H. was held entitled to the produce of timber cut down by him previously to the sale, but not to the value of timber then standing. *Wolf* v. *Hill*, 2 Swanst. 149.

Sale with Consent.]—Estates were devised to A. in fee in trust to settle them on B. for life, remainder to C. for life, without impeachment of waste, remainder to C.'s first and other sons in tail. After the testator's death A., with the consent of B. and C., cut and sold some timber on the estates, which was going to decay, and invested the proceeds in consols. Afterwards, in a suit by C. against A. and B. and C.'s eldest son, the stock was transferred into court. The court ordered the dividends to be paid to B. for life, and, afterwards B. having died, the capital to be transferred to C. *Waldo* v. *Waldo*, 12 Sim. 107; 10 L. J., Ch. 312.

As between Heir and Executor.]—A. was tenant for life without impeachment of waste, with remainder to her issue in tail, with remainder to B. for life, with remainder to his issue in tail, with remainder to B. in fee. The court directed some timber to be cut in the life of A., and the produce to be invested. Both A. and B. died without issue:—Held, as between the heir and executor of B., that the timber money was realty, and belonged to the heir. *Field* v. *Brown*, 27 Beav. 90.

Construction.]—On construction of settlement:—Held, that timber growing upon an estate during the life of the defendant was to be applicable, not to his own purposes, but to relieve the inheritance from incumbrances. *Briggs* v. *Oxford* (*Earl*), 1 De G. M. & G. 363; 21 L. J., Ch. 829; 16 Jur. 558. Affirming 5 De G. & Sm. 156.

—— **Of Will—Local Usage.**]—A tenant for life under a will of an estate containing extensive beech woods annually cut a large quantity of the beech (together with a small quantity of oak, elm, and ash) growing in the woods, and appropriated the proceeds. By the custom of the county beech was timber. The tenant for life had no express power to cut timber except for repairs. The annual cuttings were in accordance with a modern local usage, by virtue of which beech and other timber trees when growing in beech woods were periodically cut in the ordinary course of management for the preservation of the woods, and in order to secure a perpetual succession of timber, and the timber so cut was treated as part of the annual profits:—Held (Kay, L.J., dissenting), that the testator must be taken to have framed his will with reference to such local usage, and consequently that the annual cuttings were not waste as between the tenant for life and remaindermen, and the tenant for life was entitled to the proceeds. *Dashwood* v. *Magniac*, 60 L. J., Ch. 809; [1891] 3 Ch. 306; 65 L. T. 811—C. A.

—— **"Rents and Profits."**]—Where an equitable tenant for life, unimpeachable of waste, was entitled to estates, subject to a trust for payment by the trustees out of the rents and profits, but not by sale or mortgage of such estates, of certain mortgages on the estates; and timber had been cut on the estates by the direction of the court:—Held, that the term "rents and profits" meant annual rents and profits, and that the tenant for life in possession, though not in possession of the rents and profits of the estate, was entitled to all other rights incident to his estate, and, therefore, that he was entitled to the proceeds of the timber which had been cut. *Lovat* (*Lord*) v. *Leeds* (*Duchess*), 2 Dr. & Sm. 75; 10 W. R. 398.

Jurisdiction.]—Whether the produce of timber, not ripe for cutting, cut by a tenant for life impeachable for waste, belongs immediately to the first person having an estate of inheritance, passing over all the intermediate life estates, whether impeachable for waste or not, or to the first tenant for life, unimpeachable for waste, the cutting being a tort, the remedy is by action, and not in this court. *Gent* v. *Harrison*, Johns. 517; 29 L. J., Ch. 68; 5 Jur. (N.S.) 1285; 1 L. T. 128; 8 W. R. 57.

4. Cut by Order of Court.

Proceeds of, to Whom Belong.]—Tenant for life subject to impeachment for waste is entitled to the interest of money produced by the sale of timber cut by order of the court. *Tooker* v. *Annesley*, 5 Sim. 235.

When the court orders timber to be cut for any reason, the proper course is for the proceeds to be invested, and the income given to the successive owners of the estate until there is an absolute estate of inheritance, the owner of which is entitled to the principal; and the same rule applies to cases of equitable waste. *Honywood* v. *Honywood*, 43 L. J., Ch. 652; L. R. 18 Eq. 306; 30 L. T. 671; 22 W. R. 749.

The proceeds of timber cut and sold by order of the court during the life of a late tenant for life, who was impeachable of waste, ordered to be paid to the tenant for life in possession, who was unimpeachable of waste. *Phillips* v. *Barlow*, 14 Sim. 263; 14 L. J., Ch. 35.

Tenant for life without impeachment of waste, further than wilful waste, is entitled to the interest of money produced by the sale of decaying timber cut by order of court. As to any further claim, a question at law, quære. The capital laid out in real estate to be settled to the same uses. *Wickham* v. *Wickham*, 19 Ves. 419; G. Cooper, 288.

Infant—Proceeds of Timber, Personal Estate.]—By order of the court, timber was cut upon the estate of an infant, who was equitable tenant in fee-simple, with an executory devise over in the event of his dying under twenty-one, and without issue, which event happened:—Held, that the produce of the timber formed part of the personal estate of the infant. *Dyer* v. *Dyer*, 34 Beav. 540; 6 N. R. 79; 11 Jur. (N.S.) 721; 12 L. T. 442; 13 W. R. 732.

Lunatic—Produce of Timber, whether Real or Personal Estate.]—Lord Chancellor thought that, notwithstanding the words of the stat. 17 Edw. 2, s. 1, cc. 9, 10, the court has authority to order timber decaying on the estate of a lunatic to be cut, but did not absolutely decide the point, or whether the produce should be considered as real or personal estate, directing the point to be argued on a bill filed. *Bromfield, Ex parte*, 3 Bro. C. C. 510; 1 Ves. J. 453; 2 R. R. 126.

Order, when made.]—A term for years is limited for payment of debts, remainder to A. for his life, sans waste, remainder to his first, &c., son in tail. A. being in want, the court gave him leave to cut timber for his support, not exceeding the value of 500*l.* *Aspinwall* v. *Leigh*, 2 Vern. 218.

Where there is tenant for life impeachable for waste, with remainder over, court will authorise cutting of timber only where interest of succession requires it. *Hussey* v. *Hussey*, 5 Madd. 44; 21 R. R. 275.

—— **Reference—Application of Proceeds.**]—An estate was limited to one for life, with a clause of forfeiture and a gift over, on his cutting timber. There was on the estate timber which required felling. The court, on a bill filed for that purpose by the tenant for life, authorised the same to be cut down, and directed a reference to the master for that purpose. The money arising from the timber in such cases is settled on trusts similar to those on which the estate stands limited. *Peters* v. *Blake*, 6 L. J., Ch. 157. S. P., *Lygon* v. *Beauchamp* (*Earl*), id., 158.

C. TENANT IN TAIL.

Right to Cut Timber.]—Tenant in tail in possession may fell all timber fit. *Hussey* v. *Hussey*, 5 Madd. 44; 21 R. R. 275.

Right to Proceeds.]—Several persons were entitled successively to life estates in real property, limited in strict settlement. They became bankrupt, and their assignees cut down timber left for ornament and shelter. Upon a bill filed on behalf of H. L., the then first tenant in tail in esse, who was an infant, the assignees were ordered to bring the money into court. This, with the accumulations, amounted to 26,133*l.* 2*s.* 10*d.* Two of the tenants for life died without issue. H. L. attained twenty-one, and, being still the first tenant in tail, and entitled to the first estate of inheritance, he presented a petition for payment to him of the fund and the accumulations, which were ordered to be transferred to him. *Lushington* v. *Boldero*, 15 Beav. 1; 21 L. J., Ch. 49; 16 Jur. 140.

Satisfaction to.]—G., tenant for ninety-nine years, if he so long live, sans waste (except voluntary), remainder to trustees to preserve, &c., remainder to his first, &c., sons in tail male, remainder to A. in fee. G., before a son born, and A. agreed to cut down timber on the estate, and to divide the produce between them; A. agreeing not to take advantage of the waste. They cut timber of the value of 2,000*l.* G.'s son, on attaining twenty-one, suffered a recovery to the use of himself and his heirs:—Held, that G.'s son shall have satisfaction for so much of the value of his inheritance as A. had received under the agreement, with interest at 4 per cent. from the filing of the bill. *Garth* v. *Cotton*, 3 Atk. 751; 1 Ves. 524, 546.

Barring Entail.]—Restriction against cutting down timber:—Held, determined by barring entail. *Colson's Trusts, In re*, 1 Kay, 133; 23 L. J., Ch. 155; 2 Eq. R. 257; 2 W. R. 111.

Bond against Waste.]—One settles lands upon his daughter in tail, and takes a bond from her not to commit waste; bond not binding in equity. *Jervis* v. *Bruton*, 2 Vern. 251.

Equitable Waste.]—Tenant in tail, restrained by statute from barring issue and those in remainder, is not, for that reason, within the principle of equitable waste. *Att.-Gen.* v. *Marlborough* (*Duke*), 3 Madd. 498; 18 R. R. 273.

Trover.]—Trover cannot be maintained by a tenant in tail expectant on the determination of an estate for life, without impeachment of waste, for timber which grew upon and was severed from the estate. *Pyne* v. *Dor*, 1 Term Rep. 55.

After Possibility of Issue Extinct.]—Tenant in tail, after possibility of issue extinct, being dispunishable for waste by the law, has, equally with tenant for life without impeachment of waste by settlement, an interest and property in the timber. *Williams* v. *Williams*, 15 Ves. 427.

Tenant in tail, after possibility of issue extinct, having been once tenant in tail in possession with the other donee, and therefore dispunishable for waste, may not only commit waste, but also convert to her own use the property wasted; therefore, not to be restrained in equity, except for malicious waste. *Id.*, 430.

Construction—Liability for Waste.]—A. devised all his lands, &c., to his wife; and, if it should happen that she should have no son nor daughter by him begotten upon her body, and for want of such issue, then the said premises to return to his brother B., if he should be then living, and to his heirs for ever, paying to his brother 150*l.* within a year after the wife's death: decreed, to be an estate tail in the wife, and not an estate for life only; that by "no son nor daughter" must be understood "no issue;" and that she ought not to be restrained from committing waste. *Wyld* v. *Lewis*, 1 Atk. 432.

Infant.]—Where there is infant tenant in tail in possession, court will authorise cutting of all timber fit to be felled. *Hussey* v. *Hussey*, 5 Madd. 44; 21 R. R. 275.

—— **Right to Proceeds.**]—Bill, by tenant in tail in reversion, to have timber cut; ordered, and that the money be laid out in the funds, and the claim discussed when tenant in tail of age. *Mildmay* v. *Mildmay*, 4 Bro. C. C. 76.

—— **Proceeds when Cut—Interest of Infant.**]—A. tenant for life, remainder to B. in tail as to one moiety, remainder to C. an infant in tail as to the other moiety, remainder over. There is timber on the premises greatly decaying. B., the remainderman, brings a bill praying that the decaying timber might be cut down, sold, and the money divided betwixt him and the infant, and the tenant for life insists on his right to have part of the money; tenant for life must have sufficient left for repairs, &c., and an allowance for all damage done to him on the ground, but to have no allowance for the timber, which, when severed by accident or by a trespasser, belongs to the first owner of the inheritance. Decaying timber, if for ornament or safety, not to be cut down; also, where an infant is interested in the inheritance, no timber can be cut down but by the approbation of the master; and the infant's moiety of the money is to be put out for his benefit. *Berwick* v. *Whitfield*, 3 P. Wms. 267.

—— **Proceeds of Cutting, Real or Personal Estate.**]—Where guardian of an infant tenant in tail cuts down timber, the money for it shall be personal estate of the infant; but, if the infant has the fee, it shall be considered as real estate. *Tullit* v. *Tullit*, Amb. 370; Dick. 322.

—— **Inquiry.**]—Devise in strict settlement, with a clause of forfeiture by cutting any trees. Upon a bill by the infant remainderman in tail, an inquiry was directed, whether any trees, in the park, not ornamental or affording shelter to the mansion-house, are proper to be felled; and whether it would be for the benefit of all parties interested that they should be felled and sold, and the money laid out in other estates to be settled to the same uses. *Delapole* v. *Delapole*, 17 Ves. 150.

Reference—Principles of, and Form.]—Reference granted on bill by tenant in tail, whether it be for the benefit of the plaintiff and the other parties to cut timber during the continuance of the estate of a tenant for life of the lands, impeachable of waste. Form of such reference. Principles upon which such references granted. *Tollemache* v. *Tollemache*, 1 Hare, 456; 6 Jur. 364.

D. TENANT IN FEE WITH EXECUTORY DEVISE OVER.

Liability for Waste.]—A devisee in fee, subject to an executory devisee over in the event of his not leaving issue living at his death:—Held, dispunishable for legal, but not for equitable, waste. *Turner* v. *Wright*, 2 De G. F. & J. 234; 29 L. J., Ch. 598; 6 Jur. (N.S.) 809; 8 W. R. 675. Affirming Johns. 740.

A tenant in fee, with an executory devise over, is entitled to cut timber, but not to commit equitable, waste, but a provision against cutting timber may be annexed to his estate. *Blake* v. *Peters*, 1 De G. J. & S. 345; 1 N. R. 503; 9 Jur. (N.S.) 836; 32 L. J., Ch. 200; 9 L. T. 247; 11 W. R. 409.

The estate of the tenant in fee, under such circumstances, may be liable for the waste committed, though the instrument creating the estate declared that such waste should forfeit the estate. *Ib.*

Tenant in fee with executory devise over:—Held, under no obligation to repair, and not liable for permissive waste. *S. C.*, 31 L. J., Ch. 884; 10 W. R. 826.

—— **Cutting Timber.**]—Where there is an executory devise over, even of a legal estate, this court will not permit timber to be cut, more especially in the case of a trust estate. *Stansfield* v. *Habergham*, 10 Ves. 273; 7 R. R. 409.

Heir, who is entitled by way of resulting trust until the determination of an event upon which the future contingent estates were to arise, was restrained from cutting timber. *Ib.*

Infant—Proceeds of Timber, Personalty.]—A was tenant in fee-simple of an estate, subject to an executory devise over in the event of his death under twenty-one without issue. During the minority of A., timber which was deteriorating was cut with the sanction of the court. A. died under twenty-one without issue:—Held, that the produce of the timber passed as personalty to his legal personal representative. *Dyer* v. *Dyer*, 34 Beav. 540; 6 N. R. 79; 11 Jur. (N.S.) 721; 12 L. T. 442; 13 W. R. 732.

E. TENANT IN COMMON.

Generally.]—Injunction between tenants in common against destruction; not against pure equitable waste. *Hole* v. *Thomas*, 7 Ves. 589; 6 R. R. 195.

Injunction against waste between tenants in common, on the ground that one was occupying tenant to the rest; otherwise not, except as to destruction. *Twort* v. *Twort*, 16 Ves. 128; 10 R. R. 141.

The court will, as between tenants in common, only interfere to restrain waste in cases of destructive spoliation or waste. *Arthur* v. *Lamb*, 2 Dr. & Sm. 428; 12 L. T. 338.

A tenant in common cannot be restrained by injunction, upon the application of his co-tenants, from cutting down and selling trees and timber, where it appears that he is managing the estate according to the proper course of husbandry, and destructive waste cannot be proved. *Ib.*

One tenant in common cannot maintain an action in the nature of waste against another tenant in common (in possession of the whole, having a demise of the moiety from the first), for cutting down trees of a proper age and growth for being cut. *Martin* v. *Knowllys*, 8 Term Rep. 145.

Although the court has jurisdiction, after a decree in a partition suit, to grant an injunction restraining a tenant in common in possession from committing destructive waste, it will not interfere to restrain a tenant in common in possession merely from farming contrary to the custom of the country, as between landlord and tenant (that relation not existing between him and the other tenants in common). *Bailey* v. *Hobson*, 39 L. J., Ch. 270; L. R. 5 Ch. 180; 22 L. T. 594; 18 W. R. 124.

The court will restrain one tenant in common from the wilful destruction of the common property; but, where a railroad company had obtained a lease from five out of six tenants in common, and had, contrary to the wishes of the remaining tenant in common, constructed a railroad on the property, which at law had been held to be an ouster, the court refused to interfere by injunction to prevent the dissenting tenant in common removing the rails, &c., though the rent agreed to be paid by the company was three times the former rent. *Durham and Sunderland Ry.* v. *Wawn*, 3 Beav. 119; 4 Jur. 764.

Insolvency of one Tenant.]—Injunction to stay waste refused, where the plaintiff and the defendant in possession were tenants in common, but granted on affidavit of defendant's insolvency. *Smallman* v. *Onions*, 3 Bro. C. C. 621.

F. COPYHOLDS.

Generally.]—No action of waste lies by the lord against a copyholder. *Dench* v. *Bampton*, 4 Ves. 706.

Lord of a manor is entitled to injunction and account in respect of waste by a copyholder. *Richards* v. *Noble*, 3 Mer. 673.

Copyhold tenant subject to waste unless by act of God. *Rook* v. *Worth*, 1 Ves. 462.

Irremediable Mischief.]—Injunction against trespass upon irremediable mischief, in nature of waste, on a bill by the lord of a manor and his lessees against taking stones, having a peculiar value, found at the bottom of the sea within the limits of the manor. *Cowper (Earl)* v. *Baker*, 17 Ves. 128.

Lessee of Copyholder.]—Lessee of copyholder punishable for waste, though copyholder is not. *Dalton* v. *Gill*, Cary, 63.

Forfeiture.]—A copyholder licensing his lessee to commit waste, on condition of his doing a subsequent act to diminish the damage thereby occasioned, cannot eject him for a forfeiture incurred by his committing the waste without performing the subsequent act. *Doe* d. *Wood* v. *Morris*, 2 Taunt. 52.

—— **Minority.**]—Forfeiture of copyholder for waste during minority. *Litton's Case*, 3 Swanst. 493; Cary, 6.

Acts of Defendant's Testator.]—Lord of a manor may bring a bill for an account of ore dug or timber cut by defendant's testator; otherwise of ploughing up meadows or ancient pasture, or such torts as die with the person. *Winchester* v. *Knight*, 1 P. Wms. 406.

Right to Cut Timber—Forfeiture.]—Plaintiff sold defendant a copyhold estate of 16*l.* per annum value (on which was timber of 150*l.*) for 630*l.*, and covenanted to surrender on or before Michaelmas then next. Defendant paid 10*l.* earnest, entered on the premises, cut down timber, stocked the land, and acted as owner. On a bill for specific performance of covenants, plaintiff proved he gave notice that he would surrender next court day, which does not appear to have been before Michaelmas, and attended accordingly. On defendant's part, it was proved that he was disordered in his senses. Though there be proof of the timber's value, yet, as no custom is alleged of the tenant's having power to cut it down, it must be according to the common law by which the tenant has no power over it, and therefore a plain imposition. Lord Chancellor was of opinion that it was a great overvalue, and that his cutting down timber was a proof of his folly, because a direct forfeiture. As it is, it is a matter merely at law; if the surrender had been made, an action would have lain at law. Bill dismissed. *Edwards* v. *Heather*, Sel. Ch. Ca. 3.

G. JOINTRESS.

Generally.]—Injunction to stay waste granted against jointress. *Cooke* v. *Whaley*, 1 Eq. Abr. 400.

Jointure under Value.]—Where it was covenanted that jointure should be of certain value, which it was not, court refused the injunction against waste. *Carew* v. *Carew*, 1 Eq. Abr. 400.

Improvement by Waste.]—The under-tenant of a jointress commits waste sparsim; but had improved the yearly value, and offers to take a lease at the improved rent, and to pay for the timber cut. Quære, whether the court will relieve as to the waste. *Ligo* v. *Smith*, 2 Vern. 263.

11 Hen. 7.]—Motion to stay a jointress tenant in tail after possibility, &c., from committing waste:—Held, that she, being a jointress within 11 Hen. 7, ought to be restrained from wilful waste, and the injunction was granted; for by the statute she is restrained from aliening. *Cook* v. *Winford*, 1 Eq. Abr. 221, pl. 2.

Possibility of Issue Extinct.]—Settlement, on marriage, of lands of husband to the use of husband for life, without impeachment of waste; remainder to trustees, to preserve contingent remainders; remainder to wife for life for her jointure, and in bar of dower; remainder to first and other sons of the marriage in tail male; remainder to the daughters in the same manner; remainder to the heirs of the body of husband and wife. The husband being dead without issue, as to the right of the widow to cut timber, and which would be a consequence to the property in it when severed, as tenant in tail after possibility of issue extinct, either in possession by the effect of merger, if the estates can unite, or, if not, in remainder, quære. *Williams* v. *Williams*, 15 Ves. 419. *See* 11 R. R. 357, n.

Consent to Cutting Timber.]—Jointress giving leave to the next of kin in remainder for life without impeachment, &c., to cut timber, the remainderman in tail having acquiesced and encouraged his doing so, the latter was restrained by perpetual injunction from bringing action of waste against the jointress. *Aston* v. *Aston*, 1 Ves. 396.

H. TRUSTEES.

Generally.]—Devise of real estate to M. for life, and direction "that the timber or wood which should be on his real estates should from time to time be used for repairing the houses thereupon, or otherwise for the benefit and advantage of his estate, or that the same should be sold, and the money arising therefrom should be applied," &c.:—Held, devise to M. carried the underwood, and that trustees leaving sufficient timber for repairs might cut all fit timber, except ornamental. *Butler* v. *Borton*, 5 Madd. 40; 21 R. R. 272.

Consent of.]—Where a testator devises the legal estate to trustees, and gives to a tenant for life an equitable estate only, with remainders over, such tenant for life ought not to cut timber without the consent of the trustees. *Denton* v. *Denton*, 7 Beav. 388; 8 Jur. 388.

——**Reference.**]—Power contained in a will for the devisees for life, when in possession, to cut down timber as four trustees, or the survivors or survivor of them, should direct, &c.; all the four trustees being dead:—Held, that the court would execute the trust by referring it to a master to see what timber was fit to be cut down from time to time. *Hewett* v. *Hewett*, 2 Eden, 332; Amb. 508.

Right to Restrain Tenant for Life.]—Trustees to preserve, &c., may bring title to stay waste by tenant for life. *Perrot* v. *Perrot*, 3 Atk. 95.

A trustee to whom real property is devised in trust to one for life cannot interfere with the

possession of the equitable tenant for life, because he neglects to keep the property in repair; but if the tenant for life should be committing active waste the trustee may interfere, at least if the parties are entitled in remainder are under disability. *Powys* v. *Blagrave*, 4 De G. M. & G. 448; 2 Eq. R. 1204; 24 L. J., Ch. 142; 2 W. R. 700. Affirming 1 K. & J. 495; 18 Jur. 462.

Rights as to Ornamental Timber.]—Trustees in whom an estate is vested ought not to cut down ornamental trees alleged to be prejudicial, without first applying to the parties beneficially interested for their assent, or to the court for its authority, and the onus of showing that the trees are prejudicial lies on the trustees. *Campbell* v. *Allgood*, 17 Beav. 623.

Trustee in Possession—Wrongful Cutting of Timber—Valuation.]—A., seised in fee of land, demised the premises to trustees, B., C. and D., for five hundred years, in trust to pay debts, &c., for a charity. B., one of the trustees, being in possession, and as a receiver appointed by the court, cuts down 1,000*l.* worth of timber, D., one of the other trustees, consenting; B., the trustee for the charity, or as a receiver, ought not to take advantage of his having possession, without which he could not cut down the timber; yet the timber must be valued according to what it would be worth at the end of the term of five hundred years. *Bays* v. *Bird*, 2 P. Wms. 397.

Duration of Trust.]—Testator devised his real estates to trustees in fee, in trust for T. M. for life, with remainder in trust for all the children of T. M., as tenants in common in tail, with remainders over, and ultimately in trust for his own right heirs: and he bequeathed his personal estate to the trustees, in trust for Mary B. for life, with remainder in trust for all her children who should attain twenty-one, with remainder in trust for T. M. and his children in like manner; and he directed that the timber or wood which should be upon his real estates should be from time to time made use of for repairing the houses thereon, or otherwise for the benefit and advantage of his estates; or that the same should be sold, and the proceeds applied in the manner in which his personal estate was thereinbefore directed to be applied: —Held, that the direction or trust respecting the timber and wood on the estates was not perpetual, but ceased on the inheritance vesting in possession in adult persons. *Silvester* v. *Bradley*, 13 Sim. 75; 11 L. J., Ch. 365.

Settlement and Will—Power to Cut Timber, in whom Vested.]—By a settlement, real estates were limited to the use of A. for life, with remainder to the use of M. and N. to preserve contingent remainders, remainder to the use of the plaintiff for life, with divers remainders over; and it was declared that it should be lawful for M. and N., at the request and by the direction of the plaintiff or other the tenant for life for the time being, to cut timber upon the estates. A. by will devised real estates to S. and P., their heirs and assigns, to the same or the like uses, upon and for the same or the like trusts, intents, and purposes, and with, under, and subject to the same or the like powers, as the estates comprised in the settlement were subject to:—Held, that the power of cutting timber on the devised estates was vested in the trustees of the settlement, and not in the trustees of the will. *Taylor* v. *Miles*, 28 Beav. 411; 6 Jur. (N.S.) 1063; 3 L. T. 115.

Trust or Power.]—Direction to trustees to cut trees in aid of testator's real and personal estate: —Held, not a trust, but a mere power, upon the whole of the will. *Gower* v. *Eyre*, G. Cooper, 156.

Discretionary Power.]—A testator, by his will, devised all his real estates to trustees for ninety-nine years, without impeachment of waste, and, subject thereto, to the use of his son for life, without impeachment of waste, with remainder to the use of his granddaughter for life, without impeachment of waste, with remainder to her first and other sons in tail, &c. The trustees of the term were, in the event of his personal estate being deficient, to raise money to pay debts and legacies. The will contained an express provision against cutting down any timber on the estates except for necessary repairs, until the granddaughter should attain twenty-one, at which time the trustees were empowered to cut such timber "as they shall think fit," and to sell and pay the proceeds to the granddaughter. The son entered into possession, and died before the granddaughter attained twenty-one. She then became tenant for life. Some time afterwards, and after she attained her majority, the trustees sold the term by auction in order to pay debts. It was stated in one of the conditions of sale that the estate was sold subject to any rights under the provisions in the will:—Held, that the will created no obligatory trust in favour of the granddaughter, but that power to the trustees to cut, &c., was merely discretionary. *Watlington* v. *Waldron*, 4 De G. M. & G. 259; 23 L. J., Ch. 713; 18 Jur. 317; 2 W. R. 120.

—— **Interference with.**]—Upon the equitable construction of the trusts of a term:—Held, that the trustees had a discretionary power to enter on the estates, and cut fit and proper timber, and apply the proceeds in discharge of the sums directed to be raised; and that the court would protect them in the exercise of that power, there being an absence of all mala fides, or of any wanton or unreasonable exercise of their discretion. *Kekewich* v. *Marker*, 3 Mac. & G. 311; 21 L. J., Ch. 182; 15 Jur. 687.

An injunction was in this case granted at the suit of the trustees, restraining the tenant for life in possession from cutting the timber on the estates, on the ground that his doing so would interfere with the discretionary power vested in the trustees. *Ib.*

Jurisdiction.] — Bill filed by trustees for declaration of true construction of settlement, and for injunction restraining equitable tenant for life from preventing the trustees from receiving proceeds of sale of timber felled with his consent, and also from felling timber; and demurrer put into bill:—Held, that, as the interference with the sale was by a cestui que trust and not by a mere stranger, the proceeding was properly the subject of equitable jurisdiction. *Briggs* v. *Oxford (Earl)*, 5 De G. & Sm. 156; 16 Jur. 53. *S. C.*, 1 De G. M. & G. 363; 21 L. J., Ch. 829; 16 Jur. 558.

I. MERE POSSESSOR OR TRESPASSER.

Possessor.] — Injunction against tenant in

possession, not party, to stay waste. *Att.-Gen.* v. *Ancaster* (*Duke*), Dick. 68.

—— **Waste by Servant.**]—An injunction will be granted, before answer, to stay waste by a person having no interest in the thing wasted, but merely acting as a servant. *Orrery* (*Lord*) v. *Newton*, Ridgw. 252.

—— **Title of Plaintiff.**]—The court will, at the instance of a person merely alleging a legal title to realty, grant an injunction to restrain persons in possession of an estate from committing malicious and destructive waste. *Talbot* (*Earl*) v. *Scott*, 4 K. & J. 96; 27 L. J., Ch. 273; 4 Jur. (N.S.) 1172; 6 W. R. 269.

Such a case must be clearly made out, and a more general allegation that the tenant has cut down a considerable quantity of timber, some of which was of an ornamental character, and other portions of which were unripe for cutting, is insufficient. *Ib.*

The authorities as to the jurisdiction of the court to interfere at the instance of parties claiming real property under a legal title, by appointing receiver of the rents and profits, and by injunction to restrain waste, examined. *Ib.*

They establish these propositions: 1st. In the absence of fraud, and where there is no privity between the parties, the court will not interfere, at the instance of a person so claiming, to grant a receiver against parties in possession. 2ndly. Nor will it interfere at the like instance, to restrain waste, except malicious or destructive waste; e.g. by pulling down the capital messuage, stripping the estate of its timber, or other like acts, which no owner would do, or which would destroy the property before they could be arrested at law. 3rdly. But flagrant acts of this exceptional character would, at the present day, be restrained, and that before judgment at law; and notwithstanding plaintiff was out of possession, and his title denied on oath by the defendant. *Ib.*

—— **Taking Timber.**]—Injunction to restrain defendant in possession from stripping an estate of timber, granted upon a motion by a plaintiff claiming under a title at law. *Beale* v. *Cripps*, 4 K. & J. 472.

—— **Threat to Commit Waste.**]—To the bill of a plaintiff, alleging that, under a settlement thereby stated, he was entitled to an estate, of which the defendant was in possession, and had been so for nineteen years, that the plaintiff had not discovered his title until a very recent period, and that he had since brought an ejectment against the defendant to recover the premises, which action stood for trial at the next assizes, and praying an injunction to restrain the defendant from cutting down and selling ornamental and other timber of great value, and thereby occasioning irreparable injury to the estate, which the bill charged that the defendant threatened and intended to do; a demurrer, for want of equity, was allowed. *Davenport* v. *Davenport*, 7 Hare, 217; 18 L. J., Ch. 163; 13 Jur. 227.

Trespasser.]—Injunction against a mere trespasser committing waste, not granted. *Mogg* v. *Mogg*, Dick. 670.

The tendency of the authorities upon the subject of injury to real property is to break down the old distinction that existed between waste and trespass. *Lowndes* v. *Bettle*, 4 N. R. 609; 33 L. J., Ch. 451; 10 Jur. (N.S.) 226; 10 L. T. 55; 12 W. R. 399.

Where a defendant is in possession of an estate, and a plaintiff claiming possession of it seeks to restrain him from cutting down trees and digging sods, and other suchlike acts, the court will not interfere unless the acts complained of amount to such flagrant instances of spoliation as to justify the court in departing from the general rule. *Ib.*

Where a plaintiff is in possession and the person doing the acts complained of is an utter stranger, not claiming under colour of right, then the tendency of the court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law; though, if the acts tend to the destruction of the inheritance, the court will grant an injunction. *Ib.*

But, where a plaintiff in possession seeks to restrain one who claims by an adverse title, the tendency of the court will be to grant an injunction; at least when the acts committed do or may tend to the destruction of the estate *Ib.*

Where a person, not being in possession of an estate, claimed it as heir-at-law, and entered upon it, cut down trees, and cut sods, and threatened to repeat his conduct in order to establish his alleged title as against the possessor, who by himself and his ancestors had been in possession of the estate for upwards of eighty years:—Held, upon bill filed by the possessor against the claimant, that, as the acts of the defendant might be injurious to the inheritance, he must be restrained by injunction from committing them. *Ib.*

The jurisdiction against waste by injunction and account, applied to trespass by exceeding a limited right to enter and take stone from a quarry, being a destruction of the inheritance as in the case of timber, coal, &c., and the distinction between waste and trespass therefore disregarded. *Thomas* v. *Oakley*, 18 Ves. 184; 11 R. R. 181.

Injunction to restrain a party claiming by an adverse legal title from committing acts or trespass, alleged to be productive of irreparable waste, refused, under the special circumstances of the case. *Haigh* v. *Jagger*, 2 Coll. C. C. 231.

—— **Jurisdiction.**]—Semble, that, although a man be in full and complete possession of an estate, by a title adverse to another who claims it against him, and there be no privity between the parties, and the party in possession swear that his own title is just and valid, or that the title of his adversary is unjust and invalid, that state of things does not prevent a court of equity from interfering (before judgment at law or decrees in equity) to restrain the party in possession from committing waste upon the inheritance. *Ib.*

—— **Cutting Timber.**]—In 1859 H. brought ejectment against S. to recover a piece of woodland. S. set up adverse possession for more than twenty years, and the action was discontinued. H. shortly afterwards took up his residence in a house close to the wood, and frequently walked in the wood, turned cattle into it, and cut the brambles there. In 1873 he

cut down a tree in the wood, and threatened to cut more, upon which S. filed his bill for an injunction:—Held, that, after H. had, by bringing ejectment, admitted S. to be in possession of the wood, the acts done by H. must be looked upon only as acts of trespass not putting him into possession, and that S., being in possession, was entitled to an interlocutory injunction to restrain him from cutting timber. *Stanford* v. *Hurlstone*, L. R. 9 Ch. 116; 30 L. T. 140; 22 W. R. 422.

—— **Possession under Purchase.**]—Injunction against cutting timber in the case of trespass, viz. by a person having got possession under articles to purchase. *Crockford* v. *Alexander*, 15 Ves. 138; 10 R. R. 44.

—— **Collusion with Tenant.**]—Injunction against trespasser cutting timber by collusion with tenant, without prejudice to case of a mere trespasser. *Courthorpe* v. *Mapplesden*, 10 Ves. 290.

J. ACCOUNT.

Right to.]—The right to an account in equity of the proceeds of timber wrongfully felled in commission of waste is only incident to the right to an injunction. *Higginbotham* v. *Hawkins*, 41 L. J., Ch. 828; L. R. 7 Ch. 676; 27 L. T. 328; 20 W. R. 955.

Admission that any timber has been wrongfully cut gives right to account. *S. C.*, *Lee* v. *Alston*, 1 Ves. J. 82.

Tenant for life cannot have an account of what was underwood cut wrongfully by a preceding tenant. *Pigot* v. *Bullock*, 1 Ves. J. 479; 3 Bro. C. C. 589; 2 R. R. 148.

Where tenant for life, unimpeachable of waste, cuts and sells timber planted for ornament or shelter, the proceeds of that timber belong to the person having then the first vested estate of inheritance; and parties having intervening estates for life have no right to an account of the proceeds of the timber so cut, or to have such proceeds invested upon the same trusts with the lands. *Ormond* v. *Kynnersley*, *Butler* v. *Kynnersley*, 15 Beav. 10, n.; 7 L. J. (O.S.) Ch. 150; 8 id. 67.

A tenant for life, without impeachment of waste, of estates felled and converted to his own use timber growing thereon. The tenant in tail in remainder filed a bill to restrain the cutting of the timber, and for an account of the timber already felled. The tenant for life refused to account on the ground that he was entitled to the timber in right of his interest in the estate:—Held, that the tenant for life must set forth the accounts. *Newry* (*Viscount*) v. *Kilmorey* (*Earl*), 24 L. T. 15; 19 W. R. 271.

Case in which an account of timber felled during the life of tenant for life, &c., refused on account of the power given to trustees being void, &c. *Ferrand* v. *Wilson*, 4 Hare, 344; 15 L. J., Ch. 41; 9 Jur. 860.

Against Tenant for Lives, Renewable.]—Lord Chancellor Manners would not restrain a tenant for lives, with covenant for perpetual renewal, from cutting timber, though it did not appear when planted:—Ordered, that the defendant do keep an account of the produce, and let plaintiffs proceed at law. *Conolly* v. *Ely* (*Lord*), 2 Moll. 515.

For Timber Cut for raising Portions.]—Tenant for life shall not account for value of timber cut down in order that it might be applied towards raising portions. *Saville* v. *Saville*, 2 Atk. 463.

Payment of Debts.]—A. devises lands incumbered with debts to B. for life, remainder to C. in fee; B. cuts down timber from the estate; B. decreed to pay two-fifths of the debts and C. the remaining three-fifths, and B. to account for the timber which he had cut, and this to be taken as part of the three-fifths which the remainderman was to pay. *James* v. *Hales*, 2 Vern. 267; Pre. Ch. 44.

Liability of Estate of Deceased.]—Equitable waste by tenant for life is a breach of trust, and his assets after his death are answerable. *Ormond* (*Marquis*) v. *Kynnersley*, 5 Madd. 369; 21 R. R. 313.

Where a wrong has been committed, the wrongdoer must suffer from the impossibility of accurately ascertaining the amount of damage. *Leeds* (*Duke*) v. *Amherst* (*Earl*), 20 Beav. 239.

—— **Executors.**]—Therefore, where an account of the equitable waste committed by a tenant for life was directed to be taken against his executors, which it was found impossible to take accurately, and the master had arbitrarily charged the executors, his report was supported. *Ib.*

Account against the representative of tenant for life, without impeachment of waste, of dilapidations permitted by him in and about the mansion-house:—Refused. *Lansdowne* v. *Lansdowne*, 1 J. & W. 522; 21 R. R. 227. And see *S. C.* on demurrer, 1 Madd. 116; 15 R. R. 225.

A bill by a landlord for an account of waste, in cutting timber, by a tenant in his lifetime, lies against the tenant's executors. But where the waste had been committed for fifty years during the tenant's life, and the bill was not filed till a few years after his death, the account was refused as to all the waste in his lifetime, but granted with an injunction as to waste by the executors. *Fishmongers' Co.* v. *Beresford*, Beat. 607.

Practice—Right to Issue or Supplemental Suit.]—A plaintiff, having made a case by his bill for an inquiry and account as to equitable waste, and having had the opportunity of supporting that case by evidence, which he omitted to do, was not entitled to an issue as to that equity, nor to raise the question anew in a supplemental or other suit, although the bill as to that equity had not been dismissed by the decree. *Newdigate* v. *Newdigate*, 8 Bligh (N.S.) 734; 2 Cl. & F. 601.

Against Lessee — Title of Lessor — Timber Acts.]—The Irish Society in 1618 granted lands to the Fishmongers' Company, reserving the timber. By deed of 1741, the society declared they would not claim trees thereafter planted, but that the company might cut them, so as they should be first applied in the improvement of the estate. In 1747 the company demised to a lessee, excepting the trees, with liberty to themselves to cut them for the improvement of their estates, according to their interest, but not for sale. He cut for sale:—Held, that neither the nature of their title nor the timber Acts were any objection to a suit by the company for an account and

injunction. *Fishmongers' Co.* v. *Irish Society*, Beat. 607.

When barred by Lapse of Time.]—*See* LIMITATIONS, STATUTE OF.

K. INJUNCTION, PROCEEDINGS BY.

1. IN GENERAL.

Generally.]—Injunction to stay waste. *Pratt* v. *Brett*, 2 Madd. 62.

Injunction against waste by tenant. *Kimpton* v. *Eve*, 2 V. & B. 349.

Interpleader.]—Analogy between bill of interpleader and to restrain waste. *Martinius* v. *Helmuth*, cited in *Stevenson* v. *Anderson*, 2 V. & B. 212, n.

Interlocutory.] — Injunction to stay waste only granted on interlocutory application. *Kettle* v. *Corbin*, Dick. 314.

Ex parte.]—Although an injunction ex parte will not be granted to stay waste, yet an interim order will be given, with leave to discharge it, where the object of the application is to preserve property during litigation. *Anwyl* v. *Owens*, 22 L. J., Ch. 995; 1 W. R. 205, 207.

Certainty.]—An injunction to stay waste will not be granted where it is doubtful whether the acts complained of are waste; the plaintiff must first try the question of waste or no waste, at law. *Lyon* v. *Wilkinson*, 1 L. J. (o.s.) Ch. 155.

Triviality—Delay.]—Injunction to stay waste refused, the acts of waste committed being trivial, and the plaintiff's proceedings having been dilatory. *Barry* v. *Barry*, 1 J. & W. 651.

Intent to Commit Waste.]—A small degree of waste manifesting an intent to do more is sufficient for the court to act upon. Id. 653.

Delay.]—In cases of waste, it is the business of the reversioner to apply to the court promptly. *Ib.*

Appearance.]—Injunction against waste not prevented by appearance the day before the motion. *Allard* v. *Jones*, 15 Ves. 605.

Notice.]—Defendant having appeared, motion for injunction, in matter of waste not immediate, without notice, refused. *Collard* v. *Cooper*, 6 Madd. 190.

—— **Before Bill.**]—Subpœna will issue, and leave to serve notice of motion for an injunction will be given, before bill filed in cases of bills for injunctions to stay waste. *Fosbrook* v. *Woodcock*, 12 Jur. 956.

Discovery.]—In a bill to stay waste, a plaintiff is not entitled to a discovery unless he waives the double penalty. *Boteler* v. *Allington*, 3 Atk. 457.

Demurrer.] — Where a bill is filed to stay waste, and a demurrer is put in, the court will hear the demurrer immediately. *Const* v. *Harris*, Turn. & R. 514; 24 R. R. 108.

Hearing.]—Suits for an injunction to restrain waste should not be brought to a hearing, where no account is sought, or the account is waived, if an injunction has been obtained, and the right to continue it is not disputed. *Dunsany* v. *Dunne*, 15 Ir. Ch. R. 278.

Denial of Waste.]—Defendant denying he had committed waste since filing of bill, no inducement to refuse injunction. *Att.-Gen.* v. *Burrows*, Dick. 128.

Conditional.]—Where irreparable waste has been committed, and is about being repeated, the court will, without a positive affidavit of the facts, grant a conditional order for an injunction, and restrain the party in the meantime if there be danger that the waste will be committed before such affidavit can be procured. *Beere* v. *Head*, 7 Ir. Eq. R. 60.

Continuing.]—In case of an injunction to stay waste, the court will, on the answer coming in, use its discretion whether it is to be continued till the hearing or not; and, in such cases, affidavits may be read. *Potter* v. *Chapman*, Amb. 99; Dick. 146.

Dissolving.]—If a defendant, by his answer, admits that he has committed waste before the filing of the bill, though he swears he has committed none since, yet the court will not dissolve the injunction. *Anon.*, 3 Atk. 485.

Staying Judgment.]—Injunction to stay judgment wrongfully obtained in action of waste. *Cavendish* v. *Cavendish*, Cary, 76.

Previous Waste.]—Injunction must be prayed against previous waste. *Anon.*, Lofft, 151.

Where Debt Unpaid.]—Although bill may be dismissed, so far as it seeks to set aside a lease made to the defendant which permitted waste, and which is a good lease as against the lessor, yet it is within the province of the court, while a sum due to the plaintiffs remains unpaid, to prevent any waste which may tend to injure their security. *Turkington* v. *Kearman*, Ll. & G. temp. Sugd. 35.

In Favour of Unborn Child.]—The court will grant an injunction to stay waste in favour of an infant in ventre sa mère. *Wallis* v. *Hodson*, 2 Atk. 117.

At Suit of Creditor.]—The court will not grant an injunction to stay waste at the instance of a judgment creditor in a suit by him against the heir and administrator of the debtor. *Leake* v. *Beckett*, 1 Y. & J. 339.

By Person Indemnified.]—The court will not interfere to restrain the waste of a sub-tenant at the instance of his immediate landlord, if it appear that the latter has obtained an indemnity against the claims of the head landlord. *Keogh* v. *Collins*, Hay & J. 805.

During Relation of Landlord and Tenant.]—Where the relation of landlord and tenant existed between the parties, the court has some-

times interfered by injunction to restrain waste, though the locus in quo being the property of the landlord was not any part of the demised premises; but, where such relation does not exist, the court will not interfere. Therefore, when waste on the demised premises was commenced during the tenancy, and continued after the tenancy had determined by persons claiming under the late tenant, the court, after the determination of the tenancy, refused to grant injunction. *Wrixon* v. *Condran*, 1 Ir. Eq. R. 380.

Lunacy.]—Injunction to restrain waste issued without bill filed, in a lunacy matter, on application of the receiver. *Chinnerys, In re*, 6 Ir. Eq. R. 469; 1 Jo. & Lat. 90.

Against Lessee, Renewable.]—Injunction in the nature of a writ of estrepement of waste does not lie against a tenant holding under a lease containing a covenant for perpetual renewal. *Calvert* v. *Gason*, 2 Sch. & Lef. 561.

Against Purchaser.]—Injunction may be obtained upon motion to restrain purchaser under decree, not a party to cause, who has not paid purchase-money, from committing waste on property purchased. *Casamajor* v. *Strode*, 1 Sim. & S. 381.

Against Tenant not Party.]—Injunction to stay tenant in possession, not a party, from committing waste. *Att.-Gen.* v. *Ancaster* (*Duke*), Dick. 68.

Remainderman not Joined.]—Injunction to stay waste in cutting trees granted on bill by party who was only tenant for life, and had no right to trees, and though party entitled to inheritance was not joined. *Dayrell* v. *Champness*, 1 Eq. Abr. 400.

Removal of Timber.]—Order made to prevent removal of timber wrongfully cut. *Anon.*, 1 Ves. J. 93.

Proviso against Mowing.]—On a devise of a park to tenants for life, with successive remainders in tail, containing a proviso against mowing it, but no devise over in case of breach of the restriction:—Held, to be one which the court would enforce by injunction. *Blagrave* v. *Blagrave*, 1 De G. & Sm. 252.

Proceedings by Receiver.]—If waste has been committed, and the case is pressing, the receiver may file a bill for an injunction without waiting for an order for the purpose; but, if time will permit, he should first apply for a reference to inquire what proceedings he ought to take. *Nangle* v. *Fingall* (*Lord*), 1 Hog. 142.

A bill filed by a receiver for an injunction against committing waste should contain a prayer for relief, if the defendant is solvent. *Cooke* v. *Cooke*, 1 Hog. 182.

—— **Without Bill.**]—The court will, upon motion by the receiver, grant a conditional order to restrain tenants under the court from committing waste without a bill being filed for the purpose. *Cronin* v. *M'Carthy*, Fl. & K. 49.

—— **Public Works.**]—The court will not grant an injunction upon the application of a receiver, to restrain a contractor under the 6 & 7 Will. 4, c. 116, s. 162 (Grand Jury Act), from quarrying stones, for the purposes of public works, on the lands, over which the receiver is appointed. *O'Kelly* v. *Gregg*, Jon. & C. 76.

Reference.]—Where injunction to stay waste has been granted on petition, a reference was made to inquire what timber might be cut with advantage, &c. *Att.-Gen.* v. *Marlborough* (*Duke*), 5 Madd. 280; 18 R. R. 273.

Parties—Security.]—Where a tenant for life, without impeachment of waste, had sold a quantity of timber trees, which the court afterwards restrained him from felling, on the supposition that it would be equitable waste, the court held that the purchasers of the timber were not necessary parties to the injunction suit, but required the plaintiff to give security to the defendant, not only for the value of all the trees which the defendant should be prevented from cutting by the injunction, but also for any loss or damage the defendant might incur or sustain by reason of his being prevented from completing the sale. *Marker* v. *Marker*, 9 Hare, 1; 20 L. J., Ch. 246; 15 Jur. 663.

2. WHERE TITLE DOUBTFUL OR DISPUTED.

Generally.]—Injunction against waste not granted without positive evidence of title. *Davies* v. *Lee*, 6 Ves. 784.

Injunction for waste denied, plaintiff's right being doubtful. *Field* v. *Jackson*, Dick. 599.

Where the title to land is in dispute, the court of exchequer will not grant an injunction to restrain an act of trespass, but only to prevent an irreparable injury. The court therefore refused an injunction to restrain the owner in fee of a piece of land claimed by the crown, but denied by the owner to be part of a royal forest, from cutting down holly trees and underwood therein in the manner in which they had been ordinarily cut down for twenty years previously. *Att.-Gen.* v. *Hallett*, 16 M. & W. 569; 16 L. J., Ex. 131.

A possessory bill was filed to restrain the defendant from cutting turf for sale, on the allegation that he was tenant to the plaintiff of land adjoining the bog, with a limited permission to cut turf for use in the bog, which plaintiff claimed as his own. On the affidavits showing cause the tenantry of the land was admitted, and it appeared that the predecessors had long claimed the disputed right over the bog, the plaintiff's title to which was vaguely stated. In 1807 an injunction had been obtained in a similar suit, restraining the tenant from cutting turf at all:—Held, that an injunction could not be obtained in this suit, as, if the tenant was a mere trespasser, it was not sustainable to establish a disputed right, there being no triennial possession, and the allegation of a limited permission could not be strengthened by the order of 1807, which set up a different claim. *Congleton* v. *Mitchell*, 12 Ir. Eq. R. 34.

Want of Equity.]—The plaintiff claimed, under a settlement, an estate in the possession of the defendant for nineteen years, stating that he had only discovered his title very recently, and had brought an ejectment, and asking an injunction to restrain the defendant from cutting down ornamental timber; a demurrer, for want of

equity, allowed. *Davenport* v. *Davenport*, 7 Hare, 217.

Writ of Estrepement.]—The court will not entertain a motion for an injunction, in the nature of a writ of estrepement, to restrain waste, except where the title is clear. *Lowe* v. *Lucey*, 1 Ir. Eq. R. 93.

Between Devisee and Heir.] — Injunction against cutting timber refused where the title was disputed as between the devisee and heir-at-law. *Smith* v. *Collyer*, 8 Ves. 89.

Injunction against felling timber for devisee against heir-at-law in possession, admitting the waste, but disputing the will, refused. *Beatty* v. *Beatty*, 2 Moll. 541.

Injunction against cutting timber, granted, although the will was not established and the title disputed as between the devisee and heir-at-law. *Fingal* (*Earl*) v. *Blake*. 2 Moll. 50.

Injunction to stay waste at the suit of the devisee in trust against heir-at-law in possession, who disputed the will, refused, and order affirmed on appeal by Lord Chancellor Manners, considering the law of the court as settled in cases between heir-at-law and devisee, not to grant an injunction against defendant, who impeaches plaintiff's title. The order reversed on re-hearing by Lord Chancellor Hart. *S. C.*, id. 542.

Defendant claiming Adversely.]—Injunction to stay waste not granted against defendant in possession claiming by an adverse title. *Pillsworth* v. *Hopton*, 6 Ves. 51.

Defendant Improperly in Possession.]—Injunction granted to stay waste against defendant, who insists on his own title, but admits he received possession from plaintiff's tenant without plaintiff's knowledge, in breach of tenant's duty. *Norway* v. *Rowe*, 19 Ves. 154; 12 R. R. 157.

Defendant Liable to be Dispossessed.]—The court will not interfere, by way of injunction, to stay waste where the defendant may be turned immediately out of possession. *Mortimer* v. *Cottrell*, 2 Cox, 205.

Defendant having Deficient Interest.]—Where the plaintiff in the cause had obtained an order for a receiver, and was proceeding to cut timber upon the estates before the receiver had been appointed, the court refused to grant an injunction upon the application of the defendant, it appearing that the latter who was the agent of the owner of the estates (also a defendant) had no interest in such estates and no authority from his principal to make the application. *Hunter* v. *Nocknlds*, 15 L. J., Ch. 320; 10 Jur. 771.

3. AFFIDAVIT IN SUPPORT.

Setting out Title.]—In an order to obtain an injunction to stay waste, the affidavit must set out a particular title. *Whitelegg* v. *Whitelegg*, 1 Bro. C. C. 57.

Certainty.]—Where an affidavit was made in order to obtain an injunction to restrain waste, the court thought the affidavit certain enough by reason of the reference it had to the bill. *Bradly* v. *Stratchy*, Barnard. 399.

Extent.]—In the case of waste it is not sufficient to swear to information of the intention. The affidavit must go either to an act or threat of waste. *Hunnay* v. *M'Entire*, 11 Ves. 54.

Ex parte.]—Ex parte application for special injunction to stay waste should be promptly after knowtedge of such waste; and affidavit in support should state when party came first to the knowledge of such waste. *Culvert* v. *Grey*, before vice-chancellor 22nd February, 1850.

Admissibility.]—A plaintiff in a bill for an injunction to stay waste cannot read a supplemental affidavit in support of a conditional order for the injunction. The proceedings under such a bill are peculiar to Ireland. *Joley* v. *Stockley*, 1 Hog. 247.

Cutting Turf.] — To obtain an injunction against a tenant to stay waste in cutting turf, the affidavit must state that the turf was cut for the purpose of sale, the tenant being entitled to fire bote. *De Salis* v. *Crossan*, 1 Ball & B. 188.

Breaking up Meadow.]—Affidavit verifying bill for an injunction to restrain waste by breaking up ancient meadow should state deponent's knowledge of the land for a considerable period (semble, twenty years), and that it had not been in tillage during that time. Leave given to file affidavit to that effect. *Creagh* v. *Carmichael*, 7 Ir. Eq. R. 334.

4. COSTS.

Right to.]—If a suit for an injunction to restrain waste is forced to a hearing by the conduct of the respondent, the petitioner, if successful, will be entitled to his costs of suit. *Dunsany* v. *Dunne*, 15 Ir. Ch. R. 278.

Costs of proceedings for an injunction in the nature of a writ of estrepement, and which does not pray an account or answer, are seldom if ever given to the landlord. *Chatterton* v. *White*, 1 Ir. Eq. R. 200.

A. L.

WASTES.

See COMMON—COPYHOLD.

WATCHING AND LIGHTING.

See LOCAL GOVERNMENT—METROPOLIS.

WATER.

[BY J. RITCHIE.]

A. NAVIGABLE RIVERS.

1. *Rights and Incidents.*
   - *a.* Generally, 1880.
   - *b.* The Thames, 1884.
   - *c.* Of Fishing.—*See* FISH AND FISHERIES.

2. *Towing-Paths*, 1890.
3. *Obstruction or Injury.*
a. What Amounts to, 1893.
b. Actions for, 1903.
c. Indictments for, 1904.

B. Canal and Navigation Companies.
1. *Regulation of Companies.*
a. Shares, 1906.
b. Accounts, 1907.
2. *Purchase of Lands*, 1909.
3. *Right of Support*, 1914.
4. *Construction of Works*, 1916.
5. *Lease and Mortgage of Canals*, 1917.
6. *Liability to Repair*, 1918.
7. *Liability to Fence*, 1920.
8. *Liability for Overflow of Water*, 1921.
9. *Liability for Obstructing and Fouling Water*, 1925.
10. *Tolls.*
a. Taking and Amount, 1926.
b. Reducing and Varying, 1930.
c. Distraining for, 1932.
d. Extinguishment, 1933.
11. *Rights and Privileges of Taking and Using Water.*
a. Rights of Company, 1933.
b. Rights of Other Persons, 1937.
12. *Other Rights*, 1940.
13. *Rating of.*—*See* Rates and Rating.

C. Streams, Non-Navigable Rivers and Watercourses.
1. *Rights and Incidents of.*
a. Generally, 1944.
b. Ordinary Streams and Rivers.
i. Definition, 1946.
ii. Property in Soil, 1946.
iii. Use of Water, 1949.
c. Watercourses, 1952.
d. Drains and Pipes, 1954.
e. Subterranean Water, 1955.
f. Wells, 1956.
2. *Acquisition of Rights.*
a. By Prescription, 1958.
b. By Grant, 1965.
c. By Licence, 1973.
3. *Duty of Keeping Clean*, 1975.
4. *Infringement of Rights.*
a. Diversion and Abstraction of Water, 1976.
b. Obstruction, 1981.
c. Pollution, 1984.
5. *Proceedings and Evidence*, 1992.

D. Waterworks Companies.
1. *General Powers*, 1997.
2. *Liability.*
a. Compensation, 2004.
b. Injuries due to Defective Works, 2006.
c. Escape of Water, 2008.
d. Pollution of Water, 2010.
e. Rates.—*See* Rates and Rating.
3. *Rights against others Persons*, 2011.
4. *Supply of Water.*
a. General Powers and Duties, 2014.
b. Rights against Consumers, 2021.
c. Rates.
i. Amount, how Calculated, 2022.
ii. Persons Liable, 2027.
iii. Recovery of, 2029.

E. Injuries by Water, 2031.

A. NAVIGABLE RIVERS.

1. Rights and Incidents.

a. Generally.

Navigable River, what is.]—A river or a creek into which the tide flows is not therefore necessarily a public navigation. *Rex* v. *Montague*, 6 D. & R. 616 ; 4 B. & C. 589 ; 4 L. J. (o.s.) K. B. 21 ; 28 R. R. 420.

The flux and reflux of the tides is primâ facie evidence of a navigable river. *Miles* v. *Rose*, 1 Marsh. 313 ; 5 Taunt. 705 ; 15 R. R. 623. S. P., *Murphy* v. *Ryan*, Ir. R. 2 C. L. 143 ; 16 W. R. 678.

But not absolutely inconsistent with an exclusive right. *Ib.*

On a question whether a creek is a public navigable river or not, instances of persons going up it for the purpose of cutting reeds, and on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are evidence sufficient for the jury to presume it to be a public river. *Ib.*

—— **When Affected by High Tides.**]—An information was laid against the appellant for unlawfully fishing in a river wherein the respondents had a private right of fishery. It was proved that the river was navigable, and that at the place where the appellant fished the water was not salt, and that in ordinary tides it was unaffected by any tidal influence, but that upon the occasion of very high tides the rising of the salt water in the lower part of the river dammed back the fresh water, and caused it upon those occasions to rise and fall with the flow and ebb of the tide. The appellant contended that the river being navigable and tidal at the place in question, there was a presumption that the public had a right to fish there, and that the jurisdiction of the justices was therefore ousted by a reasonable claim of right :—Held, that the river at the place in question could not be considered as tidal within the meaning of the rule of law which gives the public a right to fish in navigable tidal rivers, and therefore there was no claim of title set up sufficient to oust the justices' jurisdiction. *Reece* v. *Miller*, 51 L. J., M. C. 64 ; 8 Q. B. D. 626.

Nature of.]—A navigable river is a public highway navigable by all her majesty's subjects in a reasonable manner and for a reasonable purpose. *Original Hartlepool Collieries Co.* v. *Gibb*, 46 L. J., Ch. 311 ; 5 Ch. D. 713 ; 36 L. T. 433.

A navigable river is a public highway, and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they please ; but if they abuse that right, so as to work a private injury (as to interrupt the enjoyment of a private fishery), they are liable to an action. *Anon.*, 1 Camp. 517, n.

Extinction of.]—A public right of navigation on a river or creek may be extinguished either by legal means, as an act of parliament,

a writ of ad quod damnum, or an order of commissioners of rivers, or by natural causes, as the retreat of the sea, or a deposit of silt and mud. *Rex* v. *Montague*, supra.

Where a public road obstructing a creek which is unnavigable, has existed beyond living memory, the law will presume that the public right of navigation has been destroyed by some one of the means above mentioned. *Ib.*

Riparian Proprietors.]—The owner of the land abutting on a tidal navigable river has, jure naturæ, a right of access to and from the stream wholly distinct from the right of navigation which he enjoys in common with the rest of the public. *Lyon* v. *Fishmongers' Co.*, 46 L. J., Ch. 68; 1 App. Cas. 662; 35 L. T. 569; 25 W. R. 165—H. L. (E.)

There is no distinction between the position of a riparian owner of land abutting on a tidal and that of an owner of land abutting on a non-tidal stream, as far as regards right of access from the stream to his own land, and vice versâ. *Ib.*

Such right of access is a private right distinct from the right of navigating the stream, which is common to the riparian owner and the rest of the public, and it is not to be interfered with by a licence to embank, under s. 53 of the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), but is protected by s. 179 of that act. *Ib.*

There is no distinction in principle between riparian rights on the banks of navigable or tidal, and on those of non-navigable rivers. In the former case, however, there must be no interference with the public right of navigation; and in order to give rise to riparian rights the land must be in actual daily contact with the stream, laterally or vertically. *Lyon* v. *Fishmongers' Co.* (1 App. Cas. 662) followed and held to be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the lex loci. *North Shore Ry.* v. *Pion*, 59 L. J., P. C. 25; 14 App. Cas. 612; 61 L. T. 525—P. C.

In a public navigable river, twenty years' possession of the water at a given level is not conclusive as to the right. *Vooght* v. *Winch*, 2 B. & Ald. 662; 21 R. R. 446.

The rights of a riparian proprietor against adjoining or opposite riparian proprietors are not greater in respect of a tidal than in respect of a non-tidal river. *Att.-Gen.* v. *Lonsdale* (*Earl*), 38 L. J., Ch. 335; L. R. 7 Eq. 377; 20 L. T. 64; 17 W. R. 219.

The right to the soil of a navigable river is not by presumption of law in the owners of the adjoining lands. *Rex* v. *Smith*, 2 Dougl. 411.

A party claimed a right to use a navigation, in respect of his occupation of a close abutting on the stream. This close formed a part of the King's Head Inn, until five years before the action was brought, when it was detached, and all the acts of the user of the navigation, which were proved, were exercised by the occupiers of the King's Head Inn, before the property was divided:—Held, that there was no evidence to support the right to a verdict, as on such evidence a grant could only be presumed to the occupiers of the inn. *Bowen* v. *Hill*, 2 Scott, 535; 2 Bing. (N.C.) 339; 1 Hodges, 334; 5 L. J., C. P. 77.

An owner of land at the side of a public navigable river has no right to erect on the bed of the river, for the benefit of his own trade, any structure, whether any actual obstruction to the navigation of the river will or will not be thereby occasioned; and any benefit to his own trade is too remote to be held for the advantage of the public generally, and so to justify the erection. *Att.-Gen.* v. *Terry*, L. R. 9 Ch. 423; 30 L. T. 215; 29 W. R. 395.

A riparian proprietor may have a private right of access to a navigable river distinct from his right as a member of the general public. *Att-Gen.* v. *Thames Conservators*, 1 N. R. 121; 1 Hem. & M. 1; 8 Jur. (N.S.) 1203; 8 L. T. 9; 11 W. R. 163.

—— Incidental Rights—Dredging Foreshore.]—The Clyde Navigation Trustees, being empowered by ss. 76 and 84 of 21 & 22 Vict. c. 149, to dredge the bed of the River Clyde to a depth of seventeen feet, cannot be interdicted from dredging ground which has been declared the property of the riparian owner, subject to any right which the public may have over it, and subject also to any rights conferred on the trustees by their acts of parliament:—So held, affirming the decision of the court below, but without prejudice to the question of their liability to subsequent compensation for damage. *Blantyre* (*Lord*) v. *Clyde Navigation Trustees*, 6 App. Cas. 273—H. L. (Sc.)

—— Sale of Water by—Preferable Right of Purchaser.]—A vendor by deed sold a piece of land on the banks of a navigable river, "together with a quantity of water-power equivalent to fifty horse-power, to be taken from the water-power and dam of the said vendors on the North River, and now in use to run their manufacture," &c., with a "promise of warranty against all trouble and hindrances generally whatsoever," except during such times as the dam across the river should be out of order, and should be required for the purpose of putting it into repair. It was further agreed that the purchaser should have the right to require another fifty horse-power upon stated terms, which right he subsequently exercised:—Held, that under the deed the purchasers had a right to take water from the reservoir to the extent of 100 horse-power in priority to the vendor or any purchaser from him subsequently to the deed of sale, and that the vendor or his assignees could not deprive the purchasers of the right by claiming a right to the water as members of the public:—Held, also, that the fact that a river is navigable cannot prevent a riparian owner from acquiring an interest in its water-power, which he can sell along with and as appurtenant to a parcel of his land. *Hamelin* v. *Bannerman*, 64 L. J., P. C. 66; [1895] A. C. 237; 11 R. 368; 72 L. T. 128; 43 W. R. 639; 60 J. P. 22—P. C.

—— Liability to Fence Land.]—By the Glasgow Police Act, 1886, s. 384, the master of works may by notice "require any proprietor or occupier of a land or heritage" within the city "to fence the same, or repair any chimney-stalk or flue, or chimney-head or can, or any rhone, sign-board, or other things connected with or appertaining to any building thereon, which appears to be dangerous":—Held, affirming the decision of the court below, that the statute gave no power to the master of works in Glasgow to compel a riparian proprietor to fence his land off from a tidal and navigable river, although a right-of-

way gained by the public along the river bank, and fenced on the land side, was alleged to be insecure and dangerous, on account of the proximity of the river. *Lang* v. *Kerr*, 3 App. Cas. 529—H. L. (Sc.)

Rights of Owner of Fishery.]—The owner of a several fishery in a public navigable river is, in the absence of evidence to the contrary, presumed to be the owner of the bed of the river. *Hindson* v. *Ashby*, 65 L. J., Ch. 515; [1896] 2 Ch. 1; 74 L. T. 327; 45 W. R. 252; 60 J. P. 484—C. A.

Effect of Accretions.]—The mutual rights of the owner of the bed of a river by virtue of a several fishery and the riparian proprietors are not affected by accretions to the bed or by the lowering of the level of the water, so long as the accretions or the soil from which the river has receded still remain part of the bed of the river. Whether, as between the owner of the bed of the river and a riparian proprietor, the doctrine of accretion applies where the line of demarcation between the land of the riparian proprietor and the river is in existence and clearly defined, quære. *Ib.*

Rights of Crown.]—There is no authority to show that the crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake. *Bristow* v. *Cormican*, 3 App. Cas. 641—H. L.

A navigable river is a public highway for vessels, at all times and states of the tide, and the right to pass and repass is not destroyed or abridged by the circumstance that, at particular states of the tide, a vessel cannot pass along without grounding, and thereby injuring oyster-beds therein. *Colchester Corporation* v. *Brooke*, 7 Q. B. 339; 15 L. J., Q. B. 59; 9 Jur. 1090.

The rights of the crown are subject to this public right of passage, and the crown, therefore, cannot, irrespectively of any ownership in the adjoining lands, make a grant inconsistent with it. *Ib.*

The right of the public to navigate a public river is paramount to any right of property in the crown, which never had the power to grant a weir, so as to obstruct the public navigation; and if a weir, which was legally granted in such a river, caused obstruction at any subsequent time, it became a nuisance. *Williams* v. *Wilcox*, 3 N. & P. 606; 8 A. & E. 314; 1 W. W. & H. 477; 7 L. J., Q. B. 229.

The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is vested in the crown, but subject to the right of navigation which belongs by law to the subjects of the realm, and of which the right to anchor forms a part; and every grant made by the crown of the bed or soil of an estuary or a navigable river must be subject to such public right of navigation. *Gann* v. *Free Fishers of Whitstable Co.*, 11 H. L. Cas. 192; 5 N. R. 432; 35 L. J., C. P. 29; 12 L. T. 150; 13 W. R. 589.

The ownership of the soil of navigable rivers and estuaries which is vested in the crown, is, and always has been. No grant of the bed of a river or estuary could, even before Magna Charta, have been made by the crown, except subject to the public right of navigation. A claim to levy toll, by virtue of the ownership of the soil of an estuary, from ships casting anchor on such soil, where no special consideration is offered in return for such toll, is bad, and cannot be supported by any length of enjoyment. *Ib.*

Rights of Conservators.]—An act, authorising persons to repair and cleanse a navigable river, does not authorise them make a passage to a new wharf on such river. *Partheriche* v. *Mason*, 2 Chit. 658.

Rights of Trustees.]—Semble, that the trustees of a river which has been made navigable by act of parliament, are not to be considered as occupiers of the soil of that river, unless it has been specially vested in them by that act. *Rex* v. *Trustees of the River Weaver*, 7 B. & C. 70; 5 L. J. (o.s.) M. C. 102.

Stealing Oysters.—In support of an indictment for stealing oysters in a tidal river, it is sufficient to prove ownership by oral evidence, as, that the prosecutor and his father, for forty-five years since 1815, had exercised the exclusive right of oyster fishing in the locus in quo; and that in 1846 an action had been brought to try the right, and a verdict been given in favour of the prosecutor. *Reg.* v. *Downing*, 23 L. T. 398; 11 Cox, C. C. 580.

"Vessels usually Navigating thereon."]—Under the Trent Navigation Act of 1858, it is provided that the commissioners thereunder shall maintain the navigation of the river so as to enable vessels usually navigating thereon to carry a burthen of forty tons at the least, and shall maintain the hauling-paths and ways by the side of the river for hauling, towing or drawing by men or with horses, vessels using the navigation:—Held, that, although previous to the passing of the act steam tugs were not in use upon the river, yet that the term "vessels" includes steamers, and the use of them upon the Trent is lawful. *Martin* v. *Leavers*, 46 J. P. 807.

b. The Thames.

Conservators—Election of.]—Corporate bodies entitled to vote at elections for Thames conservators cannot, under s. 22 of the Thames Conservancy Act, 1894, give proxies to electors other than their own officers or shareholders. The return of the persons elected, made by the returning officer under s. 23 of the Thames Conservancy Act, 1894, is final and conclusive, and cannot be questioned by quo warranto, as such returning officer acts judicially in the matter. Section 25 of the same act cures such an error or irregularity as the receiving and counting of invalid proxies. *Reg.* v. *Samuel*, 64 L. J., Q. B. 515; [1895] 1 Q. B. 815; 15 R. 380; 72 L. T. 572; 7 Asp. M. C. 595; 59 J. P. 375.

Wharfs.]—There is a custom on the Thames which authorises barges to be moored at low water for one tide at the piles in front of the wharfs; but in places where there are no piles, the custom does not extend to mooring at the wharf, unless through distress. *Wyatt* v. *Thompson*, 1 Esp. 252.

The corporation of London, being conservators of the river Thames, and owners of the soil between high and low water mark, cannot authorise a lessee to erect a wharf thereon, which produces inconvenience to the public in the

use of the river for the purposes of navigation. *Rex* v. *Grosvenor (Lord)*, 2 Stark. 511; 20 R. R. 732. And see *Rex* v. *Hollis*, 2 Stark. 536.

Erection of Piers or Works.]—The Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), authorises the conservators of the Thames to grant to the owner of any land fronting the river a licence to make any pier or other work immediately in front of his land, and into the body of the river, upon payment of such reasonable consideration as directed by the act, and subject to such conditions as the conservators shall think fit to impose, and by a saving clause none of the powers of the act are to abridge any right, claim or privilege to which any owner of lands on the banks of the river is entitled:—Held, that the conservators had power under the act to license the erection of a platform interfering with the navigation of the river. *Kearns* v. *Cordwainers' Co.*, 6 C. B. (N.S.) 388; 28 L. J., C. P. 285; 5 Jur. (N.S.) 1216.

Under the same act, the conservators of the Thames were empowered to erect piers at any convenient place, of such form and construction as they should deem advantageous to the public, and causing the least obstruction to the navigation. The plans were to be first approved by the admiralty:—Held, that a court of equity had no jurisdiction to interfere by injunction at the suit of the attorney-general, on the ground of the alleged inconvenience of proposed piers; or, at most, that it could only interfere where it was shown that the piers would be entirely useless. *Att.-Gen.* v. *Thames Conservators*, 1 Hem. & M. 1; 1 N. R. 121; 8 Jur. (N.S.) 1203; 8 L. T. 9; 11 W. R. 163.

The statute directed that, whenever the conservators should remove or obstruct the free use and enjoyment of any public stairs or landing-places marked by the watermen's company, they should erect equally convenient stairs or landing-places in substitution for them:—Held, that the substitution of new stairs or landing-places was not a condition precedent to the removal or disturbance, and that where the conservators had prepared plans for piers which would interfere with such old stairs without showing any adequate provision in substitution for them, a court of equity would not assume that the duty would be neglected, and would not interfere at the suit of the attorney-general to restrain the works until proper substitutes should be provided for the old stairs. *Ib.*

The conservators having a right to obstruct the stairs in the first place, the remedy, if afterwards they do not erect others equally convenient, is by mandamus. *Ib.*

The court, distinguishing the right of access to a public right of way itself, will restrain the conservators from depriving any person having a right of access to the river from his own land, of such access. *Ib.*

But if such access is merely hindered by the impediment which the conservators' works cause to all persons navigating the river, the court will not interfere, although the land-owners may suffer substantial damage thereby. *Ib.*

The city of London by licence granted a company permission to form a floating pier on the Thames, such pier to remain during pleasure, and to take tolls on all passengers landed at the pier. Under the powers conferred upon them by the Thames Embankment Act, 1862, the board of works took the floating pier from the company, and agreed to pay them a certain sum and to construct a new landing-stage in lieu of the old pier, and to appropriate it in perpetuity to the benefit of the company. The Thames Embankment Act, 1868, purported to give validity to this agreement. On a bill by the conservators of the Thames (in whom all the estate of the city of London in the bed, soil, and shores of the river had become vested by the Thames Conservancy Act, 1857) to restrain the company from continuing in possession of the landing-stage constructed in lieu of the old pier:—Held, that the company was entitled to the use of the pier only on sufferance, and at the pleasure of the conservators of the Thames; that the board of works had no power to convert the licence at pleasure into an irrevocable licence; and that the act which purported to give a validity to the agreement between the company and the board of works did not affect the rights of the conservators of the Thames. *Thames Conservators* v. *S. E. Ry.*, 24 L. T. 246.

Held, also, that their proper remedy was by bill in equity, and not by ejectment. *Ib.*

Where the metropolitan board of works carried a pipe connected with a sewer some distance into the Thames, and protected the mouth of it by driving piles into the bed of the river, which piles damaged a vessel:—Held, that as the board had not obtained the approval of the board of admiralty of the works as required by 21 & 22 Vict. c. 104, s. 27, they were liable in an action for obstructing the free navigation of the river, and that although the act gave them power to erect works on the soil or bed of the river Thames, yet nevertheless it was a condition precedent to the erection of such works that they should obtain the approval of the board of admiralty, and that the approval of the conservators of the Thames was not sufficient. *Brownlow* v. *Metropolitan Board of Works*, 13 C. B. (N.S.) 768; 31 L. J., C. P. 140; 8 Jur. (N.S.) 891; 6 L. T. 187; 10 W. R. 384. Affirmed 16 C. B. (N.S.) 546; 33 L. J., C. P. 233; 12 W. R. 871—Ex. Ch.

Compensation for Taking Wharf or Pier.]—A wharf owner, who has not any special easement or privilege over the bed or soil of the river, but only the common right of passage to his property, has neither an easement over nor a right in land, within the enlarged definition given to that word by s. 4 of the Thames Embankment Act of 1862 (25 & 26 Vict. c. 93). *Macey* v. *Metropolitan Board of Works*, 3 N. R. 669; 33 L. J., Ch. 377; 10 Jur. (N.S.) 333; 10 L. T. 66; 12 W. R. 619.

A person so situated, therefore, whose land is not taken, but whose right of passage is injuriously affected by the works authorised by the 25 & 26 Vict. c. 93, has no right to compensation before those works are proceeded with; but, having regard to the provisions of that act, and of the various acts incorporated therewith, his right to compensation arises when his damage is completed, and his remedy is under s. 68 of the Lands Clauses Act, or by arbitration alone. *Ib.*

Where damage is occasioned to a party whose premises are not entered upon, but are injuriously affected by the exercise of the powers given by the 25 & 26 Vict. c. 93, and for which damage compensation is required to be made,

the payment, ascertaining, or depositing of the amount of compensation is not a condition precedent to the commencement of the works which occasion the damage. *Ib.*

The Temple pier, erected under a licence from the conservators of the Thames, determinable by seven days' notice, was purchased and managed by a company. The metropolitan board of works, under the provisions of the Thames Embankment Act of 1862 (which incorporates the Lands Clauses Act of 1845, with the additional provision that the word "lands" shall include easements and interests in land, and which gives express power to alter and divert piers), altered and diverted the pier temporarily, to enable them to prosecute the embankment works, yet not so as to interrupt the use thereof; and proposed eventually to build, as nearly as might be at the same spot, a new pier in the place of the old one. The conservators refused to grant any licence to the company with respect to the proposed new pier:—Held, that the metropolitan board were not taking or permanently using any land or easement belonging to the company, and consequently were not bound to comply with the terms of s. 84 of the Lands Clauses Act before dealing with the pier in the manner mentioned. *Temple Pier Co.* v. *Metropolitan Board of Works*, 34 L. J., Ch. 262; 11 Jur. (N.S.) 337; 12 L. T. 369; 13 W. R. 535.

Rights of Riparian Proprietors.]—By the Thames Conservancy Act (20 & 21 Vict. c. cxlvii.), s. 53, the conservators appointed under that act have a power to grant a licence to a riparian proprietor to make an embankment in front of his own land abutting on the river; but though such licence might be the owner's justification so far as the public right of navigation was concerned, it would not authorise a licensee, being a riparian owner, to embank in front of his own land so as injuriously to affect the land of another riparian owner. *Lyon* v. *Fishmongers' Co.*, 46 L. J., Ch. 68; 1 App. Cas. 662; 35 L. T. 569; 25 W. R. 165.

The power granted to the conservators under 20 & 21 Vict. c. cxlvii. s. 53, is qualified and restricted by the provisions of s. 179. *Ib.*

The owners of lands adjoining the banks of the river have no right to complain of works erected under the powers of the Thames Conservancy Act, 1857, if such erection does not deprive them of access to their land by the river side, but only interferes with the right which they have in common with the rest of the public to the unrestricted navigation of the river. *Kearns* v. *Cordwainers' Co.*, supra, col. 1885.

Water Bailiffs.]—As to the right of the conservators of the Thames to appoint, see *Turnidge* v. *Shaw*, 3 El. & El. 588; 30 L. J., M. C. 113; 7 Jur. (N.S.) 755; 3 L. T. 147; 9 W. R. 381.

Watermen and Lightermen—Employment of.]—Under 22 & 23 Vict. c. cxxxiii. s. 54, a penalty is imposed upon any person not being a freeman, licensed in pursuance of the act, or an apprentice to a freeman or to the widow of a freeman, who shall at any time act as a waterman or lighterman, or ply or navigate any wherry, passenger boat, lighter vessel, or other craft upon the river Thames, from or to any place or places within the limits of the act, for hire or gain. The limits of the act are defined to be from Teddington Lock to Lower Hope Point:—Held, that a person not being a licensed freeman, or an apprentice to a freeman or the widow of a freeman, who navigates a barge for hire, within the limits of the act, is liable to the penalty, although such barge has started upon its voyage from a place outside the limits, and might, under 7 & 8 Geo. 4, c. lxxv., have been navigated as a western barge by such a person without incurring any penalty. *Doick* v. *Phelps*, 30 L. J., M. C. 2; 6 Jur. (N.S.) 1371; 3 L. T. 296; 9 W. R. 70.

A by-law imposed a penalty upon any freeman who should "set at work to row or in any manner navigate any lighter, barge, boat, or other craft upon the river Thames, within the limit of the act, any other person not being a freeman of the company." A freeman who had employed a non-freeman for hire to assist in working a barge within the limits was convicted of an offence against the by-law:—Held, that the by-law was good, as it applied only to the employment of persons for the ordinary rowing and navigation of barges or other craft, and was consistent with the provisions and directions of the act, and therefore the conviction was valid. *Edmonds* v. *Watermen's Co.*, 3 C. L. R. 902; 24 L. J., M. C. 124; 1 Jur. (N.S.) 727; 3 W. R. 408.

The 22 & 23 Vict. c. cxxxiii. s. 54, does not apply to a person (not being a freeman) conveying for his own purposes his servants or workpeople, and not making any charge for such conveyance. *Tadhunter* v. *Buckley*, 7 L. T. 273.

A by-law, made under ss. 57 and 106 of the Watermen's Act, 7 & 8 Geo. 4, c. lxxv., was made applicable to "every freeman of the company using and working for hire any wherry, boat, &c., for carrying passengers within the limits of the act":—Held, that this did not apply to a freeman working a boat on a private ferry as the servant of the lessee of the ferry. *Reg.* v. *Giles*, 5 W. R. 575.

Quære, whether under the act by-laws may be made affecting private ferries. *Ib.*

—— **Refusing to Admit Member.**]—The watermen and apprentices, being freemen of the Watermen's Company, and plying at any stairs, and having formed themselves into a turnway club, under the by-laws of the company, have no power to make regulations except such as are consistent with the act and by-laws, and therefore they have no power to refuse to accept as a member one who, having complied with the act and by-laws, and having tendered the requisite sum to the steward of the club, refuses to belong to an old-established burial club to which the watermen and apprentices plying at such stairs belong. *Reg.* v. *Atkins*, 4 W. R. 83.

—— **Compliance with Rules—Liability for Injuries.**]—Where a barge owner employed a freeman and an apprentice of a freeman to navigate a barge from the Pool to Lambeth and back, and owing to their misconduct the barge injured another barge:—Held, that the owner was liable, and that he was not protected by the Watermen's Act restraining him in the selection of his servants. *Martin* v. *Temperley*, 4 Q. B. 298; 3 G. & D. 497; 12 L. J., Q. B. 129; 7 Jur. 150.

—— **Regulation of Traffic.**]—The 22 & 23 Vict. c. cxxxiii., "An act for the better regulation of the barge owners and others connected with the navigation of the River Thames between

Teddington Lock and Lower Hope Point," by s. lxvi. enacts that no barge or other like craft for the carrying of goods shall be "worked or navigated" within the limits of the act, unless there be "in charge of such craft" a lighterman licensed or apprentice qualified as therein mentioned. Six barges fastened together in pairs were towed by a steam-tug on the river within the limits of the act. Four men were in charge, but no one was on board either of the last two barges:—Held, that the two barges were "worked or navigated" in contravention of the act, which required a qualified person to be on board each barge to manage it in case of separation or accident. *Elmore* v. *Hunter*, 47 L. J., M. C. 8; 3 C. P. D. 116; 38 L. T. 179.

The Isle of Dogs Ferry Society was the owner of an ancient ferry, called Potter's Ferry, which was described in their title deeds as between the Isle of Dogs and Greenwich. Down to 1850, the use of the ferry appeared to have been exercised between an ancient landing-place in the Isle of Dogs and Garden Stairs opposite, and occasionally one or two other landing-places at Greenwich. Since 1850, a dock and wharf and public roads were constructed by C., in the Isle of Dogs, about 800 yards lower down the river than the ancient landing-place. The society leased their right of ferry to D., who employed M., a freeman, to carry passengers for hire from C.'s dock and wharf to a point opposite at Greenwich, and not having a licence, as required by 7 & 8 Geo. 4, c. lxxv. s. 38, he was convicted in a penalty under its provisions:—Held, first, that s. 99 was not limited by s. 101, and extended to except boats plying in the exercise of a right of ferry from the operation of the act; but, secondly, that the right did not extend to the landing-place at C.'s dock and wharf, and therefore that s. 99 did not apply, and M. was properly convicted. *Reg.* v. *Matthews*, 5 El. & Bl. 546; 25 L. J., M. C. 7; 1 Jur. (N.S.) 1204; 4 W. R. 22.

The Watermen's Act, 7 & 8 Geo. 4, c. lxxv. s. 57, gave authority to the mayor and aldermen of the city of London, to make by-laws "for the government and regulation of the freemen of the Watermen's Company, and their widows and apprentices, and boats, the vessels and other craft to be worked within the limits of the act":—Held, that, under these words of the act, the lord mayor and aldermen were authorised to make general regulations affecting the speed of steam-vessels navigating within certain limits. *Tisdell* v. *Combe*, 3 N. & P. 29; 7 A. & E. 788; 1 W., W. & H. 5; 7 L. J., M. C. 48; 2 Jur. 32.

Under the Thames Conservancy and Watermen's Acts, and by-laws thereunder, if a barge under weigh exceeds 50 tons, there must be two qualified licensed watermen on board, and one is not sufficient though assisted by another unqualified man. *Perkins* v. *Gingell*, 50 J. P. 277.

A steam-tug of eighty-seven tons burden employed in moving another vessel was not a "wherry, lighter, or other craft," under 7 & 8 Geo. 4, c. lxxv. s. 37, and a person navigating her for this purpose, not being a freeman, did not thereby incur a penalty. *Reed* v. *Ingham*, 3 El. & Bl. 889; 2 C. L. R. 1495; 23 L. J., M. C. 156; 1 Jur. (N.S.) 61; 2 W. R. 520.

A. was employed by the Great Western Railway Company, at a weekly salary, in navigating the company's barges upon the Thames, and at the time of the alleged offence he had the command of the company's barge, laden with the goods in the possession and care of the company as common carriers, and which were in the course of being forwarded for delivery to the owners and consignees. The goods had been laden on board the barge at a private basin of the Grand Junction Canal, adjoining one of the company's stations, and without the limits of the 7 & 8 Geo. 4, c. lxxv. The barge was towed along the canal to the river, and steered by A. upon the river and within the limits of the act, to a private wharf of the company west of London bridge. The barge was flat-bottomed, and of the same build as barges known as western barges, and before it was purchased by the company it was known as a western barge, and was worked and navigated upon the river from Reading and places west of Reading to the same wharf:—Held, that the barge was not, at the time of the offence, a western barge within s. 101. *Tibble* v. *Beadon*, 24 L. J., M. C. 104. *S. C.*, nom. *Reg.* v. *Tibble*, 4 El. & Bl. 888; 1 Jur. (N.S.) 725; 3 W. R. 377.

Purpresture in—Injunction.]—On an information of the attorney-general, at the relation of an individual, and a bill by the relator, the lord chancellor granted an injunction ex parte, on affidavits, to restrain a purpresture in the river Thames, and it appearing that there had been no previous writ of ad quod damnum, and that an indictment in the king's bench was pending against the defendants for the same act, the lord chancellor refused to dissolve the injunction before the trial of the indictment, notwithstanding there were some affidavits on the part of defendants, stating that the act complained of was beneficial to the navigation; it was also held, that it was immaterial to whom the soil belonged, it not being competent either to the crown or to a subject, to use it for any purpose amounting to a nuisance. *Att.-Gen.* v. *Johnson*, 2 Wils. Ch. 87; 18 R. R. 156.

Using Vessels on, not Constructed to Consume their own Smoke.]—*See* NUISANCE.

Matters relating to Navigation on.]—*See* SHIPPING.

2. TOWING-PATHS.

Public Rights in.]—The public are not entitled at common law to tow on the banks of ancient navigable rivers. *Ball* v. *Herbert*, 3 Term Rep. 253; 1 R. R. 695.

But a right to a track path on either side of the river Tees (alternately) for towing, without paying any acknowledgment, was found upon a trial at bar. *Pierce* v. *Fauconberge (Lord)*, 1 Burr. 292.

A right of way along the bank, of the nature of a towing-path, is not a necessary incident to an inland navigation—per Blackburn (Lord). *Lee Conservators* v. *Button*, 51 L. J., Ch. 17; 6 App. Cas. 685; 45 L. T. 385; 30 W. R. 233; 46 J. P. 164—H. L.

A towing path is not necessarily confined to the mere beaten track, but may include so much of the bank as may ordinarily be used by horses when towing barges. *Winch* v. *Thames Conservators*, infra.

Exemption from an Inclosure Act.]—If an act for inclosing and allotting the common and waste lands of a parish through which a navigable river flows, empowers commissioners to

set out such public and private roads and ways as they shall think necessary, and directs that all roads and ways not so set out shall be deemed part of the lands to be allotted; an ancient towing-path upon the banks of the river, though not set out by the commissioners, still subsists, for it is not within their jurisdiction. *Simpson* v. *Scales*, 2 Bos. & P. 496; 5 R. R. 685.

Ownership—Compensation for Obstruction.]—By acts relating to a river navigation, commissioners were authorised to make such cuts as they should deem necessary for the navigation, provided that no cut should divert or stop up the present channel of the river, or alter the course of the stream. If any person should think himself injured by any work made by the commissioners, and should make complaint to the commissioners, they were to hear, and report to a subsequent general meeting, at which the commissioners were to make such order, determination and judgment thereon, as to them should seem just, and give such satisfaction as they should think reasonable. And if the party complaining should be dissatisfied with such order, he might appeal to the quarter sessions, who should make adjudication thereon, and award such costs to either party as they should think reasonable, which order and determination should be final and conclusive, to all intents and purposes whatever. A mandamus recited that B. was seised in fee of an ancient towing-path, on a part of the river, and to the exclusive right of towing barges at that part, taking reasonable tolls for such towing by his horses; that the commissioners made a cut, by which the barges were enabled to avoid that part of the river, dispense with the use of the horses, and withhold the tolls; that the commissioners had, by the cut, injured the old channel of the river, and made the navigation of the part aforesaid less easy and convenient, and diverted the navigation of the river from B.'s towing-path, and rendered the towing-path and his exclusive right wholly unprofitable; that B. had complained to the commissioners, and demanded compensation adequate to the injury he had sustained; that the commissioners, at a subsequent general meeting, made an order, determination and judgment, that they could not accede to B.'s application; that B. being dissatisfied with such order, appealed to the quarter sessions, who ordered the commissioners to pay B. 1,000*l.* in full compensation for the injury sustained by him, and 200*l.* costs, which they refused to pay, and the writ commanded them to pay. Return: That the commissioners, believing B. had no claim to compensation, did not hear evidence on the complaint, or the amount of the alleged loss, and notified to B. that they refused to accede to his application; that B., treating this refusal as an order, appealed; that on the appeal the commissioners objected that the refusal was not an order, but the quarter sessions overruled the objection; that the cut enabled navigators to avoid a dangerous bend of the river; that B. was no further entitled to the path than as owner of the land; that they had not obstructed his towing-path, nor placed any obstacle to the navigation against the towing-path; that parties might, as they sometimes did, still navigate by the old channel:—Held, first, that the refusal of the commissioners was an order, determination and judgment, from which an appeal lay to the sessions; secondly, that the sessions had jurisdiction to award compensation to B., both for the damage suffered by his towing-path being obstructed, and for the obstruction of the old navigation; thirdly, that the order of sessions was final and conclusive, and must be held to have been made on both complaints, inasmuch as the return (assuming it to negative the obstruction of the navigation) did not deny that the sessions had found such obstruction. *Rex* v. *Thames and Isis Navigation*, 5 A. & E. 804; 6 L. J., K. B. 17.

—— **Evidence of—Onus probandi.**]—Provisions in different acts of parliament appointed conservators of a river navigation and gave them full powers to do what was necessary for carrying the object of the acts into effect, including powers to purchase land and levy tolls. The conservators executed the powers of the acts so far as related to the improvement of the river navigation and the making of towing-paths, and they levied tolls. There was no evidence that they had actually purchased any of the land that lay along the course of the navigation, and had been used to form the towing-paths:—Held, that, as the acts might be carried into effect without purchasing, the burden of proof lay on the conservators to show that they had purchased; and since they had failed to show it, though they were entitled to an injunction to prevent any owner of adjoining land from so using the towing-paths as to obstruct in any way their free use for the purposes of the navigation, they were not entitled to be treated as owners of the soil of the towing-paths. *Lee Conservators* v. *Button*, 51 L. J., Ch. 17; 6 App. Cas. 685; 45 L. T. 385; 30 W. R. 233; 46 J. P. 164—H. L.

Liability for Damage caused by Non-Repair.]—A corporation constituted for the purpose of the upper navigation of the river Thames by the Thames Navigation Act, 1866 (29 & 30 Vict. c. 89), and under the powers of that act, and of the previous statutes relating to the navigation which had become vested in them, had constructed bridges and other works, and had acquired the right to use the whole of the towing-paths along the river, and to take toll for the same. In the exercise of such right the corporation took an aggregate toll in one sum for the use of the entire navigation and towing-paths, which included the works it had constructed, as well as the natural soil which had been worn into the track of a towing-path. Part of such natural towing-path got into a dangerous state by the action of the water, and in consequence thereof the horses of the plaintiff, whilst using it in towing a barge, for which the proper toll had been paid to the corporation, fell into the river and were drowned:—Held, that as the corporation took one toll for the use of the entire towing-path, parts of which were artificial, it mattered not that the place where the accident happened was not artificial, but that it was its duty to take reasonable care that the whole of the towing-path was in such a state as not to expose those using it to undue danger, and that for a neglect of such duty the corporation was responsible to the owner of the horses, although they were a public body receiving their powers for public purposes. *Winch* v. *Thames Conservators*, 43 L. J., C. P. 167; L. R. 9 C. P. 378; 31 L. T. 128; 22 W. R. 879—Ex. Ch.

Where it appeared that for making the towing-path of a canal the ownership of the soil

was not necessary for the purpose :—Held, that a mere easement and not the soil had been acquired by the company. *Badger* v. *South Yorkshire Railway and River Dun Co.*, 1 El. & El. 347 ; 28 L. J., Q. B. 118 ; 5 Jur. (N.S.) 459 ; 7 W. R. 130—Ex. Ch.

3. Obstruction or Injury.

a. What amounts to.

Weirs.]—A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal if granted by the crown before the reign of Edw. 1. *Williams* v. *Wilcox*. 8 A. & E. 314 ; 3 N. & P. 606 ; 1 W. W. & H. 477 ; 7 L. J., Q. B. 229.

If the weir when so first granted obstructs the navigation on only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining. *Ib.*

Where the crown had no right to obstruct the whole passage of a navigable river, it had no right to erect a weir obstructing a part, except subject to the right of the public ; and therefore in such a case the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere. *Ib.*

The 12 Edw. 4, c. 7, relates to navigable rivers only, and though weirs in navigable rivers are illegal unless they existed before the time of Edw. 1, such an easement may be acquired in private waters by grant from other riparian owners, or by enjoyment, or by any means by which such rights may be constituted. *Rolle* v. *Whyte*, 8 B. & S. 116 ; 37 L. J., Q. B. 105 ; L. R. 3 Q. B. 286 ; 17 L. T. 560 ; 16 W. R. 593.

Loading Staiths.]—When on the trial of an indictment for a nuisance in a river, by erecting staiths for loading ships with coal, the judge left the following points to the jury :—whether they were erected in a reasonable part of the river ; whether reasonable space was left for navigation ; whether loading the vessels by means of them was a public benefit ; whether they extended farther than was required, and whether the public benefit produced was greater than the public injury sustained : and he pointed out to the jury, among other benefits, that by means of the staiths the coals were supplied at a cheaper rate, and in better condition than they otherwise could be :—Held, to be a proper direction. *Rex* v. *Russell*, 6 B. & C. 566 ; 9 D. & R. 566 ; 5 L. J. (O.S.) M. C. 80 ; 30 R. R. 432. *See also cases*, ante, col. 1885.

Wharfs and Jetties.]—A wharf-owner drove piles into the bed of a river, extending the wharf so as to occupy three feet out of a breadth of about sixty feet available for navigation :—Held, that this was such an obstruction as would be restrained at the suit of a corporation empowered by act of parliament to remove obstructions. *Att.-Gen.* v. *Terry*, L. R. 9 Ch. 423 ; 30 L. T. 215 ; 22 W. R. 395.

The plaintiff and defendant were opposite riparian proprietors on the banks of a navigable tidal river :—Held, that the defendant could not, for the protection of his own soil or otherwise, construct a jetty projecting into the bed of the river, whereby the tidal water was thrown with greater violence upon the plaintiff's shore, and the public navigation of the river was or might be impeded ; and that a suit by information and bill in equity to restrain the erection of such a jetty was properly instituted. *Att.-Gen.* v. *Lonsdale (Earl)*, 38 L. J., Ch. 335 ; L. R. 7 Eq. 377 ; 20 L. T. 64 ; 17 W. R. 219.

Held, also, that the fact of the river traffic having been almost entirely superseded by local causes did not affect the right of the public to have the navigation conserved. *Ib.*

Action for navigating a vessel in the Thames in so negligent and unskilful a manner that she struck against and damaged a wharf and jetty. A plea that the wharf and jetty were constructed within the flow of the tide, and below low-water mark, and obstructed part of the bed and course of the river which was a public navigable river and highway for all the queen's subjects, with vessels, to navigate over and along at all times, at their free will ; and that the wharf and jetty had been constructed, and wrongfully obstructed the liege subjects from navigating in, over or along the part of the bed and course of the river with vessels, to the common nuisance of the liege subjects ; and that they could not navigate in, over or along the part of the bed and course of the river, unless the wharf and jetty were damaged : that the plaintiff had notice of the premises, and wilfully continued the nuisance : that the defendant "had occasion to pass with the vessel over that part of the bed and course of the river, and in so passing did the damage mentioned, and that he navigated the vessel with all the skill and care which would have been due and proper had not that part of the bed and course of the river been obstructed, and that he did no unnecessary damage :"—Held, after verdict for the defendant, that the plea was proved, though the nuisance did not reach low-water mark, and there was no evidence that the plaintiff constructed the nuisance, and the defendant did not disprove negligence ; but that the plea was bad for not alleging either a necessity to navigate the vessel over that part of the river where the nuisance was, or that the defendant's right course was over that part of the river, and that it would have been inconvenient and difficult to have taken any other course by which the nuisance might have been avoided. *Dimes* v. *Petley*, 15 Q. B. 276 ; 19 L. J., Q. B. 449 ; 14 Jur. 1132.

The crown granted a water lot in the Ottawa River, which became vested in the respondent, who constructed a floating wharf and boathouse on it, and occupied it for twenty years. The appellants, the owners of saw-mills on the banks of the river, allowed the refuse from their mills to collect in front of the wharf and boathouse, so as to create an obstruction and a nuisance :—Held, that the respondent was entitled to construct the wharf and boathouse, and to maintain an action for the injuries complained of. *Booth* v. *Ratté*, 59 L. J., P. C. 41 ; 15 App. Cas. 188 ; 62 L. T. 198 ; 38 W. R. 737—P. C.

One who erects or keeps erected on the shore of a navigable river between high and low water-mark a work for the more convenient use of his wharf adjoining, which work, either from its original defective construction, or from want of repair, presents a dangerous (hidden) obstruction to the navigation, is responsible for an injury thereby occasioned to a barge coming to the wharf, without any default on the part of the persons in charge of it. *White* v. *Phillips*, 15 C. B. (N.S.) 245 ; 33 L. J., C. P. 33 ; 10 Jur. (N.S.) 425 ; 9 L. T. 388 ; 12 W. R. 85.

—— **Vessels moored to.**]—In a public navigable river a decked barge or a dummy is firmly moored alongside a quay, so as to be a private nuisance to persons having a right to land from the river on the quay; if it is so fixed as not to be readily abatable, any such person may pass over such dummy in order to get to the quay, there being no other route available, where his so passing over it is not more injurious to the owners of it than the removal would be; and especially if to have removed it would have caused such person injurious delay in his affairs and business. *Eastern Counties Ry.* v. *Dorling*, 5 C. B. (N.S.) 821; 28 L. J., C. P. 202; 5 Jur. (N.S.) 869.

But he is not entitled so to use the barge as a means of passage, except in such states of the tide as, but for the barge, would have enabled him to land directly on the quay, and when the barge is therefore an obstruction and a nuisance to his right of way. *Ib.*

A. was possessed of a wharf, and had a mast projecting therefrom over the river. B. moored his vessel at the adjoining wharf, with her bowsprit overhanging the front of A.'s wharf, and, on the falling of the tide, the bowsprit of B.'s vessel coming in contact with A.'s mast, broke it:—Held, that B. was not responsible. *Dalton* v. *Denton*, 1 C. B. (N.S.) 672; 5 W. R. 203.

A riparian owner has a right to moor a vessel of ordinary size alongside his wharf for the purpose of loading or unloading, at reasonable times and for a reasonable time. *Original Hartlepool Collieries Co.* v. *Gibb*, 46 L. J., Ch. 311; 5 Ch. D. 713; 36 L. T. 433.

The court will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel, even though the vessel may overlap his own premises; though such vessel would not be allowed to interfere with the proper right of access to the neighbouring premises if used as a wharf, nor to the free entrance to or exit from such premises, if used as a dock, by other vessels. *Ib.*

The plaintiffs were owners of a wharf 125 feet long on a navigable river, and of a collier boat 176 feet long, which stopped there at intervals of time for the purpose of unloading, and while there necessarily projected over part of the defendant's wharf, close to the entrance of a dock where he carried on the business of repairing ships, the wharf itself not being used. The defendant moored a raft of timber used in his business in front of his own wharf, so as to interfere with the access of the collier to her berth:—Held, that the raft was an obstruction to the navigation; and that the collier had a right to come at reasonable times to, and remain a reasonable time alongside of, the wharf of the plaintiffs, although she projected over the defendant's wharf while doing so. *Ib.*

The W. navigation trustees having power to make by-laws for the ordering and good government of the navigation of the river W., made a by-law that the person having charge of a vessel shall not lie up or moor the same so as to prevent other vessels passing. S.'s vessel was moored on one side, the I. was moored on the other side, and each said it was the other's turn to remove for a third vessel to pass, but neither moved:—Held, that S. was rightly convicted under the by-law, and it was no answer to set up a custom about each obstructing vessel having to remove alternately, and that he had removed the time previous. *Stubbs* v. *Hilditch*, 51 J. P. 758.

Landing-Stage—Anchor.]—By a local act a local board of health was authorised to construct in conformity with certain deposited plans, "and upon the lands delineated upon the plans," a pier or landing-stage, "together with such other works and conveniences in connexion therewith" as it should from time to time think fit. Before the landing-stage was commenced plans of the proposed works were to be deposited at the admiralty for approval. The local act was to be executed subject to the powers and provisions of the Public Health Act, 1848, s. 139 of which requires notice of action "for anything done or intended to be done" under the provisions. The local board deposited plans (different in extension from the plans under the act) which received the approval of the conservators of the river, representing the admiralty, and constructed the landing-stage in conformity therewith. The landing-stage was a floating one, and was moored by anchors lying in the bed of the river. The position of the anchors was indicated by a buoy, which, being carried down by the tide, became concealed from view. One of the anchors becoming displaced, stove in and swamped a vessel which was lawfully navigating the river:—Held, first, that the anchor, although placed where it was for the benefit of the public, was an obstruction which the local board could not have created without statutory authority, and was a nuisance to the river. *Jolliffe* v. *Wallasey Local Board*, 43 L. J., C. P. 41; L. R. 9 C. P. 62; 29 L. T. 582.

Held, secondly, that the local board was guilty of negligence in its management of the buoy, but that inasmuch as the plans had received the approval of the admiralty, such approval was tantamount to the sanction of the act, so as to entitle the board to the statutory notice of action. *Ib.*

Railway Embankments.]—A declaration stated that there was a public navigable river, called the Ouse, the waters of which of right flowed along the east and west sides of a certain island, without any obstruction to the navigation thereof; that the plaintiff was possessed of barges navigating it, and along the river to the east of the island; yet the defendants wrongfully and injuriously put earth into the bed of the river to the east of the island, and filled up the ancient channel, and penned up the water, and prevented it from flowing in its usual channel, whereby the plaintiff was prevented from navigating his barges in the ancient course. Plea, that the defendants were a railway company incorporated by an act embodying the Land and Railway Clauses Act, 1845. That by the special act it was enacted, that, subject to the provisions of that act and of the incorporated acts, it should be lawful for the defendant to make and maintain the railway in the line and on the land delineated and described in the plans and books of reference. That the part of the bed of the river was in the line and among lands so delineated and described, whereupon the defendants, for the purpose of constructing the railway under the powers in the acts, entered on the part of the bed of the river, and made part of the railway thereon, and committed the grievances, the same being necessary for the making the railway. On the trial, the allegations in the plea were proved as laid; but the defendants gave no evidence of the preliminary steps having

been taken, which would have been necessary under the acts if they had sought to have the ownership of the locus in quo vested in them as purchasers under the acts:—Held, first, that as the declaration did not claim for the plaintiff any interest in the soil, but merely a public right of way, the question of ownership was irrelevant, and it was not necessary for the defendants either to allege or prove that such preliminary steps had been taken. *Abraham* v. *G. N. Ry.*, 16 Q. B., 586; 20 L. J., Q. B. 322; 15 Jur. 855.

Held, secondly, that the first clause of s. 16 of the Railway Clauses Act (as to works to be executed by the company) empowers companies to execute such works in navigable rivers, and is not, by the second clause of that section, restricted to works in rivers not navigable. *Ib.*

Held, thirdly, that although the proviso at the end of s. 16 requires that, in the exercise of the powers, the company "shall do as little damage as can be," the plea, which did not allege that the company had done as little damage as could be, was not bad for that omission. *Ib.*

Effect of Non-User.]—The defendants having erected on their own premises a permanent obstruction to a navigable drain leading from a river through their premises to the plaintiffs' close:—Held, that an action lay by the plaintiffs notwithstanding the portion of the drain, which passed through their close, had for sixteen years been completely choked up with mud. *Bown* v. *Hill*, 1 Bing. (N.C.) 549; 2 Scott, 535; 1 Hodges, 334; 5 L. J., C. P. 77.

User—In Derogation of Grant.]—A. being the owner of land adjoining a navigable lake, the bed of which was the soil and freehold of the plaintiff, granted to the defendants a right of way, and made a pier, part of which was upon his own land, and part upon the bed of the lake. He then leased the pier and the land belonging to him to a steam-boat company, who used the pier for the purpose of landing and embarking passengers. If the pier had not been built on the bed of the lake, they might have brought their steam-boats sufficiently near to be able to land their passengers by means of a temporary stage reaching from their boats to the land so leased to them, and upon which part of the pier was built. The public had a right to navigate the lake, and the plaintiff had not removed the pier, although it had been erected without his consent and against his will:—Held, that he could not maintain an action against the defendants for using the pier as above stated, inasmuch as while he allowed it to remain, it was an obstruction to their right to navigate the lake, and to land and embark their passengers at that place. *Marshall* v. *Ulleswater Steam Navigation Co.*, 41 L. J., Q. B. 41; L. R. 7 Q. B. 166; 25 L. T. 793; 20 W. R. 144.

Tendency to obstruct Navigation—Refuse cast on Shore.]—It is an offence, under s. 11 of 54 Geo. 3, c. 159, to cast rubbish or filth, such as chemical refuse, on shore in a place where it is liable to be washed into a navigable river or the sea, although there is no evidence of a tendency to injure or obstruct navigation. A company is a "person" under the act. *United Alkali Co.* v. *Simpson*, 63 L. J., M. C. 141; [1894] 2 Q. B. 116; 10 R. 235; 71 L. T. 258; 42 W. R. 509; 58 J. P. 607.

Chain placed across River by Owner of Bed—Right of Boating.]—An action was brought to restrain the defendant from interfering with posts and chains which the plaintiff, the owner of the bed of the river under a title derived from the crown, had placed in the river Mole to stop the water-way. There was a counter-claim by the defendant, who was not a riparian owner, for an injunction to restrain any hindrance to the passage of his boats. He based his claim on a public right of highway over part of the river, not on a right of recreation by custom. The evidence showed that the reach in question was not tidal; that it could not be approached by boats from below; that its depth was artificial, and depended on mill dams; that it had never been used for purposes of commerce, or as a way from one public place to another; that there was no public access to it at one end, and it was doubtful whether there was any public access to it for boats at any points; that no one except the mill-owners had done anything towards maintaining it as a water-way; that there had been a considerable amount of boating on the reach by riparian owners and by others in boats brought from a distance, chiefly for fishing, but that no right to fish was claimed; and that persons boating had hardly ever been interfered with:—Held, that the user had been permissive, and not of right, and that the defendant must be restrained from removing the obstruction. *Bourke* v. *Davis*, 44 Ch. D. 110; 62 L. T. 34; 38 W. R. 167.

Liability of Conservators—For not removing Obstruction.]—The defendants were an unpaid body of trustees created by statute conservators of the Lee, an ancient and navigable river, and were "authorised and empowered from time to time at their discretion to cleanse, scour, deepen, enlarge, or straighten the channel or course of the said river, and also to set out, open, make and maintain" certain new cuts, or canals thereinafter specified, to communicate with the river and to be used for the navigation, "and also to remove all obstructions and impediments whatsoever to the said navigation." The defendants were also by statute empowered to levy rates or tolls for the use of certain locks and artificial cuts, but were expressly forbidden to receive any tolls in respect of such part of the navigation as was between Bow Creek and Old Ford Lock, which part of the navigation was an ancient highway, and was by statute declared to be for ever free from toll. The plaintiff's barge, while navigating a part of the river between Bow Creek and Old Ford Lock, struck upon one of several submerged piles and was injured. The plaintiffs having brought an action for damages, the jury found that the piles were dangerous; that the defendants ought to have been aware of the danger, and had neglected their duty:—Held, that the action could not be maintained, since the defendants were unpaid trustees appointed for public purposes in aid of the common law right of navigating an ancient highway, and the duty of removing obstructions imposed by the statute was discretionary and not compulsory. *Forbes* v. *Lee Conservancy Board*, 4 Ex. D. 116; 48 L. J., Ex. 402; 27 W. R. 688.

Where damage was caused to a ship by striking on a mud bank which the defendants, who were empowered to take toll for the navigation, had neglected to remove:—Held, that they were

liable, though the tolls were not applied to the use of the company. *Mersey Docks* v. *Gibbs*, 11 H. L. Cas. 686; 35 L. J., Ex. 225; L. R. 1 H. L. 93; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.

By a local act, persons were incorporated for the purpose of improving the navigation of a river; and they were empowered to take tolls in respect of the transit or conveyance of goods thereon:—Held, that in the absence of any express enactment on the subject in the act, the duties of the company were confined to matters relating to the navigation, and that they were not liable for the sewerage of the river, as to clear away weeds, which, though injurious to the adjoining lands, were no detriment to the navigation. *Parrett Navigation Co.* v. *Robins*, 3 Railw. Cas. 383; 10 M. & W. 593; 12 L. J., Ex. 81.

—— **Abstraction of Water.**]—A local act empowered certain persons to make the river Kennet navigable, and to dig and cut through the banks of the river, and to erect in the river, and upon the lands adjoining, weirs, pens, dams, &c., and to do all matters and things necessary for making and maintaining or improving the navigation, the undertakers first giving satisfaction to the owners of such lands, weirs, &c., as should be digged, cut or removed, or otherwise made use of, as the commissioners named for the purpose should direct, in case the undertakers should not beforehand have agreed with the proprietors of such lands and hereditaments concerning the same. Commissioners were appointed to mediate between the undertakers and the owners of lands and hereditaments intended to be made use of, and to settle satisfaction for such portion of the lands as should be cut, digged, or made use of; and a provision was made for filling up vacancies in the body of the commissioners. If any person should sustain damage in his mills, by the owners of the navigation taking away or diverting the water, or any similar injury, the commissioners should, by a jury empanelled as therein directed, assess such damage and award compensation to the party injured. The proprietors of the navigation obstructed the water flowing to a mill by the erection of a dam under the powers of the act. All the commissioners under the act had died, and there were no commissioners in existence by whom compensation could be assessed:—Held, by Wightman, J., Erle, J., and Crompton, J., that the powers of the proprietors to raise weirs for the necessary purposes of the navigation did not cease by reason of the right of the mill-owner to recover compensation for consequential damages through the commissioners being lost; and, by Lord Campbell, C. J., that the power to raise the weir and cut off the water flowing to the mill, could only be exercised during the continuance of the body of commissioners, and that upon their extinction the extraordinary powers of the proprietors ceased. *Kennet and Avon Canal Navigation* v. *Witherington*, 18 Q. B. 531; 21 L. J., Q. B. 419.

An act for making a navigable communication for ships between the city of Norwich and the sea empowered a company to erect a lock or a sluice, with proper stop gates, to prevent the waters of a "broad" and certain navigable rivers from flowing into a lake, and to make an entrance cut from that lake to the sea. S. 3 provided, that nothing in the act should enable the company to divert or abstract any of the waters of the broad or rivers, except only for the purpose of supplying certain intended cuts with water, and of locking ships from or into the lake. The entrance was constructed, and the level of the water in the lake was kept lower than the level of the broad and the rivers. The lock also was made with proper gates. By several acts the lock and works become vested in the N. railway; it was provided that "the E. railway should have, as between themselves and the other company (but subject to apportionment of gross receipts as therein mentioned), the exclusive possession, use, enjoyment and receipt of all the property, rights, &c., of the works in the same manner as the N. railway have become entitled to the same, by virtue of the respective acts and otherwise; that the E. company should at all times repair and keep up the works with the appurtenances"; and that the powers of the N. company should be exercised by the E. company. By 17 & 18 Vict. c. ccxx., s. 2, the agreement was confirmed, and by s. 11, the E. company was to use, work, regulate and manage the five undertakings (in the act mentioned) as if they were one undertaking. By s. 12, the powers granted to the companies, by virtue of the recited acts, or any of them, with respect to their respective railways, works and undertakings, were to be exercised and enjoyed by the E. company, under the same regulations and restrictions as were by the recited acts relating to that company, imposed on that company. After the making of the agreement, the E. company entered into possession of the lock and works, and the N. company was not in possession. At the time of making the agreement, the lock had been allowed to become out of repair, and such want of repair continued after the lock and works came into the possession of the E. company, and during all that time large quantities of water escaped from the broad and rivers into the lake:—Held, first, that such water was diverted or abstracted contrary to the prohibition in the first-mentioned act. *Preston* v. *Norfolk Ry.*, 2 H. & N. 735.

Held, secondly, that the N. company was not responsible for the diversion or abstraction of the waters subsequent to the making of the agreement, and the passing of 17 & 18 Vict. c. ccxx., while the lock and works were in the possession of the E. company. *Ib.*

—— **Escape of Water.**]—By a local act of 1859, s. 7, the corporation of York was authorised to abandon the navigation of the river Foss, which they had previously purchased, to alter the channel, and to remove locks or works connected with the navigation; but before removing any locks the corporation was to make due provisions for the escape or disposal of the water held up by such locks or theretofore accustomed to flow along or into the channel of the navigation, so as to prevent the same from overflowing or otherwise damaging the adjacent lands. By s. 19, the corporation at their own expense was to make, and for the period of five years maintain, such arches, drains and passages as should in consequence of any alteration of the navigation be necessary and sufficient to convey the water from the lands adjoining the navigation into the river. The corporation abandoned the navigation and made alterations, the effect of which was that, if the channel remained in the state it then was, due provision was made for the escape of the water. They, however, took no measures to prevent the navigation from be-

coming silted up and choked with weeds, and in consequence the land adjoining the river about a mile above the alterations was flooded during an extraordinary rainfall, and the grass was damaged:—Held, that the corporation was not responsible for this damage. *Hodgson* v. *York Corporation*, 28 L. T. 836.

The owner of a farm between which and a tidal river were lands that had been reclaimed by conservancy commissioners from the river, sued such commissioners for damage caused to his farm by the river overflowing a sea-wall between the reclaimed lands and the river, and flowing over the reclaimed lands on to his farm:—Held, that as the commissioners were by their acts under the obligation to maintain and repair the sea-wall, they were liable not only for damage caused to the reclaimed lands, but to lands beyond such lands, by reason of the sea-wall being insufficient in height to prevent an overflow of the river, and further that the plaintiff was not deprived of his right of action by the fact of the water having flowed from the reclaimed lands on to his farm in consequence of his landlords having made a cutting through an embankment in order to obtain access to the reclaimed lands. *Bramlett* v. *Tees Conservancy Commissioners*, 49 J. P. 214.

Abstraction by Persons not Riparian Owners.]—By a statute a company was incorporated and empowered to do all things necessary to make the river Medway navigable; and the river or streams so to be made navigable, and all lands, tenements, and hereditaments to be by them made use of for the benefit of the navigation, were thereby vested in the company:—Held, that the statute conferred on the company such an interest in the whole of the water of the river and streams, for the purposes of the navigation, as to entitle them to sue persons abstracting part thereof, such persons not being riparian proprietors, and applying it to purposes more extensively than the rights of riparian proprietors cover; and that the company might sue independently of any question of actual damage to the navigation by reason of such abstraction. *Medway Navigation Co.* v. *Romney (Earl)*, 9 C. B. (N.S.) 575; 30 L. J., C. P. 236; 7 Jur. (N.S.) 846; 4 L. T. 87; 9 W. R. 482.

Right to Soil of River—Trespass.]—By 16 & 17 Car. 2, c. 12, certain persons were authorised to make navigable the river Itchin and certain other rivers, and to cut, dig and make new channels, and to deepen or widen the river, channels, &c., and to do all that might be fit for navigation, and to build locks, &c., upon any of the lands adjoining the rivers, and to make towing-paths; and it was expressly provided that the undertakers should not make any trench, river or watercourse, or use the locks, upon the land of any person, until a full agreement with and satisfaction to the owners of the land had been made by the commissioners appointed by the act, or by the persons authorised to make the navigation, nor until satisfaction should be paid to the owners of the lands, according to the determination of the commissioners, or by agreement, by the undertakers of the navigation. By a subsequent clause, the commissioners were to determine what satisfaction any person should have in respect of any prejudice, loss or damage sustained for such proportion of his lands next adjoining to the navigation as should be made use of for the purposes of the act, in case the undertakers of the navigation should not have agreed beforehand, and satisfy the party so damnified. But the act contained no clause giving the undertakers any power to purchase lands, nor did it recognise in them any right of soil in the beds or banks of the rivers intended to be made navigable. Where a river mentioned in the act, was made navigable by certain undertakers in 1702, and their successors exercised for a long series of years various acts of ownership and enjoyment of the banks, by cutting bushes, &c., and granted a lease of hatches and sluices, made in one of the banks, to an occupier of land adjoining thereto, for the purpose of irrigation, and there was no proof of any agreement between the undertakers and the original proprietors of the land for the purchase of the soil of the bank:—Held, that by virtue of the provisions of this act, the proprietors of the navigation did not necessarily acquire such an interest in the soil in a bank adjoining to, and formed out of the earth excavated from a new channel made for the first time under the act, as would enable them to maintain trespass; and that such an agreement could not be presumed from these acts of ownership and enjoyment, when opposed to similar acts exercised by the occupier of the adjoining land, and that the act afforded strong evidence against such presumption. *Hollis* v. *Goldfinch*, 2 D. & R. 316; 1 B. & C. 205; 1 L. J. (O.S.) K. B. 91; 25 R. R. 357.

Preventing Obstruction.]—By a public act passed in the reign of Henry 8, the corporation of the city of Exeter was empowered to remove obstructions to the navigation of the river Exe, paying compensation to the owners of the soil, where the obstructions were situated:—Held, first, that this act did not confer the conservancy of the river on the corporation. *Exeter Corporation* v. *Devon (Earl)*, L. R. 10 Eq. 232; 23 L. T. 382; 18 W. R. 879.

Held, secondly, that it did not entitle the corporation to file a bill in equity to restrain the erection of a pier in the river. *Ib.*

Held, thirdly, that it did not confer any right or privilege on the corporation within the General Pier and Harbour Act, 1861, s. 14, so as to prevent the erection of a pier in the river without their consent being obtained. *Ib.*

Sunk Vessels—Liability of Owner.]—The owner of a vessel sunk in a navigable river is bound to place a buoy over the wreck, and it is not enough to station a watchman near the spot to point out the danger. *Harmond* v. *Pearson*, 1 Camp. 515.

Where a vessel is sunk by accident, and without any default in the owner or his servant, in a navigable river, and remains there under water, no duty is ordinarily cast upon the owner to use any precaution by placing a buoy or otherwise to prevent other vessels from striking against it. *Brown* v. *Mallett*, 5 C. B. 599; 17 L. J., C. P. 227; 12 Jur. 204.

Where a vessel is sunk by unavoidable accident in a public navigable river, whether in the usual track of navigation or not, it is the duty of the owner, so long as he continues to have the possession and control of the vessel, to take due precaution to prevent injury to other vessels by their striking against it, and this obligation may be transferred with the transfer of the possession

and control to another person, and on the abandonment of the possession and control the obligation ceases. *White* v. *Crisp*, 10 Ex. 312; 2 C. L. R. 1215; 23 L. J., Ex. 317; 2 W. R. 624.

An indictment does not lie against the owner of a vessel, sunk by accident or misfortune in a navigable river, for not removing it. *Rex* v. *Watts*, 2 Esp. 675; 5 R. R. 766.

Oysters—Persons Damaging in Navigation.]—If property (as oysters) is placed in the channel of a public navigable river, so as to create a public nuisance, a person navigating is not justified in damaging such property, by running his vessel against, if he has room to pass without so doing; for an individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public. *Colchester Corporation* v. *Brooke*, 7 Q. B. 339; 15 L. J., Q. B. 59; 9 Jur. 1090.

b. Actions for.

Pleading.]—Where a plaintiff declared that he was navigating his barges laden with goods along a public navigable creek, and that the defendant wrongfully moored a barge across, and kept the same so moored thence hitherto, and thereby obstructed the public navigable creek, and prevented the plaintiff from navigating his barges so laden; per quod he was obliged to convey his goods a great distance over land, and was put to trouble and expense in the carriage of his goods over land:—Held, that this was such a special damage for which an action upon the case would lie. *Rose* v. *Miles*, 4 M. & S. 101; 16 R. R. 405.

A count stating that the plaintiff was possessed of a messuage abutting on a public navigable river, and by reason thereof was accustomed, and of right entitled, to have free use and navigation of the river, for the purpose of passing in boats and conveying goods to the messuage, and convenient access to the messuage from the river, but that the defendant fixed barges, planks and logs of wood, in that part of the river near the messuage, and kept and continued the same, and thereby hindered the plaintiff from having the free use of the river, and passing in boats and conveying goods to and from the messuage, and he was thereby put to expense in endeavouring to remove the obstructions, and was obliged to convey the goods in a longer and more inconvenient route, is good, as sufficiently showing a particular injury to the individual. *Dobson* v. *Blackmore*, 9 Q. B. 991; 16 L. J., Q. B. 233; 11 Jur. 556. S. P., *Rose* v. *Groves*, 5 Man. & G. 613; 6 Scott (N.R.) 645; 1 D. & L. 61; 12 L. J., C. P. 251; 7 Jur. 951.

—— **Allegation of Duty in Defendants.**]—A declaration stating that the defendants were possessed of a mooring anchor, which was kept by them fixed in a known part of a navigable river, covered by ordinary tides; that the anchor had become removed into and remained in another part of the river covered by ordinary tides not indicated; whereof the defendants had notice; and although they had the means and power of refixing and securing the anchor and indicating it, they neglected to do so; whereby the plaintiff's vessel, whilst sailing in a part of the river ordinarily used by ships, ran foul of and struck against the anchor, and was thereby damaged, is bad, for not showing that the defendants were privy to the removal of the anchor, or that it was their duty to refix it and indicate it. *Hancock* v. *York, Newcastle and Berwick Ry.*, 10 C. B. 348.

A declaration alleged that the defendant was possessed of a wharf for loading and unloading vessels on the banks of the river Thames, near to which wharf there was certain wood work, placed by the defendant at the bottom of the river, over which wood work, at certain states of the tide, a ship would float, but at others would not; that the plaintiff was possessed of a ship, which was, by sufferance and permission of the defendant, at and alongside the wharf, for reward in that behalf to the defendant; and that the defendant had the management and control of the wharf, and the mooring and stationing of ships at and near the same, while such ships were at the wharf for the purpose of using the same. Breach, that the defendant so unskilfully and negligently moored and stationed the plaintiff's ship in that part of the river, over the wood work, that it was greatly injured:—Held, that the declaration sufficiently alleged a duty, on the part of the defendant, to moor and station the plaintiff's ship safely, and that the breach was well stated. *Curling* v. *Wood*, 16 M. & W. 628; 17 L. J., Ex. 301; 12 Jur. 1055—Ex. Ch.

c. Indictments for.

Persons Liable — Diversion of Water for Private Protection.]—On indictment for nuisance to a canal established by act of parliament, it appeared that the canal was carried across a river and the adjoining valley by means of an aqueduct and embankment, in which were several arches and culverts: that a brook fell into the river above its point of intersection with the canal; and that in times of flood the water which was then penned back into the brook overflowed its banks, and was carried by the natural level of the country to the arches, and through them to the river, doing however much mischief to the lands over which it passed: that except for the nuisance after mentioned, the aqueduct would be sufficiently wide for the passage of the river at all times, but those of high flood, notwithstanding the improved drainage of the country which had increased the body of water: that the occupiers of lands adjoining the river and brook had, for the protection of their lands, subsequently to the making of the canal, aqueduct, and embankment, erected or heightened artificial banks called fenders on their properties, so as to prevent the flood water from escaping as above mentioned; and that the water had consequently in time of flood come down in so large a body against the aqueduct and canal banks as to endanger them and obstruct the navigation; that the fenders were not unnecessarily high, and that if they were reduced many hundred acres of land would again be exposed to inundation:—Held, that the occupiers were not justified in altering for their own benefit the course in which the flood water had been accustomed to run, and consequently they were indictable. *Rex* v. *Trafford*, 1 B. & Ad. 874. See *S. C.*, 1 M. & Scott, 401; 2 C. & J. 265; 8 Bing. 204; 9 L. J. (O.S.) M. C. 66—Ex. Ch.

—— **Erection of Buildings or Works.**]—The erection of any building in a port or a navigable river, which of itself is such a hindrance to the navigation as to amount to a nuisance, is an indictable misdemeanour, although such building is productive of collateral benefit, sufficient, in

the opinion of the jury, to counterbalance the injury done to the navigation. *Rex* v. *Ward*, 6 N. & M. 38; 4 A. & E. 384; 1 H. & W. 703; 5 L. J., K. B. 221.

The defendants, who were the owners of the soil adjoining a harbour, were indicted for a nuisance in erecting planks in it; a special verdict was found, but it did not distinctly appear by the verdict whether the erection was in the harbour or not. The verdict found, that by the defendant's works, the harbour was in some extreme cases rendered less secure. Assuming the erection to have been in the harbour:—Held, that consequences so slight, resulting from the acts of the defendants, did not amount to a nuisance. *Rex* v. *Tindall*, 1 N. & P. 719; 6 A. & E. 143; 6 L. J., M. C. 97.

On an indictment for a nuisance, it was proved that the wharf (the nuisance complained of) was erected over a part of the river, between high and low water-mark, where boats were used before to pass. And, for the defendant, it was shown that the wharf was a convenience to the public, inasmuch as boats of heavy burden could come to unlade at the wharf, which, before the building of the wharf, anchored in the middle of the river; and that the channel of the river was by this convenience kept clear:—Held, that the question for the jury was, whether the wharf occasioned any hindrance to the navigation of the river by vessels of any description, and not whether the erection of the wharf had caused a benefit to the navigation in general. *Reg.* v. *Randall*, Car. & M. 496.

By a statute reciting that the river Witham was formerly navigable for lighters, boats, &c., from Lincoln to the sea, and that, by sand and silt brought in by the tide, the outfall had been greatly obstructed, and was in a great measure stopped up, whereby trade and commerce had decayed, powers were given to commissioners for the purpose of restoring the navigation; and they were authorised, in order for the carrying on and effecting the navigation, to make a new cut through lands adjoining the river (not vested in the commissioners), and the navigation so made was to be open to all subjects of the realm paying tolls. The commissioners were also empowered, under certain regulations, to build bridges. The cut was made, and a more direct channel thereby created, through which the waters of the Witham passed to the sea. A company in whom the powers of the commissioners afterwards became vested by statute, built a bridge not according to the regulations, and occupying to some extent the bed of the new cut. On an indictment against them for a nuisance to the river as a public highway, the jury found specially that the company was guilty of building the bridge, but that it did not obstruct the navigation:—Held, first, that the cut was a public navigable river, the obstruction of which was an indictable offence. *Reg.* v. *Betts*, 16 Q. B. 1022; 19 L. J., Q. B. 531; 4 Cox, C. C. 211.

Held, secondly, that building a bridge partly in the bed of a navigable river is not necessarily a nuisance; that the question, whether in fact it is so or not in a particular instance, is for a jury; and that the verdict negativing actual obstruction was in effect an acquittal. *Ib.*

The judge, on a trial of an indictment for obstructing the navigation of the Menai Straits by erecting a wall, asked the jury whether they thought the erection proved "a material nuisance," in which case they were to find a verdict of guilty; but told them that if they thought the nuisance was so slight, rare, and uncertain, that the defendant ought not to be made criminally liable for it, they were to acquit him; and on the jury saying that they considered the erection, "although a nuisance, was not sufficiently so as to render the defendant criminally liable," he directed an acquittal:—Held, per Coleridge and Crompton, JJ., and semble, per Lord Campbell, C. J., that the charge was to be understood as meaning, not that a party may legally commit a small nuisance, but that an obstruction might be so insignificant as not to constitute a nuisance: and that the jury must be understood as finding that the obstruction in question was so insignificant, and that therefore there was not a misdirection warranting a new trial. *Reg.* v. *Russell*, 3 El. & Bl. 942; 23 L. J., M. C. 173; 18 Jur. 1022; 2 W. R. 555.

—— **Acts of Workmen.**]—The workmen of a colliery owner, in working the colliery, stacked the refuse in such a manner that it fell into a navigable river, and caused an obstruction therein. The owner was indicted for a nuisance in causing such obstruction:—Held, that not having personally superintended the works, and having given express orders to the workmen that the refuse should be deposited in a particular place where it would not do any harm, and should not be thrown into the river, did not relieve him from liability upon the indictment. *Reg.* v. *Stephens*, 7 B. & S. 710; 35 L. J., Q. B. 251; L. R. 1 Q. B. 702; 12 Jur. (N.S.) 961; 14 L. T. 593; 14 W. R. 859.

—— **Accidental Sinking of Vessel.**]—An indictment does not lie against the owner of a vessel, sunk by accident or misfortune in a navigable river, for not removing it. *Rex* v. *Watts*, 2 Esp. 675; 5 R. R. 766.

B. CANAL AND NAVIGATION COMPANIES.

1. Regulation of Companies.

a. Shares.

Nature of Property.]—Shares in canal companies are pure personalty. *Edwards* v. *Hall*, 6 De G. M. & G. 74; 25 L. J., Ch. 82; 1 Jur. (N.S.) 1189; 4 W. R. 111—L. C.

A canal was made under the authority of an act; the lands for that purpose were purchased and vested in a corporation, but the shares therein were to be deemed personal estate, and transmissible as such, and were to be conveyed by bargain and sale:—Held, that the shares did not bear the character of realty, so as to make a bequest of them specific. *Robinson* v. *Addison*, 2 Beav. 515.

Where a company is formed by act of parliament for the purchase of lands to make a canal, and the act declares that the shares "shall be deemed personal estate, and shall be transmissible as such":—Held, that though the profits arose out of the land, the shares were personal property, passing as such to the assignees, on the bankruptcy of a proprietor. Where an act prescribes certain forms in the transfer of such shares:—Held, unless they are strictly complied with, the shares remain in the order and disposition of the bankrupt proprietor; the ordinary mode of transfer not constituting an equitable mortgage. And, though the act only expressly relates to transfers

between third parties, yet it impliedly relates to where the company are the transferees. *Lancaster Canal Co., Ex parte, Dilworth, In re*, Mont. 116; 1 Deac. & C. 411.

The shares in the navigation of the river Avon, under the statute 10 Ann, are real estate, and subject to dower. *Buckeridge* v. *Ingram*, 2 Ves. J. 652. See also *Howse* v. *Chapman*, 4 Ves. 542; 4 R. R. 292.

Liability of Company in respect of.]—A mandamus will lie against a company of proprietors of a canal navigation and their clerk to compel them to make an entry of the probate of a deceased proprietor, and to register the name and place of abode of his executrix as the proprietor of one share in the profits of the navigation, belonging to the deceased at the time of his death. *Horne, Ex parte*, 7 B. & C. 632; *S. C.*, nom. *Rex* v. *Worcester Canal Co.*, 1 M. & Ry. 529; 6 L. J. (o.s.) K. B. 173.

By a navigation act it was enacted, that on a certain day the first general meeting of the proprietors should be held, at which the company should execute a deed under their common seal for each distinct share, "which deed should respectively vest a certain share in each proprietor"; the plaintiff declared in an action against the defendant, for not completing a contract for the purchase of some shares, averring, that on a day prior to the first general meeting, he was lawfully entitled to so many shares:—Held, that this was a material averment, and the ground of a nonsuit, as it could not be proved; though there was another clause in the act, by which certain persons by name (of whom the plaintiff was one) were made a corporation for the purposes of the act; and the money to be subscribed was to be divided into so many equal shares, "which were thereby vested in the person so subscribing," &c. *Latham* v. *Barber*, 6 Term Rep. 67.

Right of Shareholder to set aside Agreement Inconsistent with Act.]—All the holders of shares in a canal have a common interest in the due execution of the act which regulates it; and one shareholder may file a bill on behalf of himself and the other shareholders, to set aside an agreement inconsistent with the act, even though many of the shareholders think it for their advantage to adhere to the agreement. *Gray* v. *Chaplin*, 2 Sim. & S. 267; 3 L. J. (o.s.) Ch. 161.

An agreement, not warranted by the act, will not be rendered valid by the consent and concurrence of even all the shareholders, if it tends to deprive the public of any advantage which the public otherwise might or would have enjoyed under the provisions of the act. *Ib.*

See further COMPANY and CHARITY.

b. Accounts.

Authority to Execute Necessary Works—Passing of Accounts by Sessions.]—By an act for making and maintaining a canal, power was given to the canal company to make all such works as they should think necessary and proper for effecting, completing, maintaining, improving, and using the canal, and other works; and the company was required to lay before the sessions an account of the sums expended in making and completing the canal, up to the time of its completion; and after that an annual account of the rates collected, and of the charges and expenses of supporting, maintaining, and using the navigation and its works; and the sessions were authorised, in case it appeared to them that the clear profits exceeded the percentage limited by the act on the sums mentioned in the first account to have been expended by the company (i.e., in making and completing the canal and its works), to reduce the canal rates:—Held, that the sessions, even after the period fixed for the completion of the canal, and after the first account delivered of the capital expended in the undertaking, and on which the dividends were to be calculated, were not authorised to reject charges and expenses, stated in the annual accounts of disbursements, for new works, such as a reservoir and a steam-engine, which the company deemed necessary, and proved to have been erected for the support and improvement of the original line of canal, and for the better supplying it with water in dry seasons. *Rex* v. *Glamorganshire Canal Co.*, 12 East, 157.

By an act, a company of proprietors was authorised to make the canal, and to do all other acts which they might think necessary and convenient for the making, improving, and using the canal; and the profit of the company on the money expended in making and completing the navigation was not to exceed 8*l.* per cent. per annum; and in order to ascertain the clear amount of the profits of the navigation, the company was required to keep an account of the money laid out in making the canal, and of all charges incurred before the canal was completed, and also to make out an annual account, balanced to the 29th of September, of the rates and of the charges attending the supporting, maintaining, and using the said navigation; and these accounts were to be laid before the justices at quarter sessions, and they were to reduce the rates whenever the clear profits of the navigation exceeded 8*l.* per cent. upon the money laid out:—Held, that the company was authorised to widen and deepen the canal, after it had been once completed (that being beneficial to the public), and that the charge of such widening and deepening was a charge attending the using of the canal. *Rex* v. *Glamorganshire JJ.*, 7 B. & C. 722.

Right to Adjourn Consideration.]—By an act for making the river Tone navigable, conservators were appointed, and it was enacted that the accounts of the conservators should be made up to the 24th of June yearly, and the accounts so made up, and vouchers for the same, should be brought before the Bishop of Bath and Wells, or any five of the justices without the bishop, between the first day of August and the then next general sessions of the peace to be held for the county of Somerset, at a place appointed by the bishop, or by any five of the justices without the bishop, then and there to be examined, stated, and corrected; and the accounts, whether or not the same should have been examined and corrected by the bishop and justices, were to be brought before the bishop and justices, or any five of the justices in the absence of the bishop, at the opening of the court at the next quarter sessions to be held after the first day of August yearly; and the bishop and justices at the sessions, or any five of the justices in the absence of the bishop, were required to examine, state, and allow the accounts of the conservators, and that allowance

was to be final and conclusive :—Held, that the bishop and justices were bound to examine, state, and allow the accounts, at the first sessions, and had no authority to adjourn the examination to a subsequent session. *Bridgewater Canal Co.* v. *Bluet*, 10 B. & C. 393.

2. PURCHASE OF LANDS.

Conveyance—Inrolment of.]—Where a company was authorised by an act to purchase lands necessary for the navigation, and was required to inrol the conveyances of such purchased lands with the clerk of the peace, copies whereof were to be good evidence in all courts, the court, after a lapse of sixty-five years from the time of the purchase of certain lands, during which no application had been made to the company to inrol the conveyances, refused to grant a mandamus to that effect on the refusal of the company to do so. *Reg.* v. *Leeds and Liverpool Canal Co.*, 3 P. & D. 174; 11 A. & E. 316.

—— **Necessity of Writing.**]—Under an act, proprietors of lands were authorised to contract for, sell, and convey their lands to a canal company; such "contracts, agreements, sales, exchanges, conveyances and assurances," were to be valid to all intents and purposes; were to be inrolled with the clerk of the peace, and copies thereof to be evidence; and, upon payment of the sum agreed on for the purchase of lands, such lands were to be vested in the canal company:—Held, that a conveyance of land under this act must be in writing. *Doe* d. *Robins* v. *Warwick Canal Co.*, 2 Bing. (N.C.) 483; 2 Scott, 717.

Where an act enacted, in one clause, that after any land should have been set and ascertained for making the canal, it should be lawful for all persons seised or possessed of or interested in such lands, to contract for, sell and convey them to the company, and that all such contracts, sales, and assurances should be valid and effectual in law, and all such contracts, &c., should be made at the expense of the company and inrolled with the clerk of the peace, and copies signed by the clerk of the peace should be evidence; and a subsequent clause enacted, that upon payment of such sums of money as should be contracted or agreed for between the parties, or determined and adjusted by the commissioners, or assessed by a jury, in manner thereinbefore mentioned, the lands should be vested in the company:—Held, that, by reference to the former clause, the contract, in order to vest the lands in the company, must be in writing, and that, therefore, proof of payment by the company, for particular lands identified in evidence, was not sufficient proof of title in the company. *Harborough (Earl)* v. *Shardlow*, 7 M. & W. 87; 2 Railw. Cas. 253; 10 L. J., Ex. 245.

—— **Presumption of Agreement—Acquiescence.**]—A canal company having power to purchase lands for gross sums or for annual rent charges, to be determined by commissioners in cases of disability, took possession of the lands of an infant, on an agreement with his tenant, and after an award by the commissioners of the gross sum or annual rent charge which ought to be paid, but which award was invalid, no one being party to it who had power to bind the infant's interest, the awarded gross sum was paid by the company to the steward, on an agreement for its return if the land was not conveyed to the company on the infant attaining his majority. No conveyance was executed and the purchase-money was returned, but the company continued in the use of the land for their canal, paying to the landowner for forty years after he attained his majority a rent of nearly the amount awarded by the commissioners. The company also, with his knowledge, purchased the interests of leaseholders in the land:—Held, first, that an agreement could not be presumed to have been entered into or ratified by the landowner for a sale of the fee in consideration of a rent charge. *Somersetshire Coal Canal Co.* v. *Harcourt*, 2 De G. & J. 596; 4 Jur. (N.S.) 671; 6 W. R. 670.

Held, secondly, that an ejectment brought by the landowner and the intended erection of a bridge by him, ought to be restrained by injunction on the ground of acquiescence, the company undertaking to put in force their parliamentary powers (which had not expired), to acquire the land. *Ib.*

—— **Rights Incidental to Conveyance—Exclusive Letting of Boats.**]—A company was empowered by an act to make a canal, and to purchase lands for the purpose of the navigation, and upon payment of the purchase money the fee simple of the lands was to be vested in the company for the use of the navigation, but to or for no other use or purpose whatsoever. By a subsequent act the company was empowered to make a reservoir, for the purpose of supplying the canal with water, and to purchase land for that purpose, and all the powers of the first act were extended to making the reservoir. The acts contained various clauses reserving rights of fishery to the owners of the lands through which the canal and reservoir were made, and enabling them to use pleasure boats thereon without paying toll, but prohibiting the passage of any boats carrying passengers or goods for hire, except upon payment of toll. The canal and reservoir, and all the rights of the canal company, were subsequently vested in a railway company by act of parliament, in the same manner and to the same extent as the canal company could have held or used the same, and all the powers of the canal acts were extended to the railway company. The canal company purchased from the plaintiff's ancestor land, upon which the company made the reservoir, and took a conveyance of it in fee to a trustee for the company. Two questions being raised, first, whether the railway company could lawfully let out boats for hire upon the reservoir; and secondly, whether they could lawfully use the reservoir for any other purposes than for supplying the canal with water:—Held, by Lord Campbell, C.J., that, under these statutes, there was not a universal prohibition against the railway company using the reservoir for any other purpose, except that of feeding the canal, but that all uses of it, whether by pleasure boats or otherwise, other than for the purposes of navigation, whereby the grantor of the land, or his heirs or assigns, were prejudiced, was unlawful, but that the plaintiff, not being a shareholder, could not rely upon the improper applications of the corporate funds to this purpose. Per Coleridge, J., and Wightman, J., that the railway company could not lawfully let out pleasure boats for hire upon the reservoir, or use it for any other purposes of profit, except those contemplated by the statutes under which they were

incorporated, as the land was vested in them for the use of the navigation, and for no other use or purpose, and also because such use of the reservoir would derogate from the rights of adjacent landowners; and lastly, because it involved a disposal of the corporate funds to a purpose foreign to the object of their incorporation, and might be prejudicial to the shareholders. Per Erle, J., that the canal company and the railway company acquired, by the conveyance of the land to them, all the incidents to an estate in fee simple not expressly prohibited by their acts, with the specified duty superadded of using it for the purpose of the navigation, and of not using it for any purpose inconsistent with that object, and that therefore they might lawfully use the reservoir with pleasure boats, or in any other manner which did not impede the performance of the statutory duty. *Bostock* v. *North Staffordshire Ry.*, 3 C. L. R. 1027; 4 El. & Bl. 798; 24 L. J., Q. B. 225; 1 Jur. (N.S.) 921. See *S. C.* in equity, 25 L. J., Ch. 325; 2 Jur. (N.S.) 248; 4 W. R. 336.

—— **Towing Path—Dedication to Public.**]—Land acquired by a company under an act of parliament for the purposes of their undertaking as specified by such act may be dedicated by them as a public highway, if such use by the public be not incompatible with the objects prescribed by the act. Therefore, where land was acquired and used by a canal company under their statutes for the purposes of a towing path, and it appeared that the use of it as a public footpath was not inconsistent with its use as a towing path by the company:—Held, that the company could dedicate the land as a public footpath subject to its use by them as a towing path. *Rex* v. *Leake* (5 B. & Ad. 469) approved and followed. *Grand Junction Canal Co.* v. *Petty*, 57 L. J., Q. B. 572; 21 Q. B. D. 273; 59 L. T. 767; 36 W. R. 795; 52 J. P. 692—C. A.

Time for—When Limited.]—An act of the 51 Geo. 3, for making the Bridgewater and Taunton canal, after reciting that the making of that canal would be very prejudicial to the tolls authorised to be levied and collected from the Tone navigation, authorised and required the canal company within three calendar months to contract and agree with the conservators of the river Tone navigation and other persons, proprietors of shares or parts of shares, or otherwise interested therein, for the absolute purchase of their several and respective estates, rights and interests in and to the same; and also to contract and agree with the overseers of the poor for the time being of the town of Taunton, and the several parishes of Taunton St. Mary Magdalen and Taunton St. James, for the absolute purchase of certain respective estates, rights and interests of the town and parishes, under and by virtue of the therein-recited acts. This act was repealed by the 5 Geo. 4:—Held, by Bayley and Littledale, JJ., that the words "within three calendar months" applied to both branches of the clause, and that the canal company, therefore, was bound to have contracted within that period with the overseers of the parishes of Taunton; and not having done so, they could not afterwards compel them to sell their interest; and by Parke, J., that, whether the right to purchase that interest was limited to three months or not, at all events it was gone when the 51 Geo. 3 was repealed. *Tone Conservators* v. *Ash*, 10 B. & C. 349; 8 L. J. (O.S.) K. B. 226.

—— **When not Fixed.**]—If an act is obtained by a company, authorising them to make a canal, and for that purpose to take certain lands specified in the act, on giving compensation to the owners in the manner pointed out, but the act contains no limitation of time within which those powers are to be exercised, the company is entitled to commence those works, and avail themselves of the provisions of the act after any lapse of time, however great; and the owner, if dissatisfied, cannot restrain, and has no remedy against them in a court of law. *Thicknesse* v. *Lancaster Canal Co.*, 4 M. & W. 472; 8 L. J., Ex. 49; 3 Jur. 11.

Vesting of Title.]—In 1779, P. demised land, of which he was seised, to M. & Co., for term of sixty-five years. In 1794, an act was obtained by the Swansea Canal Company, for the purpose of making a canal through part of the land in question; and it was enacted that upon payment or tender of certain sums of money, adjusted by commissioners or assessed by a jury, for the purchase of any such lands, it should be lawful for the company to enter upon such lands, or before such payment or tender, by leave of the owners or occupiers; and that, thereupon, such land should be vested in the company for the purposes of the act. In 1797, and during the continuance of the lease, B. entered into an arrangement with M. & C., the lessees, by which a canal made by the latter was extended through part of the same land, and formed a continuation of the Swansea canal. No payment or satisfaction was made or agreed to be made to the owners of the lands, but everything was done by B. with the consent and in accordance with the wishes of such owners and proprietors. Upon the termination of the lease of 1779, the assignees of the reversion brought ejectment against the assignee of B., who continued in possession of the canal made upon the land demised:—Held, that the mere consent of the owner of the property to the construction of the canal did not bring the case within the act; and that the assignees were entitled to the possession of the land. *Doe* d. *Patrick* v. *Beaufort* (*Duke*), 6 Ex. 498.

—— **To Ownership in the Soil.**]—A. was empowered by acts to make a canal, and he was authorised to supply the canal from brooks within five hundred yards thereof, to dig and trench the adjacent land, and remove earth, trees and other obstructions thereon, for making, using, and maintaining the canal, towing-paths, trenches and watercourses, with similar powers as to roads and other conveniences connected with the canal; to enclose and appropriate such parts of the land as should be proper for wharfs or quays; to set up posts, ditches and fences in places necessary for separating the towing-paths from the adjacent lands; to lay earth and other materials requisite for the works, and do all things necessary for the making, maintaining and convenient use of the canal. It was provided that nothing should authorise A. to use the lands for any other purpose than that of the navigation. Provisions were made for the purchase and sale of such lands as should be wanted for assessing the price and the damages to be paid by A. for the use of or injury to the lands; and if he should be in possession of any lands

for a certain space of time without using them for the canal, he was to re-convey his right and interest therein; and it was provided that the works and things made in forming a certain part of the canal should become the property of A.:—Held, that no right to the soil of the lands adjoining to the canal, and applied to the purposes thereof under the powers of the act (not being those comprehended under the last-mentioned proviso), passed to A. where there had been no actual purchase. *Doe* d. *Reg.* v. *York (Archbishop)*, 14 Q. B. 81; 19 L. J., Q. B. 242.

Where it appeared that for the purpose of making and maintaining the towing path of a canal, the ownership of the soil was not necessary:—Held, that a mere easement and not the soil had been acquired by the company. *Badger* v. *South Yorkshire Railway and River Don Co.*, 1 El. & El. 347; 28 L. J., Q. B. 118; 5 Jur. (N.S.) 459; 7 W. R. 130—Ex. Ch.

—— **Proof of Ownership.**]—Provisions in different acts of parliament appointed conservators of a river navigation with full powers to do what was necessary for carrying the object of the acts into effect, including powers to purchase lands and levy tolls. The conservators executed the powers of the acts so far as related to the improvement of the river navigation and the making of towing-paths, and they levied tolls. There was no evidence that they had actually purchased any of the land which lay along the course of navigation and had been used to form the towing paths:—Held, that as the acts might be carried into effect without purchasing, the burden of proof lay on the conservator to show that they had purchased, and since they had failed to show it they were not entitled to be treated as owners of the soil of the towing-paths. *Lee Conservators* v. *Button*, 51 L. J., Ch. 17; 6 App. Cas. 685; 45 L. T. 385; 30 W. R. 233; 46 J. P. 164—H. L.

Compensation—Proceedings to Compel.]—The court will not grant a mandamus to compel a canal company, pursuant to the provisions of an act, to proceed to an assessment of the value of land, taken by them for the purposes of their canal; and also of the recompense to be made for the damages thereby sustained; if the parties interested in the land do not make their application to the court within a reasonable time after the land was taken by the company; especially, if the parties have another remedy by ejectment. *Rex* v. *Stainforth and Keadby Canal Co.*, 1 M. & S. 32; 14 R. R. 389.

In order to induce the court to issue a mandamus to a canal company, to make compensation to a claimant, a clear refusal on the part of the company must be shown; mere delay in attending to the claim is not sufficient. *Reg.* v. *Wilts and Berks Canal Co.*, 8 D. P. C. 623; 4 Jur. 848. See *Reg.* v. *Thames and Isis Navigation*, 8 A. & E. 201.

—— **Persons Entitled.**]—Under a clause in an act giving compensation for the value of lands, tenements, and hereditaments, or for damage done thereto, the tithe-owner is not entitled to compensation for the injury done to him by the conversion of titheable land taken for the purpose of the navigation, and covered with water. *Rex* v. *Nene Outfall Commissioners*, 4 M. & Ry. 647; 9 B. & C. 875; 8 L. J. (O.S.) K. B. 1.

—— **Amount Recoverable.**]—By 9 Geo. 4, c. 98, the undertakers of the Aire and Calder Navigation were empowered to make a navigable canal from certain points mentioned in the act, and also to construct a railroad from such canal to a certain highway, and for such purpose to enter upon any lands, making satisfaction as thereinafter mentioned; and it was provided, that, in case of any disputes between the undertakers and the parties interested in the lands taken, used, damaged, or affected by execution of any of the powers of the act, a jury should assess the amount to be paid for the purchase of such lands, and also what amount should be paid by way of recompense, either for the damages which should before that time have been sustained, or for the future recurring damages which should have been occasioned, and the cause of which should have been only in part obviated or repaired by the undertakers, and which could be no further obviated, repaired, or remedied by them. Other clauses provided that the company should agree for, or cause to be valued and paid for, the lands, which they were empowered to purchase, within five years after the passing of the act; that they should not deviate above 100 yards from the parliamentary line, and that they should complete all their works within fifteen years. A dispute having arisen as to the value of a piece of land, in which the contemplated railroad crossed the line of an existing railroad, a jury was summoned, who assessed the value and damages as follows:—Value of the land, 6*l.*; present damages, 0; future damages, 2,800*l.* At this time the undertakers had contracted or paid for all the lands required for their works, but had not executed the works between the termini laid down in the parliamentary map, and had deviated above 100 yards from the parliamentary line, and made a cut through land of their own:—Held, first, that that part of the verdict which assessed the future damages was void; for that, in order to enable the jury to make an assessment of future damages, the cause of injury must already exist in some work of the undertakers already done; and, secondly, that, unless the undertakers had finally abandoned the intention of making the cut in the parliamentary line, they had a right, at any time within fifteen years, to take possession of the land in question, on the payment or tender of the 6*l.* assessed as its value, and that they had a right to go on simultaneously with the making both of the cut and the railroad. *Lee* v. *Milner*, 2 M. & W. 824; M. & H. 275; 6 L. J., Ex. 205.

3. Right of Support.

See cases, sub. Mines and Minerals (under Canals, &c.), ante, vol. ix. cols. 1238 et seq.

Implied — Subjacent Minerals — Compensation.]—Ordinarily, where land is granted by private grant for the construction of specific works, the grant, in the absence of a contrary intention appearing on the face of it, carries by implication the right of reasonable and necessary support for the works to be constructed. The same principle applies to titles and rights created by act of parliament, and, where an express statutory right is given to make and maintain a thing necessarily requiring support, the right to necessary support is, in the absence of a context pointing to the contrary, implied to accompany the right to make and maintain the

thing requiring support; and, in cases where a mode of compensation is provided for the owners of the lands furnishing such support, the reasons for implying that such right of support is intended by the act are overwhelming. *L. & N. W. Ry.* v. *Evans*, 62 L. J., Ch. 1; [1893] 1 Ch. 16; 2 R. 120; 67 L. T. 630; 41 W. R. 149—C. A.

Mines — Compensation for not Working.]—By a section of an act empowering a company to make a canal, it was provided that nothing therein contained should affect the right of any owners of lands to the mines and minerals under the lands to be made use of for the canal, and that it should be lawful for such owners to work such mines and minerals, not thereby injuring, prejudicing, or obstructing the canal. By another section it was provided that if the owners should in pursuing such mines work near or under the canal so as in the opinion of the canal company to endanger or damage the same, or in the opinion of the owners of the mines to endanger or damage the further working thereof, it should be lawful for the canal company to treat and agree with the owners for all such minerals as might be near or under the canal as should be thought proper to be left for the security of the canal or mines; and in case they should disagree then it should be lawful for certain commissioners at the request of the canal company or of such owners to summon a jury to assess what satisfaction such owners ought to receive from the canal company; and upon payment of such satisfaction such owners should be perpetually restrained from working such mines within the limits for which satisfaction should by the jury be declared to extend. Owners of a coal mine under and near the canal having given the canal company notice that they were going to work the coal, the company declined to purchase or pay compensation for leaving the coal, and the owners then worked the coal and thereby damaged the canal. The working was in the usual mode, without negligence and without doing unnecessary damage save in not leaving sufficient support:—Held, that the owners of the mine had a right under the act to initiate proceedings and to receive satisfaction for such minerals as should be thought proper to be left for the security of the canal or the mine, but were liable in damages for working the mine to the injury of the canal. *Dudley Canal Co.* v. *Grazebrook* (1 B. & Ad. 59) distinguished. *Cromford Canal Co.* v. *Cutts* (5 Railw. Cas. 442) approved. *Knowles* v. *Lancashire and Yorkshire Ry.*, 59 L. J., Q. B. 39; 14 App. Cas. 248; 61 L. T. 91; 54 J. P. 103—H. L. (E.)

Where a private act of parliament, authorising the construction of a canal, empowers the canal company to give notice to mine-owners by the side of the canal to discontinue working adjacent minerals if the continued working is likely to damage the canal, and empowers the mine-owners to discontinue working if they consider that damage to the mines will probably result from further working, and in each case provides compensation for the coal unworked—but there is no statutory prohibition against working—the mine owners are not entitled to discontinue working and claim compensation on the ground that some injury may be caused to the canal by such working. *Cromford Canal Co.* v. *Cutts* (5 Railw. Cas. 442) and *Knowles* v. *Lancashire and Yorkshire Ry.* (14 App. Cas. 248), discussed and distinguished:—Semble, that if the private act imposed a prohibition upon working the mines to the danger of the canal, the canal company could not waive it. *Chamber Colliery Co.* v. *Rochdale Canal Co.*, 64 L. J., Q. B. 645; [1895] A. C. 564; 11 R. 264; 73 L. T. 258—H. L. (E.)

Right of Company to prevent working within given distance—"Mines and Minerals"—Stone quarried from surface downwards.]—A canal company was empowered by act of parliament to prevent the owners of land adjoining the canal from working the mines and minerals within ten yards of it, but was required to give compensation for stopping any such workings:—Held, first, that stone used for mending roads, and worked by quarrying from the surface, was within the description of mines and minerals, *Midland Ry.* v. *Checkley*, 36 L. J., Ch. 380; L. R. 4 Eq. 19; 16 L. T. 260; 15 W. R. 671.

Held, secondly, that the company might prohibit the working of mines beyond the ten yards if in its opinion the working would endanger the canal, but that it must compensate the owner for stopping mines beyond the ten yards. *Ib.*

4. CONSTRUCTION OF WORKS.

Liability for Injuries—Time Limited for Construction.]—By a canal act, a company was restricted from any alterations of their canal after the expiration of two years. By the same act, a proprietor of a mill near the lower part of the canal was entitled to all the surplus water of it:—Held, that the erection of a steam-engine after the two years, to pump water into the upper part of the canal, by which the carrying power of the canal was increased, and the surplus water diminished by the enlarged trade, was an injury to the mill-owner, for which he was entitled to damages. *Blakemore* v. *Glamorgan Canal Co.*, 2 C., M. & R. 133; 1 Gale, 78; 5 Tyr. 603; 4 L. J., Ex. 146. *S. C.*, 1 Cl. & F. 263; 5 Bligh (N.S.) 547.

A clause in a second act relating to the same canal declared that the works thereby authorised should be completed within two years from the time of its passing, and that the money to be raised by it should not be applied to defray the expenses of any of the works not made within that time:—Held, that this clause not only limited the application of the money to the works completed within that time, but that no works should be carried on adversely to the interests of individuals, after the expiration of two years. *Ib.*

Remedy of Party Aggrieved.]—Where a particular jurisdiction is appointed under a canal act to determine all questions that may arise respecting things to be done in pursuance and in execution of the act, if the projectors of the canal exceed their powers, or do any act not strictly within the terms of the statute, by which any individual finds himself aggrieved, he is not confined to the particular jurisdiction, but the wrong is to be remedied in the ordinary manner. *Shand* v. *Henderson*, 2 Dow, 519; 14 R. R. 202. And see *Rex* v. *Croker*, Cowp. 26.

Deviating from Line.]—Though the court will not restrain an action of trespass against a com-

pany by a party, through whose estate a canal is cutting, for deviating from the line, because he has laid by and rested upon his legal rights, yet, if he files a bill to restrain their deviating, and then moves to commit them, the court will not do so without a trial by jury in a disputed case, and directing an issue at law. *Agar* v. *Regent's Canal Co.*, G. Coop. 77 ; 14 R. R. 217.

Funds Insufficient—Power to Cut through Land—Rights of Landowner.]—Persons authorised by act of parliament to cut a canal and required to appropriate certain sums for the construction and maintenance of works to protect a harbour in which a canal was intended to terminate, not restrained from cutting through their own lands at a distance from the harbour, in the event of a present insufficiency of funds for the completion of the undertaking, pending an application to parliament for further powers to levy money. *King's Lynn Corporation* v. *Pemberton*, 1 Swanst. 244 ; 18 R. R. 62.

Persons authorised by act of parliament to cut a canal, if their funds are insufficient for the completion of the undertaking, may, on the prompt application of the owner of lands through which they are cutting, be restrained from proceeding. *Ib.*

Duty to Construct Bridge—Adjoining Owners.]—A canal company under their act of parliament were to make such bridges over their canals as two or more justices should "from time to time judge necessary, and appoint for the use of the owners or occupiers of the lands adjoining the canal." The respondent was an adjoining owner and obtained an order from the justices adjudging necessary and appointing one bridge to be constructed :—Held, that the canal company were bound to erect such a bridge. *Birmingham Canal* v. *Hickman*, 56 J. P. 598—C. A.

5. Lease and Mortgage of Canals.

Lease—Transfer of Right.]—The 8 & 9 Vict. c. 42, enabled canal companies to become carriers on canals, to lease their canals, and to take leases of others. Subsequently a railway company obtained an act enabling them to purchase the X. canal, and to exercise all its "rights, powers, and privileges" :—Held, that after the purchase, the railway company had authority to take a lease of canal Y., under the first act, this being a "right, power, and privilege" possessed by canal X., and which passed, on its sale, to the railway company. *Rogers* v. *Oxford, Worcester, and Wolverhampton Ry.*, 25 Beav. 322. Affirmed, 2 De G. & J. 662.

—— **Settlement of Disputes.**]—Equity cannot compel a resort to commissioners appointed under an act of parliament to settle disputes between parties arising from a navigation ; a lease for years having expired, and the landlord proceeding to recover possession. *Stanhope* v. *Pilkington*, G. Coop. 193.

Pledge of Undertaking.]—By a canal act, the company was empowered to borrow and take up money upon the credit of the undertaking and the rates or duties made payable by the act, and by writing under their common seal to mortgage or assign over the undertaking and the rates or duties to the person advancing the money, as a security for the money so borrowed ; and a form of mortgage was given, whereby the company engaged to pay the interest half-yearly :—Held, that the property of the company and the rates or duties alone, were pledged for the payment of the moneys advanced ; and that the company was not liable to be sued for arrears of interest. *Pontet* v. *Basingstoke Canal Co.*, 4 Scott, 182 ; 3 Bing. (N.C.) 433 ; 6 L. J., C. P. 177.

6. Liability to Repair.

Applicable to what Works.]—An incorporated company was authorised by act of parliament to make a navigable canal, the construction of which would interfere with an ancient drain. By one section of the statute the company was required to make a drain on each side of the canal, and parallel therewith, in lieu of part of the ancient drain which would be destroyed. By another section the company was required to make such arches, tunnels, culverts, drains or other passages, over, under, by the side of, or into the canal, and the trenches, streams and watercourses communicating therewith, and the towing-paths on the sides thereof, of such depth, breadth and dimensions as should be sufficient to convey the water clear from the lands adjoining or lying near the canal, without obstructing or impeding the same ; and to support, maintain, cleanse and keep in repair all such arches, tunnels, culverts, drains, and other passages :—Held, that the drains made in pursuance of the former section, in lieu of the ancient drain, were to be cleansed by the company, as well as those made in pursuance of the latter section ; and that a summary remedy given by the latter section, in case of non-repair by the company, was applicable to a default in cleansing the drains made in lieu of the ancient drains. *Priestley* v. *Foulds*, 2 Scott (N.R.) 265 ; 2 Man. & G. 175 ; 2 Railw. Cas. 422.

Lease of Canal—Neglect of Company to give Notice to Lessee.]—Where an act authorised navigation commissioners to lease the works, and the act put the duty of repairing upon the lessees, and in case they did not repair, authorised and required the commissioners to give them notice to repair, and, in case they neglected to finish the repairs in such period as the commissioners pointed out, authorised them to take possession of the tolls, and cause the repairs to be done themselves, an action does not lie against the commissioners, for that the commissioners had neglected to give the notice, whereby a lock in the line of the navigation fell in, and the plaintiff's barge was delayed in the canal, so as to cause him to lose the use of it ; the alleged injury not being the natural, necessary, and proximate result of the not giving notice. *Walker* v. *Goe*, 4 H. & N. 350 ; 28 L. J., Ex. 184 ; 5 Jur. (N.S.) 737 ; 7 W. R. 289—Ex. Ch.

Duty of Company, how Enforced.]—An order specifically to repair the banks of a canal, to stop gates, refused ; but, by injunction restraining defendant from impeding plaintiff from navigating, &c., by continuing to keep bank, &c., out of repair, &c., the effect of such former order was given. *Lane* v. *Newdigate*, 10 Ves. 192 ; 7 R. R. 381.

Non-Repair of Bridge—Personal Injury.]—

Plaintiff's husband, a bargeman in charge of a boat navigating the B. canal, for which boat toll was duly paid to defendants as trustees of the canal, moored his boat at one of the mooring places on the canal banks just below a bridge across a basin there communicating with a dock of defendants, called the P. dock. He then went into the town, and on returning thence from a public-house about two in the night, in crossing the bridge to get back to his boat to bed, he fell through a hole in the floor of the bridge into the basin and was drowned. The plaintiff, as his widow, brought an action under Lord Campbell's Act against the defendants, as trustees of the canal, and at the trial it appeared that the land, on which the bridge, basin or dock in question were constructed, was not originally part of the B. trust property, but was purchased by the late Duke of B. after the passing of the act under which the main line of the canal was made, and ever since the bridge, basin and dock had been built, eighty years before action, they had been used for the purposes of the trust like the rest of the trust property. The judge left three questions to the jury: (1) whether it was the duty of the defendants to keep the bridge and the accesses to the canal in repair; (2) whether the bridge was out of repair; (3) whether the deceased contributed to the accident by being drunk, and a verdict was found for the plaintiff for 400*l.* damages, leave being reserved to defendants to move on the question whether it made any difference in the liability of defendants, that the locus in quo was not part of the original B. system; and a rule having been obtained to enter a nonsuit on the point reserved, or for a new trial on the ground of misdirection:—Held, that there was no misdirection. The defendants, for hire and reward, permitting bargemen to moor their barges at certain mooring places on the canal, were bound to keep the whole of the premises, and all the ways to the canal over which the bargemen passed to and from their boats, in good repair; and that it was immaterial whether the way in question was or was not the nearest way; or that the locus in quo originally formed no part of the B. trust, it having been for many years past converted to and used for the purposes of the trust in the same way as the rest of the trust property. *Shoebottom* v. *Egerton*, 18 L. T. 364.

—— **Declaration.**]—The declaration alleged that defendants were possessed of a close and a navigable canal, which all the queen's subjects were entitled to navigate for reward to the defendants, and of divers basins and mooring places connected with the said canal and used for boats navigating the same and of a bridge across one of the said basins communicating with and leading to the said mooring places, which said bridge was among other things, for the use of, and was used by, boatmen navigating the said canal for reward, &c., or using the basins of the defendants or going towards or coming from the said mooring places. It then alleged a duty upon the defendants to keep the bridge in a safe condition for persons passing over it to and from the mooring places and a breach of that duty by knowingly and negligently suffering the bridge to be out of repair and in a dangerous condition for persons lawfully passing over it as aforesaid; and that J. S. was a boatman navigating the said canal, for reward to the defendants, in and upon a certain boat moored at one of the mooring places, and was lawfully passing over the bridge and using the same in manner and for the purposes aforesaid, without notice of its dangerous condition, and thereupon by and through the wrongful and negligent conduct of the defendants in keeping the said bridge, &c., as aforesaid, the said J. S. fell into the said basin of the defendants and thereby lost his life, &c.:—Held, on demurrer, that the declaration was good. The defendants invited persons navigating the canal to go over the bridge in the same way and sense that a shopkeeper invites the public to enter his shop, and they were bound therefore to keep the bridge in a safe condition, and to take care that there was no pitfall, trap or other dangerous thing in the way. *S. C.*, 18 L. T. 889.

The declaration stated that the defendants were possessed of land intersected by a canal and cuttings and of bridges across the canal and cuttings communicating with and leading to certain docks of the defendants; which land and bridges were used with the consent of defendants by persons going to and coming from the docks; that they wrongfully and improperly kept the land, canal cuttings and bridges, and suffered them to be in so improper a state as to render them unsafe for persons lawfully passing along and over the said land and bridges towards the said docks, and that one G., lawfully passing over and using the bridges, through the wrongful, negligent and improper conduct of the defendants, fell into one of the cuttings and was drowned:—Held, that the declaration disclosed no actionable breach of duty on the part of the defendants. *Gautret* v. *Egerton*, 36 L. J., C. P. 191; L. R. 2 C. P. 371; 16 L. T. 17; 15 W. R. 638.

Action against Adjoining Owner for Excavations.]—By an act a canal company was bound to repair the banks of the canal; in an action brought by the company against the owner of adjoining land, for digging clay-pits upon his own land, and causing the bank to give way, there was some evidence to shew that the bank was not in good repair; but the judge directed the jury to find for the company, if they thought that the falling in of the bank was caused by the defendant having dug clay-pits:—Held, that the company was not entitled to recover, unless, at the time when the bank gave way, it was in good repair; and that question not having been submitted to the jury, a new trial was granted. *Staffordshire Canal Co.* v. *Hallen*, 6 B. & C. 317; 9 D. & R. 266; 5 L. J. (o.s.) K. B. 154; 30 R. R. 333.

7. Liability to Fence.

Neglect of—Bridge over Canal.] — When a canal company is empowered to intersect highways and to construct bridges to connect the intercepted portions, and the canal and bridges are vested in it, and it is enabled to take tolls from boats passing the bridges, and the company erects swing-bridges, which the boatmen are entitled to open for the purpose of passing, and which when opened leave the edge of the canal unprotected, and there is not sufficient light or other means of preventing accidents, and the consequence is that while the bridge is lawfully opened at night-time, a person falls into the canal, without any fault on his part,

the company will be liable to an action. *Manley* v. *St. Helens Canal and Railway Co.*, 2 H. & N. 840; 27 L. J., Ex. 159; 6 W. R. 297.

A swing-bridge over a canal crossing a public highway when turned back for the passage of a barge along the canal, left a gap on the side of the road, without any fence towards the water. A., being upon the bridge whilst it was in this state, and the spot being dark, incautiously stepped back and fell into the water and was drowned. In an action by his widow and administratrix against the canal company, the jury was told that if they thought there had been negligence on the part of the company, and no want of proper care and caution on the part of the deceased, the plaintiff was entitled to a verdict; but that if they thought that the deceased had by his own negligence contributed to the accident, they must find for the company:—Held, a proper direction, and that upon the facts the jury was warranted in finding for the company, although of opinion that the bridge was not secured as it should have been. *Witherley* v. *Regent's Canal Co.*, 12 C. B. (N.S.) 2; 3 F. & F. 61; 6 L. T. 255.

Proximity of Public Path.]—A company was possessed of a canal and the land between it and a sluice; an ancient public footpath passed through the land close to the sluice; there was a towing-path nine feet wide, by the side of the canal, and an intervening space of twelve feet of grass between the towing-path and the footpath. By the permission of the company, the intervening space had been recently used for carting, and ruts having been caused, the whole space between the sluice and the canal had been covered with cinders, and thus all distinction between the path and the rest of the land was obliterated. A person using the path at night missed his way, and fell into the canal and was drowned:—Held, that the canal was not so near the footpath as to be adjoining to it, so as to throw upon the company the duty of fencing off the canal, and that the other facts did not render the company liable for the accident. *Binks* v. *South Yorkshire Railway and River Dun Co.*, 3 B. & S. 244; 32 L. J., Q. B. 26; 7 L. T. 350; 11 W. R. 56.

8. Liability for Overflow of Water.

Unusual Rainfall—Bursting of Banks.]—A company undertaking for their own profit to maintain a channel for carrying off water, and neglecting to do so effectually, is responsible for damage done to the adjoining land by reason of the banks giving way after an unusual rainfall, although other persons who were bound to keep the outlet of the channel of certain dimensions had failed to perform that duty, and had thereby occasioned an increase of water in the channel, without which its banks would not have given way. *Harrison* v. *G. N. Ry.*, 3 H. & C. 231; 33 L. J., Ex. 266; 10 Jur. (N.S.) 992; 10 L. T. 621; 12 W. R. 1081. See also *Hodgson* v. *York Corporation*, 28 L. T. 836, ante, col. 1901.

A right of action against a canal company for negligently keeping their sluices, by reason whereof the canal overflowed, is not ousted by provisions in the canal act for compensation to parties affected by the works and, especially by the overflowing of the water over the sluices, those provisions relating to the due and proper management of the works, not to their negligent management. *Cockburn* v. *Erewash Canal Co.*, 11 W. R. 34.

—— **No Injury due to Negligence.**]—Where a mine was flooded by water from a canal owing to an extraordinary rainfall, and it was found that no extra injury could be attributed to the precautionary measures adopted by the canal company to prevent the catastrophe:—Held, that it was a case of injuria absque damno, and afforded no ground of action, and that the compensation clauses did not apply to such a case. *Thomas* v. *Birmingham Canal Co.*, 49 L. J., Q. B. 851; 43 L. T. 435; 45 J. P. 21. *See next case.*

Right of Action or Compensation.]—Under a navigation act persons who sustained damage by reason of the navigation were entitled to compensation. The trustees of the navigation had, under their control, a lock, a weir and clows, through which, when raised, the water of the river could be let off. During a flood, after a heavy rain, they kept down the clows, and by so penning back the water, caused the premises of the prosecutor to be overflooded and damaged:—Held, upon motion to enter a verdict for the trustees non obstante veredicto upon a mandamus, that the prosecutor was entitled to judgment; that the mandamus was sufficient, though it did not aver that his premises would not have been flooded under similar circumstances before the river was altered by the works of the trustees; that the proximate cause of the damage, the penning back the water, being done on account of the navigation, the trustees were as much liable under the acts as if they had committed a breach of duty, and that it was no excuse that it had been done skilfully, and that, unless it had been done, other works of theirs lower down, and the lands of others, would have been damaged. *Reg.* v. *Delamere* (*Lord*), 13 W. R. 757—Ex. Ch. See *Dunn* v. *Birmingham Canal Navigation*, infra.

Right to Impede Flow of Water.]—The owners of a canal being threatened by an overflow of flood water from a neighbouring river, and fearing damage to their premises situated on the banks of the canal, placed across it, at a point above their premises, planks reaching from the bottom of the canal to the coping stone, which was some inches higher than the surface of the canal water. The flood water afterwards broke into the canal at a point above the barricade of planks, and opposite to the plaintiff's premises, which were also situated on the banks of the canal above the premises of the owners of the canal, and, being penned back by the planks, the water rose in the canal until it flooded the plaintiff's premises. In an action to recover damages for the injury so caused:—Held, that the owners of the canal were not liable, on the ground that the water which did the mischief was not brought there by them, and that there is no duty on the owners of a canal analogous to that on the owners of a natural watercourse, not to impede the flow of water down it. *Nield* v. *L. & N. W. Ry.*, 44 L. J., Ex. 15; L. R. 10 Ex. 4; 23 W. R. 60.

Discharge of Water.]—A company was by statute authorised to make a canal, and required to maintain it in good order for navigation by the public; preparatory to making some necessary

repairs and improvements, they turned off the water into a drain (designed for that purpose), from whence it ought to flow, as on a previous occasion it actually did, into a public sewer, which was under the exclusive care and control of the corporation of Dublin; but, owing to an unforeseen obstruction in the sewer, the water was stopped and flooded the plaintiff's premises; and although the company became aware of the flooding—though not of the immediately efficient cause—it did not appear that they had taken, or could have taken, any steps to prevent or stop the discharge of water from the canal into the drain:—Held, first, that the company, while acting in exercise of their statutory powers, could not, in the absence of negligence on their part, be made responsible for the injury done. *Boughton* v. *Midland Great Western Ry.*, Ir. R. 7 C. L. 169.

The jury having found that the flooding of the plaintiff's premises was caused by the obstruction in the corporation sewer:—Held, secondly, that there was no evidence of negligence by the company which ought to have been submitted to the jury. *Ib.*

Flooding of Mines—Working by Owner.]—A canal company was authorised to be made under the provisions of several acts of parliament. They had also, by a provision of the same statutes, the option of purchasing adjoining coal mines on receiving notice from the owner that he was about to work them. An adjoining coal owner, having given the statutory notice, and the company having refused to purchase, proceeded, as he had a right to do, to work his mines in the usual and proper manner, and thereby water from the canal flowed in and drowned his mine. The company was guilty of no actual carelessness in the management of the canal, unless it was carelessness to allow the water to remain in it while the mines were being worked:—Held, in an action by the adjoining coal owner against the company for negligent management of the canal, whereby damage resulted to his mine, that the action was not maintainable, inasmuch as the injury complained of resulted from the legitimate exercise by the company of statutory powers. *Dunn* v. *Birmingham Canal Navigation*, 42 L. J., Q. B. 34; L. R. 8 Q. B. 42; 27 L. T. 683; 21 W. R. 266—Ex. Ch.

Held, also, that the owner was entitled to compensation under the acts. *Ib.*

Obstruction by Weeds—No Liability to Remove.]—By a local navigation act, a corporation was appointed the undertakers for improving and maintaining the navigation of a river, with power to do all things it should think convenient and necessary for making, improving, and using the navigation, and to receive tolls from persons conveying merchandise on such river:—Held, that the corporation, not having the ownership of the soil of the river or any right to interfere with the river otherwise than for the purpose of navigation, was not liable for any injury to adjacent land from an overflowing of the river owing to not cutting the weeds therein, and to an accumulation of silt caused by staunches properly and not negligently erected for the navigation, if the weeds and silt so accumulated did not interfere with the navigation. *Cracknell* v. *Thetford Corporation*, 38 L. J., C. P. 353; L. R. 4 C. P. 629.

Negligent Construction of Sluices.] — But where, by a drainage act, the commissioners were to construct a cut, with proper walls, gates and sluices, to keep out the waters of a tidal river, and also a culvert under the cut to carry off the drainage from the lands on the east to the west of the cut, and to keep the same at all times open, and in consequence of the negligent construction of the gates and sluices, the waters of the river flowed into the cut, and bursting its western bank, flooded the adjoining lands, and the owners of lands on the east side of the cut close to the lower end of the culvert, which prevented the waters overflowing their lands to any considerable extent; but the occupiers of the lands on the west side, believing that the stoppage of the culvert would be injurious to their lands, reopened it, and so let the waters through on to the plaintiff's land to a much greater extent:—Held, that the commissioners were responsible for the entire damage thus caused to the land. *Collins* v. *Middle Level Commissioners*, 38 L. J., C. P. 236; L. R. 4 C. P. 279; 20 L. T. 442; 17 W. R. 929.

Altering Size of Tunnels.]—Prior to 1866 a stream was conveyed by a canal company under and across its canal through two wooden tunnels, for which, in 1866, the company substituted metal tunnels of less capacity; in consequence of which, after heavy rains, the streams, in 1873, flooded the plaintiff's lands adjacent to the canal:—Held, that the substitution of the smaller for the larger tunnels was in its inception an innocent act, without either injuria or damnum, and only became tortious upon the subsequent flooding, and that the statute of limitasions began to run from the time of the flooding in 1873. *Devery* v. *Grand Canal Co.*, Ir. R. 8 C. L. 511. Affirmed Ir. R. 9 C. L. 194.

Evidence of Negligence.]—In an action for injury caused by the leaking of water from a reservoir belonging to a canal, it was pleaded that the damage was caused by the leaking of water through the banks of the reservoir and not in any manner whatsoever by reason of the execution of the powers of the act, but by the default of the plaintiffs themselves in sinking shafts and pits in their own land, and so causing large quantities of water which naturally lay in the underground soil in which the pits and shafts were sunk, and which formed the banks and support of the reservoir, to leak out, and flow into the shafts and pits:—Held, that the plea was bad. *Barber* v. *Nottingham Canal Co.*, 15 C. B. (N.S.) 726; 33 L. J., C. P. 193; 10 Jur. (N.S.) 260; 9 L. T. 829; 12 W. R. 376.

—— **Act of Servants.**]—Where a work of a public character (as a canal) has been constructed under the authority of an act of parliament, a right of action for an injury not occasioned wilfully, nor by any act necessarily causing it, but arising from the user of the work (as, for instance, through the overflow of the water of the canal), must be founded on negligence, and negligence is the essence of the action; and although the jury has given a verdict for the plaintff, and it has been proved that the proximate cause of the injury was an act of the company's servants (as raising a floodgate), yet if it is doubtful whether that act necessarily must have caused the injury, and the jury also finds that there was no negligence,

the verdict will be entered for the company. *Whitehouse* v. *Birmingham Canal Co.*, 27 L. J., Ex. 25.

Liability for Damage by Percolation.]—See *Evans* v. *Manchester, Sheffield and Lincolnshire Ry.*, post, col. 2037.

9. Liability for Obstructing and Fouling Water.

Removal of a Sunken Vessel.]—An act constituted a company for the purpose of making and maintaining a navigable canal, which all persons were to be allowed to use, on payment of certain tolls. The act also provided, in case of obstruction by any sunken vessel, the owners of which should not weigh it up without loss of time, that it should be lawful for the company to do so, and to keep the same till payment made of the expenses for so doing:—Held, that the act did not make it compulsory upon the company, after notice, so to weigh up a sunken vessel; but that, as the company had made the canal for their profit, and opened it to the public upon payment of tolls, a duty was imposed on them, at common law, to take reasonable care to prevent danger to the navigation; and that, therefore, they were liable for their neither weighing up nor giving notice of a sunken vessel, which damaged a boat navigating their canal. *Lancaster Canal Co.* v. *Parnaby*, 3 P. & D. 162; 11 A. & E. 223; 1 Railw. Cas. 696; 9 L. J., Ex. 338—Ex. Ch. S. P., *Mersey Docks* v. *Gibbs*, 11 H. L. Cas. 686; 35 L. J., Ex. 225; L. R. 1 H. L. 93; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.

Such a common-law duty need not be expressly alleged in the declaration; it was sufficient to allege facts from which the duty can be necessarily implied. *Ib.*

Injunction to restrain Party enjoined against Obstructing from bringing Actions.]—An injunction granted, restraining the stopping of vessels and the hindering the navigation of a canal, having been made perpetual at the hearing, a further injunction was granted on motion to restrain the defendant from bringing actions against the canal company. *Grand Junction Canal Co.* v. *Dimes*, 17 Sim. 38; 18 L. J., Ch. 419; 13 Jur. 779.

Fouling of Water.]—When a canal company pumped foul water into their canal, so as to make the canal a nuisance, it was no defence that the foulness was caused by other persons. *Att.-Gen.* v. *Bradford Navigation Co.*, 35 L. J., Ch. 619; L. R. 2 Eq. 71; 14 L. T. 248; 14 W. R. 579.

A canal company was empowered by an act to take the water of certain brooks and use it for the purposes of their canal; the water in one of the brooks at the time the act passed was pure, but it afterwards became polluted by drains before it reached the canal, and it was then penned back in the canal and became a public nuisance:—Held, that the company was liable to be indicted for the nuisance, as there was nothing in the act compelling them to take the water, or authorising them to use it so as to create a nuisance. *Reg.* v. *Bradford Navigation Co.*, 6 B. & S. 631; 34 L. J., Q. B. 191; 11 Jur. (N.S.) 769; 13 W. R. 892.

A declaration alleged that the plaintiff was possessed of steam-engines and boilers, and used, had and enjoyed the benefit and advantage of the waters of a branch canal to supply the same, and which waters ought to have flowed and been without the fouling or pollution thereafter mentioned; yet the defendant wrongfully discharged into the water of the canal foul materials, and thereby rendered the waters foul, whereby the plaintiff's engines and boilers were injured. The defendant pleaded not guilty, and that the waters of the canal ought to have flowed and been without the fouling mentioned. An arbitrator to whom the cause was referred found that the plaintiff, by permission of a canal company, made a cut from the canal to his own premises, by which water got to those premises, and with which water he fed the boilers of his engines. The defendant without any right or permission from the company, fouled the water in the canal, whereby the water, as it came into the plaintiff's premises, was fouled, and by the use of it the plaintiff's boilers were injured. Judgment having been given for the plaintiff:—Held, in the exchequer chamber, by Williams, J., Crowder, J., and Willes, J., that the verdict upon the issue joined on the second plea ought to be found for the plaintiff; by Wightman, J., Erle, J., and Crompton, J., that the verdict on that issue ought to be found for the defendant. *Laing* v. *Whaley*, 3 H. & N. 675, 901; 27 L. J., Ex. 422; 4 Jur. (N.S.) 930; 6 W. R. 750.

Held, also, by Erle, J., Crowder, J., Crompton, J., and Willes, J., that the declaration was good after verdict; by Wightman, J., and Williams, J., that the judgment ought to be arrested. *Ib.*

10. Tolls.

a. Taking and Amount.

Effect of Receipt—Claim for Salary.]—A navigation act directed that the salary of the clerk to the commissioners should be paid by the proprietors of the tolls. A person, seised in fee of a part of the navigation and tolls, granted annuities, and conveyed her part of the tolls to a trustee to secure the annuities, and to permit her to hold the conveyed premises and the profits to her own use till default in payment of such annuities. By a subsequent deed she conveyed the premises in fee to Y., together with other property, in trust to sell as in the deed was directed, and to receive the proceeds of such sale, and the tolls and profits of the navigation, and out of the several receipts and profits to defray the costs and expenses necessary for carrying the trusts into effect; to pay up, and if possible discharge the annuities; to pay off certain creditors, and to hold the surplus, if any, for her benefit. The trustee under the last-mentioned deed entered into receipt of the tolls, appointed a collector, and represented himself to the commissioners as a mortgagee of the tolls, and as having a control over them, and over the repairs of the navigation, but refused to pay the salary of the clerk. The annuities were still subsisting. The clerk sued the trustee for non-payment of his salary:—Held, that it lay upon the trustee, having conducted himself as above stated, to shew that he was not a proprietor within the meaning of the act. *Tibbits* v. *Yorke*, 5 B. & Ad. 605; 3 L. J., K. B. 38.

Held, also, on reference to the several deeds, that he was such proprietor, although he only held the tolls in trust to pay creditors and discharge incumbrances, and although there was a

legal estate outstanding in a trustee to secure the annuities. *Ib.*

Regulation of, by Statute—Construction.]—Where a canal is made pursuant to an act, the right of the proprietors to toll is derived entirely from the act; and it is to be considered as if there was a bargain between them and the public, the terms of which are expressed in the statute; and the rule of construction is, that any ambiguity in the terms of the contract must operate against the company of adventurers, and in favour of the public. The proprietors, therefore, can claim nothing which is not clearly given to them by the act. *Stourbridge Canal Co.* v. *Wheeley*, 2 B. & Ad. 793. S. P., *Barrett* v. *Stockton and Darlington Ry.*, 2 Scott (N.R.) 337; 2 Man. & G. 134.

A canal was formed upon two levels, which were connected by a chain of locks. Upon the upper level, there was no lock whatever. By the act for making the canal, all persons were at liberty to navigate thereupon with boats, upon payment of such rates and dues as should be demanded by the company, not exceeding the rates therein mentioned; and, by another clause, the company was authorised to take certain rates and dues for every ton of iron and other goods navigated on any part of the canal, and which should pass through any one or more of the locks; and power was given to the owners of adjoining lands to use pleasure-boats on the canal, without paying dues, so as the same did not pass through any lock, and were not used for carrying goods:—Held, that this act gave no right to demand toll for boats navigating the upper level of the canal, in which there were no locks. *Ib.*

A local act imposed the following duties on articles: "For every ton of coals, cinder, lime and limestone, gravel and manure, the sum of 4*d.*; and for every ton of butter or other goods, wares, merchandize, and commodities, the sum of 9*d.*:"—Held, that stone sleepers of a certain size and shape, intended for a railway, were only liable to the duty of 4*d.* a ton. *Fisher* v. *Lee*, 1 Arn. & H. 11; 4 P. & D. 447; 12 A. & E. 622; 10 L. J., Q. B. 1.

An act gave a toll of 1*d.* per ton on "stone, pebbles, sand, clay, manure, limestone," and of 3*d.* per ton on "other goods, wares, and merchandise" not before mentioned:—Held, that coprolites, which are fossil substances generally supposed to be the dung of animals, and which produce, when mixed with acid, sixty per cent. of phosphate of lime and forty per cent. refuse, and are then used as manure, were not stone or manure within the act, but came within the class of goods, wares and merchandize. *Dant* v. *Moore*, 9 L. T. 381.

Where a canal act directed, "that no boat navigating thereon, which should not be capable of carrying a greater burden than twenty tons, or which should not have a loading of twenty tons on board, should be allowed to pass through any of the locks, unless the owner or navigator of such boat should pay tonnage equal to a boat of twenty tons;" and it did not appear that in any part of the act a boat per se was made liable to any toll, but that all the provisions as to tolls applied exclusively to goods conveyed on the canal:—Held, that the clause in question was confined to boats carrying some loading, and did not attach upon an empty boat passing through the locks. *Leeds and Liverpool Canal Co.* v. *Hustler*, 2 D. & R. 556; 1 B. & C. 424.

A canal act gave a higher tonnage for light goods than for heavy goods. If a jury finds that certain goods were heavy goods when the act passed, ten years' subsequent consent of the company to consider the same species as light goods will not entitle the canal company to demand for these the toll on light goods. *Staffordand and Worcester Canal Co.* v. *Trent and Mersey Canal Co.*, 6 Taunt. 151.

By an act, a toll of one shilling per ton was imposed on all coal, &c. (in addition to the ordinary toll) navigated on any part of the canal from a particular specified place, or from any place within two miles thereof:—Held, that this only applied to voyages commencing within the specified limits, and that no such additional toll was payable for coal loaded at a place more than two miles from the spot specified, although conveyed upon a part of the canal within two miles of that spot. *Brittain* v. *Cromford Canal Co.*, 3 B. & Ald. 139.

A company was empowered by act to take for tonnage upon all coals and other commodities whatsoever, conveyed upon the canal, duties not exceeding 2½*d.* per ton, on entering or passing out of the canal; and also not exceeding 1½*d.* a mile for every ton of coal, except all dung, soil, marl, ashes, and other manure (other than lime, which was to pay half tolls), and except stone and other materials for mending roads, which was to pass toll free. By another section, no boat should pass through any of the locks, unless such boat should pay a duty equal to what would be paid by a vessel loaded with a burden of thirty tons, or unless it should be returning, after having passed on the canal, with a greater burden than thirty tons:—Held, that a boat laden with thirty-eight tons of manure, which had entered the canal and passed along it without paying toll, was not liable to pay any toll on returning through the lock empty, after discharging her cargo. *Grantham Canal Navigation* v. *Hall*, 3 Railw. Cas. 710; 13 M. & W. 114; 13 L. J., Ex. 283. Affirmed 14 M. & W. 880; 15 L. J., Ex. 63—Ex. Ch.

Under a canal act, imposing a toll "on coals, lime, timber, bricks, stone, and all other goods, wares or merchandize whatsoever," gravel and materials for the repair of turnpike roads are liable to toll. *Coulton* v. *Ambler*, 3 Railw. Cas. 724, n.; 13 M. & W. 403; 14 L. J., Ex. 10.

By a canal act a company was empowered to make a canal, to be called the Union Canal, from L. to N., with a cut from G. to M. It being found impracticable to carry the work to N., another act was passed, enabling them to vary the line of the cut from G. to M., which was done accordingly. A third act was afterwards passed, for joining the Union Canal to the Grand Junction Canal, by means of a canal from G., to be called the Grand Union Canal, which was also done. By the first act the company was authorised to receive for coal navigated upon the Union Canal and cut a mileage tonnage of 2½*d.*, so as not to exceed a certain sum (5*s.*). By the third act, it was enacted, that they should not be entitled to receive more than 2*s.* 6*d.* per ton for coal navigated on the Union Canal, and thence on the Grand Union Canal, for a certain specified distance (to H.); and 2*s.* 1*d.* if carried beyond that distance. A mandamus issued, reciting that M. was aggrieved by the tonnage taken by the company on coal being higher from L. to M. by G., than if it were carried after passing G., upon the Grand Union

Canal; and commanding the company to establish a uniform rate of tolls along the whole of their line, or to take tonnage on coal from L. to M. only in proportion to that carried from L. to G., and afterwards upon the Grand Union Canal, so long as they took less than 2*s.* 6*d.* and 2*s.* 1*d.* on coal carried from L. to G. and afterwards upon the Grand Union Canal. The return to the mandamus denied the receipt of unequal tolls:—Held, that the first act having authorised a mileage toll, and the last act prohibiting in certain cases more than a certain amount of gross toll, the power of making a uniform rate of toll was expressly taken away from the company; and that the first act having imposed such mileage toll on coal on the whole of the Union Canal and cut, and having only exempted it from such toll if it passed along the Grand Union Canal, the original toll still prevailed from L. to M. on the Union Canal. *Reg.* v. *Leicester and Northampton Union Canal Co.*, 3 Railw. Cas. 730—Ex. Ch.

By 33 Geo. 3, c. lxxx., the Grand Junction Canal Company was empowered to take tolls for the passage of manure between Bramston and Brentford, and persons occupying lands through which the canal passed might carry manure without payment. By 34 Geo. 3, c. xxiv., for making a cut to Buckingham, the powers and authorities mentioned in the former act were to be exercised by the company and by the owners of lands on the new cut, as if re-enacted, and the like exemptions were to be allowed. By 35 Geo. 3, c. xliii., reciting the first-mentioned act, the company was empowered to make a cut to Paddington, and the several powers, authorities, matters and things in the recited act contained, except the rates, were to be used and exercised by the company, and applied for making the cut, and for ascertaining tolls, and in all respects as if re-enacted, and as if the cut had been part of the works authorised to be made by the first act. By 35 Geo. 3, c. lxxxv., for making a cut from Watford to St. Albans, reciting the before-mentioned acts, the powers granted thereby were to be exercised by the company and by the owners of lands as if re-enacted, and the like exemptions were allowed:—Held, first, that on the construction of the 35 Geo. 3, c. xliii., persons occupying lands on the Paddington cut could not carry manure on the canal free from toll. *Tame* v. *Grand Junction Canal Co.*, 11 Ex. 786; 25 L. J., Ex. 222.

Held, secondly, that the provisions of the several public local acts with respect to tolls on different cuts, parts of the same canal, might be compared in order to ascertain the meaning of a clause in the Paddington act, alleged to create exemptions from toll upon the Paddington cut. *Ib.*

By an act a canal company was authorised to execute certain works for the purpose of making the River Tamar navigable for the distance of thirty miles, and in consideration of the great charge and expense which the company must incur and suffer in making and maintaining the works thereby authorised to be made and maintained, it should and might be lawful to and for the company from time to time, and at all times thereafter, to ask, demand, take, and recover the several rates therein mentioned for the tonnage and wharfage of all minerals, &c., which should be carried upon the navigation, canal, and collateral cut, or any of them. The company only completed the navigation to the extent of about three miles:—Held, nevertheless, that the company was entitled to recover rates in respect of the conveyance of goods along the navigation so completed by the company. *Tamar Navigation Co.* v. *Wagstaff*, 4 B. & S. 288; 32 L. J., Q. B. 295; 9 Jur. (N.S.) 1324; 11 W. R. 951.

The Monmouthshire Canal Act provided that, upon auxiliary railroads made by private individuals under the authority of the act, the tolls should not exceed the rate charged by the canal company, which, for the articles of limestone and ironstone, was restricted to 2½*d.* a ton per mile; and it also empowered the canal company, by agreement with the landowners, itself to construct auxiliary railroads, on which tolls not exceeding 5*d.* per ton per mile might be charged. Certain landowners and owners of ironworks, and among others the lessees of the Beaufort works, formed a joint company, and, under the powers given by the act, constructed a railroad connecting a lime quarry, called the Trevil Quarry, with the several ironworks and with the railroads of the canal company. In the partnership deed of the railroad company, the lessees of the Beaufort works covenanted for themselves, their heirs, executors, administrators, and assigns, so long as the covenantors, their executors, administrators, or assigns should occupy the Beaufort works, to procure all the limestone used in the said works from the Trevil Quarry, and to convey all such limestone, and also all the ironstone, from the mines to the said works along the Trevil railroad, and to pay a toll of 5*d.* a ton per mile for the same:—Held, that the covenant securing a toll of 5*d.* a ton per mile to the shareholders of the railroad was a fraud upon the canal company and the legislature, and therefore ought not to be specifically enforced by injunction. *Keppell* v. *Bailey*, 2 Myl. & K. 517; Coop. t. Brough. 278.

b. Reducing and Varying.

According to Statute—Construction.]—An act provided that the Monmouthshire Canal Company should not receive any higher rates of tonnage than should, for the time being, be taken by the Brecknock Canal Company; and the latter, by a resolution of a general meeting, and under their common seal, reduced their tolls:—Held, that the Monmouthshire Canal Company could not question collaterally the validity of such resolution, but was bound by it. *Monmouth Canal Co.* v. *Kendall*, 4 B. & Ald. 453.

Where a canal company was empowered to take such rates as should be fixed at a general assembly of the proprietors, not exceeding 1*d.* per ton per mile upon coal; and they were also empowered to reduce the rates at a general assembly held on certain notice; but no reduction was to be made without the consent of the major part in value of the proprietors; a contract made by individuals with the company, but not at such general meeting, whereby, in consideration that those individuals would make a navigable cut to convey water from their collieries, through land not within the statutable line of the canal, into the canal, and convey the same to the company, the latter should permit them to carry their coals through the cut and along the canal for 1*s.* per ton, the company paying back 6*d.* per ton, is illegal and void; 1st., as a speculation by which the company might gain more or less than the legislature intended they should take, under similar circumstances, from

the public in general; 2ndly, as extending in effect the power of the company to purchase land beyond the limits assigned by the act; 3rdly, as enabling them to raise more capital than they were entitled by the act to do, by means of paying for land or works by a total or partial sale of their tolls; which tolls are made a security for the money subscribed or taken upon mortgage; 4thly, because the tolls could, in no instance, be reduced but at a general assembly, and this, in fact, operated as a reduction of the tolls pro tanto. *Lees* v. *Manchester Canal Navigation*, 11 East, 645; 11 R. R. 297.

By an act for making and keeping a river navigable, it was enacted that certain persons therein mentioned should be conservators, and that, for reimbursing them what should be laid out for the purposes of the act with 6*l.* per cent. interest until they had been paid the principal and interest of what they had disbursed or should thereafter disburse, every vessel navigating the river should pay to the conservators certain tolls, namely, a sum not exceeding 4*d.* for every weigh of coals; and that, in default of payment of such sums, it should be lawful to detain the vessel, and that, after the conservators should be fully reimbursed, certain less tolls, that is, the sum of 1*d.* for every weigh of coals should be paid, and no more. By a subsequent act, reciting that it was necessary to erect a lock on a certain part of the river, it was enacted, "that from and after the building of the lock, an additional toll shall be collected and paid to the conservators at the lock, viz. the sum of 1*s.* over and above the sum of 4*d.* for every weigh of coals granted by the former statute"; and the same remedy was given for non-payment: —Held, that as the two acts were in pari materiâ, the clause giving the additional toll, in the second act, was to be construed with reference to that giving toll in the first act; and that, so construing it, the true meaning was, that, until the conservators were fully reimbursed, they were not at liberty to take a less toll than that specified in the last-mentioned statute. *Rex* v. *Tone Conservators*, 1 B. & Ad. 561.

Where rates and duties were imposed on coals landed within a certain district, to be paid to commissioners therein named, and the commissioners were empowered to sue in the name of their clerk for the time being for "any penalty or sum of money due or payable by virtue of the act": —Held, that an action might be brought in the name of the clerk for arrears of rates and duties; although, by another clause, a power was given of detaining and selling the vessel and goods in case of neglect or refusal to pay the rates and duties. The act directed that any surplus of rates remaining in the hands of the commissioners should be annually invested in the funds until it should amount to 3000*l.*, and that after that sum should be invested they should reduce the rates, so as they should not, together with the dividends of the 3,000*l.*, exceed the charges annually expended in carrying the act into execution: —Held, that the commissioners had impliedly a power, after so reducing the rates, also to raise them again in case of necessity. *Goody* v. *Penny*, 9 M. & W. 687; 11 L. J., Ex. 289.

Held, also, that after the passing of the Weights and Measures Act, 5 & 6 Will. 4, c. 63, the commissioners had power to levy the rates by the ton (they having been previously levied by the chaldron), without first applying to the sessions for an inquisition under s. 14. *Ib.*

By an act, a company was entitled to demand a fixed sum for goods carried upon any part of the canal, which rates should be equal throughout the whole length of the intended canal. By 8 & 9 Vict. c. 28, subsequently passed, proprietors of canals were empowered from time to time to alter or vary the tolls granted to them, either upon the whole, or for any particular portion or portions of such canals, according to local circumstances, or the quantity of traffic or otherwise, as they should think fit, with a proviso that such tolls were to be charged equally to all persons, and after the same rate, whether per mile or per ton per mile, in respect of all boats of the like description passing along or using the same portion of the canal, and all goods of the like description conveyed or propelled in a like boat, passing along or using the same portion of the canal, under the like circumstances: —Held, that it was competent to the company to take a proportionally less toll per ton per mile for goods carried a given distance (five miles) along any part of the canal, than for goods carried less than that distance. *Strick* v. *Swansea Canal Co.*, 16 C. B. (N.S.) 245; 10 L. T. 460; 12 W. R. 711.

Held, also, that it was competent to the company to agree to carry at a lower rate for a particular individual, in consideration of a large guaranteed minimum toll, in order to enable the company to enter into a successful competition with a rival line of railway. *Ib.*

c. Distraining for.

Seizure of Goods—Right to Sell.]—A canal act gave a company tolls for all goods carried along the canal, which tolls, if not paid upon demand, they were empowered to recover by action; or they might seize the goods or other things in respect whereof such rates ought to have been paid, and the boat or other vessel laden therewith, and detain the same until payment of such rates, and all arrears due from the owner of the boats; and if such goods were not redeemed within seven days after the taking thereof, the same were to be appraised and sold as in case of a distress: —Held, that this clause did not empower the company to sell the boats. *Fraser* v. *Swansea Canal Co.*, 3 N. & M. 391; 1 A. & E. 354; 3 L. J., K. B. 153.

Held, also, that their right to seize was confined to the limits of the canal; and that, therefore, they were not authorised to seize goods after they had been landed. *Ib.*

Liability to Seizure—Trams.]—A canal company was authorised to demand and sue for certain tolls upon the carriage of goods, and to distrain any carriage or goods in respect of which any such tolls ought to be paid, and to detain the same until payment made of such tolls, and of all arrears of the same then due from the owner of such carriage or goods; and in case such distress should not be redeemed within five days, to appraise and sell the same, as in a case of a distress for rent; they were not expressly authorised to levy any toll upon carriages: —Held, that trams could not be distrained for arrears of tolls due from the owners for goods carried in them, if they were not carrying goods of such owners at the time of the distress. *Jenkins* v. *Cooke*, 1 A. & E. 372.

Wrongful Distress—Limitation of Time for Actions.]—The statute enacted that any action, brought for anything done in pursuance of the

act, or in execution of the powers and authorities granted by it, should be brought within six calendar months next after the fact committed:—Held, first, that such a distress was a thing done in pursuance of the act. *Ib.*

—— **Goods in the Hands of Third Persons.**]—Held, secondly, that where an owner of teams let them to a third person, and during such letting they were illegally distrained for arrears due from the person hiring, while not carrying such person's goods, and afterwards sold, such owner might sue, within six months from the time of sale, on a count complaining of injury done to his reversionary interest by the seizure and sale. *Ib.*

d. Extinguishment.

Transfer to another Authority.]—To an action on a bond, the condition of which bound the corporation of London to pay an annuity out of tolls collected on the Thames, a plea that the Thames Conservancy Act had transferred all control of the tolls to a corporation called the conservators of the river Thames, is a good plea, as the performance of the condition had become impossible by the act of law. *Brown* v. *London Corporation*, 13 C. B. (N.S.) 828; 31 L. J., C. P. 280; 8 Jur. (N.S.) 1103; 10 W. R. 522—Ex. Ch.

11. Rights and Privileges of Taking and Using Water.

a. Rights of Company.

Under Particular Statute — Construction.]—By 8 Geo. 3, c. 38, a canal company was established, without power to the proprietors to appropriate to themselves water raised from mines along the line of the canal. By 23 Geo. 3, c. 92, another canal was made, giving to the company power to take gratuitously the water raised from mines within a certain distance of that canal, "provided the produce of such mines was carried along some part of the canal." By 24 Geo. 3, c. 4, both canals were incorporated, but the provisions as to each, contained in 8 Geo. 3, and 23 Geo. 3, were to be kept distinct and separate. The proprietor of a mine in the line of the first canal raised coal, one-third of which was afterwards carried along part of the second canal:—Held, that the company's privilege of taking mineral water did not attach to his mine on the first canal, by reason of the partial conveyance of the produce along the second. *Finch* v. *Birmingham Canal Co.*, 8 D. & R. 680; 5 B. & C. 821; 5 L. J. (O.S.) K. B. 17.

Where a statute directed that a mill owner should be entitled to receive the surplus water by a weir above a certain lock, which the company was bound to keep water-tight:—Held, that it was to be inferred that the company should not have the right of passing any water through the lock, though necessary to the lower part of the canal, except that which passed when barges were lowered through the lock. *Blakemore* v. *Glamorgan Canal Co.*, 2 C. M. & K. 133; 1 Gale, 78; 5 Tyr. 603; 4 L. J., Ex. 146. *S. C.*, 1 Cl. & F. 283; 5 Bligh (N.S.) 547.

Where a canal act gave to the proprietors of the navigation a power of making a canal and using the water of a river for supplying it, but provided at the same time, for securing to the owners of certain works the use of the surplus waters of the river:—Held, that the making of the canal ascertained and fixed the rights of the parties, and the canal proprietors had no right afterwards to enlarge the canal, and draw a larger quantity of water from the river so as to affect injuriously the works in question. A declaration charging it to have been the duty of the canal proprietors to abstain from thus enlarging their canal, and alleging a breach of that duty, sets forth a sufficient cause of action against them. *Glamorganshire Canal Co.* v. *Blakemore*, 1 Cl. & F. 262.

A clause in a canal act declared that the works thereby authorised should be completed within two years from the time of its passing, and that the money to be raised by it should not be applied to defray the expenses of any of the works not made within the time:—Held, that this clause not only limited the application of the money to works completed within that time, but that no works should be carried on adversely to the interest of individuals, after the expiration of the two years. A declaration framed on such a clause, and alleging for breach that works were so adversely carried on after the expiration of the two years, was held to contain a sufficient legal statement of a cause of action. *Ib.*

—— **To Surface Water.**]—Semble, that owners of a canal, who have a right, under their act, to supply the canal with water from all brooks, streams, and water-courses within 1,000 yards of the canal, are not entitled to the mere surface water of a road which ran along an open gutter into the canal, so as to prevent a local board of health from making such a system of drainage as was essential to the district, and which merely allowed such surface water to flow through gratings into the sewer. *Manchester, Sheffield, and Lincolnshire Ry.* v. *Worksop Local Board*, 23 Beav. 198; 26 L. J., Ch. 345; 3 Jur. (N.S.) 304; 5 W. R. 279.

An injunction granted to restrain a board of health from opening communications between the side sewers, which drained the neighbouring houses, and the main sewer, so long as the main sewer ran into and polluted a canal, without first obtaining the consent of the company. *Ib.*

—— **Pumping Water from Different Levels.**]—A canal had three levels, of which A. was the highest, B. the middle, and C. the lowest level. The canal proprietors (though without authority under their act to do so) erected engines between the C. level and the plaintiff's mill forge, and pumped back the water which, after serving the purposes of navigation in levels A. and B., had flowed into level C. Afterward a new act, repealing former acts, and re-enacting their provisions with alterations and additions, was passed. The 15th section gave the proprietors authority to maintain engines for supplying the canal with water, and to have reservoirs and feeders supplied from all brooks, streams, &c., from which they were lawfully supplied before the passing of the act, and "from time to time to raise the water of the canals from one level to another, or to any reservoirs, and for any of the purposes aforesaid to use such engines as they should should judge proper, making full satisfaction for all damages sustained by the owners of any mills, forges, brooks, streams, &c., taken, used, removed, diverted, or injured." By s. 80, the proprietors were forbidden to take for the use of the canal any water out of the river above the plaintiff's forge, and they were

directed to maintain flood-weirs, so that all waste water running into level C., not required for that canal, should flow into the river above the plaintiff's forge. The proprietors pumped up as before the water out of the level C. back into the level A., in consequence of which, except on extraordinary occasions, no water escaped over the weirs into the river:—Held, that they were entitled to do so, and that such pumping back of the water from one level of the canal to the other did not give the plaintiff a right to compensation. *Ellwell* v. *Birmingham Canal Navigation*, 3 H. L. Cas. 112.

Under an Agreement—Opening of Sluices—Compensation.]—By an agreement, a canal company was authorised to open the sluices of a lock at other times than when boats or barges navigating the canal were passing, or about to pass, through the lock, and to take water for maintaining the navigation of the canal below the lock, paying to the plaintiff a weekly rent for each occasion when water was so taken. To this there was a proviso, that the company might, once a year, let out the water for the purpose of cleansing and repairing the canal, and refil it for seventy-two successive hours without paying rent. A boat having sunk in the lock, the water was let out of the pond below the lock, the boat emptied, and then the water was let into the lock and pond again:—Held, that this was not a taking of the water at a time other than when a boat was passing through, and consequently, that the plaintiff was not entitled to claim rent. *Llewellyn* v. *Swansea Canal Co.*, 2 H. & N. 509; 27 L. J., Ex. 85; 3 Jur. (N.S.) 1005; 5 W. R. 763—Ex. Ch.

On another occasion, the company emptied the pond below the lock, with a view of repairing another lock below, and on the repairs being done, they opened the sluices of the lock in question, and let the water down to refil the pond:—Held, that there was a taking of the water for the purposes of maintaining the navigation, and that the plaintiff was entitled to his rent. *Ib.*

Claim by Prescription—When User Illegal.]—The S. and W. Canal communicated at its highest level with the B. canal at lowest level. Owing to the unscientific construction of the locks on the B. canal, during a period of upwards of seventy years there had flowed into the S. and W. canal from the B. canal, with every barge that passed up or down the latter into or out of the former, a much larger volume of water than need have passed or escaped if the system of locks had been more ingeniously contrived. The proprietors of the B. canal proposed to improve the machinery on their canal, so as to put a stop to this unnecessary waste or flow of water. The proprietors of the S. and W. canal sought to restrain them, on the ground that they had acquired a prescriptive right by user, during a much longer period than forty years, to that amount of water which they had enjoyed during such period. They also claimed the right by parliamentary contract and by special agreement:—Held, that the true construction of the acts of parliament cited failed to establish the claim under the parliamentary contract, and that no special agreement was proved. *Staffordshire and Worcester Canal Co.* v. *Birmingham Canal Co.*, 35 L. J., Ch. 757; L. R. 1 H. L. 254.

Held, also, that had any such agreement or grant been at any time made by the company, it would have been ultra vires and unlawful. *Ib.*

Held, also, that as no grant could at any time have been lawfully made, no prescriptive right by user could be claimed or be deemed absolute or indefeasible under the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2. *Ib.*

Held, also, that the doctrine as to use of water in natural or artificial streams does not apply to water passing through locks in a canal, such water being accumulated under the authority of the legislature, to be used in a particular manner for the benefit of the public. *Ib.*

—— **User for other than Canal Purposes.**]—A company incorporated for making and maintaining a canal, and having powers under their act to take water for the purpose of supplying the canal, cannot by user acquire, under 2 & 3 Will. 4, c. 71, s. 2, a prescriptive right to take the water for any other purpose. *National Manure Co.* v. *Donald*, 4 H. & N. 8; 28 L. J., Ex. 185; 7 W. R 185.

By an act a company was incorporated for making a canal, and empowered to supply the canal with water from certain rivers. In 1824, the company made a cut, and erected on it a waterwheel, for pumping water into the canal. The company occasionally used the waterwheel to drive a bone crushing mill. In 1853, an act, passed for converting the canal into a railway, after repealing the first-mentioned act re-incorporated the company, for the purpose of making the railway. By that act it was enacted that easements, &c., vested in the canal company should, after the passing of the act, be vested in the company thereby incorporated, for their absolute benefit; that all titles by possession "acquired by the canal company should be as good in favour of the company thereby incorporated as the same were good, immediately before the passing of that act, in favour of the canal company"; and that in case any of the works used for the purposes of the canal should, in consequence of the stopping up of the canal, be no longer required for the purposes of the act, the works which should be no longer required might be sold by the company in the manner provided by the Lands Clauses Act with respect to the sale of superfluous lands. The canal having been stopped up, and converted into a railway:—Held, that on the conversion of the canal into a railway, the right of the company to the flow of water into the cut for driving the wheel ceased, and that the railway company could not convey to a purchaser any right to such flow. *Ib.*

Cesser of Easement.]—An easement to take water to fill a canal ceases when the canal no longer exists. *Ib.*

Under Parliamentary Powers.]—When a corporation acquires riparian lands under parliamentary powers, all riparian rights, whether ordinary or prescriptive, already subsisting in respect of those lands, attach to such corporation; and if the special objects of its incorporation include purposes requiring the use of the water, the supply of water to which the corporation is entitled will be measured by the extent of user necessary for the purposes of the act, if such user would be more extensive than that to which the corporation would be entitled

as the successor of the former riparian owner. *Swindon Waterworks Co.* v. *Wilts and Berks Canal Co.*, 45 L. J., Ch. 638; L. R. 7 H. L. 697; 33 L. T. 513; 24 W. R. 284.

A canal company incorporated by act of parliament claimed to be entitled to the flow of water in a certain stream for the purposes of navigation under the act, as the purchasers under the act of a tenement upon which was an ancient mill. A waterworks company without parliamentary powers, acquired lands higher up the stream than the canal company, and diverted the water of the stream and stored it in a reservoir for the purpose of selling it to the town of Swindon, claiming to do so as a matter of right:—Held, first, that the canal company was entitled to the flow of water to the extent claimed under both heads. *Ib.*

Held, secondly, the user claimed by the waterworks company not being a user connected with the servient tenement, was inconsistent with the right of the canal company. *Ib.*

Held, thirdly, that such user being claimed as of right might be restrained by injunction without proof of substantial damage already sustained or imminent therefrom. *Ib.*

b. Rights of Other Persons.

User for Other than Specified Purpose—User for Twenty Years.]—A company was established by statute for making and maintaining a navigable canal; and by a section reciting that the erection of steam engines near to the navigation might promote its interests, it was made lawful for the owners of lands within twenty yards of the canal to draw off water sufficient to supply such engines, for the sole purpose of condensing the steam used for working them, such water to be returned into the canal (allowing for inevitable waste), so that no obstruction should arise to the navigation. The company sued R. for that he being possessed of land within twenty yards of the canal, and of a mill and steam-engine on such land, drew water from the canal more than sufficient for the sole purpose of condensing, and used the same for other purposes than of condensing, whereby the company lost and was deprived of the water. Plea, that the defendant was tenant of land, and was the occupier of a mill erected on the land and abutting on the canal, and of a steam engine in the mill, and that he and all occupiers of the land, mill and engine had for twenty years used as of right the easement of drawing from time to time from the canal such quantities of water as were necessary for other purposes than that of condensing, to wit, for the purposes of supplying the boilers of the engine with water, of generating steam to work the engine, of heating the mill, of cleansing the boilers, and of supplying water to a cistern on the roof of an engine-house on the land; and that the defendant, in exercise of his right, drew off the water for the purposes aforesaid. A mill of the defendant, called the Old Mill, with a steam engine, abutting on the canal, had existed more than twenty years; within twenty years a new mill with another engine had been erected adjoining to and communicating with the Old Mill, water passing from one to the other, and the machinery of one being worked by power from the other; and the water of the canal had been used in both mills (in the old during more than twenty years) for the purposes mentioned in the plea, except that of supplying a cistern on the roof of the engine house, there being no cistern in that place. The jury found that the buildings constituted one mill, and that the user proved had been as of right, and a verdict was taken for the company. On a motion to enter a verdict for the defendant:—Held, that the justification in respect of "a certain mill" was supported by the proof of the defendant having occupied and used the water for the Old Mill during twenty years, and that if the company meant to rely upon the more modern user in the new mill, they should have new assigned; and that the failure of proof as to the cistern did not entitle the company to an entire verdict on the issue joined, but that the verdict might be entered distributively, with nominal damages for the user not justified in proof. *Rochdale Canal Co.*, v. *Radcliffe*, 18 Q. B. 287; 21 L. J., Q. B. 297.

—— **When Grant Ultra vires.**]—The company moved for judgment non obstante veredicto, on the same issue, and relied upon the act of parliament and others establishing and regulating their canal, which gave the public a right, for the purpose of navigation, to use the canal and adjoining wharfs and ways, paying certain rates, empowered the company to raise money on the security of such rates, and obliged them to convey all their waste water into the Duke of Bridgewater's canal:—Held, that the company could not, consistently with these enactments, have granted the water for other purposes than that permitted by the statute, and that an actual grant, if proved, for the purposes mentioned in the plea, would have been illegal, and no justification; and, therefore, that the grant for such purposes implied from twenty years' user was no legal defence to the action. *Ib.*

—— **When Wrongful—Right of Action.**]—An act empowered a company to purchase lands for making and maintaining a navigable canal, and contained provisions with respect to the conveyance of land, and its vesting in the company on payment of the price assessed by compensation. It was also provided, that manufacturers within a certain distance of the canal might, after notice to the proprietors of the canal, lay down pipes to supply their steam engines with water for the sole purpose of condensing the steam used for working such engines; and that if any dispute should arise with any person desirous of taking water for the above purpose, or should be in the use of taking the same, such disputes should be finally determined by commissioners. A declaration by the company stated that the canal had been made and maintained by them in pursuance of the act; that the defendant having steam engines within the prescribed distance of the canal, had, after notice to the company, laid down pipes communicating with the canal, and that the defendant had used the water drawn off by such pipes for other purposes than condensing the steam of his engines. It was objected that the declaration did not show any conveyance or ownership of the canal or water; nor did it show any invasion of a private right, or damage to such a right, inasmuch as the act complained of, if wrongful, was clearly prohibited by statute, so that a repetition of the act could never be used as evidence that it was rightful; also, that the remedy was by indictment as for a violation of a statutory provision; and further

that the complaint was a dispute over which the commissioners under the act had exclusive jurisdiction:—Held, that the declaration was good; that it must be taken that the company was in possession of the canal, and that, without averment of special damage, the wrongful act appeared to be a damage to the company's right; that the disputes over which the commissioners had jurisdiction were disputes with persons either about to use, or in the actual use of the canal water for a rightful purpose, as to the mode of taking such water, and that the provision for reference to the commissioners did not apply to a mere wrongful act. *Rochdale Canal Co.* v. *King*, 14 Q. B. 122; 15 Jur. 896—Ex. Ch.

—— **Acquiescence.**]—By a canal act, the owners of steam-engines on the banks were empowered to lay pipes and take water from the canal for the purpose of condensing steam. In 1830 K. built a steam-engine, and laid pipes to the canal, with the cognisance of the canal company, and used the water for the purpose of raising as well as condensing steam, till the year 1847, when disputes arose, and an action was brought by the company, who recovered 1*s.* damages. K. continued to take the water, and the company filed their bill, praying that he might be restrained. K., by his answer, alleged and produced evidence that the company were aware, when the mill was built, that the water would be used for raising steam:—Held, that the smallness of the damage would not prevent the court from interfering, and that the court would not compel the company to bring other actions, but that there was so much evidence of acquiescence that the court would not interfere on motion. *S. C.*, 2 Sim. (N.S.) 78; 20 L. J. Ch. 675; 15 Jur. 962.

The court at the hearing, although the company's right had been established at law, held that it was bound by their acquiescence, and refused a perpetual injunction to restrain K. from taking water for the purpose of "generating" steam. *S. C.*, 16 Beav. 630; 22 L. J., Ch. 604; 17 Jur. 1001; 1 W. R. 278.

An injunction was, however, granted as to another mill, acquiescence and encouragement on the part of the company not having been established. *Ib.*

Contract with Company—Violation of.]—A contract was entered into between a canal company and the plaintiffs, the owners of paper mills, as to the mode of enjoyment of the waters by which both were supplied. The company did acts in violation of the contract:—Held, that it was no answer, upon a bill for a perpetual injunction, to say, that the acts proposed would not be injurious, or even to prove that they were beneficial to plaintiffs; and the court, although no evidence was given of an actual damage done, made a decree for a perpetual injunction. *Dickenson* v. *Grand Junction Canal Co.*, 15 Beav. 260.

Permission to use Superfluous Water.]—The defendant being the owner of a canal of which the plaintiffs were large customers, a mutual understanding was come to between the parties, that so long as the plaintiffs remained good customers of the canal, they should be allowed to use the superfluous water of the canal for the purposes of copper works, of which they were occupiers under an agreement for a lease with the defendant. The use of the water of the canal, though convenient and economical, was not absolutely essential to the plaintiff's works:—Held, that such an understanding did not form the foundation of an equitable right. Secus, if the plaintiffs, with the knowledge of the defendant, had incurred expense in establishing a manufacture for which the use of the water was absolutely necessary. *Bankart* v. *Tennant*, 39 L. J., Ch. 809; L. R. 10 Eq. 141; 23 L. T. 137; 18 W. R. 639.

12. Other Rights.

User by Steamers.]—There is a public right of user of a canal with boats propelled by steam power, if they do not injure the canal beyond what is occasioned by traction by horses. *Case* v. *Midland Ry.*, 27 Beav. 247; 28 L. J., Ch. 727; 5 Jur. (N.S.) 1017.

In a suit instituted by a carrier to establish the right of user of a canal with steam power, the court ordered the cause to stand over, and in the meanwhile experiments to be made, under the supervision of an engineer to be appointed by the court, with the view to ascertain the damage to the canal occasioned by the use of steam power. *Ib.*

Perpetual injunction granted to restrain a canal company from preventing a railway company using steam power on the canal; the railway company undertaking not to exceed a speed of three miles an hour. *Ib.*

Letting of Boats.]—A canal company cannot grant the exclusive right to let boats for hire over their water, so as to give the grantee a right to sue a third party for the infringement of his right. *Hill* v. *Tupper*, 2 H. & C. 121; 32 L. J., Ex. 217; 9 Jur. (N.S.) 725; 8 L. T. 792; 11 W. R. 784.

Wharfs.]—A canal act empowered the lord of any manor, and the owner of any lands through which the canal should be made, to erect and use any wharfs, quays, landing-places, or warehouses in or upon their lands adjoining or near to the canal, and to land any goods or other things upon such wharf, or upon the banks lying between the same and the canal, and also to make convenient places for boats to lie and turn in, so that the making or using the same did not obstruct or prejudice the navigation of the canal or any towing-paths or sides thereof:—Held, that an owner of land adjoining the towing-paths had a right to erect a wharf on his own soil, and to land goods on the towing-path, and convey them across it to his own wharf. *Monmouthshire Canal Co.* v. *Hill*, 4 H. & N. 421; 28 L. J., Ex. 283.

Access.]—A railway company had become owner of a canal by purchase, and it was bound, by several statutes, to keep it open and navigable. The plaintiff was the owner of a mill abutting upon a sort of bay in the canal, which he alleged formed part of the canal itself; this fact was denied by the defendant, who built a wall across the bay, so as to make the canal of the same width there as in other parts. The plaintiff filed his bill for an injunction to make the defendant undo what had been done, and to prevent it from doing more:—Held, that the court could not make the defendant undo anything done, but

that the plaintiff was entitled to an injunction to restrain the company from proceeding to do more, on the plaintiff undertaking to bring an action at law to try the disputed right. *Bradbury* v. *Manchester, Sheffield, and Lincolnshire Ry.*, 15 Jur. 1167.

—— **Road over other Person's Land.**]—The power given by a canal act, enabling the proprietor of a mineral district to make roads and railways over lands of other persons from his mines to the canal, does not restrict him to the shortest practicable route, but enables him to adopt any more circuitous route which in the bonâ fide exercise of his judgment he may find expedient, provided the point at which he joins the canal is within four miles of the boundary of his estate. *Richards* v. *Richards*, 1 Johnson, 255.

Saving time by avoiding a lock is a sufficient reason for preferring a more circuitous route for this purpose. *Ib.*

A canal act empowered the proprietors of mines and their lessees to make railways or roads across the lands of other persons, intervening between the mines and the canal, to convey their minerals to the canal. In 1843 an agreement was entered into between the lessees of coal mines and the owners of intervening lands to make a tram-road across them, subject to an annual rent of 5*l.* 5*s.* The lessees afterwards abandoned the tramroad, and without any consent, except that of a tenant, made a railroad across the lands in a different direction from the tramroad. They also erected an engine-house, for which they subsequently agreed with the mortgagee in possession to pay an additional rent of 1*l.* 15*s.* The defendant subsequently became owner of the lands, and gave notice to the lessees that he should require an annual payment of 35*l.*; and the lessees refusing to pay that sum, he gave them notice to cease the use of the railway, and subsequently he took up the rails. Upon a bill filed by the lessees:—Held, that the defendant was bound by the agreement and acts of his predecessors; that the abandonment of the tramroad for a railway had not affected the rights of the parties; that the defendant was not justified in taking up the rails; and that the plaintiffs were entitled to restore them, the defendant being answerable in damages for the loss sustained by the plaintiffs. *Mold* v. *Wheatcroft*, 27 Beav. 510; 29 L. J., Ch. 11; 6 Jur. (N.S.) 2; 1 L. T. 226.

Railways Crossing.]—A company was empowered to do all works necessary and convenient for constructing a railway, and among others to cross canals and make embankments in the line; and in particular to cross a canal of which the defendants were the proprietors, and to make the embankment over a valley near the same place. Subsequent clauses in the act restricted the company from doing anything which should obstruct the navigation of the canal, or any part thereof, and specified the height and dimensions of any bridge to be made and maintained for carrying the railway over the canal. The company, for the purpose of transporting earth from the higher lands on the south to the lower land on the north side of the canal for constructing an embankment, erected a temporary bridge over the canal, supported partly on piles driven into the bed of the canal:—Held, that the clause empowering the railway company to cross canals in the progress of their works was not restricted by the subsequent clauses which applied to permanent bridges. *London and Birmingham Ry.* v. *Grand Junction Canal Co.* 1 Railw. Cas. 224.

Although a railway company are not to act capriciously in regard to carrying out the powers of an act of parliament, the act constitutes them the judges of the most convenient mode of conducting the works. *Ib.*

On the construction of the Manchester and Leeds Railway Act, a general power authorising the construction of bridges and other works, either temporary or permanent, for the purpose of the act, and according to its provisions and restrictions, was held not to be restricted by preceding sections which authorised the erection of a certain number of bridges and forbade the making any other bridges, save as were thereinbefore provided for, or in any manner to obstruct the navigation save as thereinbefore mentioned. The company, having power to build a temporary bridge for certain purposes, were held entitled to use it for other purposes, provided they did not thereby occasion a greater obstruction to the navigation than they otherwise would have done, or continue using it for that purpose after the permanent bridge was finished, and dissolved an injunction against their erection of a temporary bridge. *Priestley* v. *Manchester and Leeds Ry.*, 4 Y. & Coll. 62; 2 Railw. Cas. 134.

An estate was intersected by a canal under the powers of its act, and an accommodation bridge was built by the company, over which a private road, leading across the property to a high road, was carried. Coal pits were opened upon the estate, which, when the canal was made, had been used as a farm. For some time the coals were carried down to the canal by a tramway which did not cross the bridge. The coal-owners subsequently carried the tramway across the bridge (excavating the soil on the roadway on the bridge and approaches), in order to carry their coal to a line of railway on the other side of the property. An action for trespass having been commenced, and a writ of injunction applied for by the canal company, the coal-owners submitted in the action to judgment for 1*l.* damages and costs, and gave an undertaking not to repeat the trespass complained of. The coal-owners having, a few months afterwards, again laid down the tramway, but without breaking the soil on the bridge:—Held, that the undertaking given by the defendants formed a good ground for the interference of the court, without going into the question of their right to make the tramway. *Neath Canal Co.* v. *Ynisarwed Resolven Colliery Co.*, L. R. 10 Ch. 450.

Licence to take Ice—Derogation from Grant.]—A canal company, in consideration of the lessee's expenditure on certain ice-houses on the banks of the canal, granted a lease thereof, with licence to take ice from a part of the canal:—Held, that the licence was not exclusive, but that it was a grant of sufficient ice to enable the lessee to fill the ice-houses; and that, so long as the lessee was able and willing to take this quantity of ice, the lessors could not derogate from their grant by subsequent licences which would interfere with it. *Newby* v. *Harrison*, 1 John. & H. 393. Affirmed, 4 L. T. 424; 9 W. R. 849.

Right to Open Locks — Prescription — Presumption of Lost Grant.]—It is not a valid objection to a claim of a lawful easement that it may possibly benefit persons other than the owner of the dominant tenement. *Simpson* v. *Godmanchester Corporation*, 66 L. J., Ch. 770; [1897] A. C. 696; 77 L. T. 409—H. L. (E.)

For a period beyond living memory the respondent corporation had exercised an uninterrupted right to open three river locks belonging to the appellant and his predecessors, in times of flood, for the protection of lands occupied by the corporation or their tenants. By a deed of 1689, a predecessor of the appellant who owned one moiety only of the navigation rights purported to grant to the corporation the right to open the locks in question in times of flood:—Held, that apart from the deed of 1689, the corporation were entitled by prescription or presumption of lost grant to the right claimed as an easement, and that such easement would be presumed to have been granted in respect of the lands of the corporation affected by the exercise of the right. *Ib.*

Fenders against Floods.]—On indictment for nuisance to a canal established by act of parliament, it appeared that the canal was carried across a river and the adjoining valley by means of an aqueduct or embankment, in which were several arches and culverts; that a brook fell into the river above its point of intersection with the canal, and that in times of flood the water which was then penned back into the brook overflowed its banks, and was carried by the natural level of the country to the arches, and through them to the river, doing however much mischief to the land over which it passed; that except for the nuisance after mentioned, the aqueduct was sufficiently wide for the passage of the river at all times but those of high flood; that the occupiers of land adjoining the river and brook had, for protection of their land, subsequently to the making of the canal aqueduct and embankment, erected or heightened artificial banks called fenders on their properties to prevent the flood-water from escaping as above mentioned, and that the flood-water had come down in time of flood in such force against the aqueduct and canal banks as to endanger them and obstruct the navigation; that the fenders were not unnecessarily high, and that if they were reduced many hundreds of acres would again be exposed to inundation:—Held, that the occupiers were not justified in altering for their own benefit the course in which the flood-water had been accustomed to run, and consequently they were indictable. *Rex* v. *Trafford*, 1 B. & Ad. 874; 9 L. J. (O.S.) M. C. 66. *S. C.*, 1 M. & Scott, 401; 2 C. & J. 265; 8 Bing. 204; 1 L. J., Ex. 90.

Rights of Fishery.]—A canal act provided that the lord of every manor through which the canal and reservoirs thereto belonging should be made, should be entitled to the right of fishery in so much of the canal and reservoirs as should be made in, over or through the common waste lands within his manor, and that the owners of any other lands through which the canal should be made should also have the like right of fishery of and in so much of the canal as should be made in, over or through their lands wherein they had the right of fishery before the act:—Held, that the right reserved to the lord of the manor was confined to common or waste lands where the lord was owner of the soil, and therefore did not extent to open lammas lands, the soil of which was in various owners, the occupiers intercommoning for a certain part of the year. *Grand Union Canal Co.* v. *Ashby*, 6 H. & N. 394; 30 L. J., Ex. 203; 3 L. T. 673.

See also sub tit. FISH AND FISHERY.

C. STREAMS, NON-NAVIGABLE RIVERS AND WATERCOURSES.

1. RIGHTS AND INCIDENTS OF.

a. Generally.

Natural Right to Flowing Water.]—Running water is originally publici juris, and an individual can only acquire a right to it by applying so much of it as he requires for a beneficial purpose, leaving the rest to others, who, if they acquire a right to it by subsequent appropriation, cannot lawfully be disturbed in the enjoyment of it. *Williams* v. *Morland*, 4 D. & R. 583; 2 B. & C. 910; 2 L. J. (O.S.) K. B. 191; 26 R. R. 579.

Flowing water is publici juris in this sense only, that all may reasonably use it who have a right of access to it, and that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. *Embrey* v. *Owen*, 6 Ex. 353; 20 L. J., Ex. 212; 15 Jur. 633.

The right to have a stream of water flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes; but this is not an absolute and exclusive right to the flow of all the water, but only subject to the right of other riparian proprietors to the reasonable enjoyment of it; and consequently it is only for an unreasonable and unauthorised use of this common benefit that any action will lie. *Ib.*

The right to have a stream of water which flows above ground running in its natural course, is not by a presumed grant from long acquiescence on the part of the riparian proprietors, above and below, but is ex jure naturæ, and an incident of property; and an action lies for infringement of this right. *Dickinson* v. *Grand Junction Canal Co.*, 7 Ex. 282; 21 L. J., Ex. 241; 16 Jur. 200.

Such a right in no way depends upon prescription or the presumed grant of his neighbour, nor from the presumed acquiescence of the proprietors above and below, as stated by Tindal, C.J., and Maule, J., in *Acton* v. *Blundell* (12 M. & W. 324; 13 L. J., Ex. 289) and *Smith* v. *Kenrick* (7 C. B. 515). *Ib.*

A right to the use of flowing water does not necessarily depend upon the ownership of the soil covered by such water. *Lord* v. *Sydney Commissioners*, 12 Moore, P. C. 473; 3 L. T. 1; 7 W. R. 267.

The right to the enjoyment of a natural stream of water on the surface ex jure naturæ belongs to the proprietor of the adjoining land as a natural incident to the right to the soil itself. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. *Chasemore* v. *Richards*, infra. And see *Ennor* v. *Barwell*, infra.

—— **Water Percolating through the Soil.**]—The principles which apply to the right to water flowing in a certain and defined course, whether in an open and a visible stream or in a subterranean channel, are inapplicable to water percolating through underground strata, having no certain course or defined limit, but oozing through the soil wherever the rain penetrates. *Chasemore* v. *Richards*, 7 H. L. Cas. 349 ; 29 L. J., Ex. 81 ; 5 Jur. (N.S.) 873 ; 7 W. R. 685.

—— **Water from Natural Springs.**]—In land there was a pond, formed in the gravel bed, and which had existed from time immemorial, and in which the water rose naturally from several springs at its bottom, and thence overflowed the western edge, and formed a rivulet, which ran through and supplied other ornamental ponds, being used for cattle, and supplying the gardens of the house. In 1855 the commissioners of sewers, in order to drain a populous district thereabouts, commenced the construction of a sewer in the parish near to these premises, under the centre of the public highway, through the bed of gravel, which bed ran also through the owner's land. This cutting nowhere approached nearer to the owner's property than seventeen yards. The sewer was properly made for attaining its object. The immediate effect, however, was to drain the springs in the bed of gravel, and to prevent them from finding their way into the pond, so that the rivulet ceased to be supplied with water, and in its turn to supply the other ponds on the estate. By 11 & 12 Vict. c. 112, s. 50, where any work by the commissioners done, or required to be done, in pursuance of the provisions of this act, shall interfere with or prejudicially affect any ancient mill, or any right connected therewith, or other right to the use of the water, full compensation shall be made to all persons sustaining damage thereby in manner herein provided :—Held, that the owner of the land was not at common law entitled to compensation from the commissioners in respect of the abstraction of water. *Reg.* v. *Metropolitan Board of Works*, 3 B. & S. 710 ; 32 L. J., Q. B. 105 ; 9 Jur. (N.S.) 1008 ; 8 L. T. 238 ; 11 W. R. 492.

Claim by a plaintiff to use water which flowed from his land to the land of the defendant, and was there collected in a reservoir, whence it reflowed into the plaintiff's land. And a claim also by the plaintiff to the overflow into his land of a pond which flowed through the defendant's land into that of the plaintiff. The claims being supported by evidence of twenty years' use :—Held, that these were not maintainable. *Ennor* v. *Barwell*, 2 Giff. 410 ; 6 Jur. (N.S.) 1233. See *S. C.*, on appeal, 1 De G. F. & J. 529 ; 4 L. T. 597.

But held, that the plaintiff was entitled to water flowing from surface springs on the defendant's lands, and which naturally flowed, but not through perfectly-defined channels, into the plaintiff's lands, and was entitled to an injunction to restrain the defendant from diverting it. *Ib.*

In order to ascertain the geological formation of the land, the plaintiff was not allowed to cut down an embankment or to remove the soil ; but, on giving notice, he was allowed to enter and inspect it for the purpose of ascertaining the natural flow of the water. *Ib.*

Water, as it issues from a well or a spring, is not to be considered as produce of the soil, so as to make the right to take it in alieno solo for domestic purposes a profit à prendre. Such right is an easement only, and may be claimed by custom. *Race* v. *Ward*, 4 El. & Bl. 702 ; 3 C. L. R. 744 ; 24 L. J., Q. B. 153 ; 1 Jur. (N.S.) 704 ; 3 W. R. 240.

—— **Surface Water.**]—A landowner has a right to appropriate surface water which flows over his land in no definite channel, although the water is thereby prevented from reaching a watercourse which it previously supplied. *Broadbent* v. *Ramsbotham*, 11 Ex. 602 ; 25 L. J., Ex. 115 ; 4 W. R. 290. See *Ennor* v. *Barwell*, supra.

Water which squanders itself over an indefinite surface is not a proper subject-matter for the acquisition of a right by user. *Briscoe* v. *Drought*, 11 Ir. C. L. R. 250—Ex. Ch.

Rights of Fishing.] — *See* FISH AND FISHERY.

b. Ordinary Streams and Rivers.

i. *Definition.*

Though the word "stream" in its more usual application does imply water running between defined banks, it is not confined to that meaning —its essence being that it is water in motion as distinguished from stagnant water. Per Lord Halsbury. *McNab* v. *Robertson*, 66 L. J., P. C. 27 ; [1897] A. C. 129 ; 75 L. T. 666 ; 61 J. P. 468—H. L. (Sc.).

ii. *Property in Soil.*

Riparian Owners—Rights of.]—In an ordinary case, primâ facie, proprietors on each side of a river are respectively entitled to the soil, usque ad medium filum aquæ. *Wishart* v. *Wyllie*, 1 Macq. H. L. 389.

The soil of the alveus is not the common property of the respective owners on the opposite sides of a river ; the shore of each belongs to him in severalty, and extends usque ad medium filum aquæ ; but neither is entitled to use it in such a manner as to interfere with the natural flow of the stream. *Bickett* v. *Morris*, L. R. 1 H. L. (Sc.) 47 ; 12 Jur. (N.S.) 803 ; 14 L. T. 835.

Where two parishes are separated by a river the medium filum is the presumptive boundary between them. *Rex* v. *Landulph*, 1 M. & Rob. 393.

King James I., being seised of the lands of R., and other lands adjacent to Lough E. (which is a large, navigable, enclosed water in which the tide does not flow or reflow), and of the whole soil and bed of the lake, did by letters patent, grant the said lands and also certain islands, named, in Lough E., and also all other islands therein being parcel of the said lands or any of them, and also a free fishery in the lake or waters of Lough E., and all waters, watercourses, fisheries, fishings, &c., lying and being in or within the same :—Held, that the soil of Lough E., covered with water adjacent to the lands did not pass to the grantee to the middle thread of the lake. *Johnston* v. *Bloomfield*, Ir. R. 8 C. L. 68.

A river was, in general, the boundary of the counties of M. on the west, and E. on the east. It was proved that before 1808 the river had changed its course to the east. Evidence being given that the land left bare on the west side of the river was treated as part of the county of E., the jury found that the land was in the county of E. ; and the court refused to grant a new trial, on the ground that the judge had not directed the jury, that if the change of the course of the river had been gradual, the land

left on the west side of the river would belong to the county of M. *Ford* v. *Lacey*, 7 H. & N. 151; 30 L. J., Ex. 351; 7 Jur. (N.S.) 684.

Observations upon the rights which can be acquired in a stream by a riparian owner. *Kensit* v. *G. E. Ry.*, 54 L. J., Ch. 19; 27 Ch. D. 122; 51 L. T. 862; 32 W. R. 885—C. A.

And see further Cases, post, cols. 1966, 1967.

——**Accretions.**]—Accretions from the gradual change of the course of a non-navigable river, where there are no fixed boundaries, will become the property of the owner of the adjoining land. *Ford* v. *Lacy*, supra.

Where a non-tidal river gradually changes its bed, and thereby adds land to or takes it away from one side, the rule that the riparian owner on that side enjoys the gain or has to bear the loss applies not only where two different persons own the opposite banks, but also where the river bed belongs to a separate owner and not to the riparian owners. The question whether any particular land is part of the bed of a non-tidal river at any particular spot or time is one of fact, to be determined not by any hard and fast rule, but having regard to all material circumstances, including past and present fluctuations of the river, and the nature, growth, and user of the land. *Hindson* v. *Ashby*, 65 L. J., Ch. 91; [1896] 1 Ch. 78; 73 L. T. 468; 44 W. R. 184; 60 J. P. 40.

The accustomed course of a natural stream which a riparian owner is entitled to have preserved is the natural and apparently permanent course existing when the right is asserted or called in question. Where, by long-continued natural accretion of gravel, the bed of a river, and consequently the flow of water, have become permanently altered, it is not within the rights of a riparian owner, by removing the accretion, to restore the flow of water to its former state as to velocity and direction. *Withers* v. *Purchase*, 60 L. T. 819.

—— **Alluvial Lands.**]—Alluvial lands which are gradually gained from a river belong, by way of accretion, to the lands of the adjoining proprietor. *Mussumat Imam Bandi* v. *Hurgovind Ghose*, 4 Moore, Ind. App. 403.

An order giving possession of lands made by Foujdarry (police magistrate's) court, upon a charge of a breach of the peace coming before the magistrate, is not a determination respecting the rights to such lands. *Ib.*

Lands having been submerged by a change of the course of the river Ganges, after several years, reappeared. Upon a disputed question of right to such lands by two adjoining proprietors, each claiming the lands to be part of his mouza, the Sudder court held the plaintiff's claim to be barred, first, by the Bengal regulations of limitation from lapse of time; and, secondly, that the lands were alluvial, and attached to the mouza of the defendant. Such decree, upon appeal, reversed, the judicial committee holding, first, that the question of limitation not having been put in issue by the pleadings, could not be allowed to operate upon the case; and, secondly, that the court had mistaken the question in supposing it one of alluvion, the point at issue being one of boundary only, and that the plaintiff had made out his title to possession. *Ib.*

—— **Right of Altering Stream—Building upon Alveus.**]—Riparian proprietors have a common interest in the water of a running stream, and a separate property in the alveus or channel thereof usque ad medium filum fluminis. *Bickett* v. *Morris*, L. R. 1 H. L. (Sc.) 47; 12 Jur. (N.S.) 803; 14 L. T. 835.

But no proprietor may so use his property in the alveus as to affect the interest of ex adverso proprietors in the stream; and in order to entitle a riparian proprietor to relief against building upon the alveus, it is not necessary for him to prove that damage to him has been or is likely to be caused thereby. *Ib.*

Semble, a riparian proprietor may build a bulwark on his bank ripæ muniendæ causâ, but he must so build as to cause no actual injury to the opposite proprietor; in this case, however, mere apprehension of danger would not be sufficient ground for relief. *Ib.*

The bed of a flowing stream is the property of each riparian owner to the middle of the stream, and each is entitled to make use of it so long as he does not injure his neighbour or interfere with the flow of the water, and an encroachment on the alveus of a running stream may be complained of without the necessity of proving that damage has been sustained or is likely to be sustained. *Edleston* v. *Crossley*, 18 L. T. 15.

But where upon a balance of testimony it appears that the quantity of water sent on to the plaintiff's works will not, in all probability, be substantially diminished in quantity or quality, by the means adopted by the defendants with that object, the court will not proceed mandatory by injunction, but leave the plaintiffs to their remedy at law, if any. *Ib.*

Where the defendants, who are riparian proprietors—with the object of forming a water company, and selling the water of a slender stream, first, to other riparian proprietors, and then, if any remained over, to anyone who chose to buy it—erected a weir in alveo, which had a sensibly injurious effect upon the flow to and past the plaintiff's premises, and could not be used for the purpose for which it was erected without a continuance of such injury:—Held, that the erection of the weir was illegal, and that the plaintiffs were entitled to a perpetual injunction restraining the defendants, their servants, &c., from continuing the erection of the structure complained of, and from obstructing the rights of the plaintiffs to the flow of the water, according to its usual course and volume, to and past their lands. *Belfast Rope Works Co.* v. *Boyd*, 21 L. R. Ir. 560—C. A.

An erection in alveo fluminis is not per se illegal, because the defendant erecting it cannot prove the impossibility, as well as the absence, of injury to the plaintiffs. The reasonable uses which a riparian proprietor may lawfully make of the water passing his land include turning its natural gravitation into water power, by weirs or other like contrivances erected in alveo fluminis, although their effect if not carefully and reasonably used, might be to cause sensible injury to lower proprietors. *Ib.*

Plaintiff and defendant, owners of adjoining premises, were entitled to water from the river G., and to have the waste water carried away by separate channels. Improvements were made by commissioners having statutory powers, in the course of which a tail-race was formed from the plaintiff's premises by clearing the natural bed of the river which formed the channel by which the waste water from these premises had been

formerly discharged, and three waste sluices were made for keeping the river at a proper level, and prevented the plaintiff's and other premises from being flooded. Defendant made a pier projecting into the channel through which water was discharged from the waste sluices into the tail-race, which it was alleged would throw back the water on the sluices and across the tail-race to the injury of plaintiff. Defendant also stated his intention of erecting buildings over part of the tail-race, which would prevent access to one of the waste sluices leading from defendant's premises to the tail-race, but to which plaintiff alleged that it would be essential for him to have access in time of flood:—Held, first, that on the authority of *Bickett* v. *Morris* (L. R. 1 H. L. (Sc.) 47), plaintiff was entitled, irrespectively of proof of actual damage, to an injunction restraining defendant from continuing an obstruction in alveo fluminis, the principle of that case not being confined to the case of opposite riparian owners. Secondly, that in absence of evidence to show that the culverts could not bear the weight of the proposed buildings, plaintiff could not restrain their erection merely on the ground that he would be precluded from access to the sluice. *Palmer* v. *Persse*, Ir. R. 11 Eq. 616.

Right to Raise Bank.]—A riparian owner has the right to raise the banks of the river from time to time, as it becomes necessary, so as to confine the flood water within the banks and prevent it from overflowing his lands, so long as he does not contravene the maxim sic utere tuo ut alienum non lædas. *Ridge* v. *Midland Ry.*, 55 J. P. 55.

iii. *Use of Water.*

Rights of Riparian Owners.]—Every owner of land on the banks of a river has primâ facie an equal right to use the water, and cannot acquire a right to throw the water back on the proprietor above, or to divert it from the proprietor below, without a grant, or twenty years' enjoyment, which is evidence of a grant. *Wright* v. *Howard*, 1 Sim. & S. 190; 1 L. J. (o.s.) Ch. 94; 24 R. R. 169.

The owner of land, through which a river runs, cannot, by enlarging a channel of certain dimensions, through which the water had been used to flow before the appropriation of it by another, divert more of it to the prejudice of any other landowner lower down the river, who had at any time before such enlargement appropriated to himself the surplus water which did not escape by the former channel. *Bealey* v. *Shaw*, 6 East, 208; 2 Smith, 321; 8 R. R. 466.

The right to appropriate a stream of water, in exclusion of any owners of the banks of the stream, cannot be acquired in a less period than twenty years. *Mason* v. *Hill*, 2 N. & M. 747; 5 B. & Ad. 1; 2 L. J., K. B. 118.

If water has been accustomed to flow along a channel from time immemorial, and it has been appropriated, the first owner of the adjoining lands on both sides who appropriates it, without doing any injury to any one, either above or below him, acquires such a right by his appropriation, that though he might have enjoyed it for twenty years, he may maintain an action against any owner of the lands above him who wrongfully diverts the water from its ancient channel. *Frankum* v. *Falmouth* (*Earl*), 6 Car. & P. 529; 2 Ad. & E. 452; 4 L. J., K. B. 26, 90.

The owner of the banks of a stream has a right to the advantages of that stream, flowing in its natural course, and is entitled to use it for any purpose not inconsistent with similar enjoyment in the owners above and below. *Mason* v. *Hill*, 2 N. & M. 747; 5 B. & Ad. 1; 2 L. J., K. B. 118.

No proprietor of the banks of a stream has a right to diminish the quantity, or injure the quality of the water, to the detriment of other similar possessors of other parts of the banks. *Ib.*

Every riparian proprietor has a right to the reasonable use of the water flowing past his land, namely, for his domestic purposes, and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. He has also the right to the use of the water for any other purpose, provided he does not thereby interfere with the rights of other proprietors, either above or below him. *Miner* v. *Gilmour*, 12 Moore, P. C. 131; 3 L. T. 98; 7 W. R. 328.

Subject to this condition, a riparian proprietor may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation; but he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury. *Ib.*

Every proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of the proprietors above or below him on the stream, and may begin to exercise that right whenever he will. *Sampson* v. *Hoddinott*, 1 C. B. (N.S.) 590; 26 L. J., C. P. 148; 3 Jur. (N.S.) 243; 5 W. R. 230.

The right of the riparian proprietor is limited to natural streams, and does not attach in the case of artificial cuts or drains. *Ib.*

The ordinary right of the riparian proprietor is to take so much water as he requires for domestic or similar purposes:—Held, that the fact that the railway company did not require water for such purposes did not entitle them to take it for other purposes, such as supplying their locomotives. *Att.-Gen.* v. *G. E. Ry.*, 23 L. T. 344. Affirmed, L. R. 6 Ch. 572; 19 W. R. 788.

Semble, the interest of a riparian proprietor in the stream extends not only to the prevention of a diversion or diminution thereof, but to the prevention of any such interference with its course as might possibly be attended with damage at a future period in another proprietor. The general rule is, that even though immediate danger cannot be described, or actual loss predicated, an obstruction to the current of a stream constitutes an injury of which the courts will take notice as an encroachment which adjacent proprietors have a right to have removed. *Bickett* v. *Morris*, L. R. 1 H. L. (Sc.) 47; 12 Jur. (N.S.) 803; 14 L. T. 835.

Mere apprehension, without some show of injury, will not ground a complaint; but it is not necessary to obtain or to be guided by scientific opinions. *Ib.*

Rights of the seigneur, in Lower Canada, to the water of an unnavigable river flowing through his fief, does not entitle one of his co-seigneurs to divert the waters for his exclusive use which had been accustomed for eleven years to supply the mills of another of his co-seigneurs. *St. Louis* v. *St. Louis*, 3 Moore, P. C. 398.

Acquisition of Special Rights.]—By usage he may acquire a right to use the water in a manner not justified by his natural rights; but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement. *Sampson* v. *Hoddinott*, supra. Affirmed, without argument, by consent, 3 C. B. (N.S.) 596.

Where A. being the owner of land through which a stream runs down to the land of B., grants by deed to B. that the stream shall be in the control of B. and his assigns, and shall flow in a free and uninterrupted course through a channel described on the deed, and afterwards A. and B. assign respectively their land to Y. and Z., Y., if he divert the water from such channel, though he does not thereby deprive Z. of the use of any water, is liable to an action at the suit of Z. In such action it is sufficient for Z. to declare that by reason of his possession of the land he is entitled to have the use and benefit of the water flowing in a certain direction along the channel, and that the defendant diverted the water therefrom. It is not necessary to refer to the grant. *Northam* v. *Hurley*, 1 El. & Bl. 665; 22 L. J., Q. B. 183; 17 Jur. 672.

Supplying House at a Distance.]—A riparian proprietor has a right, by means of waterwheels and machinery erected by him for that purpose, to pump up water from a natural stream flowing past his land to a reservoir, and to convey it thence by pipes to his dwelling house, upon another estate at a distance from the stream, and he may there apply such water to his domestic and other necessary purposes of utility; provided he takes only a reasonable quantity, with reference to the size of the stream, and the rights of his neighbour; but he has no right to take more water by means of the wheels and machinery than he would have a right to take otherwise. *Norbury* (*Lord*) v. *Kitchin*, 9 Jur. (N.S.) 132; 7 L. T. 685. *S. C.*, at nisi prius, 3 F. & F. 292.

Supply of Engines.] — A railway company whose line crossed a stream in the immediate neighbourhood of one of their stations, took water for supplying their engines and for the general purposes of the station. On bill filed by a millowner lower down the stream, it appeared that the abstraction of water did no damage in wet weather, and never shortened the working of the mill for more than a few minutes a day:—Held, that the company, as riparian owners, were entitled to take a reasonable quantity of water for their purposes, and that in this case the quantity taken was reasonable. *Sandwich* (*Earl*) v. *G. N. Ry.*, 10 Ch. D. 707; 27 W. R. 616.

Where a public body is, under an act of parliament, entrusted with powers and duties for a public purpose, the court will give credit to them as being the best judges of what they want for that purpose. *Att.-Gen.* v. *G. E. Ry.*, L. R. 6 Ch. 572; 19 W. R. 788.

A railway company was restrained from taking a large quantity of water for the use of their station from a river under the control of conservators, credit being given to the evidence on their part that taking such water would impede the navigation, against the evidence on the part of the company that taking such water would produce no appreciable effect. *Ib.*

Irrigation.]—Whether a riparian proprietor may use the water for the purpose of irrigation, if he again returns it into the river, with no other diminution than that caused by the absorption and evaporation attendant on the irrigation, depends on the circumstances of each particular case. *Embrey* v. *Owen*, 6 Ex. 353; 20 L. J., Ex. 212; 15 Jur. 633.

Abstraction by Non-Riparian with consent of Riparian Owner—Variation of User.]—The owner of land not abutting on a river with the licence of a riparian owner took water from the river, and after using it for cooling certain apparatus returned it to the river unpolluted and undiminished:—Held, that a lower riparian owner could not obtain an injunction against the landowner so taking the water, or against the riparian owner through whose land it was taken. *Kensit* v. *G. E. Ry.*, 54 L. J., Ch. 19; 27 Ch. D. 122; 51 L. T. 862; 32 W. R. 885—C. A.

Observations on the rights which can be acquired by a riparian owner in an artificial stream. *Ib.*

Grant to Non-Riparian Landowner.]—A riparian proprietor derives his rights in respect of the water from possession of land abutting on the stream, and if by a deed which conveys only land abutting on the stream, he affects to grant water rights, the grants though valid can create no rights for an interruption of which the grantee can sue a third party in his own name. *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 300; 10 Jur. (N.S.) 1005; 10 L. T. 748.

A riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of the stream, and any user by a non-riparian proprietor, even under a grant from a riparian owner, is wrongful if it sensibly affects the flow of the water by the lands of other riparian proprietors. *Stockport Waterworks Co.* v. *Potter* (3 H. & C. 300) approved. *Ormerod* v. *Todmorden Joint Stock Mill Co.*, 52 L. J., Q. B. 445; 11 Q. B. D. 155; 31 W. R. 759; 47 J. P. 532—C. A.

Rights under Special Act—Construction.]—By an act of parliament authorising the construction of a railway, it was provided that nothing in the act should authorise or empower the railway company "to obstruct the navigation of a river, or any part thereof, or to divert any of the waters therein or which now supply the river":—Held, that this clause applied only to the time of construction of the railway, and did not take away the rights of the company as riparian proprietors. *Att.-Gen.* v. *G. E. Ry.*, 23 L. T. 344. Affirmed, L. R. 6 Ch. 572; 19 W. R. 788.

c. Watercourses.

General Principles.]—The right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is primâ facie entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it

passes through his land, as a natural incident to his ownership of it. In the latter any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin :—Held, in this case, that the plaintiff's legal right to the enjoyment of water overflowing from an artificial reservoir through an artificial watercourse on his neighbour's (the defendant's) land should be presumed from the circumstances under which the same were presumably created and actually enjoyed; subject to the defendant's right to the use of the water for the purpose of irrigating his lands by proper and requisite channels and other proper means. *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*, 4 App. Cas. 121—P. C.

A riparian proprietor is not entitled to the use of the water of an artificial cut or drain. *Sampson* v. *Hoddinott*, 1 C. B. (N.S.) 590; 26 L. J. C. P. 148; 3 Jur. (N.S.) 243; 5 W. R. 230.

Observations on the rights which can be acquired by a riparian owner in an artificial stream. *Kensit* v. *G. E. Ry.*, 54 L. J., Ch. 19; 27 Ch. D. 122; 51 L. T. 862; 32 W. R. 885.

What Constitutes.]—Water passing from the opening of the lock of a canal does not constitute a watercourse within 2 & 3 Will. 4, c. 71, s. 2. *Staffordshire Canal Co.* v. *Birmingham Canal Co.*, 35 L. J., Ch. 757; L. R. 1 H. L. 254.

To constitute a watercourse, in which rights may be acquired by user, the flow of water must possess that unity of character by which the flow on one person's land can be identified with that on his neighbour's land. *Briscoe* v. *Drought*, 11 Ir. C. L. R. 250—Ex. Ch.

A claim by an owner of a copper mine to sink pits on his own land, to fill such pits with iron, and to cover the same with water pumped from the mine, for the purpose of precipitating the copper contained in such water, and afterwards to let off the water impregnated with metallic substances into a watercourse upon the land of another, is a claim to a watercourse within 2 & 3 Will. 4 c. 71, s. 2. *Wright* v. *Williams*, 1 M. & W. 77; 1 Gale, 410; 1 Tyr. & G. 375; 5 L. J., Ex. 107.

—— **Tributary Streams.**]—S. was convicted upon an information laid under 14 Geo. 3 c. 96, which was one of several acts passed to improve the navigation of the rivers Aire and Calder. By s. 97, any person who wilfully throws any ballast, &c. into any part of these rivers, or of any watercourses thereunto belonging, is liable to a penalty. S. carried on the business of a tanner, and it was proved that on a certain day a quantity of rubbish was discharged by him into a beck, adjoining the premises, at a point about four miles from the river Aire, into which it flows at a place where that river is navigable :—Held, that the conviction was wrong, inasmuch as the words "watercourses thereunto belonging" did not include "tributary streams," unless they formed part of the navigation. *Smith* v. *Barnham*, 34 L. T. 774.

Semble, that the section points to a knowingly wilful act on the part of the doer, and, as S. merely exercised a supposed right, there was no wilful throwing in of rubbish at all within the meaning of the section. *Ib.*

Natural or Artificial—Rights in.]—A watercourse, though artificial, may have been originally made under such circumstances and have been so used as to give all the rights that the riparian proprietors would have had if it had been a natural stream; and, therefore, in an action by one riparian proprietor against another for the pollution and diversion of a watercourse, it is a misdirection to tell the jury, that, if the stream was artificial and made by the hand of man, the plaintiff would have no cause of action. *Sutcliffe* v. *Booth*, 32 L. J., Q. B. 136; 9 Jur. (N.S.) 1037.

The plaintiff was the owner of a farm supplied with water by a small watercourse, originating in a natural spring on the plaintiff's land, flowing, first, through the plaintiff's land, next through the defendant's land, and then through the plaintiff's land to the plaintiff's house. For seventy years and upwards, prior to 1879, the plaintiff had almost exclusively enjoyed the watercourse. In 1879, however, the defendant, by means of a pipe, appropriated nearly all the water for the use of newly-built houses. The plaintiff claimed the exclusive use of the water, and alleged that the watercourse through the defendant's land was artificial, and constructed, at a time immemorial, for the sole benefit of the plaintiff and his predecessors :—Held, that as no one could tell when the artificial part (if any) of the watercourse was made, the watercourse must be deemed to be a natural stream; or, if in part artificial, to have been made so as to give all the rights of a riparian proprietor to the defendant and his predecessors in title. *Sutcliffe* v. *Booth* (32 L. J., Q. B. 136) considered and approved. *Roberts* v. *Richards*, 50 L. J., Ch. 297; 44 L. T. 271. *See* 51 L. J., Ch. 944—C. A.

d. Drains and Pipes.

Rights of Landowners.]—An owner of land has an unqualified right to drain it for agricultural purposes in order to get rid of mere surface water, the supply of the water being casual, and its flow following no regular or definite course; and a neighbouring proprietor cannot complain that he is thereby deprived of such water which otherwise would have come to his land. *Rawstron* v. *Taylor*, 11 Ex. 369; 25 L. J., Ex. 33.

—— **Alteration after Twenty Years.**]—The flow of water from a drain, made for the purposes of agricultural improvements, for twenty years, does not give a right to the neighbour, so as to preclude the proprietor from altering the level of his drain for the improvement of his land. *Greatrex* v. *Hayward*, 8 Ex. 291; 22 L. J., Ex. 137.

Right of Access to—Interference by Servient Owner.]—The owners of a house had had for many years a supply of water by pipes passing through the adjoining land under circumstances which in the view of the court created an easement. The owner of part of the adjoining land proceeded to build a house over part of the line of pipes :—Held, that the owners of the house had a right to go on the adjoining land and repair the pipes when necessary, and that by building the house their means of access to the pipes would be materially interfered with and rendered more expensive; and an injunction was granted to restrain the building of the house. *Goodhart* v. *Hyett*, 53 L. J., Ch. 219; 25 Ch. D. 182; 50 L. T. 95; 32 W. R. 165; 48 J. P. 293.

An agreement had been entered into by D. and the plaintiffs not to erect buildings so as to prevent reasonable access to a sewer under the management of the latter. The defendant holding under D. built a stable on his land so as to delay the plaintiffs' access to the sewer for an hour or so longer than theretofore:—Held, not to be a sufficient ground for a mandatory injunction to pull down the stable. *Sandgate Local Board* v. *Leney*, 25 Ch. D. 183, n.

See also SEWERS.

e. Subterranean Water.

Flowing in Unknown and Undefined Channel.]—The principles which regulate the rights of owners of land in respect of water flowing in known and defined channels, whether upon or below the suface of the ground, do not apply to underground water which merely percolates through the strata in no known channels. *Chasemore* v. *Richards*, 7 H. L. Cas. 349; 29 L. J., Ex. 81; 5 Jur. (N.S.) 873; 7 W. R. 685.

Where, therefore, a landowner and a mill-owner, who had for above sixty years enjoyed the use of a stream which was chiefly supplied by such percolating underground water, lost the use of the stream after an adjoining owner had dug on his own ground an extensive well, for the purpose of supplying water to the inhabitants of the district, many of whom had no title as landowners to the use of the water:—Held, that the millowner had no right of action. *Ib.*

No action lies for interfering with the course of an underground stream unless its course is known. *Dickinson* v. *Grand Junction Canal Co.*, 7 Ex. 282; 21 L. J., Ex. 241; 16 Jur. 200.

Although water flows subterraneously in a channel which was, and by excavation could have been ascertained to be defined, the principle of *Chasemore* v. *Richards* (7 H. L. Cas. 349) applies, if the channel is not actually known. *Ewart* v. *Belfast Poor Law Guardians*, 9 L. R. Ir. 172—C. A.

Subterranean waters can only be the subject of riparian rights when flowing in defined and known channels. "Defined" means a contracted and bounded channel, although the course of the stream may be undefined by human knowledge. "Known" means the knowledge, by reasonable inference, from existing and observed facts in the natural or pre-existing condition of the surface of the ground. "Known" in this rule of law, is not synonymous with "visible," nor is it restricted to knowledge derived from exposure of the channel by excavation. *Black* v. *Ballymena Commissioners*, 17 L. R. Ir. 459.

—— **Whether a "Stream."**]—Water percolating through the ground in no defined or visible channel is not a "stream." *McNab* v. *Robertson*, 66 L. J., P. C. 27; [1897] A. C. 129; 75 L. T. 666; 61 J. P. 468—H. L. (Sc.)

—— **Construction of Company's Private Act.**]—Where a statute provides that it shall be unlawful for a person other than a company authorised to supply water to a town "to divert, alter, or appropriate in any manner other than by law they may be legally entitled," water flowing from particular springs, and declares that, in the event of any person so doing, and failing to restore the springs on receiving notice from the company, he shall be liable to a fine of 5*l.* for each day until restoration is made; the object of the statute is to give protection to the supply of water acquired by the company, and not to prevent a neighbouring landowner from making a legitimate use of water running upon or percolating through his land before it reaches the company's supply, and becomes part of their undertaking. *Chasemore* v. *Richards* (7 H. L. Cas. 349) discussed. *Bradford Corporation* v. *Pickles*, 64 L. J., Ch. 759; [1895] A. C. 587; 11 R. 286; 73 L. T. 353; 44 W. R. 190; 60 J. P. 3—H. L. (E.)

Abstraction by Mining Operations.]—The owner of land through which water flows in a subterraneous course has no right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner and lays his well dry. *Acton* v. *Blundell*, 12 M. & W. 324; 13 L. J., Ex. 289.

Although a landowner will not in general be restrained from drawing off the subterranean waters in the adjoining land, yet he will be restrained if, in so doing, he draws off the water flowing in a defined surface channel through the adjoining land. *Grand Junction Canal Co.* v. *Shugar*, L. R. 6 Ch. 483; 24 L. T. 402; 19 W. R. 569.

The Grand Junction Canal was, near Tring, supplied with water from a mill-pond, which pond was supplied partly by water flowing above ground from a horse-pond, and partly by subterranean springs. The local board of health of Tring constructed a sewer, which, through defective construction as the canal company alleged, diminished both supplies of water to the mill-pond, and so injured the canal company, who filed a bill to restrain the local board:—Held, that there was no remedy for the abstraction of the underground water, but that there must be an injunction to restrain the interference with that flowing above ground. *Ib.*

Injunction against draining preparatory to opening a coal mine, with prejudice to a canal, before establishing the right at law, refused upon laches for two years, permitting expenditure. *Birmingham Canal Co.* v. *Lloyd*, 18 Ves. 515; 11 R. R. 245.

Right of Support.]—An owner of land has no right at common law to the support of the subterranean water. *Popplewell* v. *Hodkinson*, 38 L. J., Ex. 126; L. R. 4 Ex. 248; 20 L. T. 578; 17 W. R. 806—Ex. Ch.

f. Wells.

Right to Water from.]—Water as it issues from a well or spring is not to be considered as produce of the soil so as to make the right to take it in alieno solo for domestic purposes a profit à prendre. The right is an easement only, and may be claimed by custom. *Race* v. *Ward*, 4 El. & Bl. 702; 3 C. L. R. 744; 24 L. J., Q. B. 153; 1 Jur. (N.S.) 704; 3 W. R. 240.

Public Well.]—The Public Health (Scotland) Act, 1867, s. 89, sub-s. 4, provides that "the local authority may cause all existing public cisterns, pumps, wells, reservoirs, conduits, aqueducts, and works used for the gratuitous supply

of water to the inhabitants to be continued, maintained, and plentifully supplied with water." A well situated on private ground, the water of which has been used for domestic purposes gratuitously by the inhabitants in the vicinity for the prescriptive period, is a public well within the meaning of this section; and the local authority can enter on the land and do all acts to the well for continuing and maintaining it, which the inhabitants might have done before. And this, notwithstanding that there may be a company with a vested right to supply the inhabitants with water. Situated in one corner of a private field in the parish of Denny is a well. From the well to the entrance of the field a footpath leads, and from this entrance to the public road going through the village of Denny there is a cart road. The inhabitants of Denny had for the prescriptive period used the water of the well for domestic purposes, and had had the well, inter alia, cradled with stones at their own expense. Up to 1877 Denny was a mere village, without any burghal territory. But in that year Denny, with the adjoining village of Dunipace, was constituted a police burgh under the provisions of 25 & 26 Vict. c. 101, and the police commissioners of the burgh then became the local authority under the Public Health (Scotland) Act, 1867 (30 & 31 Vict. c. 101). In 1878 the commissioners, in their character as local authority, and under the authority of sub-s. 4, s. 89, of the last-mentioned statute, caused the well to be covered in with an iron plate, and placed therein a handpump, with the avowed object of keeping the well free from pollution. The proprietor of the field, alleging the well to be his private property, raised a process of interdict and suspension against the local authority praying for removal of the cover and pump, &c.: —Held, that the well was a public well within the meaning of the statute, and that the local authority, as representing the inhabitants, had not done anything in excess of their powers. *Smith* v. *Archibald*, 5 App. Cas. 489 —H. L. (Sc.)

Where at the time of the passing of the Public Health (Ireland) Act, 1878 (the provisions of which as to public wells correspond to those in the Public Health Act, 1875), a well was an existing public well used for the gratuitous supply of water to the inhabitants of the district, it becomes, by s. 74 of the act (s. 64 of the English act), vested in the local authority. To show that the well was then a public well it need not be proved that the soil and freehold of the well itself was public property, for if the public had a servitude attached to the soil and freehold, by virtue of which they enjoyed the right of free access to the well to obtain water, it would be a public well within the meaning of the act. *Smith* v. *Archibald* (5 App. Cas. 489), applied. *Dungarvan Guardians* v. *Mansfield*, [1897] 1 Ir. R. 420.

A well situate on private property was freely used, without hindrance or interruption, as far back as living memory went, principally by the inhabitants of some neighbouring houses, but also by all persons who had occasion to resort to the well. A path existed during all that time affording access to the well from a public road:—Held, that a right in the public to enter and take water from the well could not be supported by prescription, that it was too wide to be the subject of a custom, and that it could only arise from a dedication to the public by the owners from time immemorial of the land on which the well existed. *Ib.*

A trough or cistern receiving the overflow from a spring at some distance had been used by the public gratuitously for watering cattle and for domestic purposes for a period of over fifty years. The defendant erected a gate to prevent the access of cattle to the trough, and let a pipe into the bottom of the trough leading into his own house, where it terminated in a stopcock, and by means of this pipe and stopcock he could draw off as much water as he pleased:—Held, that the trough or cistern was a public well or work used for the gratuitous supply of water to the inhabitants of the district of the local authority in which it was situate, and that it was vested in and was under the control of the local authority by force of s. 64 of the Public Health Act, 1875, and that the local authority might maintain an action in their own name in the county court against the defendant for damages for the interference caused by the insertion of the pipe in the bottom of the trough. *Holmfirth Local Board* v. *Shore*, 59 J. P. 344.

Abstraction of Water from.]—*See* post, col. 1980.

Abstraction by Digging Well.]—*See* post, cols. 1979, 1980.

Pollution of.]—See *Taylor* v. *Bennett*, and *Womersley* v. *Church*, post, col. 1987.

2. Acquisition of Rights.

a. By Prescription.

When Right may be Acquired.]—After twenty years' uninterrupted enjoyment of a spring of water, an absolute right to it is gained by the occupier of the close in which it issues above ground; and the owner of an adjoining close cannot lawfully cut a drain, whereby the supply of water to the spring is diminished. *Balston* v. *Bensted*, 1 Camp. 463.

A person who has used the water of a river, uninterruptedly, though for less than twenty years, gains a title to it by appropriation, and may maintain an action for obstructing it. *Canham* v. *Fisk*, 2 C. & J. 126; 2 Tyr. 155; 1 L. J., Ex. 61.

Claim by a plaintiff to use water which flowed from his land to the land of the defendant and was there collected in a reservoir whence it reflowed into the plaintiff's land; and a claim also by the plaintiff to the overflow into his land of a pond which flowed through the defendant's land into that of the plaintiff; the claims being supported by evidence of twenty years' use. Held, that these were not maintainable. *Ennor* v. *Barwell*, 1 De G. F. & J. 529; 4 L. T. 597; Affirming 2 Giff. 410; 6 Jur. (N.S.) 1233.

Action for obstruction of a watercourse to which plaintiffs alleged themselves to be entitled by reason of their possession of a mill. An agreement for such a watercourse, made twenty-eight years before with those under whom plaintiffs claimed, being given in evidence by the defendants, it should nevertheless be left to the jury to presume whether a grant has not been executed. *Dewhirst* v. *Wrigley*, C. P. Cooper, 329.

User not Precarious.]—In the year 1820 the court of Landdrost granted leave to the

ancestor in title of the respondent to divert the course of certain springs rising in crown lands from their natural course into one constructed to carry the water to the respondent's land, and such water was so carried and used up to the year 1855, when the respondent applied to the government to renew such leave. In the year 1881 the government granted the sole user of these springs to the appellants :—Held, that as the user was not in its inception precarious, the respondent had acquired a prescriptive title to the use of the water by such user for the third of a century, and that such title was not affected by the application in 1855 to renew the leave to use the water. *French Hoek Commissioners* v. *Hugo*, 54 L. J., P. C. 17; 10 App. Cas. 336; 54 L. T. 92; 34 W. R. 18—P. C.

Artificial Watercourses.]—The law of easements in respect of watercourses is generally the same, whether they are natural or artificial. *Magor* v. *Chadwick*, 3 P. & D. 367; 11 A. & E. 571; 9 L. J., Q. B. 159; 4 Jur. 482.

A party acquires by twenty years' enjoyment a right to the use of water flowing through his land in a defined artificial channel, which was originally made for the benefit of all the persons by or through whose land the water was by means of it caused to flow. *Powell* v. *Butler*, Ir. R. 5 C. L. 309.

A right to the flow of water along an artificial cut over the soil of another cannot be acquired under 2 & 3 Will. 4, c. 71, unless the circumstances under which the cut was made show that it was intended to be of a permanent character. *Gaved* v. *Martyn*, infra, col. 1961.

After a long enjoyment of a watercourse running to a house and garden through the ground of another, it shall be presumed the owner of the house has a right to the watercourse, unless the other party can show a special licence or an agreement to restrain it in point of time. *Finch* v. *Resbridger*, 2 Vern. 390.

When Temporary and Artificial.]—In 1705, certain adventurers undertook to continue and extend an underground drain, called Cromford Sough, for the purpose of unwatering a portion of the mineral field in the wapentake of Wirksworth. They secured their remuneration in the shape of ore raised from the mines laying near and benefited by the sough, in consequence of an agreement with the owners of the mines. The mouth of the sough was close to a stream called the Bonsall Brook, and discharged into it a constant flow of water. Below the junction of these waters, an ancient corn mill stood, which was worked by their united power. In 1738, the then proprietors of the sough, through whom the plaintiffs claimed a reversionary interest, granted it for 999 years to S., with covenants that he should open, and cleanse, and repair it. This lease contained a proviso that no forfeiture for not opening and cleansing the sough should accrue, provided a new sough was made, which should have the same effect of unwatering the mines. In 1771, the lord of the manor, being owner of the land through which the Cromford Sough was made, and of a piece of land between the mouth of the sough and Bonsall Brook, demised the same to A., the father of the plaintiffs, together with the stream issuing from the sough. This lease contained a proviso, that if by the bringing up of any other sough, or by any other unforeseen and unavoidable accident, the stream from the Cromford Sough should be taken away, or lessened, the lessee should have power to take down the mills, and rebuild them on another site. In 1772, A. erected extensive cotton mills on the land in question, and in 1789 purchased that land, and the fee simple in the mills, together with the manor of Cromford, including the land through which the sough was made. The plaintiffs were owners in fee of the Cromford manor and estates including the cotton mills. In the meantime, another company of adventurers had begun to construct another mining sough, called the Meer Brook Sough, on a much lower level, in the adjoining parish of Wirksworth. In 1813, the defendants representing this company, and being proprietors of mines to be drained by means of this sough, agreed with the proprietors of Cromford Sough, and the owners of the mines formerly drained by that sough, to unwater a further portion of the mineral field. Accordingly, they extended the Meer Brook Sough, the result of which was that the water which formerly ran through the Cromford Sough to the plaintiffs' mills was diverted into the Meer Brook Sough at a lower level :—Held, that although the plaintiffs, by a grant of the watercourse from the owner of the surface, or by twenty years' user, might acquire a right as against him, still that, this being an artificial and temporary watercourse, subsisting for the convenience of the mines, they did not acquire a right to it at common law, as against the owners of the mines. *Arkwright* v. *Gell*, 5 M. & W. 203; 2 H. & H. 17; 8 L. J., Ex. 201.

Held, also, that the plaintiffs did not acquire a right to the watercourse under 2 & 3 Will. 4. c. 71, s. 2, as there was no enjoyment without interruption, and of right, since the mine owners were incapable of interrupting the enjoyment, and had no interest to do so. *Ib.*

Riparian rights identical with those attaching to natural streams may be acquired by prescription in artificial watercourse of a permanent character. These rights depend upon the character of the watercourses and the purposes for which it was constructed. If the watercourse be of a permanent nature, and constructed for lasting purposes, and for the general benefit of those in its vicinity, and not merely with the temporary and private object of benefiting the property of those by whom it was constructed, riparian rights may be acquired in its waters just as in a natural stream. From the time beyond the memory of living men a stream appeared to have flowed in its present channel, which, so far as it was artificial, bore all the appearances of having been constructed for permanent use. There was no proof that there was any temporary purpose for which the watercourse could have been formed, or that there was any person who formed it for private use :—Held, that the watercourse, assuming it to be artificial, was one of that permanent nature that admitted of the existence of riparian rights in its waters of the same nature as those attaching to a natural stream, including the flow of the stream through the lands of a lower riparian proprietor in a pure, unpolluted state. *Blackburne* v. *Somers*, 5 L. R. Ir. 1.

Who may Acquire.]—One who by lease or by licence from the owner of the soil has the right

of digging and working clay (or minerals) thereunder, has such an interest in the soil as will entitle him to claim under 2 & 3 Will. 4, c. 71, a right to the flow of water over the surface by a twenty years' user. *Gaved* v. *Martyn*, 19 C. B. (N.S.) 732; 34 L. J., C. P. 353; 11 Jur. (N.S.) 1017; 13 L. T. 74; 14 W. R. 62.

A mine had from before the time of living memory been worked by tin-bounders, according to the custom of Cornwall, which enables any person to mark out a piece of waste ground, the owner of which does not choose to work the mines under it, and work them without the consent of the owner, yielding to the owner a share of the proceeds. The bounders had from before the time of living memory used for the purpose of their works the waters of an artificial watercourse arising in the land of another person. The bounders abandoned the mine in 1856, since which the owners had been in possession. A bill by the owners to restrain the diversion of the watercourse by the owner of the land in which it rose was dismissed by the V.-C., on the ground that there was no privity of estate between the owner and the bounders, and that the owner, therefore, could not claim an easement by prescription on the ground of their enjoyment of it:—Held, on appeal, that an injunction ought to be granted, for that it ought to be presumed that a right to use the waters had been acquired by arrangement with the owner of the mine, as well as with the bounders. *Ivimey* v. *Stocker*, 35 L. J., Ch. 467; L. R. 1 Ch. 396; 12 Jur. (N.S.) 419; 14 L. T. 427; 14 W. R. 743.

Tenant cannot Acquire Right against Landlord.]—By deed in 1791 A. obtained a demise from B. of an underground goit or drain to be then constructed in B.'s land for the purpose of conducting water from A.'s mill so long as an annual rent of 2*l.* 2*s.* should be paid by A. to B. In 1836 the demise of 1791 was put an end to, and liberty was given to A., who was at that time yearly tenant from B. of the land through which the goit ran, to change the goit or drain of 1791, and to substitute a new cut for conducting pure and clean water at the like rent of 2*l.* 2*s.* The new cut was made and used for pure water, and the old goit (as the plaintiff alleged) continued to be used for foul water. In 1866 the land through which the goits ran was sold to C., and in 1867 A.'s yearly tenancy of the land was determined. In an action by A. in 1879 to restrain C. from interfering with his use of the old goit, to which he claimed title by prescription from alleged open and uninterrupted use and enjoyment thereof from 1836:—Held, that until 1867 A. could not acquire an easement in the land of which he was yearly tenant, distinct from the use and enjoyment of such land, as against B., his landlord, and accordingly that, assuming the open and uninterrupted user from 1836 to have been proved, he had failed to establish any title by prescription as against C. *Outram* v. *Maude*, 50 L. J., Ch. 783; 17 Ch. D. 391; 29 W. R. 818.

The defendants in 1834 demised to the plaintiffs the coal under the C. estate for fifty years, with powers to sink pits, make soughs, &c., erect engines, and make drains, &c., for supplying such engines with water, and also to do certain other acts on the surface for the better draining and working the demised mines and any other mines of which the plaintiffs might become lessees under the lands of any other persons. In 1836 the plaintiffs took a lease for thirty-five years of the O. colliery from a neighbouring landowner. In 1846 the plaintiffs made a drain about a mile long, chiefly on the C. estate, by which they diverted a small natural stream on the C. estate, and brought it down to the O. colliery, where they made reservoirs for the water at considerable expense. They did not ask leave to make the drain, but the defendants' agent saw the work going on and encouraged it. In 1872 the plaintiffs became owners in fee of the O. colliery. In 1884, when the lease from the defendants expired, the defendants stopped the drain and diverted the water. The plaintiffs, claiming a right by prescription to the water, commenced this action to restrain them from doing so. The vice-chancellor of the county palatine held that the watercourse was made under the powers of the lease, and that the right to the water expired at the end of the lease, and he dismissed the action:—Held, on appeal, that this dismissal was right, for that if the making this drain was not authorised by the lease (as to which the court gave no opinion) it was made and enjoyed, either under the belief of both parties that it was authorised by the lease, or under a comity between landlord and tenant, and that there was no enjoyment as of right so as to give the tenant a right to the water after the lease had expired. *Chamber Colliery Co.* v. *Hopwood*, 55 L. J., Ch. 859; 32 Ch. D. 549; 55 L. T. 449; 51 J. P. 164—C. A.

Evidence of Enjoyment.]—A. occupied clay works, and for the more convenient use of them, in 1830, under an agreement with B. (with the consent of B.'s landlord) made a leat, or an artificial cut, for the purpose of conducting water from a brook flowing over the land in B.'s occupation to his works. The plaintiff, in 1835, succeeded A. in the occupation of the clay works, and continued for upwards of twenty years, without interruption, the enjoyment of the leat:—Held, that, notwithstanding the plaintiff had no notice of the agreement between A. and B., there was evidence from which the jury might find that the plaintiff had not enjoyed the stream for twenty years as of right. *Gaved* v. *Martyn*, supra.

The enjoyment of water drawn from a brook along an artificial channel, and acts done by the owner of the dominant tenement upon the servient tenement, which without the existence of an easement would be tortious and actionable, may be evidence of a right in the owner of the dominant tenement to the use of the water. *Beeston* v. *Weate*, 5 El. & Bl. 986; 25 L. J., Q. B. 115; 2 Jur. (N.S.) 540; 4 W. R. 325.

Enjoyment as of Right.]—Before 1800, a canal company, under powers of an act of parliament, diverted for the purposes of the canal a considerable part of the water from a brook which flowed through the plaintiff's land, at a point above his land, the rest of the water continuing to flow in its natural channel. In 1847 an act was passed authorising a railway company to purchase the canal, to discontinue the use of it, and to fill it up, and sell such parts as were not used for the railway. Under these powers the use of the canal was discontinued in 1853; and, in 1864, the railway company made a cut by which they restored to the brook at a point above the land the water which had been

diverted from it. In 1865 the railway company conveyed the part of the canal on which they had made the cut to a purchaser in fee. The bed of the stream, owing to the diminished scour of the water from 1800 to 1853, had been silted up, so as to be insufficient to carry off the water coming down in extraordinary floods. In 1866 such a flood occurred; the water overflowed the land and damaged the owner's crops; upon which he brought an action against the railway company:—Held, that, there being no obligation imposed upon the canal company to continue the diversion, the owner of the land had no right of action. By Blackburn and Hannen, JJ.: On the ground that, though the claim to have the water, which would otherwise have come down to his land, diverted over other land, was a claim to a watercourse within the Prescription Act (2 & 3 Will. 4, c. 71), s. 2, yet the enjoyment was not as of right, and therefore, though for more than forty years, conferred no right on the plaintiff. And by Cockburn, C.J.: On the ground that the owner of the land, the owner of the servient tenement, could acquire, by the mere existence of the easement, no right as against the owner of the dominant tenement to the continuance of the diversion. *Mason* v. *Shrewsbury and Hereford Ry.*, 40 L. J., Q. B. 293; L. R. 6 Q. B. 578; 25 L. T. 239; 20 W. R. 14. And see *Chamber Colliery Co.* v. *Hopwood*, supra.

—— **Interruption.**]—Action for disturbing a watercourse, which of right ought to flow into the plaintiff's close to irrigate it. On the trial it appeared that the watercourse was not ancient, but that the water had flowed in its present course for more than twenty years past the plaintiff's close. There was evidence that during that period the plaintiff, and those under whom he claimed, had been constantly in the habit of drawing off the water to irrigate his close, and that the owners of the watercourse resisted it. On one occasion, when the plaintiff's servant drew off the water, he was summoned before a justice for so doing, and the plaintiff's son, by his direction, attended and defended the servant, and paid a fine of one shilling. The conviction was under a local act from which there was a power of appeal. The plaintiff did not appeal. The conviction was tendered in evidence and rejected. In summing up the judge explained that the enjoyment to defeat an adverse right must be for twenty years without interruption, acquiesced in for a year. One of the jury asked what would be the effect in law of a state of perpetual warfare between the parties; which question the judge did not answer. The jury found that the watercourse had been enjoyed as of right for twenty years, and without interruption for a year, and was directed to find for the plaintiff:—Held, that interruptions, though not acquiesced in for a year, might show that the enjoyment never was of right, but contentious throughout, though, if once the enjoyment as of right had begun, no interruption for less than a year could defeat it, and consequently that the manner in which the question was left, and the verdict found, was not satisfactory. *Eaton* v. *Swansea Waterworks Co.*, 17 Q. B. 267; 20 L. J., Q. B. 482; 15 Jur. 675.

Unity of Possession.]—Where the same person is owner of land bound to supply water, and also one of the persons for whose use it is supplied, if his title to the easement is not as extensive as his title to the land charged, there is no unity of possession so as to cause an extinguishment of the easement. *Ivimey* v. *Stocker*, 35 L. J., Ch. 467; L. R. 1 Ch. 396; 12 Jur. (N.S.) 419; 14 L. T. 427; 14 W. R. 743.

Semble, nothing of absolute necessity to a building, e.g. a gutter in alieno solo, to carry off water, is extinguished by unity of ownership. *Pheysey* v. *Vicary*, 16 M. & W. 484.

A prescriptive right to the use of water flowing through certain closes, for the purpose of supplying a water-mill, is not extinguished by unity of possession of the mill and such closes. *Holland* v. *Deakin*, 7 L. J. (O.S.) K. B. 145.

—— **Existence of Easement at Time of Severance of Property.**]—S., whilst owner of certain adjoining premises, A. and B., laid down a four-inch pipe to carry surface water from A. to a main sewer running along a highway. This pipe ran into another pipe, which passed under B., and thence into the sewer. A socket joint was placed midway in the four-inch pipe, but this was not at the time connected with any other drain. In 1877, S. sold B. to the respondent, and some days afterwards the appellant purchased A. The conditions of sale in each case provided that the sale was subject to all existing easements. There was no express reservation of a right of drainage in the conveyance to the respondent. The appellant subsequently connected the soil pipe of a water-closet on A. with the socket joint in the four-inch pipe, and at the same time laid down a larger pipe in place of the latter. The respondent thereupon stopped the flow of all drainage from appellant's pipe into his own. In an action by the appellant for damages and an injunction:—Held, that the appellant was not entitled to send sewage through the pipe on respondent's premises, inasmuch as no easement of that nature existed at the time of the severance of the properties, and there was then no junction by means of which sewage could pass into the pipe, although S. might have contemplated using the socket joint to make a connection for this purpose. *Watson* v. *Troughton*, 48 L. T. 508; 47 J. P. 518—C. A.

In 1860, the owner of properties A. and B. made a drain from a tank on property B. to a lower tank on the same property, and laid pipes from the lower tank to cattle-sheds on property A., for the purpose of supplying them with water, and they were so supplied till 1863, when the owner sold property A. to the plaintiff, with all waters, watercourses, &c., to the same hereditaments and premises belonging or appertaining, or with the same or any part held, used, enjoyed, or reputed as part, or as appurtenant. The plaintiff had the use of the water after his conveyance, until a subsequent purchaser of property B. stopped it:—Held, that the watercourse was a continuous easement necessary for the use of property A., and would have passed by implication; that the plaintiff was entitled to the use of the water on the conveyance of that property without any words of grant; and that, supposing it only convenient and not necessary, the general words were sufficient to pass it. *Watts* v. *Kelson*, 40 L. J., Ch. 126; L. R. 6 Ch. 166; 24 L. T. 209; 19 W. R. 338.

—— **Alteration of Dominant Tenement—Effect of.**]—Held, also, that the right was to have the accustomed flow of water through the pipes,

without regard to the purpose for which the plaintiff used it; and that the right, therefore, was not lost by his erecting cottages instead of cattle-sheds. *Ib.* *See next case.*

Stopping Excessive User — Suspension of Right.]—A. having a prescriptive right to a flow of water, led by means of a gutter laid in a mill-stream at a point where an ancient weir was erected, lengthened the gutter for the purpose of irrigating more land. The flow of water down C.'s mill-stream was diminished, and he in consequence pulled down the ancient weir, which prevented the water from flowing down A.'s gutter:—Held, that no suspension of his right to the enjoyment of the flow of water as it had formerly existed was caused by his having become a wrongdoer, and C. was not justified in stopping the excessive user by means which altogether prevented C.'s enjoyment of the water, but only in stopping it by the least injurious means in his power. *Hill* v. *Cock*, 26 L. T. 185.

Alteration of Stream.]—A right to a watercourse is not destroyed by the owner's altering the course of the stream; and the owner may establish his claim, notwithstanding an interruption within twenty years of his action brought to enforce the right. *Hall* v. *Swift*, 6 Scott, 167; 4 Bing. (N.C.) 381; 1 Arn. 157; 7 L. J., C. P. 209.

Right to Occasional Overflow.]—The fact that an embankment is occasionally out of repair during a term of years or too low when the water is high (e.g. in a flood), and so allows water to overflow into other land, gives the owner of that other land no prescriptive right to the overflow. *Brymbo Water Co.* v. *Lester's Lime Co.*, 8 R. 329.

Right to Pollute Streams.]—*See* post, cols. 1984 et seq.

b. By Grant.

Conveyance of Land.]—Water flowing over a close primâ facie passes with it by a conveyance of the land. *Canham* v. *Fisk*, 2 C. & J. 126; 2 Tyr. 155; 1 L. J., Ex. 61.

The right to the use of flowing water in respect of lands below is not lost by the acceptance of the grant of land above, although such latter grant may expressly reserve to the grantor the right to divert the water generally. *Lord* v. *Sydney Commissioners*, 12 Moore, P. C. 473; 3 L. T. 1; 7 W. R. 267.

A deed of conveyance of land for building purposes contained a covenant by the grantee to build to secure the rent reserved:—Held, that the adjoining owner, who claimed under the same grantor, was nevertheless at liberty to drain his own land, although the result of his doing so was to cause a subsidence in the surface of the land of the first grantee. *Popplewell* v. *Hodkinson*, 38 L. J., Ex. 126; L. R. 4 Ex. 248; 20 L. T. 578; 17 W. R. 806—Ex. Ch.

Before 1834, a natural stream called the S. brook, flowed to and into farm A. S. was then owner of farms A. and B., and the defendant was owner of land adjoining the brook, and lying between it and farm B. In 1834, the whole of the water of the brook was, by agreement between S. and the defendant, diverted from the brook by a stone culvert, constructed through the defendant's land into and through farm B., and thence into and over other land of the defendant's to certain dye-works of his. So much of the water as was required for the use of farm B. was taken from the culvert on the farm by means of a pipe: the rest, the larger portion, flowing on, down the culvert, to the dye-works. Matters so continued down to September, 1866, when, S. being dead, the then owner of farms A. and B. conveyed farm B. to the defendant in fee, together with "all waters, watercourses, easements, and appurtenances belonging to or held, used, occupied, or enjoyed therewith." In March, 1857, the same person conveyed farm A. to the plaintiff in fee. Between September, 1856, and the time of the action, the culvert remained in the same state, and the water from it continued to be used by the defendant as before, both on farm B. and at the dye-works. The plaintiff having thereupon sued the defendant for a wrongful diversion of the water of the brook:—Held, that the conveyance of September, 1856, passed to the defendant the right to have the accustomed flow of the water down the culvert, through farm B. continued; that the right was not limited to the use of so much of the water as was wanted for farm B.; that, consequently, the flow of the water down the culvert from farm B. to the dye-works was no infringement of any right of the plaintiff, and that the action was not sustainable. *Wardle* v. *Brocklehurst*, 1 El. & El. 1058; 29 L. J., Q. B. 145; 6 Jur. (N.S.) 319; 1 L. T. 519; 8 W. R. 241—Ex. Ch.

—— **River Bed.**]—A purchaser of land on the banks of a river takes, by his conveyance, the right of ownership of a moiety of the bed of the river ad medium filum aquæ. *Crossley* v. *Lightowler*, L. R. 3 Eq. 279.

The more than ordinary breadth of a river does not prevent a conveyance of premises therein described as bounded thereby from operating to convey the portion of the bed and soil of the river abutting thereon, up to midstream. *Dwyer* v. *Rich*, Ir. R. 4 C. L. 424.

The presumption that, by a conveyance describing the land thereby conveyed as bounded by a river, it is intended that the bed of the river, usque ad medium filum, should pass, may be rebutted by proof of surrounding circumstances in relation to the property in question which negative the possibility of such having been the intention. The owners of a manor by conveyances made respectively in 1767 and 1846 granted to purchasers pieces of riparian land fronting a river, the bed of which formed parcel of the manor. It was proved that, prior to the earliest of the conveyances, a fishery in the river fronting the lands conveyed had for a very long time back been from time to time let to tenants by the lords of the manor as a separate tenement, distinct from the riparian closes; and that at the date of the conveyances in 1846 such fishery was actually under lease to tenants. The grantees under the before mentioned conveyances, and their successors in title, had, until the acts complained of in the action, never claimed or exercised any right of fishing over the bed of the river by virtue of any right of soil or otherwise, but the owners of the manor or the tenants of the fishery had always fished without interruption:—Held, that under the circumstances the conveyances ought not to be construed as

passing any portion of the bed of the river to the grantees. *Devonshire (Duke)* v. *Pattinson*, 57 L. J., Q. B. 189; 20 Q. B. D. 263; 58 L. T. 392; 52 J. P. 276—C. A.

Though the presumption that a grant of land described as bounded by an inland river passes the adjoining half of the bed of the river may be rebutted by circumstances which show that the parties must have intended it not to pass, it will not be rebutted because subsequent circumstances, not contemplated at the time of the grant, show it to have been very disadvantageous to the grantor to have parted with the half bed, and if contemplated would probably have induced him to reserve it; nor is the presumption excluded by the fact that the grantor was owner of both banks of the river. *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133; 55 L. T. 366; 51 J. P. 132—C. A.

M. being entitled to lands on both sides of a river, sold and conveyed to L. a piece of land the dimensions of which were minutely given in the conveyance, and which was therein stated to contain 7,752 square yards, and to be bounded on the north by the river, and to be delineated on the plan drawn on the deed, and thereon coloured pink. The dimensions and colouring extended only up to the southern edge of the river, and if half the bed had been included the area would have been 10,031 square yards instead of 7,752. The deed contained various reservations for the benefit of M., but contained nothing express to show whether the half of the bed was intended to pass or not. M. was at the time owner of a private bridge close by, from which he received tolls. Thirty years afterwards a bridge was projected to cross the river from L.'s land. The plaintiffs, who had succeeded to all M.'s property in the neighbourhood, brought their action to restrain the making of the new bridge. If the grant to L. passed half the bed, no part of the new bridge would be over land of the plaintiffs:—Held, that the presumption that the grant included half the bed was not rebutted, and that an injunction could not be granted on the ground that the erection of the bridge would be a trespass. *Ib.*

The general law of conveyancing—that where a riparian owner, who is also owner of the soil under the river ad medium filum, makes a grant of his land on the banks of the river, the soil ad medium filum passes by the grant—applies to land of any tenure, whether freehold, copyhold, or leasehold. *Tilbury* v. *Silva*, 45 Ch. D. 98; 62 L. T. 254.

A grant by the crown of land bounded by a stream may include by implication the soil of the stream, ad medium filum aquæ. *Lord* v. *Sydney Commissioners*, 12 Moore, P. C. 473; 3 L. T. 1; 7 W. R. 267.

Lease — "Stream."] — Water percolating through the ground in no defined or visible channel is not a stream. A lessor granted to his tenant "the right to the water in the said ponds and in the streams leading thereto." In land adjoining the demised premises a tiled drain was placed, which intercepted water which otherwise would have found its way into the ponds:—Held (Lord Halsbury dissenting), that the water thus intercepted was not water in a stream. *NeNab* v. *Robertson*, 66 L. J., P. C. 27; [1897] A. C. 129; 75 L. T. 666; 61 J. P. 468—H. L. (Sc.)

Though the word "stream" in its more usual application does imply water running between defined banks, it is not confined to that meaning—its essence being that it is water in motion as distinguished from stagnant water—By Lord Halsbury. *Ib.*

Channel unknown, though defined—Construction of Grant.]—T., who was lessee for lives renewable for ever of a parcel of ground, expressed in the original lease to be demised, "together with the free use of all springs and streams of water arising in or running through the demised premises, or any part thereof, for any bleach-green or other works which then were, or at any time thereafter should be, erected on the premises," made two sub-leases of portions of the premises to different persons, for lives renewable for ever, the first sub-lease being made in 1851, and describing the premises therein comprised as "that parcel of ground formerly used as a bleach-green, together with the free use of all waters running in or running through the demised premises or any part thereof, theretofore used for the purposes of linen manufacture on the said lands, as fully as T. was entitled thereto"; and the second being made in 1853, of the remaining portion of the lands "together with the free use of all water, if any, arising in or running through the demised premises, or any part thereof, as fully as T. was entitled thereto." The interest in both sub-leases, as well as the equity of redemption in the superior lease (which had been mortgaged), afterwards became vested in W., who was subsequently adjudicated a bankrupt, and the lands were sold by the court of bankruptcy. The plaintiff purchased the portion of the lands comprised in the sub-lease of 1851; and one C., under whom the defendant claimed, became the purchaser of the portion included in the sub-lease of 1853. Both portions of the land were put up for sale by auction on the same day, one of the conditions of sale providing that each would be sold "subject to existing easements"; but the court, having refused the plaintiff's first tender, he subsequently increased it, and was not actually declared the purchaser until a few days after the confirmation of the sale to C. By deed of the 15th March, 1876, made between the assignee of W. and certain other persons and the plaintiff, which recited (inter alia) the superior lease, the sub-lease of 1851, with the water rights thereby respectively granted, and the sub-lease of 1853, the grantors conveyed to the plaintiff the parcel of land formerly used as a bleach-green, together with the full use of all water rising in or running through the demised premises, or any part thereof, theretofore used for the purposes of linen manufacture, as fully as T. was entitled thereto under the recited superior lease or otherwise; and all other (if any) the premises comprised in the lease of 1850, "excepting thereout and out of this grant" the premises purchased by C. By deed of the 11th of April, 1876, made between the same grantors and C., and containing similar recitals to those in the conveyance to the plaintiff, the grantors conveyed to C. the lands comprised in the sub-lease of 1853. The testatum of this deed made no mention of water rights. The plaintiff's lands were at a lower level than the lands of C., and in the plaintiff's lands, a few feet from the fence dividing them from C.'s lands, a copious stream of pure water issued from the ground. This water was peculiarly suitable for

bleaching purposes; and the plaintiff, who was a bleacher, deposed that he intended to use it for bleaching; and, at the time of action brought, it was used for domestic purposes in the dwelling-house on the plaintiff's grounds, and for the supply of a large mill thereon. The defendants, who were the local sanitary authority, entered into an agreement with C. to permit them to bore for water on his lands, and they made a cutting on them a few feet from the fence, and obtained a large supply of water, whereupon the stream on the plaintiff's land ceased to flow. The plaintiff having applied for an injunction to restrain the defendants from diverting and obstructing the water from his stream:—Held, on appeal, that the conveyance to the plaintiff did not grant him the right claimed, and that he would not have been entitled to it even if the conveyance to C. had contained an exception of all existing easements. *Ewart* v. *Belfast Poor Law Guardians*, 9 L. R. Ir. 172—C. A.

Rights of Purchaser from same Vendor.]—The purchase of the right to the use of a portion of the water of a river cannot prevent a subsequent purchaser from the same vendor of another portion from diverting the water by virtue of a right which existed prior to the first purchase. *Miner* v. *Gilmour*, 12 Moore, P. C. 131; 7 W. R. 328. *And cases* ante, col. 1964.

Covenant to Supply running with Land.]—In 1849 A. purchased from B. a plot of freehold land on which was a well, and covenanted for himself and his assigns to supply water to all houses erected, or to be erected, on B.'s adjoining lands, which had been laid out for building purposes, B. covenanting to insert in the conveyances to the purchasers of any of the houses covenants by them to take water from A. at a fixed price. A. subsequently conveyed to C., and B. conveyed two of the houses to the plaintiff:—Held, that A.'s covenant to supply water ran with the land purchased by him, but that, independently of that, C. had purchased with notice of the covenant, and was therefore bound to supply water to the plaintiff's houses. *Cooke* v. *Chilcott*, 3 Ch. D. 694; 34 L. T. 207.

Deed Operating as Grant.]—By a deed between A., owner of Greenacre, and B., owner of Blackacre, it was agreed that A. should have during the first ten days of every month, for the purpose of irrigation, all the water of a stream which flowed through Greenacre into Blackacre, and that at all other times the water should be under the control and at the disposal of B., his heirs and executors, and allowed to flow in a free and an uninterrupted course towards and into Blackacre, through a channel therein partially described, and that the owner of Greenacre should cleanse and repair the channel, with liberty to B., and his heirs, to do so on his default:—Held, that this deed operated as a grant to B. of an easement of the watercourse therein described at all times, except the first ten days of each month and that he thereby acquired a right in respect of that channel, and that an alteration of this channel was an injury to his right, in respect of which B. might maintain an action, although no actual damage had occurred. *Northam* v. *Hurley*, 1 El. & Bl. 655; 22 L. J., Q. B. 183; 17 Jur. 672.

For upwards of twenty years water had flowed through an old drain on the defendant's land, and along an ancient watercourse, and thence along a close of the defendant, called Gin Bank, and had thence contributed to supply the plaintiff's mills after their erection in 1845. In that year the defendant conveyed to the plaintiff the close Gin Bank, "together with all ways, watercourses, liberties, privileges, rights, members, and appurtenances to the same close belonging or appertaining," subject to the proviso, that it should be lawful for the defendant to use for any manufacturing, domestic, or agricultural purposes, any water flowing from or through the contiguous lands of the defendant unto and into the close Gin Bank, returning the surplus, or so much as remained after being used for the purposes aforesaid, into its usual channel at a certain point, so that the water should not be diverted from its then course, but be allowed to flow into the close Gin Bank. The defendant erected a lock-up tank upon his land, and caused the water which arose on his land, near to the close Gin Bank, and which had previously been accustomed to flow along the old drain and ancient watercourse into the close Gin Bank, to be conveyed from the tank to a lower part of his land to be used by his tenants. This water was used by them for the purposes mentioned in the proviso to the deed, but the surplus could not be returned to the close Gin Bank:—Held, that by the deed the defendant granted to the plaintiff the use of the water, subject only to the use by himself of it as specified in the proviso; and that, by locking it up, he had diverted it, and was liable to an action for a breach of his covenant by reason of such diversion. *Rawstron* v. *Taylor*, 11 Ex. 369; 25 L. J., Ex. 33.

Grant of Artificial Channel.]—A landowner granted to a company all the watercourses, dams and reservoirs upon lands of his, which watercourses, dams and reservoirs were laid down upon an annexed plan, which was to be taken as part of the deed, and were thereon coloured blue, and also the several streams and springs of water flowing into or feeding the watercourses, dams and reservoirs, with right for the company solely to take and use the water from the springs or streams of water, watercourses, dams and reservoirs, with powers to cleanse and repair, and with all such other powers as should be requisite for enabling the company to enjoy the premises thereby granted. The grantor was to be at liberty to use the waste or overflow water from the dams or reservoirs of the company, but was not to exercise this power if the company resolved that its exercise would be injurious to them. The property coloured blue on the plan consisted of an artificial watercourse, partly covered and partly open, the dimensions of various parts of which were specified on the plan, and in some cases it was noted on the plan that they might be enlarged to a certain extent. Several springs and streams feeding the watercourses were marked on the plan. The watercourse was large enough to carry off all the water which flowed into it except after heavy rain, but at one point of its course underground there was a contraction of the channel which after heavy rains backed up the water and caused a considerable overflow over a weir, of which overflow the grantor for many years had the benefit. The grantees having

occasion for more water, proceeded to remove the obstruction, so as to allow the whole of the water which came into the watercourse during heavy rains to run down into their reservoir :—Held, that the grant was a grant of the artificial channel, of the definite springs and streams on the land, and of such other water as should find its way into and run down the channel as it stood, and not a grant of all the water on the land, and that the grantees had no right to alter the levels of or enlarge the channel so as to enable it to carry off all the water that ran into it in times of heavy rain. *Taylor* v. *St. Helen's Corporation*, 46 L. J., Ch. 857; 6 Ch. D. 264; 37 L. T. 253; 25 W. R. 885—C. A.

Contract for Sale — Parties not ad idem — Specific Performance.]—Where, on a sale of a mill, &c., it appeared clearly that the plaintiff believed that he was buying a right to the use of certain water, which the defendant believed he was not selling, a bill for specific performance of the contract of sale was dismissed; but under all the circumstances of the case, without costs. *Butterworth* v. *Walker*, 11 L. T. 436; 13 W. R. 168.

When Implied.]—S., owner in fee of two mills, in 1855 leased one to P., who used it as bleaching works, a drain, partly covered and partly open, carrying off the water used in the works into a stream from 300 to 400 yards distant, on which, a little lower down, the other mill was situate. This discharge of refuse took place about seven times a fortnight. In 1858, by arrangement between S., P., and the defendant, P. surrendered his lease, and S. granted a new lease to the defendant of the premises late in P.'s occupation; the defendant being described in the lease as a bleacher, and there being a clause in it that all buildings erected by the defendant for the purpose of bleaching should be the property of S. at the end of the term. In 1859 the plaintiff purchased the fee in both mills. The defendant carried on the business of a bleacher, and used his premises as P. had done, the premises, including the drain, remaining precisely as in P.'s time. The plaintiff occupied the other mill himself, and used it as a paper mill, and brought an action against the defendant for fouling the stream by discharging the refuse into it:—Held, that the lease might be explained by the state of the premises, and the mode in which they had been used at the time it was granted; and that by the lease, thus explained, there was an implied grant by S. to the defendant of the right to use the drain and stream in the manner he had done; and that consequently the plaintiff, who stood in S.'s place, could not maintain the action. *Hall* v. *Lund*, 1 H. & C. 676; 32 L. J., Ex. 113; 9 Jur. (N.S.) 205; 7 L. T. 692; 11 W. R. 271.

Lands, on which were certain dams and artificial watercourses leading therefrom, and which were held under leases containing reservations of all mills, mill-seats, dams, dam-seats, water, and watercourses, and all convenient ways to and from the same, were ordered to be sold in an administration suit. They were accordingly put up for sale by auction in four lots, the particulars and conditions of sale, which set out the reservations in detail, stating that each lot would be sold subject to all rights and easements legally existing. The sale by auction proved abortive. The plaintiff subsequently tendered for lot 4. His offer was accepted, and this lot was conveyed to him, "excepting and reserving all such matters and things as are excepted and reserved in and by the said recited indenture of lease," and also subject to all such rights and easements as then existed or affected the premises. After the acceptance of the plaintiff's offer, and before the conveyance to him, H. made a tender for lot 3, which was accepted; and this lot was by deed, subsequent to the plaintiff's conveyance, assigned to him, with similar exceptions, reservations, &c. H. assigned his interests to the defendants. Prior to, and at the time of, the plaintiff's proposal and conveyance, some of the artificial watercourses flowed from lot 3 to lot 4, and the water thereof was utilised for certain purposes on this lot. The lessor had never interfered or expressed any intention of interfering with the plaintiff's user or enjoyment of these watercourses. The defendants obstructed the water flowing therein:—Held, that the plaintiff was entitled to a declaration, as between him and the defendants, of a right to the usual and accustomed flow of water, and to an injunction to restrain the defendants from obstructing the same. Mere possession of rights, corporeal or incorporeal, is sufficient to maintain an action for disturbance of them against a wrongdoer. *Pullan* v. *Roughfort Bleaching Co.*, 21 L. R., Ir. 73.

—— **Easement—Drain.**]—Where an owner of two or more adjoining houses sells one of them, the purchaser of such house is, without any express reservation or grant, entitled to the benefit of all drains from his house; and is, on the other hand, subject to all the drains necessary for the enjoyment of the adjoining house. Such necessity is to be considered with reference to the time of the conveyance, as matters then stood, without alteration, and without reference to whether any other outlet could be made for the drainage. *Pyer* v. *Carter*, 1 H. & N. 916; 26 L. J., Ex. 258; 5 W. R. 371. But see contra, *Suffield* v. *Brown*, 4 De G. J. & S. 185; 3 N. R. 340; 33 L. J., Ch. 249; 10 Jur. (N.S.) 111; 9 L. T. 627; 12 W. R. 356.

Two properties, which adjoined, were originally possessed by the same owner, in one of which was a cesspool and a drain to carry the water from the adjoining property, which was a tan-yard. The owner afterwards sold the property to different persons, and the conveyances contained no reference to the drain and cesspool:—Held, that there was an implied grant of the easement of the cesspool in the conveyance of the tan-yard. *Ewart* v. *Cochrane*, 4 Macq. H. L. 117; 7 Jur. (N.S.) 925; 5 L. T. 1; 10 W. R. 3.

Reservations—Extent of.]—In a lease of premises with their appurtenances the lessor reserved, out of the demise, "the free running of water and soil coming from any other buildings and lands contiguous to the premises, in and through the sewers and watercourses made or to be made within, through or under the premises":—Held, first, that the reservation extended to water and soil coming from contiguous lands and buildings, whether that water and soil in the first instance actually arose on or from such contiguous lands or buildings or not. *Chadwick* v. *Marsden*, 36 L. J., Ex. 177; L. R. 2 Ex. 285; 16 L. T. 666; 15 W. R. 964.

Held, secondly, that it did not extend beyond

water in its natural condition, and such matters as are the product of the ordinary use of land for habitation, and that therefore it did not give to the occupier of certain tan-pits, who claimed under the lessor, a right of passage for the refuse of those pits. *Ib.*

Where an owner in fee of two adjoining houses, let to A. and B. as yearly tenants, allowed A.'s house to have a waterpipe running into the well of B.'s house, and at a subsequent sale of the houses by auction each tenant purchased his own house, such privilege of water supply does not pass as against B. under an ordinary reservation in the conditions of sale of "rights of way and water and other easements." *Russell* v. *Harford*, L. R. 2 Eq. 507; 15 L. T. 171; 14 W. R. 982.

The reservation in a grant of land by a colonial government that the land should be liable to have watercourses made over any part of it without compensation to any proprietor or lessee, includes, in the absence of any other source of supply, the right to divert water from a natural stream on the land into the watercourse so made. *Remfry* v. *Surveyor-General of Natal*, 65 L. J., P. C. 72; [1896] A. C. 558; 75 L. T. 58—P. C.

c. By Licence.

Grant by Parol.]—In an action for obstructing a drain, the plaintiff claimed right and title to the drain by virtue of a licence granted to his landlords, their heirs and assigns, to make the drain, and have the foul water pass from their scullery through the drain across the defendant's yard, into another yard appurtenant to the premises in the plaintiff's occupation:—Held, that the interest, as declared upon by the plaintiff, being in its nature freehold, and the licence to support it being merely by parol and not by deed, the action was not maintainable. *Hewlins* v. *Shipham*, 7 D. & R. 783; 5 B. & C. 221; 4 L. J. (O.S.) K. B. 241; 31 R. R. 757.

Where one declared in an action for obstructing a watercourse, upon his possession of a mill with the appurtenances, and that by reason of such his possession he had a right to the use of the water running in a tunnel to the mill; such allegation is not supported by proof that the tunnel was made on the defendant's land, which he had agreed to let the plaintiff have for this purpose for a consideration, but of which no conveyance was made by him to the plaintiff; and he had since refused assent, because the plaintiff had not the water by reason of the possession of the mill, but by parol licence or contract, which could not pass the title to the land, and as the licence was revocable, and was in fact revoked. *Fentiman* v. *Smith*, 4 East, 107; 7 R. R. 533.

Permission was obtained from E. and other landowners, on behalf of a body of subscribers, to make a watercourse through their respective lands to supply the town of G. with water. The watercourse was made, but no grant was executed, and no sum arranged. It was alleged that the subscribers agreed to pay to E. 2*s.* 6*d.* a year, but this was denied. E. subsequently diverted the watercourse into the old channel; and, upon a bill filed by several of the subscribers:—Held, upon its being amended, and made on behalf of the plaintiffs, and others whose names and residences were unknown, being subscribers to the fund, that the plaintiffs were entitled to the use of the watercourse passing under the lands of E.; and an injunction was granted to restrain the defendant from preventing, obstructing, or interfering with the flow of water, or with the plaintiffs' use of the watercourse, and a reference was made to the master to settle a proper compensation. *Devonshire (Duke)* v. *Elgin*, 14 Beav. 530; 20 L. J., Ch. 495.

Revocation of.]—The plaintiff having been allowed to form a watercourse on L.'s land, L. subsequently leased part of the land to the defendant, who thereupon gave notice to the plaintiff to discontinue the watercourse over the land leased to him. The flow of water being wrongfully continued, and it being necessary to enter upon the land of L. to stop it, the defendant entered the land, and there dammed up the water, so that it was penned back and flooded the plaintiff's land:—Held, that the lease was a revocation of the licence, and that the fact that the defendant might have stopped the water at another point on L.'s land, so that less damage would have been done to the plaintiff, did not give him any cause of action, as the nuisance could not have been abated at the latter point without doing damage to the land of L. *Roberts* v. *Rose*, 4 H. & C. 103; 35 L. J., Ex. 62; L. R. 1 Ex. 82; 12 Jur. (N.S.) 78; 13 L. T. 471; 14 W. R. 225—Ex. Ch.

A general licence to take water at any place is revocable, except as to such places where it has been acted upon, and expenses have been incurred. *Mason* v. *Hill*, infra.

The plaintiff's father, by oral licence, permitted the defendant to lower the bank of a river, and make a weir above the plaintiff's mill, whereby less water than before flowed to his mill:—Held, that he could not sue the defendant for continuing the weir. *Liggins* v. *Inge*, 5 M. & P. 712; 7 Bing. 682; 9 L. J. (O.S.) C. P. 202.

Effect of.]—A licence to take a quantity of water at any particular place will not authorise the taking away the same quantity of water at another place. *Mason* v. *Hill*, 2 N. & M. 747; 5 B. & Ad. 1; 2 L. J., K. B. 118.

Memorandum in Writing.]—In 1804, by a memorandum in writing, not under seal, a riparian proprietor agreed to allow the occupier of a mill erected on land abutting on a natural stream, to make a goit through the land of the former, the latter paying for the privilege an annual sum of 5*s.* The goit was made, and thence the water of the stream flowed through it to the mill which it worked, and then returned into the stream at a point below. The defendant abstracted the water above the point where the goit commenced, whereby the flow to the mill was diminished:—Held, that the owner of the mill was not a mere licensee, but acquired under the agreement a right in respect of which he could maintain an action against the defendant for abstracting the water. *Nuttall* v. *Bracewell*, 4 H. & C. 714; 36 L. J., Ex. 1; L. R. 2 Ex. 1; 12 Jur. (N.S.) 989; 15 L. T. 313.

Enforcing.]—A. and B. occupied adjoining premises under C., their landlord, and B.'s premises were supplied with water by means of a pipe from A.'s premises. A. and B.'s premises were put up for sale by auction in different lots, it being made a condition that the premises were

to be sold subject to rights of water and other easements subsisting thereon. A. and B. purchased at the sale the premises severally occupied by them :—Held, that B.'s supply of water from A.'s premises was not an easement which could be enforced against a purchaser, it being simply a licence from the landlord for B. thus to obtain water during his tenancy. *Russell* v. *Harford*, L. R. 2 Eq. 507 ; 15 L. T. 171 ; 14 W. R. 982.

3. Duty of Keeping Clean.

To Prevent a Nuisance.]—A watercourse, whether called by the name of sewer or brook, cannot be allowed to remain in such a state as to be a nuisance to the neighbourhood, or to be covered over and turned into a sewer so as to take away from the occupiers of adjoining lands any rights they may have to use it as a watercourse. *Att.-Gen.* v. *Hackney Board of Works*, 44 L. J., Ch. 545 ; L. R. 20 Eq. 626 ; 33 L. T. 244.

Obligation of Incorporated Body.]—A local act incorporated certain persons for the purpose of securing a regular and proper supply of water to millowners whose works were situated on the banks of the river Bann. These persons had powers given them to collect the waters of several small streams into a reservoir, and, as often as necessary, to send down those waters to the Bann through the channel of a stream called Muddock. The 2nd clause directed them to "make, erect, construct, maintain, repair, and keep," by means of a reservoir, a due and adequate supply of water for the river Bann at all seasons of the year ; and to enter on the lands of the different streams named, to do what was necessary for the conveyance and due regulation of the supply of such waters, and "to make, erect, alter, maintain, repair, widen, deepen, scour, cleanse, and keep proper and sufficient conduits, aqueducts, channels and watercourses, drains, feeders, weirs, dams," &c. The 82nd clause gave similar directions, and ordered that the surplus water should be returned into the different streams from which it had been taken, and also made provisions for supplying with water the cattle depasturing in fields adjoining. The persons incorporated under the act erected the reservoir, collected the waters of the different streams, and sent them through the channel of the Muddock to supply the Bann, but, after a time, neglected to cleanse the channel of the Muddock, so that at times it overflowed its banks and did damage to the lands of the adjoining proprietors :—Held, that under the words of the act there was an obligation on the persons so incorporated to take care that the due execution of the works and operations intended by the act should not be injurious to the lands lying along the banks of the Muddock, and that the bed or channel of the Muddock must be cleansed and kept in a proper state for the flow and reflow of the water that had to pass through it. *Geddis* v. *Bann Reservoir Co.*, 3 App. Cas. 430—H. L. (Ir.)

Under Inclosure Act—Authority to Occupiers.]—By an award, made by commissioners under an inclosure act, drains were set out, and it was directed that the owners or occupiers of the land over which such drains passed should make and cleanse and keep the same of sufficient width and depth to carry off the water intended to run down the same :—Held, that this did not authorise the plaintiff to make a sough or underdrain on his land, so as to cause an increased quantity of water to pass into one of the awarded drains. *Sharpe* v. *Hancock*, 8 Scott (N.R.) 46 ; 7 Man. & G. 354 ; 13 L. J., C. P. 138.

4. Infringement of Rights.

a. Diversion and Abstraction of Water.

Rights of Inhabitants—Spout in Highway.]—The inhabitant householders of a district were entitled by custom to a flow of water to a spout in a highway, and the use of such water, for domestic purposes, in their houses. A riparian proprietor, through whose land the water flowed on its way to the spout, on various occasions diverted the water so as sensibly and materially to diminish the flow, and various inhabitants of the district were on such occasions inconvenienced by failing to obtain water at the spout when they wanted it. Certain occupiers of a house in the district brought an action against a riparian proprietor for an infringement of their right, but the jury found that they had not personally sustained any actual inconvenience from the want of water :—Held, that the action was nevertheless maintainable, inasmuch as the acts of the defendant would, if continued, be evidence of a right in derogation of the rights of the occupiers as inhabitants of the district. *Harrop* v. *Hirst*, 38 L. J., Ex. 1 ; L. R. 4 Ex. 43 ; 19 L. T. 426 ; 17 W. R. 164.

Right of Action by Riparian Owner.]—The proprietor of lands contiguous to a stream may as soon as he is injured by the diversion of the water from its natural course, maintain an action against the party so diverting it ; and it is no answer to the action, that the defendant first appropriated the water to his own use, unless he has had twenty years' undisturbed enjoyment of it in the altered course. *Mason* v. *Hill*, 3 B. & Ad. 304 ; 1 L. J., K. B. 107. And see *S. C.*, 2 N. & M. 747 ; 5 B. & Ad. 1 ; 2 L. J., K. B. 118.

Unreasonable Use of Water—What is.]—To an action by the plaintiff, the occupier of a water grist mill, against a riparian proprietor for diverting the stream, the defendant pleaded not guilty ; and that at certain periods of the year, when the water was more than sufficient for the use of the mill, the defendant diverted small and reasonable quantities of the water for the purpose of irrigating closes belonging to her on the bank of the stream ; which quantities of water, except that which was absorbed and used in the irrigation, were returned into the stream above the mill ; that the diversion was not continuous, but only intermittent ; that the quantity of water absorbed and lost was small and "inappreciable," and that the diversion caused no damage to the plaintiff's mill. At the trial, it was proved that the diversion was not continuous, and that it caused no diminution of the water cognisable to the senses. The judge, in directing the jury, left it to them, with respect to the issue on not guilty, to say whether there was any sensible diminution of the water by reason of the diversion ; and with respect to the other issue, he told them that he had a difficulty

in affixing the legal meaning to the term "inappreciable," but suggested that it might mean a quantity so inconsiderable as to be incapable of value or price:—Held, that this was not, under all the circumstances, such an unreasonable use of the water as to be prohibited by law, and therefore that the issue on not guilty was rightly found for the defendant. *Embrey* v. *Owen*, 6 Ex. 353; 20 L. J., Ex. 212; 15 Jur. 633.

Semble, that the word "inappreciable" meant "incapable of being estimated or valued," and in that sense the plea was not proved. *Ib.*

Party Diverting Stream on his Own Land.]—The defendant diverted a stream as it passed through his premises, but restored it undiminished as to the quantity of water to its former channel before it reached the premises of the plaintiff; the defendant also employed the stream, while on his premises, in a way which rendered the water unfit for ordinary use, but he alleged that the water, by the time it reached the plaintiff's lands, was freed to the utmost possible extent from any noxious ingredients with which it had become impregnated, and it did not appear that any actual damage was sustained by the plaintiff. Under these circumstances, the lord chancellor dissolved an injunction which had been granted by the vice-chancellor restraining the defendant from diverting and using the water. *Elmhirst* v. *Spencer*, 2 Mac. & G. 45.

By a Corporation—Breach of Duty.]—A corporation was empowered by statute to erect a reservoir near a river, and on completion to divert the waters of the river, discharging down the river seventy-five cubic feet of water per second for twelve hours of every working day. The corporation began, but was prevented by the nature of the ground from completing the reservoir. They diverted the water, and discharged down the river more than its natural flow, but less than the quantity required by the statute:—Held, that riparian proprietors could recover at common law for any damage sustained by the diversion of the water, but could not recover for failure to comply with the statutory requirement. *Waller* v. *Manchester Corporation*, 6 H. & N. 667; 30 L. J., Ex. 293; 7 Jur. (N.S.) 635.

—— **Draining Ornamental Pond.**]—The Metropolitan board of works constructed a sewer on the high road, and the Lewisham district board made a branch sewer running into it. The combined effect of the two was to drain an ornamental pond and rivulet on the adjoining lands of the plaintiff. In a suit to obtain an injunction:—Held, first, that neither of the boards was, in respect to the diversion of the water, to be treated as clothed with the rights or obligations of adjoining landowners. *Stainton* v. *Woolryeh*, 23 Beav. 225; 26 L. J., Ch. 300; 3 Jur. (N.S.) 257; 5 W. R. 305.

Held, secondly, that they had not exceeded their statutory right, so as to be liable to be restrained by injunction. *Ib.*

Held, thirdly, that if either of the boards was producing injury to the plaintiff by the unskilful or improper construction of the sewer, the court would interfere to prevent it. *Ib.*

Held, fourthly, that such not being the case, the rights of the plaintiff were limited to a claim for compensation under the 11 & 12 Vict. c. 112, s. 50, and the 18 & 19 Vict. c. 120, s. 86. *Ib.*

By Landowner who has Permitted Watercourse to be Made on his Land.]—Permission was obtained from E. and other landowners, on behalf of a body of subscribers, to make a watercourse through their respective lands, to supply the town of G. with water. It was alleged that the subscribers agreed to pay to E. 2*s.* 6*d.* a year, but this was denied. E. subsequently diverted the watercourse into the old channel; and, upon a bill filed by several of the subscribers:—Held, upon its being amended, and made on behalf of the plaintiffs, and others whose names and residences were unknown, being subscribers to the fund, that the plaintiffs were entitled to the use of the watercourse passing under the lands of E.; and an injunction was granted to restrain the defendant from preventing, obstructing, or interfering with the flow of water, or with the plaintiff's use of the watercourse. *Devonshire* (*Duke*) v. *Elgin*, 14 Beav. 530; 20 L. J., Ch. 495.

From Artificial Watercourse, Permanent or Temporary.]—No action will lie for an injury by the diversion of an artificial watercourse, where from the nature of the case it is obvious that the enjoyment of it depends upon temporary circumstances, and is not of a permanent character, and where the interruption is by a person who stands in the nature of a grantor. *Wood* v. *Waud*, 3 Ex. 748; 18 L. J., Ex. 305; 13 Jur. 742.

Where water has flowed in an artificial and a covered watercourse for more than sixty years, from a colliery into an immemorial and a natural stream, upon whose banks the plaintiff's mills are situate, the plaintiff in such case has no right of action for diversion of the water of such artificial watercourse, against a party through whose land it passes, but who does not claim under or who is unauthorised by the colliery owners. The case, however, would be different if the water was polluted; and the abstraction of the water to the amount of 5 per cent., or its detention so as to occasion sensible inconvenience, will support an action for such injury. *Ib.*

A watercourse, though artificial, may have been originally made under such circumstances, and have been so used as to give all the rights that the riparian proprietors would have had if it had been a natural stream; and, therefore, in an action by one riparian proprietor against another for the pollution and diversion of a watercourse, it is a misdirection to tell the jury, that, if the stream was artificial and made by the hand of man, the plaintiff could have no cause of action. *Sutcliffe* v. *Booth*, 32 L. J., Q. B. 136; 9 Jur. (N.S.) 1037.

Erection of a Dam—Liability for Act of Lessee.]—The defendants were owners of the soil of a stream which supplied water to two print-works. A., whilst the occupier of both works, erected a weir across the stream, and thereby diverted the water from one of the works. The plaintiff, becoming lessee of the last-mentioned works, and entitled to the water of the stream, removed the weir. A. afterwards, without any authority from the defendants, and against their will, replaced the weir:—Held, that they were not responsible for the act of A., or for the continuance of the nuisance.

Saxby v. *Manchester, Sheffield and Lincolnshire Ry.* 38 L. J., C. P. 153; L. R. 4 C. P. 198; 19 L. T. 640; 17 W. R. 293.

—— **Pleadings.**]—Where a declaration alleged that the defendant placed and raised a dam across the stream, and thereby diverted and turned the water, and prevented it from running along the usual course to the plaintiff's mill, and from supplying the same with water for the necessary working thereof, as the same of right ought and otherwise would have done:—Held, that such an allegation was supported by proof, that, in consequence of the dam, the water was prevented from being regularly supplied to the mill, although the stream was not diverted, as the dam was erected above the mill, and the water returned to its regular course long before it reached the mill, and there was no waste of water occasioned by the erection of the dam. *Shears* v. *Wood*, 7 Moore, 345; 1 L. J. (O.S.) C. P. 3.

Irrigation of Field—Removal of Stakes.]—The plaintiff, who had a right to irrigate his meadow by placing a dam of loose stones across a small stream, and occasionally a board or fender, fastened the board by means of two stakes, which had never been done by his predecessors. The defendant, who had rights on the same stream, removed the stakes and the board also. A verdict having been given for the plaintiff in an action for such removal, the court refused to set it aside, holding that the defendant had no right to remove the board as well as the stakes, on the ground that the stakes gave the board a character of permanency incompatible with her own rights. *Greenslade* v. *Halliday*, 6 Bing. 379; 4 M. & P. 71; 8 L. J. (O.S.) C. P. 124.

Injury to Watercourse.]—If one has anciently pits which are separated by a rivulet, he may cleanse them, but cannot change or enlarge them to the injury of the watercourse. *Brown* v. *Best*, 1 Wils. 174.

Preventing Repair of Bank—Cutting Channels.]—Where a mill-stream broke through the bank nearing of the defendant's ground, and the stream was escaping into a new channel, and irreparable injury was to be apprehended, the court made a conditional order before appearance, to restrain defendant from preventing plaintiff, &c., from repairing the bank for the purpose of bringing back the stream into its proper channel, and also to restrain the said defendant from preventing the plaintiff from entering on that part of the lands in the possession of the defendant which formed part of the bank of the stream to repair the breach, and also to restrain the defendant from cutting, &c., any channel for the water of the said stream on the lands in his possession, whereby the watercourse might be diverted from plaintiff's mill, unless cause within six days. *M'Swiney* v. *Haynes*, 1 Ir. Eq. R. 322.

Abstraction—By Digging a Well.]—Where water is taken from a river after it has formed part of its stream, not by the reasonable use of it by another riparian proprietor, but by the digging of a well, an action at common law will lie by a riparian proprietor for injury to his right, against the party d'gging the well; as it also may for the abstraction of water which never did form part of the river, but has been prevented from becoming so in its natural course by the excavation of the well; and this whether the water was part of an underground watercourse, or percolated through the strata. *Dickinson* v. *Grand Junction Canal Co.*, 7 Ex. 282; 21 L. J., Ex. 241; 16 Jur. 200.

Such an action may however be maintained on an agreement not to diminish the supply of water of the river, or on the provisions of a special act of parliament to that effect. *Ib.*

In any of these cases the action is maintainable for injury to the right, though no actual loss may have been occasioned. *Ib.*

A local act authorised a company to enter upon lands within a manor, and to dig and search for any spring of water, and to convey the water from such springs into the town for the use of the inhabitants of the town and the shipping in the harbour. It provided that the company should not take the water from any spring, streams, or ponds, so as to deprive the occupiers of the lands of water for their own necessary uses, and for the cattle depasturing therein. The company had power to lay down pipes, and the inhabitants, with the consent of the company, might obtain the water by pipes, to communicate with the company's pipes, at certain charges, according to the bore of the pipes:—Held, that the defence that the defendant, within twenty years after the discovery of the spring by the plaintiffs, sunk a well and used the water in a manner and for purposes not prohibited by the act, was admissible under not guilty, and a plea denying the plaintiff's right. *South Shields Waterworks Co.* v. *Cookson*, 15 L. J., Ex. 315.

—— **From a Well.**]—Quære, whether the owner of an old well can prevent his neighbour from sinking a well in his own land, on the ground that thereby the supply of water to the old well will be drawn off, or diminished. *Hammond* v. *Hall*, 10 Sim. 551; 4 Jur. 694.

The owner of land through which water flows in a subterraneous course has no right or interest in it which will enable him to maintain an action against a landowner who, in carrying on mining operations in his own land, drains away the water from the land of the first-mentioned owner and lays his well dry. *Acton* v. *Blundell*, 12 M. & W. 324; 13 L. J., Ex. 289.

M. sold to B. a well on M.'s land, with the right to B. to draw water therefrom through pipes in M.'s lands, and covenanted for himself, his heirs, or assigns, not to distuib B.'s right. M. voluntarily sold to a railway company some land near, and, owing to their operations, the springs that supplied the well were intercepted, and the well became dry:—Held, that B. had not broken his covenant, for it only applied to the water that flowed from the well after reaching it and not before it reached it. *Brain* v. *Marfell*, 44 J. P. 56—C. A.

—— **By Licensee of Landowner.**]—The water from a spring flowed in a gully or a natural channel to a stream on which was a mill. The spring having been cut off at its source, and the water received into a tank as it rose from the earth, by the licence of the owner of the soil on which the spring rose:—Held, that an action lay by the mill-owner against the person so

abstracting the water. *Dudden* v. *Clutton Union*, 1 H. & N. 627; 26 L. J., Ex. 146.

—— **By Riparian Proprietor—Action by Conservators.**]—By 13 Geo. 2, c. 36, s. 2, a corporation was empowered to do all things necessary to make the Medway navigable; and the river so to be made navigable, and all lands to be by them made use of for the benefit of the navigation, were thereby vested in the corporation, their successors, heirs and assigns, for ever:—Held, that the act conferred upon the corporation such an interest in all the water of the river for the purposes of the navigation as were interfered with by the abstraction of any part by the riparian proprietors, and that it was not necessary that there should be an actual damage to the navigation to entitle the corporation to sue for such abstraction. *Medway Navigation Co.* v. *Romney (Earl)*, 9 C. B. (N.S.) 575; 30 L. J., C. P. 236; 7 Jur. (N.S.) 846; 4 L. T. 87; 9 W. R. 482.

Continuous and apparent Easement—Injunction.]—The plaintiff and defendant were owners of lands formerly belonging to the same person. A stream of water had for many years originated in a spinney on the defendant's land, and had flowed down in a defined channel to and through the plaintiff's land into a brook. The conveyance of the plaintiff's land expressly included all easements and watercourses "appertaining to" the land conveyed. An injunction was granted to restrain the defendant from diminishing the flow of water down the stream by abstracting water from the springs that fed the stream, on the ground either that there had been an implied grant to the plaintiff of a continuous and apparent easement, or that he had the right of an ordinary riparian owner to the flow of an ancient stream. *Dudden* v. *Clutton Union* (1 H. & N. 627) applies under the circumstances, and not *Broadbent* v. *Ramsbotham* (11 Ex. 602). *Bunting* v. *Hicks*, 7 R. 293; 70 L. T. 455—C. A.

Liability to Indictment for.]—Where an action would lie at the suit of an individual for a diversion of a watercourse, an indictment will lie where the act affects the public. *Rex* v. *Trafford*, 1 B. & Ad. 874. See *S. C.*, 1 M. & Scott, 401; 8 Bing. 204; 2 C. & J. 265; 2 Tyr. 201; 1 L. J., Ex. 90.

Jurisdiction of Chancery.]—Turning watercourses from mills may be determined in chancery, but was referred to commissioners of sewers. *Swain* v. *Rogers*, Cary, 26.

b. Obstruction.

Rights of Riparian Owner—Erection of Mill-Dams.]—The owner of the banks of a non-navigable river may, without any illegality, build a mill-dam across the stream within his own property, and divert a mill-lade, without asking the leave of the proprietors *above* him, provided he does not obstruct the water from flowing as freely as it was wont, and without asking the leave of those proprietors *below* him, if he takes care to restore the water to its natural course before it enters their land. *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839—H. L. (Sc.)

—— **Filling up Bed of River.**]—By an act, if any person shall build, erect, or place any building or erection within fifteen feet of the centre of the bed of the stream of a river, he shall be summoned before justices, who may order the removal of the obstruction and impose a penalty on the offender. A flood washed away the bed of the river, and B., who had mills or works adjoining and was owner of the land on both sides of the stream, restored the bed to its original level by laying large stones side by side without cement or fastening:—Held, that this was not a building or erection, and therefore justices were right in declining to convict. *Colbran* v. *Barnes*, 11 C. B. (N.S.) 246.

—— **Subsidence due to Working Minerals.**]—The plaintiff was entitled, for the purposes of his mill, to a supply of water by means of a stream running through and over the lands of the defendant. The defendant, in working the minerals lying under the bed of the stream, had caused a subsidence of the bed to the extent of four feet for some distance. In order to maintain the original level of the stream, the defendant had constructed embankments on either side, and there was no actual diminution in the supply of water to the mill. Upon a bill for an injunction, the court refused to make a hostile decree against the defendant, but by reason of the subsidence which had taken place in the bed of the stream, he was required to give an undertaking not to work the minerals in such a way as to obstruct or interfere with the flow and passage of the water to the mill, staying further proceedings, giving no costs, but reserving liberty to the plaintiff to apply if occasion should require. *Elwell* v. *Crowther*, 8 Jur. (N.S.) 1004; 6 L. T. 596; 10 W. R. 815.

—— **Making Mound.**]—A proprietor of land on the bank of a river having commenced the building of a mound, which, according to the opinion and report of an engineer, would, if completed, in times of ordinary flood, throw the water of the river on the grounds of a proprietor on the opposite bank, so as to overflow and injure them, was restrained by perpetual interdict from the further erection of any bulwark or other work which might have the effect of diverting the stream of the river in time of flood from its accustomed course, and throwing the same upon the lands of the appellant. *Menzies* v. *Breadalbane*, 3 Bligh (N.S.) 414.

—— **Preventing Flow of Water to Mill.**]—Injunction to restrain defendant from preventing water flowing in regular quantities to a mill. *Robinson* v. *Byron*, 1 Bro. C. C. 588.

Injunction against the obstruction of the flow of water through a goit in defendant's lands to plaintiff's mill. *Dewhurst* v. *Wrigley*, C. P. Cooper, 319.

Where, pending proceedings at law to try the right to a watercourse, the defendants were proceeding to take the law into their own hands:—Held, that the plaintiff was entitled to file a bill for an injunction; but where the application for dissolving it, on the ground of the bill showing a legal title acquired by lapse of time, had been refused, the court said that it ought to make provision for having the question between the parties tried by law. *Ib.*

Bill stated plaintiff to be lessee of an ancient mill, and that defendant had erected floodgates and other works on the river, which obstructed plaintiff's mill, and prayed that defendant might be decreed to pull down these works, and be restrained from erecting new ones,

such works having been erected above three years: such a bill will not lie until the right be established at law, and a demurrer for want of equity is good. *Weller* v. *Smeaton*, 1 Cox, 102; 1 Bro. C. C. 572.

Actual Damage not essential.]—In an action for wrongfully obstructing the flow of a river by increasing the height of a weir, whereby the plaintiff's land abutting on the river was flooded, if the effect of the acts complained of was to raise the water of the river as it flowed past the plaintiff's land above the height at which it ought of right to have flowed, such raising would be an actionable wrong, and would entitle the plaintiff to a finding in his favour with nominal damages, actual damage not being essential in order to maintain the action. *Williams* v. *Morland* (2 B. & C. 910; 26 R. R. 191) not followed. *McGlone* v. *Smith*, 22 L. R., Ir. 559.

A riparian owner has a right, irrespective of any actual damage sustained by him, to complain of an obstruction to a stream. *Norbury (Earl)* v. *Kitchin*, 15 L. T. 501.

—— **Transfer on Sale—Evidence of Damage.**]—A mill on the bank of a river had been supplied for more than twenty years by water flowing from a stream through an ancient divergent channel, and conducted thence through a reservoir and a tunnel constructed in his own land by a former proprietor of the mill, who was also the owner of both banks of the divergent channel. At the place where the reservoir was constructed the divergent stream had formerly, after filling and overflowing a cattle-trough, been allowed to waste itself over adjoining land, whence it found its way by percolation to the river, into which the stream itself also flowed:—Held, that an action was maintainable by the present owner of the mill, who had purchased it with all existing water rights, against a riparian proprietor above the point of divergence in the original stream, for obstructing the flow of water to the mill. *Holker* v. *Porritt*, 42 L. J., Ex. 85; L. R. 8 Ex. 107; 21 W. R. 414. Affirmed, 44 L. J., Ex. 52: L. R. 10 Ex. 59; 33 L. T. 125; 23 W. R. 400—Ex. Ch.

A natural stream divided itself at a point called E. into two branches; one branch ran down to the river Irwell; the other passed into a farm-yard, where it supplied a watering-trough, and the overflow from the trough was formerly diffused over the ground, and found its way ultimately into the Irwell. The second branch appeared to have been made by artificial means, but had existed from time immemorial. In 1847 the owner of the land on which the watering-trough stood, collected the overflow into a reservoir, and conducted it by a culvert to a mill situated on the banks of the Irwell. In 1865 he became owner of all the rest of the land through which the second branch flowed. In 1867 he sold the mill, with all water rights. In an action brought by the purchaser against a riparian owner on the stream above E. for obstructing the flow of the water:—Held, that he was entitled to maintain the action. *Ib.*

In a claim by the plaintiffs, as riparian proprietors, and as having prescriptive right to use of water, for injunction and damages:—Held, that there was evidence of actual damage, but that, even if there had been merely evidence of injury to the riparian and prescriptive rights of the plaintiffs, an injunction and not damages would still have been awarded. *Pennington* v. *Brinsop Hall Coal Co.*, 46 L. J., Ch. 773; 5 Ch. D. 769; 37 L. T. 149; 25 W. R. 874.

—— **Forcing Water back on a Mill.**]—The occupier of a mill may maintain an action for forcing back water and injuring his mill, although he has not enjoyed it precisely in the same state for twenty years; and therefore it was holden to be no defence to such an action, that the occupier had, within a few years, erected in his mill a wheel of different dimensions, but requiring less water than the old one, although the declaration stated the plaintiff to be possessed of a mill, without alleging it to be an ancient mill. *Saunders* v. *Newman*, 1 B. & Ald. 258; 19 R. R. 312.

—— **Right of Mill-Owner to Stem Water.**]—Semble, that if a mill-head pens back the water upon the adjoining lands, and injures them, but in consequence of defective construction and want of repair in the wheels and waste gates, the mill-pond is, by the working of the mill at seasons wholly selected by the miller without the control of the landowner, so soon and so frequently exhausted, that the adjoining lands are frequently relieved from the stagnating water, and suffer but small damage; the miller is justified in repairing and improving the construction of his mill, and thereby penning back the water upon his neighbour's land on the same level for longer periods, although he thereby occasions him a greater damage. *Alder* v. *Savill*, 5 Taunt. 454; 15 R. R. 551.

If an ancient ditch has at one end anciently opened into a stream, and the owner of a mill on the stream has kept the opening at the end of the ditch closed for twenty years and more, without interruption, that would give the mill-owner such a right to keep it closed, that the owner of the land adjoining the ditch would not be justified in reopening the communication, although it might appear that the communication between the ditch and the stream was ancient. *Drewett* v. *Sheard*, 7 Car. & P. 465.

Of Surface Water.]—When a prescriptive right to discharge surface water across adjacent property by a specific channel has been acquired, the obstruction of the channel on the servient tenement, by the tenant of the latter, is an invasion of a legal right, for which an action is maintainable without proof of actual perceptible damage. *Claxton* v. *Claxton*, Ir. R. 7 C. L. 23.

Of Artificial Watercourse.]—A. immemorially had, for watering his lands, a channel through his own field, in a porous soil, through the banks of which channel, when filled, the water percolated, and thence passed through the contiguous soil of B., below the surface, without producing visible injury. B. built a new house in his land, below the level of his soil, in the current of the percolating water:—Held, that A. could not justify filling his channel, if the percolating water thereby injured the house of B. *Cooper* v. *Barber*, 3 Taunt. 99; 12 R. R. 604. See also *Bowers* v. *Hill*, 1 Bing. (N.C.) 549; 2 Scott, 535; 1 Hodges, 334; 4 L. J., C. P. 153.

c. Pollution.

Rights of Riparian Proprietor.]—A riparian proprietor has a right to the natural stream of water flowing through the land in its natural

state, and if the water is polluted by a proprietor higher up the stream, so as to occasion damage in law, though not in fact, to the first-mentioned proprietor, it gives him a good cause of action against the upper proprietor, unless the latter has gained a right by long enjoyment or grant. *Wood* v. *Waud*, 3 Ex. 748; 18 L. J., Ex. 305; 13 Jur. 472.

Right to Pure Water.]—The abstraction of water from a natural stream openly and under a claim of right, for a period of twenty years, to a tenement not abutting on the stream, will create no easement to have pure water flow down the stream to the point of abstraction. *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 300; 10 Jur. (N.S.) 1005; 10 L. T. 748.

W. occupied bleaching works on the O. B. under a lease. The improvement commissioners of Harrogate, who had adopted the Local Government Act, and thereby were constituted the local board of health for Harrogate, commenced a system of drainage for Harrogate in 1862, and the sewage flowing through the C. stream into the O. B. polluted its waters so that they could not be used for bleaching purposes. In 1868, W. filed his bill, praying for an injunction to restrain the commissioners from permitting the sewage to flow into the O. B. The suit was compromised, and by an agreement, dated the 1st of March, 1869, the commissioners agreed to pay him a certain sum for damages, and that they would not, after the 31st of that month, permit the sewage to flow through the drains under their control into the O. B. The commissioners adopted the irrigation system for the disposal of their sewage, which proved wholly inadequate. Sewage flowed down the C. stream into the O. B., and also the overflow from the irrigation farm. W. was obliged to take other bleaching work, as the waters of the O. B. were so polluted by the drainage that he could not use them. He therefore filed his bill against the commissioners, praying for an injunction in the terms of the agreement, and for an inquiry as to damages sustained by him. Relying on the performance of the agreement, W. took a new lease of the bleaching works:—Held, that he was entitled to an injunction and an inquiry as to damages as prayed. *Wood* v. *High and Low Harrogate Improvement Commissioners*, 22 W. R. 763.

In an action by mill-owners, riparian proprietors, to restrain the discharge of water containing acid into a stream, where the defendant asked that damages, in lieu of an injunction, might be given, an injunction was granted. *Pennington* v. *Brinsop Hall Coal Co.*, 46 L. J., Ch. 773; 5 Ch. D. 769; 37 L. T. 149; 25 W. R. 874.

Every riparian proprietor is entitled to have the natural water of the stream transmitted to him, without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the court. The respondents were riparian proprietors on one side of a stream, called the Doups Burn. They and their predecessors had for sixty years used the water of the burn for the purpose of distillation, when the appellants, without any prescriptive right so to do, poured into the stream a large body of water which they pumped up from their mines, which water, if it had been left to the law of gravitation, would have never reached the stream. The respondents did not complain of the increased volume of the stream, but that the foreign water was of a character and quality different from that of the natural stream, and that it prejudicially affected the water of the stream for distillery purposes:—Held, that the respondents were entitled to have the appellants interdicted from discharging the mine water into the stream. *Young* v. *Bankier Distillery Co.*, [1893] A. C. 691; 69 L. T. 838; 58 J. P. 100—H. L. (Sc.)

The plaintiff, by permission of a canal company, made a communication from the canal to his own premises by which water got to those premises, with which water he fed the boilers of his engine. The defendant, without right or permission from the company, fouled the water in the canal, whereby the water as it came into plaintiff's premises was fouled, and by the use of it, plaintiff's boilers were injured:—Held, that plaintiff might maintain an action against defendant for thus fouling the water. *Whaley* v. *Laing*, 2 H. & N. 476.

—— **Extent of Right.**]—Where an owner of land complained that a bleaching manufactory rendered the water which passed through his grounds impure, it was held that he must prove that he sustained some substantial damage; it was not sufficient to show that the water did not come out of the defendant's grounds in as pure a state as when it entered. Where there were two streams, one passing through the defendants' grounds to their bleaching factory, the other, after it had received the water from the factory, passed through the plaintiff's land, an injunction which restrained the defendants from using both streams was, on that ground alone, untenable. *Elmhirst* v. *Spencer*, 2 Mac. & G. 45.

—— **Water Purified as far as Possible.**]—The defendant diverted a stream as it passed through his premises, but restored it undiminished as to the quantity of water to its former channel before it reached the premises of the plaintiff; the defendant also employed the stream, while on his premises, in a way which rendered the water unfit for ordinary use, but he alleged that the water, by the time it reached the plaintiff's lands, was freed to the utmost possible extent from any noxious ingredients with which it had become impregnated; and it did not appear that any actual damage was sustained by the plaintiff. Under these circumstances, the lord chancellor dissolved an injunction which had been granted by the vice-chancellor, restraining the defendant from diverting and using the water. *Ib.*

Of Underground Stream.]—A person is not entitled so to use his own land as thereby to pollute water that eventually mingles by means of natural underground passages, into which he has introduced it, with an open stream passing through his neighbour's land, to such a degree as to render the water of that stream unfit for a purpose for which his neighbour has acquired a prescriptive right to use it. *Hodgkinson* v. *Ennor*, 4 B. & S. 229; 32 L. J., Q. B. 231; 9 Jur. (N.S.) 1152; 8 L. T. 451; 11 W. R. 775.

In Working of Mines.]—The rights of tin-bounders according to the customary law of Cornwall to the use of water within their tin bounds, for the purpose of streaming their tin,

will not prevent the acquisition by another of a prescriptive right under 2 & 3 Will. 4, c. 71, to the enjoyment of the water by a twenty years' user; nor will this right be affected by an agreement with the tin-bounders for a money payment to abstain from fouling the water by streaming their tin therein. *Gaved* v. *Martyn*, 19 C. B. (N.S.) 732; 34 L. J., C. P. 353; 11 Jur. (N.S.) 1017; 13 L. T. 74; 14 W. R. 62. See *Ivimey* v. *Stocker*, 2 Dr. & Sm. 537; and on appeal, 2 Dr. & Sm. 537; 35 L. J., Ch. 467; L. R. 1 Ch. 396; 12 Jur. (N.S.) 419; 14 L. T. 427; 14 W. R. 743.

Of Wells.]—In an action for disturbing the plaintiff in the use of a well, by putting rubbish into it, he will be entitled to recover, if, by means of the rubbish, the water has been shallowed, and the well rendered less convenient for use; but if the effect only was to make the water temporarily muddy, that is too minute a damage to support the action. *Taylor* v. *Bennett*, 7 Car. & P. 329.

When a well is supplied with water which percolates through the earth, and does not flow through any defined channel, although the owner of the well is not entitled to the water until it actually enters his well, the occupier of adjoining property will be restrained from using a cesspool therein in such a manner as to pollute the water coming through his property and supplying the well. *Womersley* v. *Church*, 17 L. T. 190.

—— **By Gas Company — Penalties.**]—When noxious matter percolates through the soil from gasworks, so as to foul a well, such percolation will render the defendants liable under the 3 & 4 Will. 4, c. 90, which imposes a penalty of 200*l.* on any gas company, "who shall suffer any washings, &c., to be conveyed into any well." *Millington* v. *Griffiths*, 30 L. T. 65.

A well which, on account of its having become contaminated, has been disused by the owner for several years, and has been covered over, does not cease to be a well within the meaning of the act. *Ib.*

Non-user, and closing of his own well in consequence of its being polluted, even coupled with the acceptance by the plaintiff of the use of substituted wells of the defendants, is not such an abandonment of the former as to alter its character and make it no longer a well, nor can any licence to pollute be inferred from such a state of facts. *Ib.*

A local act for the establishment of a gas company, enacted that if the company should at any time cause or suffer to be conveyed or to flow into any stream or place for water any washing or thing produced by making gas, or should do any act to the water contained in such stream, &c., whereby it should be fouled or corrupted, the company should forfeit for every such offence 200*l.*, and an additional penalty of 20*l.* for every day such washing, &c., should be conveyed or should flow after the expiration of twenty-four hours from notice of the offence served on the company:—Held, that the former penalty was not confined to the case of water wilfully or knowingly fouled, but extended to the case of water in a well fouled by water escaping through fissures in a gas tank, occasioned by mining operations in the vicinity. *Hipkins* v. *Birmingham and Staffordshire Gas-light Co.*, 5 H. & N. 74; 29 L. J., Ex. 169; 1 L. T. 303; 8 W. R. 182. Affirmed on appeal, 6 H. & N. 250; 30 L. J., Ex. 60; 7 Jur (N.S.) 213; 9 W. R. 168—Ex. Ch.

Injury to Vegetation.]—In the absence of any allegation of prescriptive right in the plaintiff, the court will not restrain the draining of gravel-pits into a stream, to the injury of watercress beds of the plaintiff's supplied by such stream. *Weeks* v. *Heward*, 10 W. R. 557.

Under Statutory Authority—Local Boards.]—By the Leeds Improvement Amendment Act, 1848, it was provided that the clauses of the Towns Improvement Clauses Act, 10 & 11 Vict. c. 34, as to making and maintaining public sewers and the drainage of houses, should be incorporated with and form part of the act "except so far as they or any of them are inconsistent with the provisions of this act, or are expressly varied or excepted by this act"; and by s. 6, the corporation of Leeds was authorised to construct one or more trunk or other sewer or sewers, sufficiently capacious to receive the foul and drainage water and filth of the town, and to convey the same into the river Aire:—Held, that the power to drain into the river was controlled by the Towns Improvement Clauses Act, s. 24, and also by s. 107, though that clause was not expressly incorporated in the local act; and that the corporation was not authorised by the local act to create a nuisance by draining into the river. *Att.-Gen.* v. *Leeds Corporation*, 39 L. J., Ch. 711; L. R. 5 Ch. 583; 19 W. R. 19. Affirming 22 L. T. 330.

Held, that though the river Aire was polluted before it received the drainage of Leeds, the landowners on the banks were entitled to restrain the further pollution. *Ib.*

Held, that though the sewer had been completed, and in operation sixteen years before proceedings were taken, the court would interfere at the suit of the landowners. *Ib.*

—— **Nature and Extent of Liability.**]—A sanitary authority in whom the sewers are vested have only a limited ownership in them; they are not in the same position as to responsibility for fouling a stream as a private individual, because they cannot stop the sewers on account of the damage to the inhabitants of the neighbourhood. And although, perhaps, the sanitary authority might obtain an injunction to restrain persons from using the sewers who had no right to do so, a landowner complaining of the nuisance cannot bring an action against them for not doing so; because an action cannot be maintained either at law or in equity to compel a person to bring an action for the purpose of restraining a nuisance which he cannot himself prevent. Where a sanitary authority have not themselves constructed sewers which are a nuisance, but only permitted them to be used as formerly by the inhabitants, they are not doing an act which can be restrained under the Public Health Acts or the Rivers Pollution Act, 1876. *Att.-Gen.* v. *Dorking Union*, 51 L. J., Ch. 585; 20 Ch. D. 595; 46 L. T. 573; 30 W. R. 579—C. A.

Right of Local Board to Drain into Metropolitan Sewers.]—The Metropolitan board of works took into their drainage system a natural brook, called the Stamford Brook. That brook was the natural means of drainage for the Acton district, which was outside the metropolitan area, and the inhabitants of that district, and

the defendant board, on becoming the sanitary authority of the district, had used for that purpose that part of the brook which was in their district. By this means, as the Acton district increased, the sewers of the Metropolitan board, as they said, became overburdened with sewage coming from outside their area, and they requested the defendant board to send their sewage some other way. They, however, refused to do so, and claimed a right to drain into the Metropolitan board's sewers. These proceedings then were instituted by the Metropolitan board:—Held, that the defendant board, although they had a statutory duty to compel the drainage of their district, were in no different position as regards the plaintiff board than an ordinary riparian owner was as regards another riparian owner lower down on the same stream, and that, apart from the sewage of such persons as had acquired a prescriptive right to drain into the sewers of the plaintiff board, they could not be made to receive the sewage of the Acton district; and that an injunction must be granted to restrain the defendant board from draining into the plaintiff board's sewers in the future. As to existing drains, as to those which were made before the defendant board came into existence, they could not be interfered with; and as to those made since, under the circumstances of the case, they would not be interfered with. *Att.-Gen.* v. *Acton Local Board*, 52 L. J., Ch. 108; 22 Ch. D. 221; 47 L. T. 510; 31 W. R. 153.

Raising Temperature of Water used for Condensing.]—The defendants demised to plaintiff a plot of land, one-half of an adjoining brook, a cotton-mill, reservoir, and steam engine of 100 horse power on the plot of land, and the use of a weir below the mill, for the purpose of holding up the water of the brook from the weir to the level of the bed of the brook at a bridge above the mill, "and the free use and enjoyment of so much of the stream of water which usually flowed down the brook adjoining the plot of land, as should be necessary for effectually supplying with water and working the steam engine, or any other steam-engine of like power and capacity"; and covenanted not to construct any other weir or dam between the weir and bridge, and for quiet enjoyment of the premises, according to the tenor of the demise. Shortly afterwards, the defendants erected, a little below the bridge, but above the plaintiff's mill, a new cotton-mill and steam-engine, with a reservoir, which drew off water from the brook between the plaintiff's reservoir and the bridge, and they discharged the heated water which they had used for their new mill into the brook, whereby on one occasion they rased the temperature of the water which the plaintiff had to use for condensing his engine, from 57° to 68°. All the engineering witnesses agreed that every additional degree of heat above 41° renders water less fit for condensing purposes. It was also deposed, that on another occasion, in consequence of the increased temperature, the plaintiff's engine worked "nearly half a stroke per minute less" than the usual rate of twenty-eight strokes per minute. Upon motion for a decree, the court granted a perpetual injunction, restraining the defendants from discharging heated water, so as to increase the temperature of the water which the plaintiff used for condensing; being of opinion that the evidence, exclusive of that as to the actual diminution in the working of the engine, showed a material interference with the quality of the water to which the plaintiff was entitled under the demise, and that the question whether such interference was such as to give him a right to damages, was one which he was not obliged to try. *Tipping v. Eckersley*, 2 K. & J. 264.

But so much of the motion as sought to restrain the defendants from diverting the water for their new mill was directed to stand over, upon terms of the plaintiff bringing an action, the plaintiff having failed to show that he had ever yet been deprived by the defendants of the quantity of water necessary for effectually supplying and working his engine, although it appeared that he had great reason to fear that he would be so deprived. *Ib.*

Claim of Right by Prescription.]—There can be no prescriptive right to pollute a stream by the discharge of sewage in such a manner and to such an extent as to be injurious to public health. Even assuming that a prescriptive right to foul a stream with sewage can be acquired, such right must be restricted to the limits of it when the period of prescription commenced; and if the pollution be substantially increased, whether gradually or suddenly, the court will interfere by injunction to prevent the wrongful excess; and if it be possible to separate the illegal excess from the legal user, the wrongdoer must bear the consequences of any restriction necessary to prevent the excess, even if it unavoidably extends to a total prohibition of the user. *Blackburne* v. *Somers*, 5 L. R. Ir. 1.

Where a man has the right to the use of an ancient stream of water flowing through his land, and sewage is so precipitated into it as to pollute it, it is not competent to the persons causing the nuisance to claim as against him a prescriptive right to discharge the sewage into the stream. *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, 35 L. J., Ch. 382; L. R. 1 Ch. 349; 12 Jur. (N.S.) 208; 14 L. T. 154; 14 W. R. 512.

The owner of an ancient paper mill where the paper had been made from rags, introduced a new vegetable fibre, and carried on the works upon the same scale for making paper from this new material. For more than twenty years before this change the refuse arising from the paper manufacture had been discharged into a stream which ran past the plaintiff's house:—Held, that the easement to which he was entitled was to be presumed to be, not a right to foul the stream by discharging into it the washing produced by the working up of rags, but a right to discharge into it the washings produced by the manufacture of paper in the reasonable and proper course of such manufacture, using any proper materials for the purpose, but not increasing the pollution, and that the onus lay on the plaintiff to prove any increase of pollution. *Baxendale* v. *M'Murray*, L. R. 2 Ch. 790; 15 W. R. 32.

What conditions are required in order that a person establishing works on a running steam may, by long user of the water, acquire a right therein, although he has no proprietorship in the river or the water; and may, as against new comers, obtain a right to pollute such stream. *Wood* v. *Sutcliffe*, 2 Sim. (N.S.) 163; 21 L. J., Ch. 253; 16 Jur. 75.

A prescriptive right to take in a particular way and at a particular place pure water which

is returned to the stream in an impure state infers no right to take the supply of pure water in any other way and at any other place. *M'Intyre* v. *M'Gavin*, [1893] A. C. 268; 1 R. 246; 57 J. P. 548—H. L. (Sc.)

—— **Variation of User.**]—From 1832 to 1877 the refuse of a fellmongery, and the washings of dyes used in a coloured rug manufactory, had been discharged into a watercourse, which was an arterial drainage work within the jurisdiction of drainage commissioners. In 1878 the fellmongery was abandoned, and the manufacture of leather boards substituted at the same factory. The pollution caused by the discharge of the refuse of the leather board manufactory was less in degree than that caused by the fellmongery. The drainage commissioners convicted the owners of the leather board factory under a section of a local act of polluting the stream, and this conviction was affirmed on appeal to the quarter sessions:—Held, that the conviction must be confirmed, for even if the factory-owners had a prescriptive right to foul the stream, it was as fellmongers, and not as leather board manufacturers; and that there was no authority for holding that the variation of the user, although it cast no increased, but even a less burden on the servient tenement, enabled the factory-owners to substitute a business of a totally different kind to that originally carried on by them, and at the same time claim to maintain their original prescriptive right to pollute the watercourse, even if such right did exist. *Clarke* v. *Somersetshire Drainage Commissioners*, 57 L. J., M. C. 96; 59 L. T. 670; 36 W. R. 890.

—— **Evidence of.**]—Action by the owner of a mill on the river Calder, which mill of right ought to be supplied with a flow of water from a millpool on the Calder, against an owner of works higher up the stream, for placing cinders and scoria at his works, so as to fall into the stream of the Calder, whence they were carried down into the plaintiff's millpool, and filled it up, to the obstruction of his right to water. Plea, that the occupiers of the defendant's works had, for more than twenty years, as of right placed cinders and scoria, the refuse of their works, on the banks of the stream, and in its channel, and that the cinders and scoria complained of were such refuse so placed:—Held, that the plea was bad, non obstante veredicto, as not showing that the defendant had during twenty years, as of right, caused the refuse to go into the pond; for till the occupiers of the mill sustained some damage from the defendant's user, no right as against them began to be acquired. *Murgatroyd* v. *Robinson*, 7 El. & Bl. 391; 26 L. J., Q. B. 233; 3 Jur. (N.S.) 615; 5 W. R. 375.

When a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people. *Crossley* v. *Lightowler*, 36 L. J., Ch. 584; L. R. 2 Ch. 478; 16 L. T. 638; 15 W. R. 801.

The fact that the stream is fouled by others, is not a defence to a suit to restrain the fouling by one. *Ib.*

C. wishing to prevent the water of a river from being fouled by some dye-works, purchased from the owners of the dye-works a piece of land on the banks of the river, without communicating to them his object:—Held, that in the absence of any express reservation by the owners of the dye-works of the right of fouling, C. could maintain a suit in equity to restrain it. *Ib.*

Loss of Rights by Non-User.]—The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right, without some evidence of an intention to abandon it; but where dye-works had not been used for more than twenty years, and had been allowed to go to ruin:—Held, that any right of fouling a stream attached to them was lost. *Ib.*

Where, through an artificial watercourse made for the purpose of draining mines, the drainage water has flowed for twenty years in a pure state, in consequence of the working of the mines having been discontinued, over premises of a person who has used it for that period, the working of the mines cannot be resumed (unless there is a custom to warrant it), so as to foul the water and disturb the enjoyment. *Magor* v. *Chadwick*, 11 A. & E. 571; 3 P. & D. 367; 9 L. J., Q. B. 159; 4 Jur. 482.

See also cases sub tit. NUISANCE.

5. PROCEEDINGS AND EVIDENCE.

Injunction—Before Undoubted Nuisance.]—Where a man has a right to the use of an ancient stream of water flowing through his land, and sewage matter is so precipitated into it as to pollute it, and to prevent his using it, he may apply to a court of equity for an injunction to restrain the pollution before it has become an undoubted nuisance. *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, L. R. 1 Eq. 161; 13 L. T. 332; 14 W. R. 92. Affirmed, 35 L. J., Ch. 382; L. R. 1 Ch. 349; 12 Jur. (N.S.) 208; 14 L. T. 154; 14 W. R. 562.

—— **Conditions of Granting.**]—What conditions are required in order to induce a court of equity to grant an injunction to restrain the infringement of a right, acquired by long user, to use the water of a stream for certain purposes. *Wood* v. *Sutcliffe*, 2 Sim. (N.S.) 163; 21 L. J., Ch. 253; 16 Jur. 75.

—— **Continuing Nuisance.**]—A., by diverting a watercourse, brought a nuisance upon B., who connived at it; yet the court granted an injunction, for every continuance is a fresh nuisance. *Anon.*, 2 Eq. Abr. 522, pl. 3.

—— **Form of.**]—An order restraining persons from polluting a stream should restrain them from such a pollution as would be to the injury of the plaintiff. *Lingwood* v. *Stowmarket Paper Making Co.*, 11 Jur. (N.S.) 993; 14 W. R. 78.

Venue.]—It is not necessary to give a local description to the nuisance in an action for diverting the water of a navigation, though the venue is local. *Mersey and Irwell Navigation* v. *Douglas*, 2 East, 497.

The plaintiff's cause of action arises so entirely for nuisance in the county where the injury is sustained, as to retain the venue there. *Williams* v. *Land*, 4 Taunt. 729.

If a trench cut in the county of N. causes the plaintiff's lands to be overflowed in the county of W., although a statute requires all actions to be brought and tried in the county where the cause of action arises, the action may be brought

and tried in W. *Sutton* v. *Clarke*, 6 Taunt. 29; 1 Marsh. 429; 16 R. R. 563.

Declarations.]—If a plaintiff, in a count, claims the right to the use of a well as appurtenant to a certain dwelling-house; and, in a second count, complains that the defendant obstructed a watercourse, which the plaintiff claims as appurtenant to a certain other dwelling-house; the word "other" is here not matter of description, and therefore it is no ground of nonsuit that both the rights claimed were appurtenant to the same house. *Taylor* v. *Bennett*, 7 Car. & P. 329.

A count for diverting and turning a stream of water is not supported by proof of penning back and checking its course, whereby the water was made to overflow the plaintiff's meadow. *Griffiths* v. *Marson*, 6 Price, 1.

The wrongful act complained of was the digging and continuing the sewer, and thereby diverting the water from the pond. The evidence was, that the water was not diverted by digging the sewer, but previously, for the purpose of making the sewer; and since the sewer had been made, the water in the pond could not rise to its former height:—Held, that there was no variance between the declaration and the proof, so far as it related to the continuing of the sewer. *Dukes* v. *Gostling*, infra.

An allegation that the plaintiff was possessed of mines, lands and premises, and of right ought to have had and enjoyed, and still of right ought to have and enjoy, the water of a stream which had been used to flow alongside the lands and premises, is not supported by proof that the plaintiff was a lessee of mines under lands adjoining the stream, with a grant from the surface owner of the use of the water for colliery purposes. *Insole* v. *James*, 1 H. & N. 243; 4 W. R. 680.

Where the plaintiff brought an action for diverting a watercourse, stating that the locus in quo was in the possession of S., as his tenant:—Held, that the averment was satisfied by proof of a mortgage from S., the tenant for life, to the plaintiff, who was entitled to the reversion. *Partridge* v. *Bere*, 1 D. & R. 272; 24 R. R. 487.

Where the owner of land through which a stream flows has, within twenty years, built mills upon its bank, and applied the water of the stream to the working of them, he may recover upon an issue raised by a traverse of an allegation, that his right to the water was "by reason of the possession of the mills." *Wood* v. *Waud*, 3 Ex. 748; 18 L. J., Ex. 305; 13 Jur. 472.

Where a declaration was for obstructing a drain over which the plaintiff was alleged to have a right of user, and which he had used for general drainage, and the right proved only was to use the drain not for foul drainage, but for ordinary water, the plaintiff failed at the trial, and the court refused an amendment. *Cawkwell* v. *Russell*, 26 L. J., Ex. 34.

A declaration alleged that plaintiff was possessed of steam-engines and boilers, and used, had and enjoyed the benefit and advantage of the waters of a certain branch canal to supply the same, which waters ought to have flowed and been without the fouling or pollution thereafter mentioned; yet defendant wrongfully discharged into the canal foul materials and thereby rendered the waters foul, whereby the plaintiff's engines and boilers were injured. The defendant pleaded first, not guilty; secondly, that the waters of the canal ought to have flowed and been without the fouling mentioned. An arbitrator, to whom the cause was referred, found that plaintiff, by permission of a canal company, made a cut from the canal to his own premises, by which water got to those premises, with which water he fed the boilers of his engines. The defendant, without any right or permission from the company, fouled the water in the canal, whereby the water, as it came into the plaintiff's premises, was fouled, and by the use of it plaintiff's boilers were injured:—Held, in the exchequer chamber, by Wightman and Williams, JJ., that the declaration was bad and the judgment ought to be arrested; by Crowder and Willes, JJ., that the declaration was good. *Laing* v. *Whaley*, 3 H. & N. 675.

Pleas.]—Held, also, by Williams, Crowder and Willes, JJ., that the verdict upon the issue joined upon the second plea ought to be found for the plaintiff; by Wightman, Erle and Crompton, JJ., that it ought to be found for defendant. *Ib.*

A plaintiff declared that he was possessed of a mill: and by reason thereof was entitled to the use of a stream for the mill, and that the water ought to run and flow to the mill, and that the defendant wrongfully and injuriously diverted the same:—Held, that, under the plea of not guilty, the only matter in issue was the fact of the diversion, and that the right to the use of the stream, as claimed, was admitted. *Frankum* v. *Falmouth* (*Earl*), 4 N. & M. 330; 2 A. & E. 452; 1 H. & W. 1; 4 L. J., K. B. 26, 90.

In a declaration, the plaintiff stated, by way of inducement, that the defendant was possessed of a close used as a private road, and then the injury was stated to have been sustained by the defendant digging a sewer in the close used as a private road, and thereby withdrawing the water from a pond on the plaintiff's close. It was in evidence that, at the time of digging the sewer, the close was not used as a private road:—Held, that, under the plea of not guilty, the defendant admitted all matters of inducement; and semble, that the allegation of the user of the defendant's close was surplusage. *Dukes* v. *Gostling*, 1 Scott, 570; 1 Bing. (N.C.) 589; 1 Hodges, 120; 4 L. J., C. P. 211.

A declaration stated that the plaintiff was lawfully possessed of a mill, and by reason thereof ought to have and enjoy the benefit of the water of a watercourse which ran and flowed by means of a weir therein, erected a little above the mill, being kept at a certain height, unto the mill, for supplying it with water for the working thereof, and complained that the defendant wrongfully pulled down the weir, and placed and kept it at a lower height than it ought to have been. The defendant pleaded that he was the occupier of a close adjoining the watercourse, and that he and all others the occupiers for the time being of the close, for twenty years next before action, enjoyed as of right, and without interruption, the right of, from time to time, as occasion required, removing a part of the weir, and placing and keeping it at a lower height than the rest, to such an extent and for such a time as was necessary for diverting enough of the water to irrigate the close; that the irrigation being necessary for the close, wherefore the defendant removed the part of the weir, and placed and kept it at such lower height to such an extent and for such a time as and no more or longer than, was necessary for

diverting the water for the irrigation of the close:—Held, that this plea was good; that it was not an argumentative traverse of the right alleged, inasmuch as it set up a right which, under 2 & 3 Will. 4, c. 71, was not complete until the commencement of the action, and, therefore, was not inconsistent with the plaintiff's right to have the weir at a greater height at the time of the act complained of. *Ward* v. *Robins*, 15 M. & W. 237.

To an action for polluting a stream, and impregnating it with noxious substances, whereby the plaintiff's cattle were unable to drink the water, the defendant pleaded an immemorial right to use the water of the stream for the purposes of his trade of a tanner, and returning it polluted to the stream when so used, and also prescriptive rights for twenty and forty years. At the trial, it appeared that the defendant and his father and grandfather had for a long series of years carried on the business of tanners at the place in question, using the water of the stream as they wanted it; but that, within the last twelve years, the tannery business had been considerably enlarged, and the business (and consequently the pollution of the stream) increased fourfold:—Held, that whether the pleas were to be understood as claiming an immemorial or a prescriptive right, not limited to the purposes of the tannery, or the more limited right to use the water for the purposes of the business as carried on more than twenty years ago, the verdict was not warranted by the evidence. *Moore* v. *Webb*, 1 C. B. (N.S.) 673.

A declaration alleged that the plaintiff was reversioner of a house, garden and premises, occupied by his tenant; that the defendant was possessed and in the occupation of a close near to the house; and that there was a watercourse in the close, and the defendant, by reason of his possession of the close, ought to have scoured and kept open the watercourse as often as was necessary, to prevent the water from being obstructed, and from running out of the watercourse, unto, into, and under the house. Breach, that the defendant, during the tenant's occupation, wrongfully permitted the watercourse to be obstructed for want of proper cleansing, insomuch that the water was penned back, and ran into and damaged the house, to the injury of the reversion. Plea, that a wall, parcel of the plaintiff's premises, was situate near to the watercourse and to the defendant's close; and by reason of the wall being, through the neglect of the tenant, ruinous, part of the wall near to the watercourse fell down, and by means thereof rubbish, part of the materials, fell into the watercourse, and the same was thereby choked up as alleged, and the water for a short time unavoidably was penned back, and ran out as in the declaration mentioned. Averment, that the defendant, in a short and reasonable time after he had notice that the watercourse was so choked up, and before action brought, cleansed out the same, so that the water flowed as it ought to do:—Held, that the alleged default of the tenant was no answer, the plea not showing that the owners and occupiers of the estate for the time being were bound to repair the wall which fell. *Bell* v. *Twentyman*, 1 Q. B. 766; 1 G. & D. 223; 10 L. J., Q. B. 278; 6 Jur. 336.

And the defendant could not excuse himself by averring that he repaired as soon as he had notice of the injury, for that he became liable at the time when the injury occurred. *Ib.*

So, if he had alleged that he repaired as soon as possible after the injury. *Ib.*

If a defendant in one plea claims to have water flow in a mill-stream to a ditch at all times, and in another plea claims the right only at the time of flashes, and the jury finds the right in his favour at all times, the judge will discharge the jury as to the claim at the time of flashes. *Drewett* v. *Sheard*, 7 Car. & P. 465.

Replication.]—To an action by a reversioner for widening a channel, the defendant pleaded that A. and all prior occupiers of a mill, whilst such occupiers, had, as of right, for twenty years employed a watercourse, and while such occupiers had for twenty years as of right scoured and amended the channel, when and so often as the same required scouring, as to the mill appertaining. Replication, traversing in the terms of the plea the enjoyment of the watercourse, and the scouring as of right, for twenty years:—Held, that the replication was not bad for duplicity, it being rightly a traverse of one whole quasi prescription alleged in the plea. *Peter* v. *Daniel*, 5 C. B. 568; 5 D. & L. 501; 17 L. J., C. P. 177; 12 Jur. 604.

Evidence.]—In an action for breaking the plaintiff's close and destroying a hatch, the defendant pleaded that the water of the stream ought to have flowed to his mill, and because the hatch prevented its so doing he pulled it down:—Held, that evidence might be given of what a former tenant said as to asking permission to have the water, as this was an act done, and might be proof of an exercise of a right by one side, and an acquiescence in it by the other. *Wakeman* v. *West*, 8 Car. & P. 105.

In an action for breaking flood gates, the defendant justified as lessee of a mill which he held of the bishop of W. For the defendant, old leases of the mill granted by the bishop of W. were produced from the bishop's registry and read in evidence; and it was proposed, on the part of the defendant, to put in an old map of the place in question, also brought from the bishop of W.'s registry. Held, that the map was not admissible in evidence. *S. C.*, 7 Car. & P. 479.

In an action for diverting water from the mill of A., he obtained a verdict; A. and B., afterwards in possession of the mill, brought an action for a similar injury against the same defendants:—Held, that as A. and B. were in possession of the mill formerly in the possession of A., it must be presumed they were privy in estate with him, and that consequently the record was admissible in the second action. *Blakemore* v. *Glamorgan Canal Co.*, 1 Gale, 78; 2 C., M. & R. 133; 5 Tyr. 603; 4 L. J., Ex. 146.

Where the plaintiff claimed the whole bed of a river, flowing between his land and the defendant's, the defendant contending that each was entitled ad medium filum aquæ:—Held, that evidence of acts of ownership exercised by the plaintiff upon the banks of the river, on the defendant's side, lower down the stream, and where it flowed between the plaintiff's land and a farm of C. adjoining the defendant's land; and also of repairs done by the plaintiff, to a fence which divided C.'s farm from the river, and was in continuation of a fence dividing the defendant's land from the river, was admissible for the plaintiff. *Jones* v. *Williams*, 2 M. & W. 326; M. & H. 51; 6 L. J., Ex. 107.

A defendant was owner of a close containing

a well, the water of which had flowed immemorially into an old pond, situate in one of three closes belonging to the plaintiff. The defendant's predecessor of the land having, about 1812, changed the course of the water, whereby it ceased to flow into the old pond as before, the plaintiff made three new ponds, one in each of his three closes, and having conducted the water into them, ceased to use the old pond, which became filled with rubbish and overgrown with grass. In 1843 the defendant diverted the water from the three ponds, whereupon the plaintiff brought his action. The declaration stated, that, at the time of the grievance, three closes of land, and certain, to wit, three ponds filled with water, one pond thereof being in and upon each of the closes respectively, were in the possession and occupation of the plaintiff's tenant; and it then stated the diversion complained of:—Held, that the plaintiff, who had failed to prove a right to the overflow of water into the three ponds, was entitled to give evidence of the immemorial right to the overflow of water into the old pond. *Hale* v. *Oldroyd*, 14 M. & W. 789; 15 L. J., Ex. 4.

—— **Record of Conviction.**]—In an action for disturbing a watercourse, it was proved that the water had flowed in its present course for more than twenty years. The plaintiff had been in the habit of drawing off the water, but on one occasion he had been summoned and fined one shilling, from which he did not appeal:—Held, that the conviction was improperly rejected, as the conviction unappealed against was, under the circumstances, evidence of an acknowledgment by the plaintiff that the usage to draw off the water for irrigation was not as of right. *Eaton* v. *Swansea Waterworks Co.*, 17 Q. B. 267; 20 L. J., Q. B. 482; 15 Jur. 675.

D. WATERWORKS COMPANIES.

1. General Powers.

Taking of Streams—Compensation.]—The 10 & 11 Vict. c. 17, places the taking of streams upon the same footing as the taking of lands under the Lands Clauses Act (8 & 9 Vict. c. 18); and a waterworks company was restrained from diverting a stream belonging to the plaintiff, without first paying compensation for the same, or making deposit and giving a bond in accordance with the provisions of the 8 & 9 Vict. c. 18. *Ferrand* v. *Bradford Corporation*, 21 Beav. 412; 2 Jur. (N.S.) 175.

Company proceeding in mode not Sanctioned by Act—Right of Party having no Interest to Injunction.]—Persons obtaining from the legislature power to interfere with the rights of property are bound strictly to adhere to the powers so conceded to them to do no more than the legislature has sanctioned, and to proceed only in the mode which the legislature has pointed out; but (except in a proceeding at the instance of the attorney-general) any one seeking the assistance of a court of equity, to restrain the violation of such a contract with the legislature, is bound to show that he has a private interest in the matter. Therefore where a waterworks act empowered a company to divert the water of a stream (without limit as to quantity), by means of an open channel filled with loose stones, and they were diverting it by means of a culvert:—Held, that another company, which was entitled to the water of a stream into which the diverted stream had flowed, was not entitled to an injunction to restrain a violation of the terms of the act as to the mode of diversion. *Liverpool Corporation* v. *Chorley Waterworks Co.*, 2 De G. M. & G. 852.

Injunction to restrain Company from applying for New Act.]—An injunction to restrain the Grand Junction Waterworks Company from applying to parliament for an act authorising the company to procure its supply of water by means of an aqueduct from the river Colne, instead of the Thames, as authorised by the existing acts under which it was incorporated, was refused. *Ware* v. *Grand Junction Water Co.*, 2 Russ. & M. 470.

A court of equity will not, at the instance of a shareholder, restrain a joint-stock company, incorporated by act of parliament, which prescribes its constitution and objects, from applying in its corporate capacity to parliament and from using its corporate seal and resources to obtain the sanction of the legislature to the remodelling of its constitution, or to a material alteration and extension of its object and powers. *Ib.*

—— **Rights of Duke of Cornwall.**]—By an act a company had power to take water from the river Chew on paying compensation for it; but it was enacted that it should not be lawful for the company to divert, or take, or in any manner interfere with water flowing or passing, or which, but for the powers of the act, might flow or pass into the river Chew, unless and until the water, after the rate of twelve cubic feet per second for twelve hours for each and every day, should be passing down the river from and out of reservoirs for the use of mills. By a subsequent act it was provided that nothing in that act or the present act should extend to authorise the company to purchase, take, use or interfere with any land, soil or water, or any rights in respect thereof, belonging to the Duke of Cornwall, without his written consent:—Held, that the company did not by the exercise of the powers conferred by the first act, acquire any right as against the Duke of Cornwall to the water of the Chew, without obtaining the authority of the Duke of Cornwall in the manner provided for by the last act. *Att.-Gen. (Prince of Wales)* v. *Bristol Waterworks Co.*, 10 Ex. 884; 3 C. L. R. 726; 24 L. J., Ex. 205.

Taking of Lands—Waterworks Clauses Act.]—The meaning of the Waterworks Clauses Act, 1847, s. 12, is, that subject to a company having authority to take lands and construct works, then, if the company has power and space and room enough in the land which they are authorised to take to afford them an area for additional works, they may be empowered to make the collateral and auxiliary works referred to in the section. *Simpson* v. *South Staffordshire Waterworks Co.*, 4 De G. J. & S. 679; 34 L. J., Ch. 380; 11 Jur. (N.S.) 453; 13 W. R. 729.

—— **Limitation to Plans.**]—A waterworks company, before applying to parliament, deposited plans, showing that a certain field would be affected by a tunnel passing forty-five feet below the surface, and gave a notice to the

owner accordingly. The company obtained its act, authorising it to construct its works according to the plans, and afterwards proposed to take the field, sink a well, and erect pumping machinery thereon:—Held, that the company could not, by the exercise of its compulsory powers, take any portion of the field, other than so much as was required for the tunnel. *Ib.*

Breaking up Roads for Works.]—Under s. 31 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), it is incumbent upon the undertakers intending to break up a road to communicate beforehand their proposed plan or method of executing the work to the road authority; and this in a sufficient manner to enable the road authority to judge whether what is proposed ought to be done without modification. If the plan is not approved of by the road authority, it rests with the undertakers to apply for the determination of two justices before proceeding to operations. *Edgware Highway Board* v. *Colne Valley Water Co.*, 46 L. J., Ch. 889.

The "plan" referred to in s. 31 of the Waterworks Clauses Act, 1847, which enacts that no street shall be opened or broken up by a water company, except according to such "plan" as shall be approved of by the local road authority, means a plan showing whereabouts in the street, both as regards depth and lateral position, the water pipes are proposed to be laid. *East Moulsey Local Board* v. *Lambeth Waterworks Co.*, 62 L. J., Ch. 82; [1892] 3 Ch. 289; 2 R. 88; 67 L. T. 493—C. A.

When a water company gives notice to the local authority of its intention to open and break up the street for the purpose of laying down water pipes, and submits such a plan as above mentioned to the local authority, if the latter do not propose anything themselves so as to create a "difference" which under the same section can be referred to the justices, and do not attend with their officer at the time fixed for the opening and breaking up of the street to superintend it, then the water company may perform the work without the superintendence of the local board or their officer. *Edgware Highway Board* v. *Colne Valley Waterworks Co.* (46 L. J., Ch. 889) discussed and approved. *Ib.*

—— **Local Authority having Control of Streets generally and Power to Supply Water—Power to Break up Private Road without Owner's Consent.**]—A private road is a "street" within the meaning of ss. 16 and 54 of the Public Health Act, 1875. The words "where the local authority have not the control of the streets," in s. 57 of the Public Health Act, 1875, are descriptive of and mean a local authority not having the control of the streets generally in its district—i.e., a local authority which is not the road authority. *Hill* v. *Wallasey Local Board*, 63 L. J., Ch. 1; [1894] 1 Ch. 133; 7 R. 51; 69 L. T. 641; 42 W. R. 81—C. A.

The defendants, who had the powers of an urban sanitary authority with respect to the W. district, and the control of the streets generally in that district, and also the power of supplying the inhabitants with water, proceeded, without the plaintiff's consent, to break up a private road belonging to the plaintiff, which was situate within their district, for the purpose of laying down water mains:—Held (A. L. Smith, L.J., dissenting), that s. 57 of the Public Health Act, 1875, incorporating s. 29 of the Waterworks Clauses Act, 1847, which forbids the laying down of any pipe in any private land without the consent of the owner, did not apply to the defendants, as they were a local authority having the control of the streets generally in their district; that under ss. 16 and 54 of the Public Health Act, 1875, the defendants, as the local authority, had the power to carry the water mains through the plaintiff's private road without his consent; and, consequently, that the plaintiff was not entitled to an injunction. *Ib.*

—— **By Owner or Occupier—Liability for.**]—By 10 & 11 Vict. c. 17, s. 52, the owner or occupier, defined in s. 48, is empowered to break up so much of the pavement of any street as is between the main of the waterworks company and his premises, to effect a communication therewith, and such communication is to be made under the superintendence of an officer of the company. Where an owner, acting under this power, opened a street to lay a service-pipe, and carelessly filled up the hole, and the connection with the main was, at the same time, effected by a waterworks company:—Held, that the owner, and not the company, was responsible for reinstating the street, and that the word "pavement" in s. 52 was not confined to a foot pavement. *Glover* v. *East London Waterworks Co.*, 17 L. T. 475; 16 W. R. 310.

Placing Works on Surface — Stop-valves in Footway.]—Section 28 of the Waterworks Clauses Act, 1847, provides that the undertakers may open and break up the soil and pavement of streets within their district and lay down and place pipes, conduits, service pipes, and other works and engines, and do all other acts which they shall from time to time deem necessary for supplying water to the inhabitants of the district. Section 32 of the same act provides that, when the undertakers open or break up the road or pavement of any street they shall, with all convenient speed, complete the work for which the same shall be broken up and fill in the ground and reinstate and make good the road or pavement so opened or broken up:—Held, that the power given by s. 28 includes any works which the undertakers may deem necessary for the purpose of regulating the supply of water, and is not confined to the laying down of apparatus underground, but enables the undertakers to place such works on the surface of the street as may not be inconsistent with the substantial reinstatement of the road or pavement in its previous condition or create a nuisance; and therefore that a water company was authorised by the section to place in the pavement of a street covers or guard-boxes to protect stop-valves placed for the purpose of regulating the supply of water in the communication pipes, by which water was supplied to premises in the street, such covers or guard-boxes not creating a nuisance or being inconsistent with the substantial reinstatement of the pavement. *East London Waterworks Co.* v. *St. Matthew, Bethnal Green*, 55 L. J., Q. B. 571; 17 Q. B. D. 475; 54 L. T. 919; 35 W. R. 37; 50 J. P. 820—C. A. See also *Preston Corporation* v. *Fullwood Local Board*, 53 L. T. 718; 34 W. R. 196; 50 J. P. 228.

Laying down Pipes—Limits of Act.]—An act for supplying with water the town and port of C. and the neighbourhood, after reciting that

the town of C. and the neighbourhood were insufficiently supplied with water, incorporated a company, and gave it the usual powers, and enacted that the limits of the act for the supply of water should comprise "the whole of the town and port of C., and the parishes and places within and adjoining to such town":—Held, that the word "port" was used in its popular sense, and did not extend to the district fixed by the commissioners of the treasury as the port of C. for the purposes of the customs duties. *Cardiff Corporation* v. *Cardiff Waterworks Co.*, 5 Jur. (N.S.) 953; 7 W. R. 386.

The company was proceeding to lay down pipes, which they alleged were necessary for the supply of C., but which they admitted they intended to use for the purpose of carrying water beyond the limits of their powers. At the suit of the board of health of C., the court restrained the company from laying down pipes under the streets of C. for the purpose of supplying with water any parish or place not being part of the port of C., or any parish or place within or adjoining such town. *Ib.*

—— **After Expiration of Period for Completion of Works — "Extension of Works."**]—Semble, where under a special waterworks act, incorporating the Waterworks Clauses Act, 1847, a water company has, within the period fixed by the special act for the completion of the works, laid down a water-main in a road within the limits of the act according to deposited plans and sections, the company may, after the expiration of the period, lay down a second main, having regard to s. 28 of the general act, and particularly where the special act gives them power to "extend, enlarge, or alter any of their mains or pipes at any time, and from time to time as occasion may require, for the purpose of supplying the inhabitants within the limits of the act with water"; provided the company complies with the requirements of the special and general act, as to notice and otherwise, before breaking up the road for the purpose. *East Moulsey Local Board* v. *Lambeth Waterworks Co.*, 62 L. J., Ch. 82; [1892] 3 Ch. 289; 2 R. 88; 67 L. T. 493—C. A.

—— **Right to lay Pipes through Structure of Railway Bridge—Waterworks Clauses Act, 1847.**]—Section 28 of the Waterworks Clauses Act, 1847, provides that persons authorised by the act to construct waterworks "may open and break up the soil and pavement of the several streets and bridges within the limits of the special act . . . and for the purposes aforesaid remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits." Section 29 provides that "nothing herein contained shall authorise or empower the undertakers to lay down or place any pipe, conduit, or other work in any land not dedicated to public use without the consent of the owners or occupiers thereof":—Held, that where a railway company had constructed an iron bridge to carry a public road over their line, the water authority of a town were not justified in interfering with the structure of the bridge by carrying their pipe through the iron girders which supported the bridge, as the structure could not in any sense be said to be land dedicated to the public use. *Glasgow Corporation* v. *Glasgow and South-Western Ry.*, 64 L. J., P. C. 171; [1895] A. C. 376; 11 R. 226; 72 L. T. 809; 59 J. P. 788—H. L. (Sc.)

Construction of Works by Local Authority —Necessary Notices.]—The Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 75, is not materially extended by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 52, and therefore a local authority, desiring to construct waterworks, and having, before the passing of the latter act, given the notices required by s. 75 of the former act, is not, in consequence of the passing of the latter act, required to give the notices under s. 52 of that act. *Richmond Waterworks Co. and the Southwark and Vauxhall Waterworks Co.* v. *Richmond Vestry*, 45 L. J., Ch. 441; 3 Ch. D. 82; 34 L. T. 480.

Where prior to the incorporation of a local water company, the local authority had substantial waterworks in existence, additions to or alterations of such works can be made by the local authority without giving the water company notice under s. 52 of the Public Health Act, 1875. The words "before commencing to construct waterworks" in s. 52, mean new waterworks in a fair and reasonable sense of the term, and do not apply to improvements of or additions to existing waterworks. *Cleveland Water Co.* v. *Redcar Local Board*, 64 L. J., Ch. 64; [1895] 1 Ch. 168; 13 R. 18; 43 W. R. 90; 59 J. P. 7.

Duty to fix proper Fire-plugs in Mains.]—Section 38 of the Waterworks Clauses Act, 1847, imposes no duty on the undertakers to provide a pipe of sufficient capacity to carry a proper fire-plug in a place where their existing pipe is sufficient for that purpose, although, in the opinion of the justices empowered by the section to settle the proper position of the fire-plugs in the district, it is, as a fact, essential that a fire-plug should be placed there. *Reg.* v. *Wells Water Co.*, 55 L. T. 188; 51 J. P. 135.

Fire-plug fixed by Waterworks Company—Local Authority — "Request" — Constructive Request by User of Fire-plugs.] — Though s. 66 of the Public Health Act, 1875, makes it the duty of the urban authority to provide proper fire-plugs in their district, it does not impose upon them any statutory obligation to pay for fire-plugs erected by a waterworks company without a previous request from the urban authority; and a "request" by such authority, within the meaning of s. 38 of the Waterworks Clauses Act, 1847, cannot be implied from the fact that the urban authority have used fire-plugs erected within their district by a waterworks company, and that such plugs comply with the requirements of that section. *Grand Junction Waterworks Co.* v. *Brentford Local Board*, 63 L. J., Q. B. 717; [1894] 2 Q. B. 735; 9 R. 788; 71 L. T. 240; 59 J. P. 51—C. A.

Employment of Engineer.]—A company was incorporated for supplying a town with water. The act fixed the share capital of the company at 15,000*l.*, and defined the area from which the water was to be supplied. Some years after the works were completed the committee of management of the company, in consequence of complaints of the defective supply, resolved, with the sanction of the shareholders, to apply to parliament for power to make fresh works, so as to

include a largely extended area, both in respect of the sources and the supply of water, with a large additional capital; and having power to enter into contracts on behalf of the company, employed an engineer to prepare the necessary parliamentary plans:—Held, that the employment of the engineer for the above purpose was not ultra vires, and (the contract being in other respects valid) that he was entitled to recover as for work and labour from the defendant, who had (by another statute) become liable to pay the debts and perform the agreements of the company. *Bateman* v. *Ashton-under-Lyne Corporation*, 3 H. & N. 323; 27 L. J., Ex. 458; 6 W. R. 829.

Right of New Company to Purchase from Old—Payment for Share Capital.]—By a deed executed in 1857, in pursuance of a preliminary agreement and an act of parliament confirming the same, certain waterworks and property were transferred by an old company to a new company, upon certain terms, under which the latter was to pay to the former a rent equal to interest upon the share capital of the former at five per cent., with a clause for reducing the rate of interest to 4½ per cent. in certain events. The deed contained a proviso that, if the transferee desirous of becoming absolute owner of the works "should on or before any 25th day of December, after having given to the old company six calendar months' previous notice of its desire to avail itself of the option thereby given, pay unto the old company" the amount of its share capital, the party making such payments should thereupon become entitled to the works freed from the rent thereby reserved. Notice to purchase was given in due course, but the money was not paid at the time specified in the notice:—Held, that the right to purchase had not been lost by the non-payment of the money. *Ward* v. *Wolverhampton Waterworks Co.*, 41 L. J., Ch. 308; L. R. 13 Eq. 243; 25 L. T. 487; 20 W. R. 85.

Alleged Right to Supply Water—Infringement—Injunction.]—Plaintiff, through several mesne assignments, being in possession of a right, originally in the city of London, of supplying Southwark with water, prayed injunction to restrain defendant from encroaching on this right by raising engines, laying pipes, &c. Defendant demurred to bill, for that plaintiff ought first to have established his right at law; demurrer allowed. *Whitchurch* v. *Hide*, 2 Atk. 391.

Sale to Local Authority under Statutory Provision—"Mains, Pipes, and Fittings"—Principle of Valuation.]—Under a local act of parliament a water board was required to sell to a sanitary authority "all mains, pipes, and fittings" belonging to the board within the district of the sanitary authority at a price to be fixed by arbitration; and after such sale the board was to cease to supply water within the district:—Held that the price to be paid to the board by the sanitary authority was to be arrived at by a calculation of the value of the mains, pipes, and fittings regarded as plant in situ capable of earning a profit, and that the arbitrator was not entitled to take into consideration the loss of the revenue accruing to the board by reason of the supply of water to the district by means of those mains, pipes, and fittings. *Stockton and Middlesbrough Water Board* v. *Kirkleatham Local Board*, 63 L. J., Q. B. 56; [1893] A. C. 444; 1 R. 288; 69 L. T. 661; 57 J. P. 772—H. L. (E.)

Shares in Company—Nature of.]—Though shares in waterworks are a legal estate and a corporeal inheritance, yet no one proprietor can receive the profits himself, and as there is no other way to get at it, it is proper to come into this court for mesne profits. *Townsend* v. *Ash*, 3 Atk. 337.

See further, LOCAL GOVERNMENT.

2. LIABILITY.

a. Compensation.

For Abstraction or Diversion of Water—In what Cases.]—The abstraction by a waterworks company of water from a stream does not entitle a riparian proprietor below to require the company to treat under the Waterworks Clauses Act, 1847, s. 6, for the purchase of his interest in the stream, but entitles him only to compensation as for land injuriously affected. *Bush* v. *Trowbridge Water Co.*, 44 L. J., Ch. 645; L. R. 10 Ch. 459; 33 L. T. 137; 23 W. R. 641.

—— **Interests injuriously affected—Award—Apparent ambiguity.**]—The appellant granted to D. certain mills on a stream forming the outlet to two lochs nearly surrounded by his property, with his "whole rights of water and water-power connected with the said mills"; "reserving" all his "rights in the lochs" and stream "except the rights therein connected with the mills." The storage capacity of the lochs had been increased by embankments made within the appellant's ground. The respondents, who were waterworks commissioners under a special act, acquired by agreement the rights of D. in the water, and under their compulsory powers took from the appellant a small piece of ground and a wayleave for a pipe, which they inserted in the stream and diverted the waters of the lochs to supply a town. Sect. 9 of the special act provided that a certain quantity of water sent down the stream daily should be held to be a sufficient compensation to the mill-owners and others. Sect. 10 reserved, inter alia, any rights the appellant had in Loch Humphrey. In a claim for compensation the arbitrator found the appellant entitled (1) to 50*l.* for the land and wayleave; and (2) "In the event of it being determined that the appellant had retained any right or interest in the waters of the lochs and the streams or any of them, and that he is now entitled to compensation in respect of such right or interest, I find 3,000*l.* to be the amount to be paid" in respect of the right or interest to be acquired from the appellant "in the aforesaid waters and the embankments" at the lochs, including in the said sum of 3,000*l.* the sum of 1,650*l.* as the estimated price or value of the embankments:—Held, that the award was valid, inasmuch as the arbitrator had valued only one thing, the enhanced value of the water in the lochs, and had not valued, as a separate subject, the embankments, but had properly included in the 3,000*l.*, as a factor of value, the incidental rights obtained by the respondents to have the embankments left standing. *Blantyre* (*Lord*) v. *Babtie*, 13 App. Cas. 631—H. L. (Sc.)

—— **When no Action Lies.**]—By 10 & 11 Vict. c. 17, s. 12, powers for the execution of

certain works are given, and it is provided that the undertakers shall make full compensation to all parties interested for all damages sustained by them through the exercise of such powers. In the execution of works authorised by a local act, incorporating that section, A. intercepted water which would otherwise have percolated through the strata of earth into a well upon the premises of B., and drained off water which had accumulated in the well. Upon a complaint by B., before justices, in order to recover compensation for the damage she had sustained, A. was ordered to pay her a sum of money and costs:—Held, that this order was wrong; for that, inasmuch as no action would lie against A. in respect of either quantity of water, supposing no act authorising the execution of the works, had been passed, the claim for compensation could not be sustained. *New River Co.* v. *Johnson*, 2 El. & El. 435; 29 L. J., M. C. 93; 6 Jur. (N.S.) 374; 1 L. T. 295; 8 W. R. 179.

Purchasable Interest—What is.]—A corporation under its local waterworks act, with which were incorporated the Lands Clauses Act, 1845, and the Waterworks Clauses Act, 1847, was empowered to purchase, enter upon, take, use, divert and appropriate certain streams, one of which, arising at a distance, came down to and turned a mill, of which plaintiff was tenant for life. The corporation gave the owner notice of their intention to take and divert the whole of the stream, and actually diverted part. In pursuance of an agreement made between the parties, two valuers were appointed (in accordance with s. 9 of the Lands Clauses Act, 1845), to assess the compensation to be paid in respect of the damage, both present and future, caused by the abstraction of the whole of the stream. The valuers disagreed, and a third valuer was appointed by justices, with the consent of both parties, who awarded "the sum of 939*l.* 5*s.* as the compensation money to be paid by the corporation for the permanent damage and injury which the owner or owners for the time being of the above-mentioned mill, lands, and premises, may have sustained, or shall or may sustain, by the abstraction of the whole of the stream." In an action on this award, claiming a mandamus to the corporation to pay the money into the bank:—Held, that the interest of the owner and his remainderman was a purchasable interest, within the meaning of the special act and the acts incorporated with it, and that it was competent to the corporation to pay for the whole stream at once, though they had only diverted part. *Stone* v. *Yeovil Corporation*, 46 L. J., C. P. 137; 2 C. P. D. 99; 36 L. T. 279; 25 W. R. 240—C. A.

Held, also, that the parties proceeded rightly under s. 9 of the Lands Clauses Act, and that that section applies not only to cases where lands in the occupation of a tenant for life are purchased and taken, but also to cases of compensation for permanent injury to such lands, the words "such lands" in that clause being equivalent to "lands so occupied." *Ib.*

Held, also, that the agreement between the parties amounted to a binding agreement, on the part of plaintiff to accept, and on the part of the corporation to pay, the sum assessed by the two valuers, or in case of disagreement, by the third valuer. *Ib.*

Damage by Severance of Minerals.]—When a corporation was under an act empowered to make a conduit for water through a field at some distance below the surface:—Held, that it was not necessary for it to make compensation for damage by severance of minerals where it was not required by the provisions of the Waterworks Clauses Act, 1847, to purchase them. *Huddersfield Corporation and Jacomb, In re*, 43 L. J., Ch. 748; L. R. 17 Eq. 476; 30 L. T. 78. Affirmed, 44 L. J., Ch. 96; L. R. 10 Ch. 92; 31 L. T. 466; 23 W. R. 100.

Mines—Prospective Prevention of Working through Leakage.]—Under the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), compensation for the prospective prevention of the working of a mine by reason of leakage from a reservoir cannot be awarded at any time before the working has approached the limits mentioned in s. 22. *Holliday* v. *Wakefield Corporation*, 60 L. J., Q. B. 361; [1891] A. C. 81; 64 L. T. 1; 40 W. R. 129; 55 J. P. 325—H. L. (E.)

b. Injuries Due to Defective Works.

Action for Damages—When Allowed—Arbitration.]—A provisional committee of a waterworks company agreed with B., on his withdrawing his opposition to their bill in parliament, to purchase lands for their works at a fixed sum per acre, including damage for severance, and in addition to pay for any damage he should sustain from the water of the company being near his house or dwelling, and also to make good to him or his tenants all loss or damage which the erection of the intended works might cause to any property belonging to or in the occupation of him or them which the company might not purchase (except damage occasioned by severance), whether caused by the order or neglect of the company, the damage in all these cases to be assessed by arbitrators. The act was obtained, and it incorporated the lands clauses act; and the purchase money was paid, and the compensation money under the above heads was ascertained by the arbitrators and paid to B. He subsequently brought an action against the company, claiming damages for taking so little care of a reservoir that the water oozed out over his land, causing offensive smells and vapours, and rendering his buildings damp and unwholesome, and permanently injuring their value, and for obstructing a drain, and thereby penning back the sewage of his house, so that it could not flow away by means of the drain as it ought; and further, that by reason of making the reservoir and works authorised to be made by the act, a drain whereby his adjoining house and lands were drained, was interrupted and rendered useless, and the company neglected to substitute another drain according to their duty, whereby his house and lands were insufficiently drained; and also for cutting a channel across, and thereby, and also, by means of the reservoir and works, depriving him of the use of an agricultural road, forming a communication between his lands, and for not substituting another road in lieu of it; and also by the reservoir and works obstructing a public footpath, and depriving him of the use of it, and thereby causing him particular damage and inconvenience:—Held, first, that the action was maintainable, the damages claimed not being those directed by act of parliament to be settled by arbitration, or such as were contemplated by or within the scope of the previous agree-

ment between the parties. *Blagrave* v. *Bristol Waterworks Co.*, 1 H. & N. 369; 26 L. J., Ex. 57.

—— **Notice of Injury.**]—Held, secondly, that with respect to the right of action for the damage occasioned by the interruption of the drain and non-substitution of another, it was immaterial that the company had no notice that the interrupted drain was for the drainage of the house, or that he required another substituted drain; and so also with respect to the interruption and non-substitution of the occupation-road, that it was no answer that he had not required any way to be substituted. *Ib.*

—— **Nature of Injury.**]—Held, thirdly, that a claim against the company for wrongfully and maliciously raising the level of the water of a stream so as to prevent its flowing at its accustomed speed at the place where it arrived at B.'s lands, might be a loss or damage caused by the erection of the works, which by the agreement was to be assessed by arbitration. *Ib.*

—— **Fraudulent Representation to Arbitrators.**]—A count alleged that B. and the company referred to arbitration the amount of compensation to be paid for the damage which he should sustain by the construction of a reservoir near his house and lands, for which damage the company would have been bound to compensate him, and that the amount of compensation depended in part upon the height to which the reservoir would be constructed; and that the company wrongfully, maliciously and fraudulently caused it to be represented to the arbitrators that they intended to construct the reservoir to the height of thirty feet, whereas they either had not determined on the height, or intended to construct it to a greater height, and did afterwards so construct it, by reason of which representation the arbitrators awarded to B. much less compensation than they otherwise would have done:—Held, that the count disclosed no cause of action. *Ib.*

—— **Remoteness of Damage.**]—A waterworks company under its act laid down one of its mains along and under a turnpike road, made under an act which declared the soil to be in the owners of the adjoining land, subject only to the right to use and maintain the road. K. was owner of land on both sides, at a spot where the road was carried across a valley on an embankment, and wanting to connect his land on either side he employed C., at an agreed sum, to make a tunnel under the road. In doing the work it was discovered that there was a leak in the main of the company higher up the road, and on C. digging out the earth, the water from the leak flowed down upon the work and delayed it, so as to cause pecuniary damage to C., for which he brought an action against the company:—Held, that, assuming K. could have maintained an action against the company for injury to his property, the damage sustained by C. by reason of his contract with K. becoming less profitable, or a losing contract, in consequence of the injury to K.'s property, gave him no right of action against the company. *Cattle* v. *Stockton Waterworks Co.*, 44 L. J., Q. B. 129; L. R. 10 Q. B. 453; 33 L. T. 475.

—— **Indictable Nuisance.**]—The tunnel was formed by digging through half the width of the road, forming the tunnel, and then completing the other half in the same way. Before commencing the work K. obtained the consent of the road surveyor and the trustee:—Held, assuming K. could, under the circumstances, have been indicted for the nuisance to the high road, the partial obstruction to the highway did not render the whole proceeding so illegal as to prevent C., who was engaged in it, from recovering damages for a wrong. *Ib.*

—— **Stop-cock Box—Aperture uncovered—Nuisance.**]—A water company laid a communication pipe from their main to the consumer's house with a stop-cock and box in the road; this box was left uncovered, by reason of which a passer-by was injured. Evidence was given at the time that the aperture was dangerous to passers-by, but the judge nonsuited the plaintiff on the ground that the property in the box was in the consumer, and that the consumer was bound to repair it:—Held, that there was evidence of negligence on the defendant's part, and that the nonsuit was wrong. *Strute* v. *Southwark and Vauxhall Water Co.*, 53 J. P. 424.

—— **Guard to Stop-cock in Service Pipe, Liability to Repair.**]—Where a water company alone has a statutory power to break up streets and repair service-pipes and the apparatus connected therewith, a duty is cast on the company to keep in repair the apparatus in the street, and it is liable to a passer-by for injuries resulting from non-repair, even though the service-pipes and apparatus were laid by the company at the request and expense of the householder. *Chapman* v. *Fylde Waterworks Co.*, 64 L. J., Q. B. 15; [1894] 2 Q. B. 599; 9 R. 582; 71 L. T. 539; 43 W. R. 1; 59 J. P. 5—C. A.

—— **Fire-plug placed in Street—Duty to Keep in Repair.**]—A fire-plug had been lawfully fixed in a highway by the defendants. Originally the top of the fire-plug had been level with the pavement of the highway, but in consequence of the ordinary wearing away of the highway the fire-plug projected half an inch above the level of the pavement. The fire-plug itself was in perfect repair. The plaintiff, whilst passing along the highway, fell over the fire-plug and was hurt:—Held, that, as the fire-plug was in good repair, and had been lawfully fixed in the highway, no action by the plaintiff would lie against the defendants. *Kent* v. *Worthing Local Board* (10 Q. B. D. 118) commented on. *Moore* v. *Lambeth Waterworks Co.*, 55 L. J., Q. B. 304; 17 Q. B. D. 462; 55 L. T. 309; 34 W. R. 559; 50 J. P. 756—C. A.

c. Escape of Water.

When no Negligence.]—A water company having observed the direction of the act of parliament in laying down their pipes is not responsible for an escape of water from them not caused by their own negligence. *Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 781; 25 L. J., Ex. 212; 2 Jur. (N.S.) 333.

The fact that their precautions proved insufficient against the effects of a winter of extreme coldness, such as no man could have foreseen, is not sufficient to render them liable for negligence. *Ib.*

A main belonging to a waterworks company burst, and the water flooded the plaintiffs' premises, causing considerable damage:—Held,

that the company being authorised by act of parliament to lay the main, and having been guilty of no negligence, were not liable in damages to the plaintiffs. *Green* v. *Chelsea Waterworks Co.*, 70 L. T. 547—C. A.

—— **Damage to Lands by extraordinary Flood —Damnum fatale.**]—By s. 43 of the Kirkcaldy and Dysart Waterworks Act, 1867, it was provided that the commissioners under the act, "should be bound to make good to the Countess of Rothes and her heirs, &c., all damage which may be occasioned to her or them, by reason of or in consequence of any bursting. or flow, or escape of water from any reservoir, or aqueduct, or pipe, or other work connected therewith" which may be constructed by the commissioners. The countess is proprietrix of lands situated below the site of one of the reservoirs, and during an extraordinary rainfall a great quantity of water was continuously discharged from the reservoir, through a waste weir into the watercourse of a burn, and did much damage to the countess's lands. She claimed compensation. There was no failure or insufficiency of the works and no negligence:—Held, reversing the decision of the court below (Lord Blackburn dissenting), that on the construction of the above clause the countess was entitled to compensation for damage by flood waters from the reservoir, no matter how caused. *Rothes (Countess)* v. *Kirkcaldy Waterworks Commissioners*, 7 App. Cas. 694—H. L. (Sc.)

Per Lord Watson: Statutory provisions, such as here, in a local and personal act must be regarded as a contract between the parties, whether made by their mutual agreement, or forced on them by the legislature. *Ib.*

Absence of Reasonable Care—Evidence of.]—Although a water company is not liable for the unforeseen results of an extraordinary frost, yet the company is bound to take reasonable care to provide against the consequences of ordinary frost. *Steggles* v. *New River Co.*, 11 W. R. 234. Affirmed, 13 W. R. 413—Ex. Ch.

Where it was known that the effect of frost would be to cause the plugs in the water pipes to start, and thus to let the water out at the side, and some precautions might have been taken, if not to prevent this, at all events to prevent the water from escaping through the soil, and no such precautions having been taken, the plugs started in a frost of extraordinary severity, and the water, thus escaping. ran through the soil into a cellar:—Held, that there was some evidence of negligence on which a jury might hold the company liable. *Ib.*

Obligation to Cleanse Channel of River.]—A company was authorised by its special act to construct a reservoir, to divert into it the water of the River Muddock and of other streams, and from the reservoir to supply through the channel of the Muddock sufficient water to enable the mills on the river Bann to be worked at all seasons of the year; and these works it executed without negligence, and in the due exercise of its parliamentary powers. In consequence of these works, the channel of the Muddock passing near the plaintiff's land became choked, and, for want of cleansing, incapable of discharging the increased volume of water so sent through it, and the plaintiff's land was thereby flooded and injured:—Held, that there was an obligation on the company to cleanse the channel of the river. *Geddis* v. *Bann Reservoir Co.*, 3 App. Cas. 430—H. L. (Ir.)

d. Pollution of Water.

Not within Statutory Powers—Liability for.]—A waterworks company was authorised by its private act to take and use the water of certain springs which supplied a river upon the banks of which certain mills were situate. The act provided that the company should not abstract more than a certain amount of water before it had constructed a compensation reservoir for storing the water during floods for the benefit of the mill-owners. The act gave the company compulsory powers for acquiring land, streams and springs for its undertaking, and powers to acquire by consent lands for constructing its compensation reservoir. The act contained a reservation of the rights of the owners and occupiers of any lands, mills or works, to the use of the waters of the stream, except so far as provided and declared by the act. The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), was incorporated with this act. The company constructed a compensation reservoir, and a subsequent act of parliament which gave it further powers, including powers of emptying and cleansing the reservoir, recognised this reservoir as a sufficient compensation reservoir for the mill-owners, and directed it to be maintained. The owner of some dye works situate on the river below the reservoir filed a bill against the company, complaining that the effect of the reservoir was to make the water of the river more muddy than it was before its construction, and to render it unfit for the process of dyeing, and praying for an injunction to restrain the company from fouling the stream. These allegations being in the judgment of the court established:—Held, that the acts gave the company no power to foul the water; that the compensation clauses in the Waterworks Act, 1847, did not apply, inasmuch as the injury was such as the company was not authorised to commit; and that the owner of the dye works was entitled to an injunction. *Clowes* v. *Staffordshire Potteries Waterworks Co.*, 42 L. J., Ch. 107; L. R. 8 Ch. 125; 27 L. T. 521; 21 W. R. 32.

—— **Assessment of Damages.**]—The plaintiff was owner of two dye works, which were situate upon the banks of a river, and had carried on flourishing businesses until the construction of a reservoir by the defendants higher up the river. The consequence of the construction of the reservoir was that a deposit of mud was formed at the bottom of it, which, escaping into the river, so fouled it that the water became unfit for use in the plaintiff's works, and the business consequently fell off, until the plaintiff was obliged to sell the works very much below their former value. The plaintiff brought an action, and the judge at the trial directed the jury to find a verdict for the plaintiff, and the jury awarded 400*l.* for damages and 1,000*l.* for the depreciation of the property. On motion for a new trial:—Held, that the plaintiff was not entitled to recover anything for the depreciation of his property, and that the rule must be made absolute for a new trial, unless he would consent to reduce his damages to the 400*l.* lawfully recoverable. *Tatton* v. *Staffordshire Potteries Waterworks Co.*, 44 J. P. 106.

e. Rates.

See RATES AND RATING.

3. RIGHTS AGAINST OTHER PERSONS.

User and Diversion of Water.]—A waterworks company purchased a mill on the upper part of a stream, and thereby became riparian owners. They collected the water from the stream into a reservoir and applied it for the purpose of supplying a neighbouring town with water. A canal company being the riparian owners lower down the stream, finding their flow of water affected, brought a suit for an injunction, and the waterworks company by their pleadings claimed the right to use the water in the manner complained of:—Held, that such user of the water by them was neither a user in connection with the tenement of the waterworks company, nor a reasonable user such as an upper riparian owner had a right to make, and that the canal company was entitled to an injunction to restrain such user of the water. *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, 45 L. J., Ch. 638; L. R. 7 H. L. 697; 33 L. T. 513; 24 W. R. 284.

A canal company was established by acts of parliament which gave them the right of taking water from streams within the distance of 2,000 yards, for the purpose of making and maintaining their canal. They purchased a mill on the stream in question, and so became riparian owners. They afterwards ceased to use the mill:—Held, that by the purchase of the mill they acquired all the rights incident thereto, in the same way as such rights would have been acquired by a private individual, and not fettered or restricted within the limits of their statutory powers as a canal company. *Ib.*

A water company, who were authorised in 1869 by their act to make a reservoir with a dam across a stream, and to impound all the waters of that stream and of other streams then flowing into that stream above the dam, and so became owners of the reservoir through the site of which the stream originally flowed, have the right to stop any person from diverting the water, which at that time came down, or but for a stoppage would come down as part of that stream or its tributaries above the dam, and as to which the person diverting could have been restrained from continuing his diversion at the suit of a lower riparian owner, but not to stop any person using water above who had a right to do so at the time their act was passed. *Brymbo Water Co.* v. *Lesters Lime Co.*, 8 R. 329.

A person who makes an artificial cutting, and so brings water to a stream which did not go there before, can prima facie cut it off if he chooses. *Ib.*

——**Right to Percolating Water—Construction of Company's Act.**]—Where a statute provides that it shall be unlawful for a person other than a company authorised to supply water to a town "to divert, alter, or appropriate in any manner other than by law they may be legally entitled," water flowing from particular springs, and declares that, in the event of any person so doing, and failing to restore the springs on receiving notice from the company, he shall be liable to a fine of 5*l.* for each day until restoration is made; the object of the statute is to give protection to the supply of water acquired by the company, and not to prevent a neighbouring landowner from making a legitimate use of water running upon or percolating through his land before it reaches the company's supply, and becomes part of their undertaking. *Chasemore* v. *Richards* (7 H. L. Cas. 349) discussed. *Bradford Corporation* v. *Pickles*, 64 L. J., Ch. 759; [1895] A. C. 587; 11 R. 286; 73 L. T. 353; 44 W. R. 190; 60 J. P. 3—H. L. (E.)

A local act authorised a company to enter upon lands within a manor, and to dig and search for any spring of water, and to convey the water from such springs into a town for the use of the inhabitants of the town and the shipping in the harbour. It provided that the company should not take the water from any spring, streams or ponds, so as to deprive the occupiers of the lands of water for their own necessary uses, and for the cattle depasturing therein. The company had power to lay down pipes, and the inhabitants, with the consent of the company, might obtain the water by pipes, to communicate with the company's pipes at certain charges, according to the bore of the pipes:—Held, that the owners or occupiers of lands within the manor were not prevented by the act from sinking wells in such lands, though the effect might be to draw off the water from the company's springs. *South Shields Waterworks Co.* v. *Cookson*, 15 L. J., Ex. 315.

—— **Right to have Pure Water.**]—The abstraction of water from a natural stream, openly and under a claim of right, for a period of twenty years, to a tenement not abutting on the stream, will create no easement to have pure water flow down the stream to the point of abstraction. *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 300; 10 Jur. (N.S.) 1005; 10 L. T. 748.

Covenant not to Supply Water within Company's District—Breach.]—The B. company, possessing springs of water of their own, covenanted, upon selling to the A. company a portion of those springs, to take from the A. company the entire supply of water they might require for certain specified purposes, and that they would not supply any of the places (their own premises forming part of the district) which the A. company was authorised to supply by act of parliament. The B. company afterwards leased a portion of their premises, through which portion their own stream of water ran, thus supplying their lessees with water from this stream:—Held, that the B. company was precluded by the covenant from using their own supply of water for the purposes for which they had stipulated to take water from the A. company. *Hartlepool Gas and Water Co.* v. *West Hartlepool Harbour and Railway Co.*, 12 L. T. 366.

Held, also, that it could not be decided, in the absence of the lessees of the B. company, whether the supply of water furnished to them by the B. company could be stopped, but the court directed an inquiry as to what damages the A. company had sustained and was sustaining, by reason of the B. company supplying their lessees with water. *Ib.*

A delay of twelve years in making the complaint did not amount to acquiescence, or to an abandonment of the plaintiff's rights. *Ib.*

Upon a contract by a water company in Scotland to supply a town with pure and wholesome water, at a certain rate of charge,

in consideration of the privilege to do so exclusively, the company insisted that it was entitled to prevent the use of salt water coming from the sea, and for that purpose sought an interdict or injunction, which, however, was refused. The refusal was confirmed on appeal by the house of lords. *Shaw's Water Co.* v. *Greenock Magistrates*, 2 Macq. H. L. 151.

Right of Support—Right to Work Minerals—Damage.]—By an inclosure act, the common lands of a manor, the fee simple of which, with the mines and minerals thereunder, and power to work the same, had previously been vested in the lord of the manor, subject to certain rights of common of pasture, were enclosed and divided into allotments. The act provided that the lord of the manor should enjoy all mines and minerals as fully and freely as if the act had not passed, without paying damages or making satisfaction for so doing, and empowered him to make all convenient ways, and for the purpose to remove fences, trees, or other obstructions. The act further provided that the annual rental of 500 acres (out of about 20,000) should be set apart to provide for the compensation to which the allottees might thereafter be entitled, any deficiency to be made up by means of a rate levied on the allottees. Afterwards the plaintiffs, a waterworks company, incorporated under an act of parliament, which incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, purchased compulsorily from the representative of the allottee land forming part of one of such allotments, and constructed a reservoir thereon. The defendant, claiming title under the lord of the manor, gave notice to the plaintiffs of his intention to work the coal under such land within forty yards of the reservoir. The plaintiffs did not offer to purchase the minerals, and the defendant worked the coal according to the usual course and practice of mining, and thereby caused damage to the reservoir. The plaintiffs sued in respect of such damage:—Held, that the inclosure act did not empower the lord of the manor and his representatives to work the minerals in such a manner as to let down the surface:—Held (by Cave, J.), that the plaintiffs had purchased the whole of the allottee's interest, namely, the ownership of the surface together with the right of support, and the defendant had only the same right as he had had before the purchase by the plaintiffs, namely, the right to work the minerals, leaving sufficient to support the surface, and therefore the plaintiffs were entitled to recover:—Held (by A. L. Smith, J.), that, as at the date of the purchase by the plaintiffs the surface and the minerals were vested in different owners, and the plaintiffs had purchased compulsorily from the owner of the surface, and had given no notice to treat in respect of the minerals, all that they were entitled to was the ownership of the surface, without any right of support as against the defendant, and therefore they had no cause of action for damage caused by the working by the defendant of the minerals according to the usual course and practice of mining, and were not entitled to recover. *Consett Waterworks Co.* v. *Ritson*, 22 Q. B. D. 318; 60 L. T. 360; 53 J. P. 373. Reversed on another point, 22 Q. B. D. 702—C. A.

——**Mines—Deposit of Plans.**]—The deposit of plans of their underground works, pursuant to ss. 19 and 20 of the Waterworks Clauses Act, 1847, is a condition precedent to the right of a company incorporated under that act to recover for injuries caused to their pipes by the ordinary and usual workings of a subjacent mine. *South Staffordshire Waterworks Co.* v. *Mason*, 56 L. J., Q. B. 255; 57 L. T. 116.

——**Reservation of Mines and other Minerals — Whether Clay is included in "other Minerals."**] — Section 18 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), provides that "the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them." The appellants, by virtue of the act and a conveyance containing a reservation of the "whole coal and other minerals in the land in terms of the Waterworks Clauses Act, 1847," purchased from the respondent a parcel of land for the purpose of erecting waterworks. Under the land was a seam of valuable brick clay. The respondent worked this clay in the adjoining land, and having reached the appellants' boundary, claimed the right to work out the clay under the land purchased by the appellants:—Held (Lord Herschell dissenting), that common clay, forming the surface or subsoil of land, was not included in the reservation in the act, and that the appellants were entitled to an interdict restraining the respondent from working the clay under the land purchased by them. *Glasgow (Lord Provost)* v. *Farie*, 58 L. J., P. C. 33; 13 App. Cas. 657; 60 L. T. 274; 37 W. R. 627—H. L. (Sc.)

Injury to Pipes by Railway Company—Interest in Land.]—A railway company, under the powers of an act of parliament, took land in which were laid certain pipes belonging to a waterworks company. These pipes were not removed by either of the companies at the time the railway company took the land, but the ground in which they lay was overlaid by that company by additional soil to the depth of several feet. Subsequently, the railway company, in tunnelling through the ground, came upon the pipes and removed them, but did not hand them over to the waterworks company or pay them their value. On these facts they took proceedings under the lands clauses and the railways clauses acts for settling the amount of compensation to which they were entitled as for an injuriously affecting their interest in the land:—Held, that the facts stated gave them no interest in the land, and that they consequently could not maintain proceedings for compensation for injuriously affecting it. *New River Co.* v. *Midland Ry.*, 36 L. T. 539; 25 W. R. 502—C. A.

4. Supply of Water.

a. General Powers and Duties.

Supply for a Township—Amount.]—A corporation obtained parliamentary power to collect all the water from the gathering grounds of a district, but was bound to supply to a particular township not less than 25,000 gallons, or more than 75,000 gallons of water per day, at the price of 6*d.* per 1,000 gallons, and the amount to be supplied between the maximum and minimum limits was to be at the option of the purchaser:—Held, that

the township might enforce the supply of more than 25,000 gallons per day for the purpose of selling part of it at a profit to a neighbouring township. *Halifax Corporation* v. *Soothill Upper Local Board*, 30 L. T. 513. Affirmed, 31 L. T. 6.

In 1845 a company was formed for supplying water to a town, under an act which contained no provision for supplying water at high pressure. In 1850 the works of that company were authorised to be extended by an act which declared that the 10 & 11 Vict. c. 17, with respect to the construction of the waterworks, should be incorporated therewith. In 1855 a new company was formed for the better supplying with water the same town, the suburbs, and the parishes and places adjacent thereto, by an act, which enacted that the 10 & 11 Vict. c. 17, should, except as therein otherwise provided, be incorporated with and form part of that act; and that the water to be supplied from any pipe of the company need not be constantly laid on under pressure. In 1856 the two companies were amalgamated under an act which contained a general provision incorporating 10 & 11 Vict. c. 17, therewith:—Held, that the amalgamated company was not liable to the high-pressure obligation contained in 10 & 11 Vict. c. 17, ss. 35 and 42. *Purnell* v. *Wolverhampton New Waterworks Co.*, 10 C. B. (N.S.) 576; 4 L. T. 513.

Water for Disposal of Sewage—"Waterworks"—Water for flushing Sewers.]—Works erected and maintained by a local authority to provide the water necessary to carry out a scheme for the disposal of sewage of its district are not "waterworks" within the meaning of s. 52, as defined by s. 4 of the Public Health Act, 1875; nor can the local authority be said to be "supplying" water within the meaning of those sections. *West Surrey Water Co.* v. *Chertsey Union*, 63 L. J., Ch. 806; [1894] 3 Ch. 513; 8 R. 696; 71 L. T. 368; 43 W. R. 6; 59 J. P. 167.

There is no provision in the Waterworks Clauses Act, 1847, which compels a local authority to take water to "cleanse sewers" from a water company within whose limits of supply the sewers are situate. *Ib.*

Supply for Domestic Purposes—Duty of Owner to supply Water.]—Section 62 of the Public Health Act, 1875, enables rural sanitary authorities to cause houses within their districts to be provided with a proper supply of water, where there is an available supply within a reasonable distance, and is not repealed in any way by s. 6 of the Public Health (Water) Act of 1878. The latter section enables such authorities to cause houses within their districts to be provided with a supply of water where there is not an available supply within a reasonable distance, and does not apply to cases which come within the former section. *Colne Valley Water Co.* v. *Treharne*, 50 L. T. 617; 48 J. P. 279.

—— **Fixed Bath—Power to make Extra Charge.**]—The defendants, a waterworks company, were required by their special act to supply water for domestic purposes to the inhabitants of the borough, at specified rates, it being also provided that a supply for domestic purposes should not include a supply for baths, washhouses, or public purposes, &c. The plaintiff erected in his house a fixed bath connected with the water service. The company demanded, in addition to the ordinary water rate, an extra charge for the supply to this bath, on the ground that a supply for such a purpose was not a supply for domestic purposes within the meaning of the act:—Held, that the company were not entitled to make such extra charge. *Weaver* v. *Cardiff Corporation*, 48 L. T. 906; 47 J. P. 599.

—— **Use of Water to wash Carriage.**]—Water for domestic use supplied under the provisions of a waterworks act, to the occupier of a house, may be used to give drink to a horse and to wash a horse and carriage kept by the occupier for his own use in a building near his dwelling-house and in the same curtilage. *Busby* v. *Chesterfield Waterworks and Gas Light Co.*, El. Bl. & El. 176; 27 L. J., M. C. 174; 4 Jur. (N.S.) 757; 6 W. R. 515.

Insufficient Supply—Hot Weather—Unavoidable Cause.]—The I. company complained of the E. water company refusing a supply of water. The water company were excused under ss. 42 and 43 of the Waterworks Clauses Act, 1847, if prevented by frost, unusual drought, or other unavoidable cause or accident. The magistrate found that the cause was either drought or unavoidable:—Held, the water company came within the words of the exemption. *Industrial Dwellings Co.* v. *East London Waterworks*, 58 J. P. 430.

—— **Liability for in Case of Fire.**]—A Waterworks Act, 1853, s. 79, provided that the company should, at the request of an owner or occupier of any premises situate in or adjoining any street in which any main or service pipe of the company was or should be laid, and who required a supply of water, afford a supply of water. The plaintiff declared upon this section, and alleged that he was such an owner and occupier, and that he requested and required a supply of water; but notwithstanding the fulfilment of all conditions the company wrongfully, improperly, and negligently made default in affording to the plaintiff the supply, by reason whereof he was unable to extinguish a fire which destroyed his premises. The company pleaded that the main or service-pipe had a fire-plug properly fixed in it, and that the fire-plug was opened for the purpose of supplying water for extinguishing another fire, which was the cause of default. They also pleaded that they were prevented from affording the supply of water from unavoidable cause or accident:—Held, that the former of these two pleas was good, but that the latter was bad. *Campbell* v. *East London Waterworks*, 26 L. T. 475.

By the Waterworks Clauses Act, 1847, the undertakers are; (1) to fix and maintain fire-plugs; (2) to furnish to the town commissioners a sufficient supply of water for certain public purposes; (3) to keep their pipes to which fire-plugs are fixed at all times charged with water at a certain pressure, and to allow all persons at all times to use the same for extinguishing fire without compensation; and (4) to supply to every owner or occupier of any dwelling-house, having paid or tendered the water-rate, sufficient water for domestic purposes. By s. 43, a penalty of 10*l.* (recoverable summarily before two justices, who may award not more than half the penalty to the informer and are to give the remainder to the overseers of the parish) is imposed on the

undertakers for the neglect of each of the above duties, and for the neglect of (2) and (4) they are further to forfeit to the commissioners or ratepayer a penalty of 40*s.* a day, for each day during which such neglect continues after notice in writing of non-supply. A person brought an action for damages against a waterworks company for not keeping their pipes charged as required by the act, whereby his premises situate within the limits of the company's act were burnt down:—Held, that the statute gave no right of action to the party. *Atkinson* v. *Newcastle and Gateshead Water Co.*, 46 L. J., Ex. 775; 2 Ex. D. 441; 36 L. T. 761; 25 W. R. 794—C. A.

—— **Penalties, by whom Recoverable.**]—Upon the true construction of the Metropolis Water Act, 1871, it is for the metropolitan authority of the district, and not for an individual householder, to proceed for penalties under the act. A householder aggrieved by an insufficient water supply can only recover penalties under s. 43 of the Waterworks Clauses Act, 1847. *Kyffin* v. *East London Waterworks Co.*, 65 L. J., M. C. 60; [1896] 1 Q. B. 446; 74 L. T. 141; 44 W. R. 446; 18 Cox, C. C. 235; 60 J. P. 230.

Supply by Meter—"Consumer of Water."]—The words "any consumer of water" in s. 41 of the New River Company's Act, 1852 (15 & 16 Vict. c. cix.), mean, not any person merely desirous of being a consumer, but a person who is actually consuming water or who at least is entitled to demand a supply for his consumption and is taking the necessary steps to obtain it, and is therefore not entitled to require the company to supply by meter the water for domestic purposes as well as the water for other purposes. *Cooke* v. *New River Co.*, 59 L. J., Ch. 333; 14 App. Cas. 698; 61 L. T. 816; 54 J. P. 260—H. L. (E.)

—— **"Dwelling-house."**]—Semble, that any house in which water is required for domestic purposes is a "dwelling-house" within the meaning of s. 35 of the act, though no person sleeps or takes meals there. *S. C.*, 57 L. J., Ch. 383; 38 Ch. D. 56; 58 L. T. 830—C. A.

Cutting off—Temporary Stoppage to remedy Leakage—Notice to Vestry—Public Health (London) Act, 1891.]—A water company, which supplied a certain dwelling-house with water, turned off the water solely in order to prevent waste of water through a certain leak in the service pipe:—Held, that upon the facts a magistrate was justified in coming to the conclusion that there was no "cutting off" of the water supply within the meaning of s. 49 of the Public Health (London) Act, 1891, and, therefore, there was no necessity for the water company to give notice under that section to the sanitary authority. *Young* v. *Southwark and Vauxhall Water Co.*, 5 R. 432; 69 L. T. 144; 41 W. R. 622; 57 J. P. 806.

—— **Failure to provide Stop-valve in Communication Pipe—Obligation of Consumer to Provide.**]—By the Folkestone Waterworks Act, 1858, (21 Vict. c. x.), s. 14, persons supplied with water are directed to provide proper ball or stop-cocks or other necessary apparatus of improved construction for regulating the supply of water so that the water may be properly drawn off and effectually prevented from running to waste. By the Waterworks Clauses Act, 1847, ss. 48, 51, and 52, any owner or occupier of a house wishing to have water is empowered to put down a communication pipe between his premises and the company's main, to remove it, and to break up the streets for any such purpose. By the Folkestone Waterworks Act, 1888 (51 & 52 Vict. c. xxv.), ss. 5 and 6, the company are directed to afford a constant, instead of, as before, an intermittent supply of water, and permission is given to the company to attach a stop-valve to the communication pipe outside of and at or near the point at which it enters the premises of the consumer:—Held, that there is no obligation upon the consumer to put down such stop-valve into his communication pipe, or to pay for it when put down by the company, and that the company were liable to a penalty for cutting off the water from the premises of a consumer who neglected to comply with a notice requiring him to put down such valve. *Ward* v. *Folkestone Waterworks Co.*, 59 L. J., M. C. 65; 24 Q. B. D. 334; 62 L. T. 321; 38 W. R. 426; 54 J. P. 628.

—— **Obligation to Provide Meter—Failure to Pay or Tender Rate in Advance.**]—The special act of a water company provided for the supply of water to the inhabitants of the district for "family use" at certain rates calculated on the rental of the house supplied. The act contained further provisions for the supply of water for schools, manufactories, &c., &c., and for other purposes than family consumption, and for baths, &c., and for the purposes of any trade or business whatsoever, at certain rates per thousand gallons. The supply of water under these latter provisions having been held obligatory upon the company unless prevented by causes beyond their control:—Held, that there being no provision in the special act throwing upon the consumer the obligation of providing a meter to measure the water supplied for the purposes of a bath, no such obligation could be implied from s. 14 of the Waterworks Clauses Act, 1863, incorporated with the special act, which section provides that where the undertakers are authorised by the special act to supply water by measure they may let for hire to any consumer of water so supplied any meter or instrument for measuring the quantity of water supplied. *Sheffield Waterworks Co.* v. *Carter*, 51 L. J., M. C. 97; 8 Q. B. D. 632; 30 W. R. 889; 46 J. P. 548.

The occupier of a house within the district of the above-mentioned company had a bath connected by means of a pipe with the house cistern, to which water was conveyed from the company's mains for "family use." The company required him to put up a meter for the purpose of measuring the water used for the bath, but he refused to do so. He had paid to the company in advance the proper amount in respect of the water supply for "family use" for the quarter ending the 29th of September, but had not paid or tendered any sum in respect of the water supply to the bath during such period. The company in consequence of his refusal to put up a meter or disconnect the bath cut off the communication pipe from their main to his house upon the 20th of September. On the 29th of September, having cut off the pipe connecting the cistern with the bath, but not the waste or outlet pipe from the bath, he gave notice to the company of what he had done and paid to the company in advance the proper amount for

the supply of water for "family use" during the ensuing quarter, but did not restore the communication pipe between the company's mains and his cistern. The company refused to restore the supply on the ground that he had not cut off the waste pipe from the bath, which he refused to do. The supply of water was not renewed till the 4th of November, when the company restored the communication pipe under protest:—Held, that the company were not entitled to insist on the consumer's providing a meter, but that they were not liable to a penalty under the Waterworks Clauses Act, 1847, s. 43. for not supplying water during the period between the 20th and the 29th of September, inasmuch as no payment or tender in respect of the water supply to the bath for such period had been made. But held, that the company were liable to a penalty in respect of the period subsequent to the 29th of September: that they had no right to refuse the supply of water after that date, and that they were not justified in cutting off the supply, and were, therefore, not entitled to require the consumer to renew the communication. *Ib.*

—— **Non-payment of Rate.**]—P.'s landlord had agreed to pay water-rate, and had duly paid it, when P. received notice to quit. P. refused to quit, and the landlord requested the C. waterworks company to cut off the water, which they did without any notice to P.:—Held, that the magistrate was wrong in holding that the company had acted in contravention of the statute 50 & 51 Vict. c. 21, s. 4. *Chelsea Waterworks Co.* v. *Paulet*, 52 J. P. 724.

—— **Action by Tenant for.**]—Where a dispute has arisen as to the amount of the water-rate payable by an occupier of premises to a water company (whose special act incorporated the Waterworks Clauses Act, 1847), the determination of the annual value of the premises supplied, by two justices, under s. 68 of the act of 1847, is a condition precedent to the right of the occupier to sue the company for cutting off the water, and for the amount alleged to have been paid in excess. *Whiting* v. *East London Waterworks Co.*, 1 Cab. & E. 331.

—— **Injunction to Restrain.**]—Where there is a dispute as to the annual value of a tenement for the purposes of water-rate, and the waterworks company threatens to discontinue the supply, the court has, by virtue of the powers conferred upon it by the Judicature Act, 1873, s. 25, sub-s. 3, jurisdiction to grant an injunction, notwithstanding that the Waterworks Clauses Act, 1853, provides (s. 68) for the determination of such disputes by two justices, and imposes (s. 43) upon the company fixed penalties for refusal to supply. *Hayward* v. *East London Waterworks Co.*, 54 L. J., Ch. 523; 28 Ch. D. 138; 52 L. T. 175; 49 J. P. 452.

The court, however, in such a case, will decline to grant an injunction, except pending the proceedings before the justices for the settlement of the dispute, or upon an undertaking by the plaintiff to commence the proceedings within a short period. The discontinuation of a water supply by a London waterworks company is an injury sufficiently irreparable to support an injunction. *Ib.*

—— **Cost of Providing or Hiring Meter.**]—The Sheffield waterworks company was authorised to receive payment by measure and not by a rate for water supplied to fixed baths in private houses. There is no express provision in the principal or general acts as to how the water for such a purpose is to be measured, or whether the company or the consumer shall bear the cost of providing a meter for measuring the water, but by the Waterworks Clauses Act, 1863, s. 14, where the company supply water by measure, they may let to a consumer a meter for such remuneration in money as they may agree upon:—Held, that a consumer taking water from the company for a fixed bath in his private house was bound at his own expense to measure the water so used by some automatic and self-registering meter or other instrument, or in some other equally accurate way, and to record the amount from time to time taken. *Sheffield Waterworks Co.* v. *Bingham*, 52 L. J., Ch. 624; 25 Ch. D. 443; 48 L. T. 604.

Reinstating Supply of Water after being Cut off for Non-Payment of Rates.]—A tenant of premises supplied by a company with water having failed to pay the water-rate, the company, under the powers conferred upon them by s. 74 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), severed the communication with their main pipes. A subsequent tenant demanded a supply of water for the same premises, tendering to the company the current quarter's rate and the estimated expense of restoring the communication, but the company refused to supply the water until the arrears due from the former tenant were paid. A magistrate having convicted the company under s. 43 of the Waterworks Clauses Act for such refusal:—Held, that, although the company were not warranted in refusing to supply water to the incoming tenant until the arrears due to them as above stated were paid, they could not be made liable to the penalties imposed by s. 43 until he himself had restored the communication with their main pipes. *Sheffield Waterworks Co.* v. *Wilkinson*, 48 L. J., M. C. 145; 4 C. P. D. 410.

—— **Jurisdiction to Compel.**]—A company was established by act of parliament for supplying the inhabitants of several districts with water, at such terms as they should mutually agree upon; and a subsequent act provided that the company should only demand reasonable sums:—Held, that a court of equity had no jurisdiction, upon an offer to pay either a reasonable price or that which was originally agreed upon, to compel the company to continue a supply to any inhabitant beyond the term of his contract, or to restrain them from discontinuing such supply until the decision of the question by a trial at law. *Weale* v. *West Middlesex Waterworks Co.*, 1 J. & W. 358. See *Hoddesdon Gas and Coke Co.* v. *Haselwood* (6 C. B. (N.S.) 239; 28 L. J., C. P. 268; 5 Jur. (N.S.) 1013; 7 W. R. 415) as to the right at law in the analogous case of gas.

Duty to Supply Pure Water—Water Pure in Mains, but Contaminated in Consumer's Pipes.]—Undertakers for the supply of water to Huddersfield were bound on certain conditions to cause pipes to be laid down and water to be brought to every part of the town, and by s. 35 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), "to provide and keep in the pipes

to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town who should be entitled to demand a supply and should be willing to pay water-rate for the same." By their special act the undertakers were empowered to make by-laws with regard to the consumers' pipes. The by-laws made under this power prescribed lead as the necessary material for every consumer's pipe, "not being of cast-iron." The undertakers in accordance with their usual practice at the consumer's request and cost laid down communication and service pipes of lead between their mains and the plaintiff's house. The effect of the by-laws and of s. 19 of the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), was that though the lead pipes might be the property of the plaintiff they were entirely under the control of the undertakers, and could not without their consent be interfered with by the plaintiff. Water was supplied by them to the plaintiff which was pure and wholesome in the mains but was of such quality that in its passage from the mains to the plaintiff's house it became contaminated by the lead and poisoned the plaintiff. The plaintiff having brought an action against the undertakers for damages for the injury to his health alleged a breach of the statutory obligation:—Held, that the obligation imposed by s. 35 was to supply water which was pure and wholesome in the mains and (Lord Selborne and Lord Watson dissenting) that having complied with that obligation the undertakers were not (negligence being out of the case) liable to the plaintiff in this action. But held, by Lord Selborne and Lord Watson, that the undertakers were liable, on the ground that the water contained some special and peculiar solvent of lead which made it poisonous after passing through the leaden pipes, although it would have been harmless if it could have been drunk direct from the mains. *Milnes* v. *Huddersfield Corporation*, 56 L. J., Q. B. 1; 11 App. Cas. 511; 55 L. T. 617; 34 W. R. 761; 50 J. P. 676—H. L. (E.)

Delegation of Powers—Company Able and Willing to Supply.]—A waterworks company is not, within the meaning of the Public Health Act, 1875, s. 52, able and willing "to supply water within the district of a local authority," unless it has both the necessary powers and the requisite supply of water. *Richmond Waterworks Co. and Southwark and Vauxhall Waterworks Co.* v. *Richmond Vestry*, 45 L. J., Ch. 441; 3 Ch. D. 82; 34 L. T. 480.

When company R. had the necessary powers but no water, and company S. had the requisite supply of water but no powers within the district, and company R. sold its plant to company S., and certain members of company S. bought all the shares in company R. with the intention of allowing company S. to exercise the powers of company R.:—Held, that the powers could not be so delegated, and that neither company was able and willing within the meaning of the act, and consequently that neither was entitled to notice under the Public Health Act, 1848, s. 75, or under the Public Health Act, 1875, s. 52. *Ib.*

b. Rights against Consumers.

Taking Water from Unoccupied House—Liability.]—The respondent, a child of fourteen years of age, was charged with unlawfully taking water from an unoccupied house at H., such water being alleged to belong to the appellant company. The information was laid under 10 & 11 Vict. c. 17, s. 59; but the stipendiary magistrate for S., before whom the case was brought, dismissed it on the ground that the alleged offence did not come within s. 59. The water company appealed:—Held, that the magistrate was right in dismissing the charge, for s. 59 of 10 & 11 Vict. c. 17, under which it was laid, provides no penalty for the taking of water from an unoccupied house. *Piercy* v. *Pope*, 45 L. T. 477; 30 W. R. 60; 46 J. P. 102.

Taking Water from a Fountain—Dedication to Public.]—A fountain having been erected on a highway by an individual for the benefit of a town, the local board of health, as the owners of the waterworks, gratuitously supplied the fountain with water for the use of cattle in the cattle market on market days, and for horses if yoked when passing to and fro:—Held, that the board might so limit their dedication of the use of the water, and that it did not amount to a dedication to the gratuitous use of the public. *Hildreth* v. *Adamson*, 8 C. B. (N.S.) 587; 30 L. J., M. C. 204; 2 L. T. 359; 8 W. R. 470.

A housekeeper, therefore, in the town, who takes water from such fountain, he not having agreed to be supplied with water by the board, is liable to the penalty fixed by 10 & 11 Vict. c. 17, s. 59, that act being incorporated with the Local Board of Health Act. *Ib.*

Tampering with Pipe—Liability of Owner.]—A., acting as owner of premises, made a contract with a water company to supply the premises with water to a certain height. In his absence, his men, to the injury of the company, fixed the pipe at a higher level. After it was done, A. knew of it; A. was not in fact the owner of the premises:—Held, that he was liable to an action brought by the company. *West Middlesex Waterworks Co.* v. *Suwerkrop*, 4 Car. & P. 87.

Construction of Agreement.]—An agreement whereby a mining company undertakes to obtain all the water required by them for their mining purposes from a water company, and from no other person or persons, does not authorise the mining company to obtain a gratuitous supply of water for these purposes from another source. But a proviso in the agreement that nothing in the agreement should prevent the mining company from using any water obtained from the mines or from their wells or reservoirs is not confined to mines the property of the company at the date of the agreement. *Kimberley Waterworks Co.* v. *De Beers Consolidated Mines*, 66 L. J., P. C. 108; [1897] A. C. 515; 77 L. T. 117—P. C.

c. Rates.

i. *Amount, how Calculated.*

"Annual Value."]—A water company by a special act of 1826 were compellable to supply water to certain dwelling-houses in the metropolis for domestic purposes at certain rates per cent. per annum, payable "according to the actual amount of the rent where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or

annual value upon which the assessment to the poor's-rate is computed in the parish or district where the house is situated." By a special act of 1852 the company were compellable to furnish the water "where the annual value of the dwelling-house or other place shall not exceed 200*l.* at a rate per cent. per annum on such value not exceeding 4*l.*; and where such annual value shall exceed 200*l.*, at a rate per cent. per annum on such value not exceeding 3*l.*" The occupier of one of the houses was lessee for a long term at a ground rent, and paid no rent except the ground rent:—Held, that whether the later act repealed the provisions of the former or not, the case must be dealt with under the later act; and that the words "annual value" in the late act meant "net annual value" as defined in the Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 1:—Held, also, that "annual value" had the same meaning in the earlier as in the later act. *Colvill* v. *Wood* (2 C. B. 210) commented on. *Dobbs* v. *Grand Junction Waterworks Co.*, 53 L. J., Q. B. 50; 9 App. Cas. 49; 49 L. T. 541; 32 W. R. 432; 48 J. P. 5—H. L. (E.)

—— **Annual Rack-rent.**]—By the terms of its special act a water company were to supply water at certain rates on the "annual rack-rent of the house . . . . if the same be let at rack-rent, and on the annual value if and while the same is not let at rack-rent." An owner and occupier contended that his house not being let at an annual rack-rent, the water-rates payable by him ought to be assessed according to the annual value; and that the annual value was the net annual value as distinguished from the gross value or gross estimated rental:—Held, that the words in the section "annual rack-rent" and "annual value" must be treated as equivalent; that the legislature never intended to lay down two scales of charges, one for tenants of houses and the other for owner occupants; and that an owner occupying his own house must pay water-rates upon the gross estimated rental as distinguished from the net annual value. *Stevens* v. *Barnet Gas and Water Co.*, 57 L. J., M. C. 82; 36 W. R. 924.

—— **"Rent"—Deduction of Rates from Rent.**]—By its act, a waterworks company was bound to supply the houses within a certain district with water "at the following rate per annum, that is to say, where the rent of such dwelling-house" should not amount to 7*l.* per annum, at a rate not exceeding 6 per cent. per annum, on such rent, but not exceeding 7*s.* 2*d.* per annum; and so on in a graduated scale. The owner of numerous small houses was supplied with water, in respect of which he paid, either under statutory obligation or by voluntary agreement, the poor-rate, water-rate, and district-rate:—Held, that "rent" in the act was equivalent to "annual value"; and that, in estimating the rents on which the water-rate was payable, the owner was entitled to deduct the rates so paid by him. *Sheffield Waterworks Co.* v. *Bennett*, 42 L. J., Ex. 121; L. R. 8 Ex. 196; 28 L. T. 509; 21 W. R. 686—Ex. Ch.

By the Liverpool Corporation Waterworks Act, the rates at which water is to be supplied for domestic purposes, are to be assessed upon the annual value of the premises; and by an act which amended the former, if the owner of any dwelling-house, the yearly rent or value whereof shall not amount to 13*l.*, or which, whatever may be the annual value thereof, shall be let to weekly or monthly tenants, or in separate apartments, shall be desirous of paying a reduced water-rent by the year for the same, whether occupied or not, the council may compound with such owner for the payment of the water-rents payable by virtue of the acts in respect of such dwelling-house, at any sum not less than three-fourths of the annual water-rent for the same; and all such compositions shall be recoverable in like manner as the rents and charges authorised by the act are by law recoverable. By a composition paper, A., as the owner of dwelling-houses let to weekly tenants, agreed with the corporation to compound for the water-rates, and in a schedule thereto stated the "rental to be 4*s.* 6*d.* per week, and 3*s.* 6*d.* per week, respectively." The composition paper contained a stipulation, that, "if at any time it should be ascertained that the rental of such houses was not truly and correctly set forth in the schedule, the corporation might be at liberty to amend the same by inserting therein the true and correct amounts of such rental," and might recover against A. the additional water-rents due in respect thereof. The rents of the houses were, in point of fact, 6*d.* per week, respectively, more than the sums stated in the schedule, A. claiming to deduct that sum in respect of poor and other rates, which, by agreement with the tenants, were paid by him:—Held, that A. was not entitled to make such deduction, but that the corporation was entitled, under the agreement, to receive the composition upon the amount of rent paid by tenants. *Rook* v. *Liverpool Corporation*, 7 C. B. (N.S.) 240.

Held, also, that the production of the composition paper, and proof that no demand of water-rates had been made upon the tenants, was sufficient evidence that the composition had been made, without showing that any entry thereof had been made in the books of the council. *Ib.*

—— **Houses lying Vacant—Owner Compounding for Rates—Repairs and Insurance.**]—It was provided by a water act that the charge to be made for the supply of water for domestic use should be at a rate varying according to the "annual rent" of the premises supplied. The appellant was the owner of certain houses supplied with water by the respondents under the act. The houses were let at weekly rents, the appellant paying all rates charged thereon, and also for all repairs and insurances thereof. He was allowed, as an owner, under 32 and 33 Vict. c. 41, s. 4 (The Poor-Rate Assessment and Collection Act, 1869), a deduction of 30 per cent. from the full amount of the poor-rate which an occupier if rated would have paid. The respondents charged the appellant with water-rates calculated on the following basis: they multiplied the weekly rents by fifty-two and deducted from the amount so arrived at the actual sums paid by the appellant for rates, and then charged the water-rates upon the balance:—Held, that, in order to arrive at the "annual rent" upon which the water-rate was to be computed, an allowance should be made in respect of "voids," i.e., houses lying vacant from time to time; and that the actual amount of the poor-rates and other rates paid by the appellant was rightly deducted, but that the appellant was not entitled to deduct the full

amount of the rates which an occupier if rated would have paid; nor the amount which he paid for repairs and insurances. Meaning of the terms "annual rent" and "annual value" discussed. *Dobbs* v. *Grand Junction Waterworks Co.* (in C. A.) followed. *Smith* v. *Birmingham Corporation*, 52 L. J., M. C. 81; 11 Q. B. D. 195; 49 L. T. 25; 31 W. R. 788; 47 J. P. 645.

—— **Rateable Value.**]—By the special act of a water company, which incorporated the Waterworks Clauses Act, 1847, save so far as the clauses or provisions thereof were expressly varied or excepted, the company were obliged to supply water to the occupiers of dwelling-houses for domestic purposes at a rate not exceeding 6*l.* per cent. per annum upon the "annual rack rent or value" of the premises supplied. It was further provided in a subsequent section of the act that the rate should be "payable according to the annual value at which the premises were from time to time assessed to the poor-rate if the same were so assessed, or if not, according to the net annual value of the premises." By the 68th section of the Waterworks Clauses Act, 1847, the "water-rates, except as hereinafter and in the special act mentioned, shall be payable according to the annual value of the tenement supplied with water":—Held, that the water rate charged by the company must be calculated on the "rateable value," not on the "gross estimated rental" of the premises supplied with water. *Warrington Waterworks Co.* v. *Longshaw*, 51 L. J., Q. B. 498; 9 Q. B. D. 145; 46 L. T. 815; 31 W. R. 11; 46 J. P. 773.

Garden Attached to Dwelling House.]—Section 68 of the Bristol Waterworks Act, 1862, enacts that the company shall furnish to every occupier of a private dwelling-house within their limits a sufficient supply of water for the domestic use of such occupier, at certain annual rents or rates according to the "annual rack-rent or value of the premises so supplied"—(by s. 71) not to include, amongst other things, a supply of water "for watering gardens by means of a tap, tube, pipe, or other such like apparatus." And s. 32 of the Bristol Waterworks Amendment Act, 1865, enacts that, "if any dispute shall arise as to the amount of the annual rent or value of any dwelling-house or premises supplied with water by the company, such dispute shall be decided by two justices; provided that the amount of the annual rack-rent or value to be fixed by such justices shall not be less than the gross sum assessed to the poor-rate, or less than the rent actually paid for such dwelling-house or premises." A dwelling-house and garden in the occupation of the owner were assessed to the poor-rate as follows:—"Gross estimated rental, 240*l.*," "Rateable value, 204*l.*" It was proved that the value of the house without the garden would be 10 per cent. less; and that the owner contracted to pay and did pay 1*l.* 1s. annually for the watering by means of a pipe and tap in the garden which surrounded the dwelling-house and was occupied and assessed therewith:—Held, upon a case stated by the justices, that the words "gross sum assessed to the poor-rate" meant the "gross estimated rental," and not "rateable or net value;" and that the water-rent was chargeable upon the gross estimated rental of "the premises," including the pleasure garden occupied with the house, and not merely upon the dwelling house itself, the extra charge for the garden supply being for using a pipe and tap. *Bristol Waterworks Co.* v. *Uren*, 54 L. J., M. C. 97; 15 Q. B. D. 637; 52 L. T. 655; 49 J. P. 564.

In determining the annual value of a residential tenement under section 68 of the Waterworks Clauses Act, 1847, for the purposes of water supply to the dwelling-house for domestic purposes alone, it is not competent to justices to exclude a portion of the garden occupied and enjoyed with the dwelling-house, and thus curtail the area to be assessed for water-rate. The section contemplates the mere valuation of the existing tenement as the owner and occupier choose to enjoy it. *Grand Junction Waterworks Co.* v. *Davies*, 66 L. J., Q. B. 633; [1897] 2 Q. B. 209; 76 L. T. 833; 45 W. R. 687; 61 J. P. 484.

Premium for Lease—Public-House.]—By the special act of a water company it was provided that water should be supplied for domestic purposes by the company at a rate per cent. upon the annual value of the dwelling-house or other place supplied, that a supply of water for domestic purposes should not include a supply of water for, among other things, any trade or manufacture or business requiring an extra supply of water, and that the company might furnish water for other than domestic purposes on such terms as might be agreed on between the company and the consumer. The company supplied water for domestic purposes to a house occupied as a licensed public-house. The company contended that the annual value of the premises as a licensed public-house should be taken as the basis of the water-rate payable in respect of such supply, and that therefore the fact of the premises being licensed, and a premium which had been paid for the lease of the premises as a public-house ought to be taken into consideration in fixing the value. The occupier contended that such water-rate should be based upon the value of the premises for domestic purposes only:—Held, that the contention of the company was correct. *West Middlesex Waterworks Co.* v. *Coleman*, or *Coleman* v. *West Middlesex Waterworks Co.*, 54 L. J., M. C. 70; 14 Q. B. D. 529; 52 L. T. 578; 33 W. R. 549; 49 J. P. 341.

Water for Public Purpose — Rate fixed by Agreement.]—By the New River Company's Act, 1852 (15 & 16 Vict. c. clx.), s. 35, the company must supply houses within their limits with sufficient water for domestic purposes at certain fixed rates. By s. 38, domestic purposes are not to include engines or railway purposes, or baths, cattle, or fountains, or flushing sewers or drains, or business requiring an extra supply of water. By s. 41, the company shall, at the request of any consumer of water for purposes other than the purposes for or in respect of which the rates or charges are thereinbefore provided or limited, or at their own instance, afford a supply of water by means of a meter, and charge for the same at certain limited rates, according to the quarterly consumption. By s. 37 of the Waterworks Clauses Act, 1847 (incorporated in the act of 1852), the undertakers shall provide a sufficient supply of water for cleansing sewers and drains, for cleansing and watering streets, and for other public purposes at rates and upon conditions to be agreed to by the undertakers or to be settled by justices or by

an inspector. The Metropolitan Board of Works demanded from the company a supply of water by meter, under s. 41, for watering the roads and gardens on the Victoria embankment, such supply being required only during one-third of the year and the driest weather:—Held, that the company was not bound to afford this supply at the limited rates fixed by s. 41; but that they were entitled to claim rates for such supply, to be fixed by agreement or settlement, under s. 37 of the Waterworks Clauses Act, 1847. *Metropolitan Board of Works* v. *New River Co.* 37 L. T. 124.

—— **Supply to a Workhouse—Ratability.**]—By a special act incorporating the Waterworks Clauses Act, 1847, a waterworks company were bound at the request of the owner or occupier of any house to supply such person with water for domestic purposes at a minimum rate, to be increased if such house should be occupied by more than one family, and the act further provided that a supply of water for domestic purposes should not include a supply of water for baths, washhouses, or public purposes. The Waterworks Clauses Act, 1847, deals with the supply of water for cleansing sewers and drains, cleansing and watering the streets, supplying any public pumps, baths, or washhouses, and imposes a penalty for neglect to supply water "for the public purposes aforesaid":—Held, that a workhouse was a house of which the guardians were owners, and the company were bound to supply them with water for domestic purposes, such supply not being a supply "for public purposes" within the meaning of the special act or of the Waterworks Clauses Act, 1847, and that for the purposes of the special act the inmates of the workhouse were to be treated as one family, and the rate assessed accordingly. *Liskeard Union* v. *Liskeard Waterworks*, 7 Q. B. D. 505; 30 W. R. 292; 45 J. P. 780.

Minimum Charge.]—No dispute determinable by justices of the peace under s. 68 of the Waterworks Clauses Act, 1847, can arise as to the annual value of premises where a water company are making the minimum charge which they are entitled to make under their special act. *Colne Valley Water Co.* v. *Treharne*, 50 L. T. 617; 48 J. P. 279.

Occupation between Quarter-days — Liability for full Quarter's Rate.]—A water company is not authorised by the Waterworks Clauses Act, 1847, to charge a full quarter's rate for an occupation commencing between two quarter days, but only a rate proportionate to the period of occupation. *East London Waterworks Co.* v. *Fonlkes*, [1894] 1 Q. B. 819; 10 R. 243; 58 J. P. 384.

Power to make Special Charge—Fixed Baths—Domestic Uses.]—The Lambeth Waterworks Company is entitled, under its incorporating act of 1848, to make a special charge for the supply of water to fixed baths in private dwelling-houses. *Walker* v. *Lambeth Waterworks Co.*, 63 L. J., Ch. 874; 8 R. 622; 71 L. T. 75; 58 J. P. 736.

ii. *Persons Liable.*

Owner—Unoccupied House not Exceeding the Value of Twenty Pounds.]—The respondents, relying on s. 58 of their private act (15 & 16 Vict. c. clviii.), which extended the provisions of s. 72 of the Waterworks Clauses Act, 1847, to houses not exceeding the annual value of 20*l.*, claimed water rates from the appellants as owners of certain houses under the annual value of 20*l.* each, for two quarters, during the whole of which time such houses were unoccupied:—Held, that an owner's liability for rates under s. 72 of the Waterworks Clauses Act, 1847, ceases on the quarterly day of payment next after the house has become unoccupied, and that as s. 58 of the respondents' private act merely extended the provisions of that section to houses not exceeding the annual value of 20*l.*, the respondents were not entitled to recover. *British Empire Mutual Life Assurance Co.* v. *Southwark and Vauxhall Water Co.*, 59 L. T. 321; 36 W. R. 894; 52 J. P. 758.

—— **Notice to obtain Proper Supply—Non-compliance.**]—A local authority caused a supply of water to be brought in main water pipes along the street in which a house was situate, and gave notice to the owner of the house, under s. 62 of the Public Health Act, 1875, to obtain a proper supply and do all such works as might be necessary for that purpose. That notice was not complied with, and the local authority did not exercise the power given to them by that section of executing the works necessary to connect the house with the main. In an action by the water company for water-rates:—Held, that the defendant was liable, and that it was not a condition precedent to such liability that the works necessary to bring the water into the house should have been executed. *Southend Waterworks Co.* v. *Howard*, 53 L. J., Q. B. 354; 13 Q. B. D. 215; 32 W. R. 923; 48 J. P. 469.

Landlord or Tenant.]—In a lease of a shop and basement and of three rooms on the third floor of the same house, the lessor covenanted to pay "all rates and taxes chargeable in respect of the demised premises." Water was separately supplied by a water company to the shop and basement, and paid for by the tenant. In an action to recover from the lessor the amount so paid:—Held, that such a charge was "a rate" within the meaning of the covenant. *Direct Spanish Telegraph Co.* v. *Shepherd*, 53 L. J., Q. B. 420; 13 Q. B. D. 202; 51 L. T. 124; 32 W. R. 717; 48 J. P. 550.

In a lease of a warehouse in the city of London, the lessor covenanted to pay all rates, taxes, and impositions whatsoever, whether parliamentary, parochial, or imposed by the corporation of the city, or otherwise howsoever, which then were, or thereafter might be rated, charged, or assessed on the said premises or any part thereof, or on the yearly rent, or on the landlord, owner or tenants of the said premises in respect thereof. Water having been supplied to the premises under the provisions of the Waterworks Clauses Act, 1847, the lessees paid the water-rates due in respect thereof and sought to recover the same from the lessor:—Held, that such water-rates were not rates or impositions imposed on or in respect of the premises within the meaning of the covenant, and that therefore the lessees could not recover. *Badcock* v. *Hunt*, 58 L. J., Q. B. 134; 22 Q. B. D. 145; 60 L. T. 314; 37 W. R. 205; 53 J. P. 340—C. A.

See also LANDLORD AND TENANT (COVENANTS).

Purchaser of Freehold—Liability for Arrears.]—The effect of 50 & 51 Vict. c. 21, s. 4. is that a purchaser of the freehold of a dwelling-house is liable to a personal action at the suit of the waterworks company to recover arrears of water-rate which accrued due before the date of the purchase. *East London Waterworks Co.* v. *Kellerman*, [1892] 2 Q. B. 72; 67 L. T. 319; 56 J. P. 773.

iii. *Recovery of.*

Dispute as to Annual Value—Right to Sue—Necessity for Decision of Justices.]—The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 68, enacts that the water-rate shall be payable according to the annual value of the tenement supplied with water, and that, "if any dispute arise as to such value, the same shall be determined by two justices." This act incorporates the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), ss. 140 and 142 of which give the mode and procedure before the justices. By the New River Company's Act, 1852 (15 & 16 Vict. c. clx.), s. 46, which incorporates the Waterworks Clauses Act, 1847, it is enacted that "nothing in this act, or any act incorporated herewith contained shall prevent the company from recovering any sum of money not exceeding 50*l.* which shall be due to them for water rates or rents, or for damages, costs, or expenses, by action or proceeding in such manner as is by law provided for the recovery of debts not exceeding 50*l.*":—Held, that where a bonâ-fide dispute arises as to the annual value, the company must, before they can sue for the rate under s. 46 of the special act, obtain a decision of justices on that dispute under s. 68 of the general act. *New River Co.* v. *Mather*, 44 L. J., M. C. 105; L. R. 10 C. P. 442; 32 L. T. 658.

By a borough improvement act with regard to the supply of water, it was provided that, "The following acts and parts of acts (so far as they are applicable and not inconsistent with this act) shall be incorporated with this act (that is to say): The Waterworks Clauses Acts, 1847 and 1863 (except the provisions thereof with respect to the amount of profit to be received by the undertakers when the waterworks are carried on for their benefit)." The Waterworks Clauses Act, 1847, s. 68, provides that the rates are to be paid according to the annual value, and if any dispute arise as to such value, the same shall be determined by two justices. The same act, in a series of sections (75 to 84), provides for the amount of profit to be received by the undertakers when the waterworks are carried on for their benefit:—Held, that s. 68 of the Waterworks Clauses Act, 1847, was not incorporated in the borough improvement act, and that the settlement by two justices of a dispute as to value was not a condition precedent to the plaintiff's right to bring an action for an overcharge. *Slater* v. *Burnley Corporation*, 59 L. T. 636; 36 W. R. 831; 53 J. P. 70.

—— **Jurisdiction of Justices.**]—Upon the hearing before justices of a summons to enforce payment of a water-rate made under a local act incorporating the Waterworks Clauses Act, 1847, the justices have power, under s. 68 of that act, to determine a dispute as to the annual value of the premises rated. It is not necessary to their jurisdiction before making an order for payment of the rate upon such summons that the dispute should have been previously determined in a separate proceeding before justices. *New River Co.* v. *Mather* (L. R. 10 C. P. 442) distinguished. *Lea* v. *Abergavenny Improvement Commissioners*, 55 L. J., M. C. 25; 16 Q. B. D. 18; 53 L. T. 728; 34 W. R. 105; 50 J. P. 165. See *Colne Valley Water Co.* v. *Treharne*, supra, col. 2027.

Proceedings before Justices—Complaint—Limit of Time.]—The proceedings before justices to recover water-rates under the Waterworks Clauses Act, 1847, constitute a "complaint" within the meaning of s. 1 of Jervis' Act, and the order made by justices is an "order for the payment of money" within the meaning of the same section; such proceedings, therefore, must, under s. 11 of Jervis' Act, be commenced within six months from the time the rates became due. *East London Waterworks Co.* v. *Charles*, 63 L. J., M. C. 209; [1894] 2 Q. B. 730; 10 R. 435; 71 L. T. 200; 42 W. R. 702; 58 J. P. 764.

—— **Need for Formal Demand.**]—In the absence of facts from which it can be inferred that a person liable to pay a water-rate was ignorant of the amount of such rate, proof of a formal demand is not a condition precedent to the right of the water company to apply to a magistrate for an order under s. 140 of the Railways Clauses Act, 1845, for payment of such rate. *East London Waterworks* v. *Kyffin*, 64 L. J., M. C. 32; [1895] 1 Q. B. 55; 15 R. 38; 71 L. T. 615; 59 J. P. 405.

Right of Distress—Power under Private Act—Subsequent Public Act.]—A private act passed in 46 Geo. 3, gave the West Middlesex Waterworks company power to levy a distress on default of payment by consumers of water of the water-rates mutually agreed upon in accordance with 46 Geo. 3, c. 119, s. 59. By an act passed four years later the company was empowered to charge a reasonable amount for the water, but there was no express enactment as to the mode of recovering that amount. Subsequently to the Waterworks Clauses Consolidation Act, 1847, another private act, 15 & 16 Vict. clix., was passed in part incorporating that act, but expressly stipulating that, "except as by this act is expressly provided, this act or anything therein contained shall not repeal, alter, interpret, or in any manner affect any of the provisions in force at the commencement of this act, of the recited acts, or any of them; and, except only so far as is requisite for the execution of this act, all those provisions, and all powers, privileges, exemptions, and immunities of or for the benefit of any person or corporation thereby respectively created, conferred, or saved shall be and continue as valid and effectual as if this act had not passed." The act of 46 Geo. 3 was therein recited. The company issued its warrant of distress on the plaintiff's premises, and he brought an action for illegal distress:—Held, that the power of the company to distrain was not taken away either inferentially by the Waterworks Clauses Consolidation Act, 1847, or expressly by the subsequent private act incorporating that act. *Richards* v. *West Middlesex Waterworks Co.*, 54 L. J., Q. B. 551; 15 Q. B. D. 660; 33 W. R. 902; 49 J. P. 631.

—— **Completion of Works.**]—To an action for breaking and entering the plaintiff's mill and taking his goods, the defendants pleaded a justi-

fication under a local act of parliament; that they, as commissioners under the act, completed one of three reservoirs mentioned therein; that the mill was benefited by the supply of water therefrom; that a rate was made; and that the trespass was committed, and the goods were taken as a distress for nonpayment of the rate. The plaintiff replied that only one reservoir had been completed. The act enacted, "that no rate shall be levied or assessed, until the reservoirs shall be actually made and in use, and water supplied therefrom":—Held, that the completion of one reservoir entitled the commissioners to levy a rate on the class of persons mentioned in the act actually benefited by it; and, therefore, that the plea was good. *Sidebottom* v. *Glossop Reservoir Commissioners*, 1 Ex. 611—Ex. Ch.

Overcharge — Recovery Back — Compulsory Payment.]—The defendants, as sanitary authority for the borough of B., had demanded from the plaintiff and the plaintiff had paid, a water-rate of 8*l.* 15*s.* 4*d.*, such rate being calculated on the "gross rental" of the plaintiff's premises. The plaintiff, contending that such rate ought to have been assessed on the "rateable value" only, brought an action in the county court to recover the difference overpaid. The defendants had no power to distrain for the rates, but they had a power to stop the water supply for non-payment; they had not stopped the water supply, and had not threatened to do so. The county court judge held that the payment was not a voluntary one, and could be recovered back, on the ground that the defendants had a power to stop the water supply:—Held, that the payment was a voluntary one, and could not be recovered back. *Slater* v. *Burnley Corporation*, supra. S. P., another case of the same name, 53 J. P. 535.

E. INJURIES BY WATER.

Liability for Storage—General Principle.]—If a person brings on his own land any matter which, if it escapes, may prove injurious to his neighbour's property, such as a large body of water, he is liable to make compensation for any injury that may accrue from its escape out of his land; and it is no defence, if it escapes and causes damage to his neighbour, that the injury was caused without any default or negligence on his part. *Rylands* v. *Fletcher*, 37 L. J., Ex. 161; L. R. 3 H. L. 330; 19 L. T. 220. Affirming 12 Jur. (N.S.) 603; 14 W. R. 799—Ex. Ch.

A. was the lessee of mines. B. was the owner of a mill standing on land adjoining that under which the mines were worked. B. desired to construct a reservoir, and employed competent persons, an engineer and a contractor, to construct it. A. had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care was taken by the engineer or the contractor to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passages and flooded A.'s mine:—Held, that he was entitled to recover damages from B. in respect of this injury. *Ib.*

—— **Vis major.**]—One who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable for damage effected by an escape of the water, if the escape is caused by the act of God or vis major; e.g., by an extraordinary rainfall, which could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented. *Nichols* v. *Marsland*, 46 L. J., Ex. 174; 2 Ex. D. 1; 35 L. T. 725; 25 W. R. 173—C. A.

—— **Tanks in India—Immemorial Rights.**]—The principle that if a man brings and accumulates upon his land anything which, if it escapes may cause damage to his neighbour, he does so at his peril, is not applicable to the case of water stored in tanks in India, which have existed from time immemorial, and are preserved and repaired by the landowners by reason of their tenure, as essential to the welfare and existence of the people. *Madras Ry.* v. *Carvetinagarum* (*Zemindar*), 30 L. T. 770; 22 W. R. 865—P. C.

—— **Damage caused by Public Authority in Lawful Exercise of Powers.**]—The defendants, under the powers conferred upon them by the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), ss. 135, 136, constructed, and properly constructed, a sewer having its outfall at Deptford Creek, a little above the plaintiff's coal wharf, with water-gates, which it was the duty of the person in charge of them to open when the water within them became eight feet deep,—a depth which was reached only in heavy rainfalls. On the 29th of August, 1879, there was an exceptionally heavy rainfall, and it became necessary to open the water-gates to prevent a large district from being flooded. This having been done, and the rain increasing in violence, the rush of water from the sewer carried away a portion of the plaintiff's wharf, with a barge moored thereto and a quantity of coals deposited therein and thereon:—Held, that the injury complained of was occasioned by the opening of the water-gates, and not by the act of God, and therefore the defendants were primâ facie liable for the damage done, within the principle of *Rylands* v. *Fletcher* (L. R. 3 H. L. 330); but that, as they were a public body acting in the discharge of a public duty, and as that which happened was only the inevitable result of what parliament had authorised them to do, they were not liable. *Dixon* v. *Metropolitan Board of Works*, 50 L. J., Q. B. 772; 7 Q. B. D. 418; 45 L. T. 312; 30 W. R. 83; 46 J. P. 4.

—— **Injury by Canal Company — Injuriâ absque damno.**] — The plaintiffs, owners of collieries, sued the defendants, proprietors of a canal constructed under an act of parliament, for damage caused to their mines by water which overflowed from the canal into a brook, and thence into the mines. They also in the alternative claimed to be entitled to a mandamus for the summoning of a jury to assess compensation for the same injury, as being one caused by the works which the canal company were authorised to construct and maintain. It was found in the special case stated by an official referee, that on the occasion of an extra-

ordinary rainfall the defendants opened a sluice and discharged from the canal into a brook more water than the latter was able to carry off, the consequence being that the brook overflowed into the plaintiffs' mines. It was found, further, that if the sluice had not been so opened the canal bank would shortly have burst; that the adjacent country and the plaintiffs' mines would have been inundated; that the course which the defendants adopted to avert such a catastrophe was a prudent one, and the only effectual one which could have been adopted in the emergency; that so far as the plaintiffs' mines were concerned the opening of the sluice caused them to be flooded some hours sooner than they would otherwise have been, but that no additional damage was caused thereby to the plaintiffs, the inundation being inevitable by reason of the excessive rainfall and consequent accumulation of water:—Held, upon these findings, that even assuming the defendants' act to have been a wrongful one, it was injuriâ absque damno, and, therefore, not a ground of action:—Held, secondly, that the compensation clauses of the acts of parliament did not apply to such a case. *Thomas* v. *Birmingham Canal Co.*, 49 L. J., Q. B. 851; 43 L. T. 435; 45 J. P. 21.

—— Liability of Conservancy Commissioners—Damage to Lands adjoining Reclaimed Lands.]—See *Bramlett* v. *Tees Conservancy Commissioners*, supra, col. 1901.

—— Injury Due to Negligence of Third Person.]—A company undertaking for their own profit to maintain a channel for carrying off water, and neglecting to do so effectually, are responsible for damage done to the adjoining land by reason of the banks giving way after an unusual rainfall, although other persons who were bound to keep the outlet of the channel of certain dimensions had failed to perform their duty, and had thereby occasioned an increase of water in the channel, without which its banks would not have given way. *Harrison* v. *G. N. Ry.*, 3 H. & C. 231; 33 L. J., Ex. 266; 10 Jur. (N.S.) 992; 10 L. T. 621; 12 W. R. 1081. *See also cases*, ante, cols. 1921, et seq.

Breach of Statutory Obligation—Height of Bank.]—A dock company, which was empowered by act of parliament to make and maintain a dock and works according to the levels defined on the deposited sections, constructed its dock communicating with the Thames by an artificial channel, the height of the retaining bank of which and of the dock was shown on the sections to be 4 ft. above Trinity high-water mark. The natural level of the land surrounding the dock was some 8 ft. below Trinity high-water mark, and the river was kept from overflowing it by means of a river wall 4 ft. 2 in. above Trinity high-water mark. The company allowed part of its retaining bank to be some inches below the height of 4 ft. above Trinity high-water mark. An extraordinarily high tide took place, the water rising to 4 ft. 5 in. above high-water mark, and the water in the dock overflowed the bank and damaged the property of an adjoining landowner. In an action for damages by the latter:—Held, that the company was liable to damages, because it had broken its statutory obligation to maintain its retaining bank at the height of 4 ft. above high-water mark; that independently of the act, the company was bound, as a riparian proprietor, to keep the bank up to the level of the rest of the river wall, and was liable to damages for negligence in not doing so; and that, although the extraordinarily high tide was an act of God, that fact did not free the company from its liability, though, if it could show that some of the damage which actually happened was exclusively attributable to a cause beyond its control, it would be entitled to a proper deduction in that respect. *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine's Docks Co.*, 9 Ch. D. 503; 39 L. T. 433; 27 W. R. 267—C. A.

Interfering with Bank—Threatened Inundation.]—Commissioners of sewers are entitled to restrain a railway company by injunction until the hearing, from interfering with a natural deposit of beach, forming a protection to the country from the inundations of a tidal navigable river, within the survey of the commissioners; and this notwithstanding a purchase by the company from the lord of the manor, under parliamentary powers, of the spot in question. *Crossman* v. *Bristol and South Wales Union Ry.*, 1 Hem. & M. 351; 11 W. R. 981.

Semble, that "banks and walls, &c.," by tidal and navigable rivers, as well as by the sea coasts, are included in 3 & 4 Will. 4, c. 22. *Ib.*

—— Liability of Adjoining Owner.]—The defendants possessed a reservoir with sluices connected with a main drain or watercourse, from which the reservoir was supplied, and with sluices by which the surplus water was returned into the drain at a lower level. The combined effect of the emptying of a reservoir belonging to a third person above the defendants' premises, and of an obstruction in the drain below them, was to force water through the sluices into the defendants' reservoir and so cause an overflow thence on to the plaintiff's land. In an action for damage caused thereby it was shown that the defendants had no control over the main drain, or the other reservoir, or knowledge of the circumstances which caused the overflow, and that the sluices were maintained so as to prevent overflow under ordinary circumstances:—Held, that the defendants were not liable. *Box* v. *Jubb*, 48 L. J., Ex. 417; 4 Ex. D. 76; 41 L. T. 97; 27 W. R. 415.

Injuries caused by Precautions against Flood.]—An extraordinary flood arising from natural causes is a common enemy, against which a man has a right to protect his own property, although the damage inflicted by the flood upon his neighbour be thereby increased, provided he does not interfere with the natural outlet of a natural stream. *Nield* v. *L. & N. W. Ry.*, 44 L. J., Ex. 15; L. R. 10 Ex. 4; 23 W. R. 60.

Reasonable selfishness is permissible in a man who tries to protect himself from a common enemy, such as is a flood. *Ib.*

A railway company owned a canal near a river, which did not communicate with it. Owing to heavy rains the river overflowed its banks, and the manager of the canal, fearing that the water from the river might enter the canal, and, by causing it to overflow, injure the warehouses of the railway company, inserted planks in grooves made in the banks of the canal with the object of preventing the water of the river from entering the canal. The water, however, found its way into the canal, which, owing to the insertion

of the planks, rose to a higher level than it would otherwise have done, and ultimately overflowed its banks, doing substantial damage to a mill situated on the bank of the canal, which would not have been done to it if the planks had not been made use of by the manager :—Held, that the railway company was not liable to the owner of the mill for the damage so caused, as they had only sought to protect themselves from a common enemy. *Ib.*

By reason of an unprecedented rainfall, a quantity of water was accumulated against one of the sides of the defendants' railway embankment, to such an extent as to endanger the embankment, when, in order to protect their embankment, the defendants cut trenches in it by which the water flowed through, and went ultimately on to the land of the plaintiff, which was on the opposite side of the embankment and at a lower level, and flooded and injured it to a greater extent than it would have done had the trenches not been cut. In an action for damages for such injury, the jury found that the cutting of the trenches was reasonably necessary for the pretection of the defendants' property, and that it was not done negligently :—Held. that though the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff, and that they were therefore liable. *Whalley* v. *Lancashire and Yorkshire Ry.*, 53 L. J., Q. B. 285 ; 13 Q. B. D. 131 ; 50 L. T. 472 ; 32 W. R. 711 ; 48 J. P. 500—C. A.

Flooding adjoining Mines—Working by Owner.]—A canal company was authorised to be formed under the provisions of several acts of parliament. They had also, by a provision of the same statutes, the option of purchasing adjoining coal mines on receiving notice from the owner that he was about to work them. An adjoining coalowner, having given the statutory notice, and the company having refused to purchase, proceeded, as he had a right to do, to work his mines in the usual and proper manner, and thereby water from the canal flowed in and drowned his mine. The company was guilty of no actual carelessness in the management of the canal, unless it was carelessness to allow the water to remain in it while the mines were being worked :—Held, in an action by the adjoining coalowner against the company for negligent management of the canal whereby damage resulted to his mine, that the action was not maintainable, inasmuch as the injury complained of resulted from the legitimate exercise by the company of statutory powers. *Dunn* v. *Birmingham Canal Navigation*, 42 L. J., Q. B. 34 ; L. R. 8 Q. B. 42 ; 27 L. T. 683 ; 21 W. R. 266—Ex. Ch.

Held, also, that the owner was entitled to compensation under the acts. *Ib.*

—— **Injuries arising from Lawful Act.**]—A mine-owner will not be liable to the owner of an adjacent mine for injury occasioned to such adjacent mine, where such injury proceeds from natural causes, in themselves beyond his control, though his own acts may have conduced to produce the injury, if his acts have only been those of the proper and ordinary working of his own mine, without default or negligence. *Smith* v. *Musgrave*, 47 L. J., Ex. 4 ; 2 App. Cas. 781 ; 37 L. T. 367 ; 26 W. R. 83—H. L. (E.)

But when for his own convenience he does something, e.g. diverts the course of the stream, he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow, so that even if that overflow should be directly and mainly occasioned by an act of nature, his own conduct in not so forming the new and diverted course for the stream of form and of sufficient capacity to carry off an accidental overflow of water, even of an exceptional kind, will be matter for consideration in determining the question of his liability. *Ib.*

A.'s mine was flooded by water which had, after an unusual rainfall, accumulated in an excavation made by B. on his land, and had escaped thence through his mine into A.'s, which was situated at a lower level :— Held, that, although B., in making the excavation, had no intention of collecting water therein, and although he had provided an outlet for such an amount of water as might be looked for in ordinary seasons, he was liable for the damage sustained by A. *Ib.*

A. and B. occupied adjoining collieries. A. predecessor of B., but with whom he had no privity, committed a trespass, and made holes, called "thyrlings," in a barrier (of coal belonging to A.) which separated the two collieries. B. in working his mine broke down a seam of coal of his own, and the consequence was that the water flowed from his mine into A.'s through the thyrlings :—Held, that there was no duty on B. to prevent the water from flowing from his mine into A.'s mine. *Smith* v. *Kenrick*, 7 C. B. 515 ; 18 L. J., C. P. 172 ; 13 Jur. 362.

Percolation.]—A man who places an artificial mound upon his property and thereby causes rain water, percolating naturally, to come on to the property of his neighbour, is liable to the latter in respect of damage so caused. *Hurdman* v. *North-Eastern Ry.*, 47 L. J., C. P. 368 ; 3 C. P. D. 168 ; 38 L. T. 339 ; 26 W. R. 489.

A statement of claim alleged that the surface of the defendants' land had been artificially raised by earth placed thereon, and that in consequence rain water falling on their land made its way through their wall into the adjoining house of the plaintiff, and caused substantial damage :—Held, that the statement of claim disclosed a good cause of action. *Ib.*

A. allowed water to collect in the cellar of his house. The water percolated through the ground and injured the cellar of the adjoining house belonging to B. :—Held, that B. had a right of action against A. in respect of the injury so done. *Ballard* v. *Tomlinson* (26 Ch. D. 194) dissented from. *Snow* v. *Whitehead*, 53 L. J., Ch. 885 ; 27 Ch. D. 588 ; 51 L. T. 253 ; 33 W. R. 128.

—— **Compensation—Company with Statutory Powers.**]—A company with statutory powers suffered water to percolate from their canal into an adjoining mill and cause damage. Such percolation arose in the first instance from a subsidence of the land caused by the working of a mine-owner under both the canal and the mill, and could not have been foreseen or prevented by the company by any reasonable means at any reasonable cost :—Held, that the canal company were nevertheless guilty of negligence in not making good the damage when it occurred, and must pay compensation to be assessed as provided by the canal act, but that it was not a case for granting an injunction against the com-

pany to restrain the percolation of water. *Evans* v. *Manchester, Sheffield and Lincolnshire Ry.*, 57 L. J., Ch. 153 ; 36 Ch. D. 626 ; 57 L. T. 194 ; 36 W. R. 328.

Water Undermining a Wall—Action by Successor in Title.]—The plaintiff, in 1822, had a remainder in fee in a wharf expectant on a tenancy for life of his father. The defendants, in that year, dug soil out of their dock, which was contiguous, and the water thereby undermined the wall of the wharf. In 1823, the plaintiff's father died ; and, in 1824, the action of the water on the wall had undermined it so far that it fell :—Held, that the plaintiff had a right of action against the defendants, although they had done no act since the death of the plaintiff's father, by which the plaintiff came into possession of the freehold of the wharf. *Gillon* v. *Boddington*, 1 Car. & P. 541 ; R. & M. 161.

Adjoining Premises—Arrangement for Common Benefit—Absence of Negligence.]—Where damage results to an occupier of land from water or other injurious matter collected on adjoining land, no action lies if the occupier of the land upon which the injurious matter is collected can show that the damage resulted (i.) from the act or default of some third party, or (ii.) without wilfulness or negligence on his part, whilst using his land in an ordinary and reasonable manner, or (iii.) without negligence on his part, the injured party consenting to what was done, or (iv.) from water or other injurious matter, which was stored for the common benefit of both parties. Where the rain water from the plaintiff's and defendant's adjoining roofs drained on to the roof of the defendant's area, and so down a pipe into the defendant's drain, this arrangement being with the assent and for the benefit of both parties, the defendant is not liable, in the absence of negligence on his part, for damage arising to the plaintiff's premises from an accumulation of water on the area roof owing to an obstruction in the pipe. *Gill* v. *Edouin*, 15 R. 113, n. ; 72 L. T. 579—C. A.

Escape of Water in Houses—Liability for.]—When the owner and occupier of a building lets the lower floor to a tenant, and remains himself in occupation of the upper floors and roof, he is under no liability to the tenant, to make compensation for damage done to this lower floor by an escape of water from the roof caused by an accident (such as a rat gnawing a hole in a water-pipe), which could not have been prevented by the exercise of reasonable care and vigilance. *Carstairs* v. *Taylor*, 40 L. J., Ex. 129 ; L. R. 6 Ex. 217 ; 19 W. R. 723.

A. occupied for business purposes the ground floor and B. the second floor of the same house, as tenants from year to year. There was a water-closet on B.'s premises to which he alone had access. After the respective premises had been closed on a Saturday evening, water percolated from the water-closet through the first floor to A.'s premises and caused damage to his stock in trade. The overflow of water was owing to the valve of the supply pipe to the pan having got out of order, and the waste pipe being choked with paper. The defects could not be detected without examination, and B. did not know of them and was guilty of no negligence :—Held, that there was no obligation on him to keep in the water at his peril ; and that he was not liable to A. for the damage. *Ross* v. *Fedden*, 41 L. J., Q. B. 270 ; L. R. 7 Q. B. 661 ; 26 L. T. 966.

The defendants owned a house above the plaintiff's shop. Owing to the lid of a cistern on the defendants' premises being so arranged that the ballcock would not act, and to the pipe of the sink being stopped up, the water overflowed and did damage to the plaintiff's shop. There was no satisfactory evidence to show how the cistern had been interfered with :—Held, that there was nothing to show that the defendants had been guilty of negligence ; that the principle of *Fletcher* v. *Rylands* (37 L. J., Ex. 161) did not apply, and therefore that there must be judgment for the defendants. *Blake* v. *Land and House Property Corporation*, 3 Times L. R. 667.

The plaintiffs and the defendant occupied adjoining houses, between which there was no party wall. The former sued the latter in the county court for damage to their premises by water flowing from the defendant's premises to theirs through a defect in the pipe which supplied him with water from the neighbouring waterworks. The county court judge found as a fact that defendant had not been guilty of negligence, entered a verdict for him, assessed damages at 10*l*., and gave plaintiffs leave to appeal :—Held, that he was right, the damage caused being damnum sine injuria. *Sutton* v. *Card*, W. N. [1886] 120. And see *Snow* v. *Whitehead*, supra.

—— **Liability of Master for Act of Servant—Scope of Authority.**]—The plaintiffs occupied premises beneath the offices of the defendants, who were solicitors. One of the defendants had a room of the offices, and in it was a lavatory for his own use exclusively, and his orders were that no clerk should come into his room after he had left. A clerk went into the room to wash his hands at the lavatory after his employer had left, turned the tap, and negligently left it so that water flowed from it into the plaintiffs' premises and damaged them. In an action for negligence :—Held, that the act of the clerk was not within the scope of his authority, or incident to the ordinary duties of his employment, and that there was no evidence of negligence for which the defendants were liable. *Stevens* v. *Woodward*, 50 L. J., Q. B. 231 ; 6 Q. B. D. 318 ; 44 L. T. 153 ; 29 W. R. 506 ; 45 J. P. 603. And see *Ruddiman* v. *Smith*, 60 L. T. 708 ; 37 W. R. 528 ; 53 J. P. 518.

Frozen Water—Washing of Van in a Street.]—B. washed a van of his on part of the street opposite his coach-house, and the water so used ran along the gutter of the street for about seventy feet down to the corner of another street, where, meeting an obstruction, it accumulated and extended over part of the roadway, instead of going into the sewer, and there being a frost at the time it became frozen over. The cleaning a van in the street was an offence under the Metropolitan Police Act (2 & 3 Vict. c. 47), s. 54, sub-s. 1, but B. was not shown to have known of the obstruction, and if he had cleaned the van in the coach-house the water would also have gone into the same gutter :—Held, that B. was not liable for damage caused to a horse by slipping whilst passing over the frozen water at the corner, as such damage was too remote, and was not the immediate and

proximate cause of his act. *Sharp* v. *Powell*, 41 L. J., C. P. 95; L. R. 7 C. P. 253; 26 L. T. 436; 20 W. R. 584.

Threatened Injury—Raising Level of Brook.]—A. sold a piece of land to B., and covenanted for quiet enjoyment. Afterwards, A. raised the level, by three inches, of a brook running past B.'s grounds, through his, A.'s property:—Held, that this was not a proper subject of complaint for the interference of a court of equity. *Ingram* v. *Morecraft*, 33 Beav. 49.

Aggravation of Servitude—Accumulation of Water.]—By s. 501 of the Civil Code of Quebec the proprietor of the higher land can do nothing to aggravate the servitude of the lower land. Where the plaintiffs, being entitled to a flow of water from their land, executed certain works which had the effect of accumulating the volume of water, and probably of increasing the depth of its channel:—Held, that to the extent of such accumulation and consequent increase of flow, they had aggravated the servitude of the lower land, and to that extent had no right to demand a free course for the water sent down by them. Having insisted on their right to the existing flow, and refused to allege and prove a case for relief pro tanto, their suit was dismissed with costs. *Frechette* v. *La Compagnie Manufacturière de St. Hyacinthe*, 53 L. J., P. C. 20; 9 App. Cas. 170; 50 L. T. 62—P. C.

Measure of Damages.]—*See* DAMAGES.

J. R.

WATERMEN.

See SHIPPING—WATER.

END OF VOLUME XIV.

BRADBURY, AGNEW, & CO. LD. PRINTERS LONDON AND TONBRIDGE.